MASHAMHANDA *v* MPOFU & ORS 1999 (1) ZLR 1 (HC)

Citation	1999 (1) ZLR 1 (HC)
Case No	Judgment No. HH-1-99
Court	High Court, Harare
Judge	Garwe J
Heard	July 31, 1998; October 3, 1998
Judgment	January 6, 1999
Annotations	None

Special case

Flynote

Delict - actio injuriarum - defamation - action for - multiple defendants - should be proceeded against in one action

Practice and procedure - parties - joinder of - defamation action against one party - action against others instituted later - leave of court required to proceed against other parties

Headnote

The defendants had, at the instance of a bank, published statements concerning the plaintiff. The plaintiff had instituted an action for defamation against the bank, and while litigation in that case (in which the plaintiff was successful and was awarded damages) was pending, the present proceedings were instituted. No attempt was made to consolidate the actions and the question arose whether the plaintiff was entitled to claim damages from the defendants in addition to the damages already awarded. It was argued for the plaintiff that the award made against the bank was only a factor to be considered. The defendants argued that since defamation is a delict and thus a "fault" in terms of the Damages (Apportionment and Assessment) Act [*Chapter 8:06*], the plaintiff could not, without leave of the court, bring another action for damages in respect of the same cause of action against any wrongdoer who was not joined in the first action.

Held, that at common law damages for defamation are regarded as a penalty intended to compensate the plaintiff for his injured feelings and reputation. He is not entitled to be

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compensated twice for the same wrong. However, there have been instances where damages for defamation have been granted simultaneously against two or more defendants in their individual capacities; and other instances where damages arising from the same incident have been awarded against two or more defendants at different times.

Held, further, that in terms of s 6 of the Damages (Apportionment and Assessment) Act, there is a need to join all wrondoers in the same action, unless leave of the court is granted. Defamation is an act which gives rise to delictual liability and is thus a "fault" in terms of the Act and accordingly the defendants should have been joined in the action against the bank.

Cases Considered

Cases cited:

Dunning v *Thomson & Co Ltd* 1905 TH 313

Gray v *Poutsma & Ors* 1914 TPD 203

Hartley v *Palme* (1907) 24 SC 236

Robinson v *Kingswell* 1913 AD 513

Toerien v *Duncan* 1932 OPD 180

Zimbank v *Mashamhanda* 1995 (2) ZLR 417 (S)

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

Statutes Considered

Legislation considered:

Damages (Apportionment and Assessment) Act [*Chapter 8:06*], ss 2, 6 & 7

Case Information

P Nherere, for the plaintiff

A P de Bourbon SC, for the 1st, 2nd, 3rd, 5th and 7th defendants

Judgment

Garwe J: Following a pre-trial conference held before Mubako J in chambers, it was agreed that this matter be set down as a stated case.

The agreed facts of this matter are these. On 5, 20, 22 and 26 September 1990, the first, second and third defendants caused to be printed and published in *The Chronicle*, *The Sunday Mail* and *The Herald* respectively, an advertisement headed "Zimbabwe Banking Corporation Limited", a copy of which is annexed to the plaintiff's declaration. It is common cause that the fifth defendant printed and distributed the said advertisement and that the first, second and third

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defendants edited the advertisement. The first, second, third, fifth and seventh defendants all admit that the third paragraph of the advertisement was defamatory of the plaintiff. That paragraph reads:

> "The bank has reason to believe that one of the sources of the information made available to Cde Mangwende is Mr A E Mashamhanda who is employed by the Bank and who has been suspended for incompetence and insubordination. When he was suspended, Mr Mashamhanda indicated that he would do his best to damage the Bank's image."

In a separate action, the plaintiff sued the Zimbabwe Banking Corporation for defamation damages arising out of publication of the advertisement. In that suit, the plaintiff was awarded $45000 in damages - see *Zimbabwe Banking Corp Ltd* v *Mashamhanda* 1995 (2) ZLR 417 (S). Whilst litigation in that case was proceeding, the plaintiff also instituted the present proceedings in April 1992. No attempt was made to consolidate the two actions and these have proceeded as separate actions.

The interesting question of law that now arises is whether the plaintiff is entitled to claim further damages from the defendants for publication of the defamatory advertisement in addition to the damages already awarded against the Zimbabwe Banking Corporation by the Supreme Court.

The plaintiff has since withdrawn its claim against the fourth and sixth defendants. Since the fifth and seventh defendants are in fact one entity, a notice of application to amend has been filed but for some unknown reason not yet determined.

Mr *Nherere*, who appears on behalf of the plaintiff, has submitted that notwithstanding the award of damages against Zimbank, the plaintiff is still

entitled to damages from the defendants. He argues that the award made against the Zimbabwe Banking Corporation is only a factor to be considered in assessing the *quantum* of damages. The defamatory matter having been printed in a newspaper, the editor, proprietor and printer are all liable and the liability of each is separate. Moreover, since damages for defamation are not strictly compensatory in character but normally include a penal element under the *actio injuriarum*, damages can be awarded separately against the defendants. He further submits that whilst one can raise the defence of contributory negligence in the context of the Aquilian action, such a defence has never been available in an action for defamation. He argues that s 6 of the Damages (Apportionment and Assessment) Act [*Chapter 8:06*] does not apply in the instant case.

Mr *de Bourbon*, who appears for the first, second, third, fifth and seventh defendants, submits that the law as expounded by the plaintiff is not the current law of this country. In particular, he submits that since defamation is delictual, it is covered by the definition of "fault" in s 2 of the Damages (Apportionment and Assessment) Act. In terms of s 6 of the Act, a claimant cannot bring another action for damages in respect of the same cause of action against any wrongdoer who was not joined in the first action, save with the leave of the court. Since the leave of the court has not been sought, he contends that the plaintiff is not entitled to bring the present

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action. The damages suffered by the plaintiff and his costs have been paid by the Zimbabwe Banking Corporation and no apportionment of these is possible at this stage. He submits that the whole purpose of the legislation is avoid duplication of litigation and to enforce "the once and for all" rule in respect of damages.

The issue, it seems to me, is whether in terms of the Damages (Apportionment and Assessment) Act the plaintiff is not entitled to bring this action except with the leave of this court. It is apparent from the decision in *Zimbabwe Banking Corp Ltd* v *Mashamhanda supra* that the court was aware that the defamatory material was contained in advertisements placed in four newspapers - *The Herald*, *The Sunday Mail*, *The Gazette* and *The Chronicle*, all of which are part of the fifth defendant, Zimbabwe Newspapers (1980) Ltd. It was considered in the circumstances that $45000 in damages was appropriate, although McNally JA was of the view that "a little less" should have been awarded. Is the plaintiff in these circumstances entitled to bring separate actions for defamation damages against the bank, the newspaper and the editors?

The common law position appears clear. In an action for defamation, the general damages which the defamer is compelled to pay are regarded as a penalty imposed upon him for the wrong which he has done by violating the

injured party's right to retain his good name and fame untarnished, and they are awarded to the injured person to compensate him for his injured feelings and reputation: Mr Justice SM Kuper "A Survey of the Principles on which Damages are Awarded for Defamation" (1966) 83 *SALJ* p 477. See also *Gray* v *Poutsma & Ors* 1914 TPD 203 at 218. The general principle is that a plaintiff should not be allowed to recover damages in excess of his actual loss or be twice compensated for the same wrong. Put another way, the plaintiff is entitled to receive a sum representing the damages that he has suffered from a single wrong inflicted by all. Defamation damages are not a road to riches. There is a long line of cases in which damages for defamation have been granted simultaneously against two or more defendants in their individual capacities. See eg *Robinson* v *Kingswell* 1913 AD 513 at 527; *Hartley* v *Palme* (1907) 24 SC 229 at 236; *Zimbabwe Newspapers (1980) Ltd & Anor* v *Bloch* 1997 (1) ZLR 473 (S). There are also cases where damages arising from the same incident have been awarded against two or more defendants at different times. See for example *Dunning* v *Thomson & Co Ltd* 1905 TS 313 at 320; *Toerien* v *Duncan* 1932 OPD 180 at 204, which held that "a judgment against one defendant is no bar to an action in respect of the same defamation against another defendant".

There is no suggestion by the defendants that the above does not correctly reflect the common law. The defendants' argument however is that the common law to an extent has been replaced by legislation and in particular the Damages (Apportionment and Assessment) Act. It therefore becomes necessary to look at this piece of legislation in greater detail.

The Law Reform (Contributory Negligence) Act 41 of 1971 was promulgated on 1 June 1971. This became Chapter 45 in the 1974 Revised Edition of the Statute. It provided for the apportionment of liability in cases of contributory negligence. "Fault" was defined as

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"negligence, breach of statutory duty or other act, omission or circumstance which gives rise to delictual liability, or would, but for the provisions of this section, give rise to the defence of contributory negligence". That Act was repealed and replaced by the Damages (Apportionment and Assessment) Act 28 of 1985, which is now cited as [*Chapter 8:06*] in the 1996 Revised Edition. That Act introduced notable changes. In addition to the apportionment of liability in case of contributory negligence and whilst basically retaining the same definition of "fault", the Act introduced the apportionment of damages in cases involving two or more wrongdoers, whether or not they were acting in concert, the need to join all wrongdoers in the same action unless leave of the court is granted upon good cause shown, and an entitlement to a wrongdoer who has met the damages in full to seek a contribution from the other wrongdoer.

The question is whether defamation is a "fault" as defined in the Act. If it

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is, then clearly the provisions of s 6 would apply and a claimant would be obliged to bring all wrongdoers in the same suit unless leave of the court is granted. It should be noted that, as in the repealed Act, the legislation was to "amend the law relating to contributory negligence and to provide for other matters incidental thereto".

There can be no doubt that "fault" has been given the widest possible definition. It not only includes negligence or breach of a statutory duty but also *any other act, omission or circumstances which gives rise to delictual liability* or which would, but for the Act, give rise to the defence of contributory negligence.

The position is now settled that in interpreting a statute, the ordinary grammatical meaning of the words must be adhered to unless this leads to an absurdity or result which the legislature would never have intended. The definition of fault has not been qualified in any way. There can be no doubt in this case that defamation is an act which gives rise to delictual liability. The legislature must have been aware of this and the distinction between the *Lex Aquilia* and *actio injuriarum*. To suggest, as has been done by the plaintiff, that defamation is excluded is clearly untenable. There is no basis for this submission, the words used in the Act being clear and allowing of no ambiguity. No absurdity or inconsistency arises. The suggestion by the plaintiff that the Act is concerned only with cases involving contributory negligence in the sense in which the term is ordinarily understood is, in my view, untenable if regard is had to the letter and spirit of the statute and in particular the provisions of s 5 of the Act, which make it clear that damages will be apportioned in cases involving two or more wrongdoers, whether or not they are acting in concert, and s 6, which provides that all wrongdoers must be brought to court at the same time.

The plaintiff cited *Zimbabwe Newspapers (1980) Ltd & Anor* v *Bloch supra*, where damages were awarded against the proprietor and the editor individually, as authority for the proportion that liability is separate. I do not find this to advance the plaintiff's argument any further. The proprietor and editor were jointly sued in the same action. The issue in this case is whether separate actions can be instituted against them. It was not as if the plaintiff in the *Zimbabwe Newspapers* case sued the paper first and, after an award of damages, then proceeded against

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the editor. In defamation cases, the writer, publisher, proprietor of newspaper and the editor are all liable and damages can be awarded against each one of them individually. Clearly, the court in the above case awarded separate damages pursuant to the provisions of s 5 of the Act and in particular para (b) of that section, which empowers a court to order that the damages be paid by the wrongdoers in such proportions as the court considers just and equitable. The plaintiff has not cited any recent

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case and indeed, I am not aware of any where damages arising from the same defamatory statement have been awarded against two defendants in separate actions.

In all the circumstances, I am not persuaded that defamation is excluded from the definition of "fault". Although the preamble talks of contributory negligence and other matters incidental thereto, there is nothing to suggest that this excludes actions under the *actio injuriarum* such as defamation.

In view of the above conclusion, I am satisfied that in terms of s 6 the plaintiff should have instituted one action for defamation damages against both the bank and the present defendants. At the very least, he should have applied for the joinder of the two actions so that they would have been heard together. It is common cause he did neither. Instead, he proceeded separately against the bank and present defendants. Damages have already been awarded by this court against the bank and the damages have been paid. It is clear the damages were assessed in the light of all the circumstances of this case and in particular, the role played by the present defendants. In terms of s 7 of the Act, the bank, if it were so disposed, would be entitled to seek a contribution from the present defendants.

In the light of this conclusion, the plaintiff is not entitled to bring this claim.

The plaintiff's claim must accordingly, be dismissed with costs.

Makarau & Gowora, plaintiff's legal practitioners

Honey & Blanckenberg, first, second, third, fifth and seventh defendants' legal practitioners

CRUTH *v* MANUEL 1999 (1) ZLR 7 (SC)

Citation	1999 (1) ZLR 7 (SC)
Case No	Judgment No. S-73-98
Court	Supreme Court, Harare
Judge	Ebrahim JA, Muchechetere JA, Sandura JA

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Heard May 4, 1998
Judgment January 8, 1999
Annotations None

Civil appeal

Flynote

Family law - child - illegitimate child - access to child by father - whether father has rights in respect of child

Headnote

The mother of a child born out of wedlock had allowed the father of the child only limited access to his child. The father had applied for an order allowing him greater access rights to the child. The High Court had dismissed this application. The father appealed against this decision.

Held, (*per* Muchechetere JA and Ebrahim JA) dismissing the appeal, that under the common law all rights in respect of a child born out of wedlock are vested in the mother and she has the same rights as those of the parents of a legitimate child. The father of a child born out of wedlock has no rights at all in relation to the child. Such a father is the same position as a third party in relation to the child. To hold that the father of a child born out of wedlock has rights in respect of the child would be to elevate the legal status of the father of such a child to that of a spouse in a divorce and allow unwarranted interference in the mother's rights over the child.

Held, further, that the fact that he is the father of the child or is paying maintenance does not give him any rights in relation to a child born out of wedlock. Similarly, a third party, like a member of the social welfare department, cannot come to court and ask for the rights of the mother to be interfered with in the interests of the child when no concern has been raised about the way in which the woman has been exercising those rights.

Held, further, that the court cannot normally interfere with the rights of the mother of a child born out of wedlock. It can only do so when the mother is not exercising her rights properly, this is adversely affecting the welfare of the child and it is therefore in the interests of the child that the court interfere. The welfare of the child only becomes an issue where the third party is alleging that the mother is doing things which are prejudicial to the rights of the child. In the present case, there was no allegation that the mother was exercising her rights in a way that was prejudicial to the interests of the child. All the appellant had said was that he wanted reasonable access to the child so that a natural bond could be established. Although she was under no obligation to do so, the mother had allowed her child to meet its father once in a while so that a natural bond could be established. She was entitled to put her own limits on the frequency and timing of the access.

Held, further, that if the law was to be changed in regard to the position of the father this could not be done by the court; it must be done by the legislature.

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Held, (*per* Sandura JA, dissenting) that although at common law the father of a child born out of wedlock, unlike the father of a legitimate child, has no inherent right of custody or access, the difference between the two fathers is not one of real substance in practice. In

modern law, whether or not access to a minor child is granted to its non-custodian father does not depend on whether or not the child was born out of wedlock. Instead, in each case the decision will be made on the basis of a consideration of what is in the child's welfare. There is no evidentiary burden on either party when the question of access is being decided for the first time. This is because the litigation really involves a judicial investigation in which the court can call evidence *mero motu* and is not an adversarial hearing. The case should be remitted to the High Court for the hearing of oral evidence on the question of the nature and extent of the access to be granted to the father.

Cases Considered

Cases cited:

B v *P* 1991 (4) SA 113 (T)

B v *S* 1995 (3) SA 571 (A)

F v *B* 1988 (3) SA 948 (D)

Douglas v *Meyers* 1991 (2) ZLR 1 (H); 1987 (1) SA 910 (ZH)

T v *M* 1997 (1) SA 54 (A)

Case Information

A J Dyke, for the appellant

A Ebrahim, for the respondent

Judgment

Sandura JA: This is an appeal against the judgment of the High Court which dismissed with costs the appellant's application for an order granting him access to his son who was born out of wedlock on 16 August 1993. The respondent is the mother of that child.

The facts of this case are as follows. The appellant and the respondent met in February 1992 and commenced living together in November 1992. At that time, the respondent had one minor child from a previous marriage, a girl called Storm. From November 1992 to November 1996, the parties lived together. Although they were not married they behaved in all respects as husband and wife and shared household expenses. As a result of that relationship a child, Dayne Luke Manuel-Cruth ("Dayne"), was born in August 1993. However, as a result of certain differences between them, the parties ceased living together on 30 November 1996.

Shortly, thereafter, the appellant made attempts to see the child and was allowed to see him about twice per week until the end of December 1996, when the respondent indicated to him

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that he could only see him once a month on the last Sunday of each month, at Greenwood Park in Harare, from 10 am to midday and in her presence. The reasons for limiting the appellant's access to the child to two hours per month were not common cause. However, it was common cause that on at least three occasions the appellant went to Greenwood Park but the respondent and the child did not turn up. The respondent had earlier been advised by her lawyers that the appellant did not have any inherent right of access to the child because the child had been born out of wedlock. In the circumstances, the appellant filed an application in the High Court seeking an order permitting him to collect the child from the

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respondent every other Friday at about 6 pm, spend the weekend with him and return him to her by 6 pm on Sunday. The application was opposed by the respondent who, however, counter-claimed payment of maintenance for the child in the sum of $1000 a month. The appellant had previously offered to pay that maintenance but the respondent had refused to accept it.

When the application was heard, the presiding judge expressed the opinion that the access granted to the appellant for only two hours at Greenwood Park once every month was unreasonable. Nevertheless, he dismissed the application with costs but ordered the appellant to pay maintenance for the child in the sum of $1000 a month until the child attained the age of eighteen years. This appeal does not concern the maintenance granted in favour of Dayne in terms of para 2 of the order of the court *a quo*, but the dismissal, in terms of para 1 of that order, of the appellant's claim for greater access to Dayne.

In dismissing the application, the learned judge appears to have been influenced by the allegations made against the appellant by the respondent. In her opposing affidavit, she said the following:

> "I agree. I made the arrangements for the applicant to see his son once a month and I still abide by this arrangement. Although I did not believe a natural bond had existed between the applicant and Dayne, I felt it was important that this be established, in the interests of Dayne. However, I took the drastic steps of ensuring that access be supervised in my presence because of the actions which the applicant displayed to my daughter Storm which will be amplified in an Affidavit by Storm hereunder. What has been of paramount importance to me is the welfare of both my children and although I have felt it necessary not to deprive the applicant of the opportunity of maintaining contact with Dayne, I, however, felt it prudent that such contact be undertaken under strict supervision by myself.
>
> I verily believed and still do believe that in view of the molestation of my daughter Storm by the Appellant, I could not take the chance for such behaviour to be likewise visited upon Dayne."

In addition, the respondent alleged that the appellant was an alcoholic and that he and his entire family drank alcohol excessively. The appellant strongly denied the respondent's allegations and averred that the respondent was bitter about the breakup of their relationship and, therefore, sought to deprive him of any meaningful access to his child. Commenting on the appellant's denial the learned judge said:

> "He denies (both) the heavy drinking (and) the deviant behaviour. We don't have enough proof either way, but here it is not a question of proving him 'guilty or not guilty'. It is much more a question of whether the court can

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risk, if what is alleged is true, having to order that he has wider access to the child. The court prefers to err on the side of caution for the protection of the minor child."

He then briefly referred to the law relating to a father's entitlement to access to his illegitimate child and dismissed the appellant's application with costs.

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In my view, the learned judge erred. It was quite clear that there were disputes of fact between the parties which could not be resolved on the papers without the hearing of oral evidence. The resolution of those disputes were crucial in determining whether the order sought by the appellant should be granted.

In any event, the approach usually adopted in opposed applications is not appropriate if it leaves serious disputed issues of fact relevant to a child's welfare unresolved. As Howie JA said in *B* v *S* 1995 (3) SA 571 (A) at 585D-E:

"Because the welfare of a minor is at stake, a court should be very slow to determine the facts by way of the usual opposed motion approach (*Plascom-Evans Paints Ltd* v *Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)). That approach is not appropriate if it leaves serious disputed issues of fact relevant to the child's welfare unresolved."

The court *a quo* should have proceeded in terms of r 229B of the High Court Rules 1971, in order to resolve the factual disputes between the parties. That rule reads as follows:

"In any application, the court or a judge may permit or require any person to give oral evidence if the court or judge, as the case may be, considers it would be in the interests of justice to hear such evidence." C

In the circumstances, it is necessary for me to set aside the order granted by the court *a quo* and remit the matter to that court for the hearing of oral evidence.

However, before concluding this judgment I would like to comment on the law relating to a father's entitlement to access to his child born out of wedlock. The learned judge expressed the view that in spite of the recent South African decision in *T* v *M* 1997 (1) SA 54 (A) the law on this matter in our jurisdiction was as stated in *Douglas* v *Meyers* 1991 (2) ZLR 1 (H); 1987 (1) SA 910 (ZH), a decision of the High Court of Zimbabwe. It appears to me that the issues which arose in that case have not previously been raised for determination by this court. In that case, the presiding judge,*(1) after referring to a number of South African cases and textbooks, set out the legal position as follows:

"From the above, my conclusion is that there is no inherent right of access or custody for a father of a minor illegitimate child but the father, in the same way as other third parties, has a right to claim and will be granted these if he can satisfy the court that it is in the best interests of the child. The onus is on the applicant, in this case the father, to satisfy the court on the matter and usually the court will not intervene unless there is some very strong ground compelling it to do so. The standard usually applied by the court is that used before interfering with the custodial rights of a father of a legitimate child although in a case like the present one the fact that the applicant is paying maintenance for the child will also in my view be taken into account. See *Calitz* v *Calitz* 1939 AD 56 at 64 where Tindall JA said:

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> 'Where, however (as in the present one), it is not exercising such a power, the court in Scotland cannot deprive the father of the custody except upon special grounds. In *Nicholson* v *Nicholson* 6 SC LR 692 - a case where the court ordered an infant to be returned to the father - the common law was thus stated: *"The legal right to the custody of a lawful child is in the father. But that right is not absolute, it is not beyond the control of the law. It is within the power of the court to mitigate the severity of the general rule by interfering in exceptional cases. The exceptions must be few and must rest on clear grounds and the grounds must be found in consideration of danger to life, health or morals of the child. When the interests of the child in regard to life, health or morals have required it, the court has refused to permit the father to retain custody. This has been done in Scotland in the exercise of the* nobile officium *of this court." I presume that power corresponds with the powers of the Supreme Court in South Africa as the upper guardian of minors*' [the emphasis is mine].

In view of the above, the applicant in this case can therefore only succeed if he satisfies this court that it is in the best interests of the child that the court interferes with the custodial rights of the respondent and grant reasonable access to him."

That decision was subsequently followed in *F* v *B* 1988 (3) SA 948 (D) where Kriek J held that the court would only interfere in exceptional cases where considerations relating to the interests of the child compelled it to do so.

However, in *B* v *P* 1991 (4) SA 113 (T), the Full Bench of the Transvaal Provincial Division disagreed with what was said in *Douglas* v *Meyers supra* on the circumstances in which the father of a child born out of wedlock would be entitled to access to his child. The court held that such a father need not show very strong compelling grounds, and that all he need show is that, on a balance of probabilities, the child's best interests would be served by granting him access to the child, and that such access would not unduly interfere with the mother's right of custody.

That decision was subsequently approved in *B* v *S supra*. At 584C-H Howie JA had this to say:

"In *B* v *P*, however, Kirk-Cohen J (giving the judgment of the Full Bench) pointed out that it emerged quite clearly in what followed immediately upon the quoted passage in *Douglas* that the court in the latter case had erroneously derived the perceived need for very strong compelling grounds from what was said in *Calitz* v *Calitz* 1939 AD 56 at 64.

As observed in *B* v *P* at 115H-I, *Calitz* had nothing to do with a child born out of wedlock. It was concerned with custody by the father of a legitimate child in a situation where the parents were neither divorced nor judicially separated. In *Calitz*, it was noted that in Scottish law the father of a legitimate child was entitled to custody during the subsistence of the marriage and would only be deprived of it by the court, acting in effect as upper guardian, in exceptional cases where there was clear evidence of danger to the life, health or morals of the child. On the apparent assumption that South African law was substantially the same on this aspect, this court held that, in the absence of such factors in the case before it, the lower court had erred in depriving the father of custody.

After analysing *Calitz* and reviewing other case law, Kirk-Cohen J concluded (at 117A-C) that, where the court acts as upper guardian, it makes no difference whether the

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child concerned is legitimate or illegitimate. For that reason, he said, the requirement in *Douglas* and *F* v *B* of very strong compelling grounds was inapplicable. With respect, that conclusion is entirely correct.

It follows that the court *a quo* erred ... in requiring the appellant to show a very strong and compelling ground why he

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should have access."

I find myself in complete agreement with the observations made by the learned Judge of Appeal. There was no basis for extending what was said in *Calitz supra*, to the issue of access to a child born out of wedlock.

On the respective positions of the father of a legitimate child and the father of a child born out of wedlock, the learned Judge of Appeal had this to say at 582C-F:

"It is true that the father of a legitimate child has a right of access at common law ..., with which right he can confront the mother if she refuses access. But that right will be to no avail if for any reason she persists in her refusal. He will then have to go to court for an order enforcing access. If access is found to be adverse to the child's welfare, he will fail. By comparison, the father of a child born out of wedlock who considers access is in the best interests of the child can confront the mother with the contention that he should, on that ground, be granted access. If she refuses to concede that, he will have to go to court to obtain an order granting him access. As in the other example, he will fail if access is not in the child's best interests. The difference between the respective positions of the two fathers is therefore not one of real substance in practice."

Once again, I entirely agree with the views expressed by the learned Judge of Appeal.

Finally, in the more recent case of *T* v *M supra*, Scott JA at 57H 58A, summed up the position with regard to access by a non-custodian father to his child born out of wedlock as follows:

"While at common law the father of a child born out of wedlock, unlike the father of a legitimate child, has no right of access, the difference between the respective positions of the two fathers is not one of real substance in practice since in our modern law whether or not access to a minor child is granted to its non custodian father is dependent not upon the legitimacy or illegitimacy of the child but in each case wholly upon the child's welfare, which is the central and constant consideration. Accordingly, and to the extent that one may choose to speak in terms of an inherent right or entitlement, it is the right or entitlement of the child to have access, or to be spared access, that determines whether contact with the non-custodian parent will be granted. Furthermore, when the question of access is judicially determined for the first time, there is no onus in the sense of an evidentiary burden or so-called risk of non-persuasion on either party. This is because the litigation really involves a judicial investigation in which the court can call evidence *mero motu* and is not adversarial."

I entirely agree with the principles summarised by the learned Judge of Appeal. In my view, these are the principles which the court *a quo* should have applied in determining the appellant's application. In the circumstances, the learned judge was wrong when he ignored the decision in *T* v *M supra*, which had clearly been drawn to his attention, without giving much thought to it.

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However, as I intend remitting the matter to the court *a quo*, I reiterate that the principles set out above are the principles to be applied. The main issues to be determined will be the nature and extent of the access to be granted to the appellant. It was, of course, common cause that it was in the best interests of Dayne for the appellant to have access to him. The disagreement between the parties was on the nature and extent of that access.

As far as the question of costs incurred by the parties in the court *a quo* is concerned, it is my view that this should be reserved for determination by the court which will hear the oral evidence. With regard to the costs of appeal, as neither party has succeeded on appeal, I think

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that it is proper that each party should bear his or her own costs.

In the circumstances, I would make the following order:

1. Paragraph 1 of the order of the court *a quo* be and is hereby set aside.

2. The following order be and is hereby substituted for para 1 of the order of the court *a quo*:

   (a) the application is postponed *sine die* for the hearing of oral evidence, on a date to be arranged with the Registrar of the High Court, on the question of the nature and extent of the access to be granted to the applicant in respect of Dayne.

   (b) the evidence will be that of the parties, their witnesses, and any witnesses whom the court may call *mero motu*.

   (c) the Registrar of the High Court shall request the Department of Social Welfare to investigate the circumstances of both parties and file a report on the question referred to in para (a) above.

   (d) the question of the costs of the application incurred so far is reserved for determination by the court hearing the oral evidence.

3. The matter be and is hereby remitted to the High Court for the hearing of oral evidence, in terms of the order set out in para 2 above, by the judge who previously heard the matter or, if he is not available, by any other judge of that court.

4. Unless the question of the appellant's access to Dayne is amicably resolved by the parties, the appellant shall, through his legal practitioners and within thirty days of the date of this order, notify the Registrar of the High Court in writing of his intention to pursue the application in terms of the order set out in para 2 above. If the appellant fails to give such notification, or if he fails to prosecute the application further after such notification, that order will lapse and para 1 of the order of the court *a quo* will revive.

5. Each party will pay his or her own costs of appeal.

Muchechetere JA: I have read the judgment prepared by my brother Sandura JA but respectfully disagree with it. In my view, in cases of this nature it is of paramount importance to keep in mind the point of law which I consider has been approved and accepted in all the cases cited above, that is, *Douglas* v *Meyers supra*; *B* v *P supra*; *F* v *B supra*; *T* v *M supra* and *B* v *S supra*. It is to the effect that:

> "... *there is no inherent right to access or custody* for a father of a minor illegitimate child but the father, *in the same way as other third parties*, has a right to claim and be granted these if he can satisfy the court that it is in the best interests of the child ... *Douglas* v *Meyers supra* at p 914E" (The emphasis is mine).

I have always understood the above to mean that the father of a child born out of wedlock has no rights at all in the child and that conversely all these rights are vested in the mother. The law does not therefore recognise the father of a child born out of wedlock as a parent to it but gives

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full recognition to the mother. In the circumstances, the rights of the mother to the child are the same as the rights of legitimate parents to their children. It is in this context that the case of *Calitz* v *Calitz supra*, was cited in *Douglas* v *Meyers supra*. It was to emphasise that the rights of the mother in the child are the same as those of a legitimate father or mother to their child. It appears, therefore, that this point was not appreciated by Howie JA in *B* v *S supra.*

The rights of legitimate parents and therefore those of the mother of a child born out of wedlock cannot be interfered with ordinarily. Third parties, and the father of a child born out of wedlock is placed in the same category, can only interfere with those rights in the interests of the child when they are not being exercised properly. In my view, it should first be appreciated here that it is the rights of the parents and the mother which the third parties would seek to interfere with. And one cannot interfere with another's rights if the other person is exercising them properly. The trigger that warrants any interference must therefore be an allegation that the rights are not being exercised properly and that it is therefore in the interests of the child that those rights be interfered with. The welfare of the child in cases of this nature only becomes an issue where there is an allegation that the exercise by the mother of her rights causes some concern.

It therefore follows, in my view, that a father of a child born out of wedlock cannot come to the court and simply allege that because he is the father of the child, or he is richer than the mother, or he pays maintenance etc, it is in the interests of the child that the rights of the mother should be interfered with. Similarly, a third party eg child welfare department, religious organisation cannot come to court and simply ask for the rights of either the legitimate parents of a child or the mother of a child born out of wedlock to be interfered with in the interests of the child when no concern has been raised about the

exercise of the rights. This would, in my view, be elevating the legal status of an illegitimate father to that of a spouse in a divorce situation or on separation and negating the accepted principle of law that he has no inherent rights in the child born out of wedlock. There must therefore be some allegation that the mother is not exercising her rights properly. In this connection, I therefore, still maintain what I said in *Douglas* v *Meyers supra* at pp 165-168:

> " ... there are no allegations suggesting or implying the respondent is not capable of, or has not looked after, properly necessitating a periodical check by the appellant. There is no allegation or suggestion that the maintenance paid has so far been or in the future will be, misused. There is no allegation that the child, who has been seen by the applicant on three separate occasions since birth, was other than happy and well in the respondent's care and custody. Nothing untoward has been said about the respondent's character and the environment under which the child has been brought up. It is, more importantly, not explained in which way it is in the interests of the child that it should know and be acquainted with its father. Mr *Bisset*'s submission on this point in my view amounted to saying that any child needed a father. This may be correct but there are some kinds of fathers children are better without. In my view, the application has not gone beyond saying that the applicant wants access because he is a natural father and because he pays maintenance. This, in my view, is the same as applying for access as of right on the ground of an inherent right of access which, as I have stated above, is non-existent in the case of a natural father."

It is for the above reasons that I find myself in respectful disagreement with the decision in *B* v *P supra*, *B* v *S supra*, and *T* v *M supra* and the finding arrived at by my brother Sandura, but in

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agreement with the decision by Kriek J in *F* v *B supra*. As I have already indicated, the finding in those decisions elevate, without, in my view, any legal basis, the legal status of an illegitimate father and allows for the unwarranted interference of the mother's rights over the child. It may be, perhaps because such fathers are now obliged to pay maintenance by law, or for some other reasons that there is a general desire to grant the fathers some rights over the children. That, in my view, can only be best done through legislation and there is at present no such legislation in Zimbabwe.

Returning to the facts in this case, my view is that they are on all fours with those in *Douglas* v *Meyers supra*. The words quoted above in *Douglas* v *Meyers supra* could be stated word for word for what occurred in this case. All that the appellant says is, I want reasonable access to the child so that a natural bond can be established between us. In my view, the admission by the respondent that it is in the interests of the child to meet its father once in a while for a natural bond to be established between them is not a concession that her rights ought to be interfered to an extent acceptable to the appellant. She is under no obligation to do so. She is, in my view, therefore, entitled to put her own limits to the frequency and timing of the access.

EBRAHIM JA

Ebrahim JA: I agree with the views of Muchechetere JA. The court is being asked to substitute its own decision for that of a person in whom the parental authority of the minor concerned vests where such person has not been shown to be incompetent to make such a decision. I do not believe that the function of the court as the upper guardian of all minors embraces the right to assume such a role. The mere fact that the court may reach a different conclusion as to where the best interests of the minor lie does not automatically make it the best arbiter of such an issue. Accordingly, it is my view that the starting point in conducting an inquiry of this nature is whether the third party instituting the inquiry has provided some basis on which a finding could be made that the court is more competent than the person having parental authority to make the decision. If no such basis exists, the inquiry can proceed no further, whether the third party is the father of a minor born out of wedlock or otherwise. If the law is to be changed with regard to such fathers, the decision must be that of the legislature, not the court.

Accordingly, the appeal is dismissed with costs.

Ahmed & Ziyambi, appellant's legal practitioners

A Ebrahim, respondent's legal practitioner

JIAH & ORS *v* PUBLIC SERVICE COMMISSION & ANOR 1999 (1) ZLR 17 (SC)

Citation 1999 (1) ZLR 17 (SC)

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Case No	Judgment No. S-158-98
Court	Supreme Court, Harare
Judge	Ebrahim JA, Muchechetere JA, Sandura JA
Heard	May 26, 1998
Judgment	January 8, 1999
Annotations	None

Civil appeal

Flynote

Administrative law - audi alteram partem rule - applicability to dismissals under regulations governing public service - public servants taking part in unlawful strike - may not be summarily dismissed without being given opportunity to make representations

Public service - discipline - fair hearing - constitutional right to - applicable to dismissal made under public service regulations

Headnote

The appellants were junior doctors and nurses, employed in the public service. They had, in common with most other public servants throughout the country, taken part in a general work stoppage in August 1996, and again in October of that year. All striking doctors and nurses were sent a letter from the Acting Minister for the Public Service, stating that they had been summarily dismissed from their employment. The letter said that they could make written representations within a month. The appellants all applied for reinstatement. Five received letters rejecting their applications; the others were told they would be reinstated, but not paid for the time between their dismissal and reinstatement. The appellants sought an order from the High Court reinstating them. They alleged that they had not been given an opportunity to make representations before they were dismissed and that no investigation of their respective positions was ever made. The respondents claimed that there had been newspaper announcements warning of serious consequences if the striking public servants did not return to work within a very short time. The High Court (Adam J) had dismissed the applications, on the grounds that notification had been given to the appellants of the consequences of failing to return to work, that there was an emergency and that therefore *ex parte* action was lawful. The High Court had also held that the exclusion of a prior hearing and representations had been mitigated by the regulations which entitled a dismissed public servant to make subsequent written representations. On appeal:

Held, that even if there had been such press announcements, these could not be taken to be certificates of service on the appellants. The crucial point was whether the appellants had been given an opportunity to be heard. In this case, there was never any application of a judicious mind before any of the decisions were made.

Held, further, that the tenor of the legislation dealing with the public service could not be said to

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exclude the *audi alteram partem* principle, either directly or by implication. The respondents should have given the appellants an opportunity to be heard.

Held, further, that while the fact that the regulations allowed representations to be made

afterwards might have been a valid exception under the common law, the subsequent "hearings" provided for were not sufficiently fair to have the effect of curing the lack of an earlier hearing.

Held, further, that there was no urgency in this case. The urgency related to the situation in the hospitals, but that did not make it urgent to dismiss the striking doctors and nurses.

Held, further, that it was clear that the appellants were not re-employed because, having represented the doctors and nurses in negotiations with the Government, they were seen as having led the strike. The other doctors and nurses were reinstated. The treatment of the appellants was in breach of the equity principle and should be classified as an unfair labour practice.

Held, therefore, that the dismissals of the appellants should be declared null and void.

Quaere: whether the provision for subsequent hearings would prevail against the mandatory provisions of s 18(9) of the Constitution.

Cases Considered

Cases cited:

Admin, Natal & Anor v *Sibiya & Anor* 1992 (4) SA 532 (A)

Admin, Tvl & Ors v *Zenzile & Ors* 1991 (2) SA 21 (A)

Chrmn, PSC & Ors v *Hall* S-49-89

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

Holland & Ors v *Min of Public Service* 1997 (1) ZLR 186 (S)

Muringi v *Air Zimbabwe Corp & Anor* 1997 (2) ZLR 488 (S)

National Union of Metalworkers of SA & Ors v *Henred Fruehauf Trailers (Pty) Ltd* 1995 (4) SA 456 (A)

Ntshotsho v *Umtata Municipality* 1998 (3) SA 102 (Tk)

Statutes Considered

Legislation considered:

Constitution of Zimbabwe 1980, s 18(9)

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Public Service (Maintenance of Services) Regulations 1990 (SI 258 of 1990), ss 2, 5, 7 and 8

Case Information

L T Biti, for the appellants

J Musimbe, for the respondents

Judgment

Muchechetere JA: This is an appeal against the decision of the High Court, Harare, on 25 June 1997*(2) in which the appellants' application, to the effect that:

> "1. the dismissal by the first respondent of the applicants by way of letter dated 30 October 1996, be and is hereby declared null and void;
>
> 2. the applicants be and are hereby reinstated to their original positions forthwith without any loss of benefits and that the respondents jointly and severally be and are hereby ordered to pay all such arrears and bonus to the applicants;
>
> 3. ss 5 and 7 of the Public Service Regulations 1990 is (are) *ultra vires* ss 11 and 18 of the Constitution of Zimbabwe;
>
> 4. ss 5 and 11 of the Public Service (Maintenance of Service) Regulations 1990 is (are) *ultra vires* s 25 of the Public Service Act [*Chapter 16:04*];

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> 5. that the first and second respondents jointly and severally each paying the other to be absolved pay the costs of suit;"

was dismissed with costs.

The facts in the matter, as found by the learned judge in the court *a quo*, are that the first two appellants are junior medical practitioners and the other appellants are nurses. They were employed by the first respondent through the second respondent. On 19 August 1996, most of the country's civil servants, including the appellants, went on a nationwide general "strike" (work stoppage) to press for better working conditions, including payment of back-pay. A few weeks later, everyone agreed to, and did, return to work. On 21 October 1996, the junior doctors and nurses again went on strike. On 23 October 1996, the first and second appellants, as part of the civil service representatives, took part in negotiations with Government representatives. On 26 October 1996, the Acting Minister of the Public Service, Labour and Social Welfare issued the following statement:

> "The few nurses and junior doctors who have been on strike should now return to work. If they do not do this, they will face the serious consequences that must follow."

And on 29 October 1996, he also issued the following statement:

> "Those who do not return to work on Wednesday (30 October 1996) will be dismissed forthwith and dismissed permanently. They will not be allowed to reapply."

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On 30 October 1996, the first respondent addressed a *pro forma* letter to virtually every junior doctor and nurse in its employ in Harare and Bulawayo. All the appellants received it. The letter reads:

> "Ref D. 162
>
> 30 October 1996
>
> SUMMARY DISMISSAL IN TERMS OF THE PUBLIC SERVICE (MAINTENANCE OF SERVICE) REGULATIONS, 1990
>
> You ... currently employed in the Ministry of Health and Child Welfare are hereby notified that the Commission has summarily dismissed you from the Public Service with effect from 31 October 1996 in terms of s 5(1)(c)(iii) of the Public Service (Maintenance of Service) Regulations 1990.
>
> The grounds upon which you have been dismissed are that you were not at your place of work at ... between the period 21-30 October 1996 and that during the period declared or took part in or advised, encouraged, incited, commanded, aided or procured another person to declare or take part in a work stoppage or the continuation of a work stoppage.
>
> You are hereby notified that you are entitled to make written representations to the Commission in connection with your dismissal within one month after being informed of your dismissal in terms of s 7(2) of the said Regulations.
>
> You shall not be paid any remuneration for the period during which you took part in the work stoppate (*sic*)."

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In response, the appellants wrote to the Medical Superintendents of their respective institutions as follows:

> "RE: APPEAL FOR REINSTATEMENT IN RESPONSE TO LETTER REFERENCE D/162
>
> I ... would like to appeal for reinstatement with the Public Service Commission in response to (the) letter of dismissal received on ... 1996. It is my hope that I will be reinstated at my old grade and salary without prejudice to my benefits."

The first, second, fifth and seventh appellants received letters from the first respondent dated 16 December 1996, which read:

> "Dear Sir,
>
> REPRESENTATIONS SUBMITTED IN TERMS OF SECTION 7(2) OF THE PUBLIC SERVICE (MAINTENANCE OF SERVICE) REGULATIONS, 1990
>
> I refer to your application for reinstatement into the Service dated ... 1996.
>
> I regret to inform you that your application for reinstatement into the Service has been unsuccessful.
>
> Yours faithfully,
>
> (Signed)

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NGONI MASOKA

SECRETARY

PUBLIC SERVICE COMMISSION

c.c. Secretary for Health and Child Welfare

Director, Salary Service Bureau

Pensions Officer."

The third and fourth appellants also received letters dated 16 December 1996 from the first respondent. These were to the effect that, in terms of s 7(3)(b) of the Public Service (Maintenance of Service) Regulations 1990 ("SI 258 of 1990"), their summary dismissals had been confirmed, but that they had been re-appointed to the Service with effect from the date they assumed duty, that they retained their former grade and salary and would not be paid for the period between their dismissal and re-appointment and would not be entitled to payment of an annual bonus for 1996. Their appointment was also subject to their assumption of duty on or before 18 December 1996 and that if they did not assume duty by that date their re-appointment would be null and void.

In their founding affidavits, the appellants alleged that the first respondent failed to deal adequately with the very poor conditions of service for civil servants; that what the first respondent purported to do when the junior doctors and nurses went on strike was to summarily dismiss them *en masse*;

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that no investigation of each of their positions was ever made; that none of them was ever offered an opportunity to present his or her side of the story before the adverse decision was taken; and that since s 25 of the Public Service Act [*Chapter 16:04*] incorporates the principles of natural justice, the provisions of s 5 as read with s 7 of SI 258 of 1990 were *ultra vires* that section. They further stated that as the application was also in the form of a review their dismissals were null and void on the grounds of gross irregularity in the proceedings, in that they were denied the right to be heard before the adverse decision was made against them.

In connection with the first respondent's allegation that the appellants led an illegal strike of junior doctors and nurses, the appellants' response was that it was unfair in the absence of investigation for the first respondent to allege that. None of the appellants deny taking part in a strike.

In para 9.6 of his founding affidavit, the first appellant states the following:

"In my case, there never was any investigation that was carried out, I was simply lumped with the striking doctors and dismissed. Further, even in the case of the striking doctors, all of them were simply dismissed when some in fact were not part of the strike. The second respondent never properly applied its mind and simply took a harsh decision without respecting the rights of the employees concerned including myself. To permit summary action and summary dismissal without due process of the law envisaged in s 25 of Chapter 16:04, then ss 5 and 7 of SI 258/90, to that extent, are *ultra vires* s 25 of the Act. In any event, s 25 itself recognises that there are Service

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Regulations which define avenues of investigations, and in this case, the same are the Public Service (Disciplinary) Regulations 1992."

The above position was adopted by all the appellants.

In an opposing affidavit, one Hope Cynthia Sadza ("Sadza"), for the first respondent, acknowledged the need to improve the working conditions of the civil servants. She also admitted that the Government had omitted the 20% increase, which had been recommended in the job evaluation exercise and promised, but stated that it had been agreed between the Government and the unified Civil Service Committee that civil servants would return to work whilst negotiations continued on the other grievances. She went on to say in para 8 of her affidavit:

"On 21 October 1996, to the surprise and shock of Government and most of the civil servants *the applicants led another illegal strike of junior doctors and nurses* ... " (the emphasis is mine).

On the appellants' allegations that they were not given an opportunity to present their cases before they were dismissed, Sadza stated the following in paras 11.2, 11.3 and 12 of her affidavit:

"11.2 ... From the letters of summary dismissal served on the applicants (now the appellants) it is clear that all affected parties were advised to make representations within a month. The summary dismissal therefore in terms of the above-mentioned

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Regulations was like a provisional order. The applicants had a month to be heard. Indeed using the same format the applicants and many others made their representations although they are obviously and terribly scanty (appeals for reinstatement, quoted above). One therefore, wonders what form of a hearing the applicants envisaged.

11.3 It is respectfully submitted that after the representations were considered most of the dismissals were confirmed but thereafter some employees were re-hired or re-employed, at the discretion of the first respondent. The respondents declined to re-engage five of the applicants. ...

12. It is further argued that an investigation and consideration of the employees' situations was taken into account. This is evidenced by the fact that some employees were re-appointed whilst others were requested to leave the Service. Further the whole issue of negotiations involved the consideration of the employees' position. Their representations were also considered."

In another opposing affidavit, one Thomas Arnold Zigora ("Zigora"), for the second respondent, confirmed that the general conditions of service for civil servants were poor and that that was why the Government initiated the 1995 job evaluation exercise. He went on to say that after the award of a 20% increase and the establishment of committees for further negotiations it was unwarranted for the nurses and junior doctors to mount another strike in October. He denied that negotiations had broken down. Zigora also stated the following in para 10 of his affidavit:

"... It is further submitted that the relationship between the dismissed doctors and nurses on the one hand and their respective superintendents and the respondents has deteriorated to such an extent that they can no longer work together. The dismissal(s) should stand."

In an answering affidavit, which was adhered to by all the appellants, the first appellant stated

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the following:

"4.1 Medical personnel went on strike on 21 October 1996. These civil servants exercised their constitutional right to freedom of expression, association and movement. They went on strike because of genuine issues which were raised in my founding affidavit. *It is unfair, in the absence of an investigation, for the first respondent to allege that we, the applicants, led the strike. It is this type of prior judging that has obviously led to our dismissal. And it is this type of prior judging that principals* (sic) *of natural justice exist to afford protection to individuals who, like ourselves, are victims of unbridled power* ...

5.2 Revision of the salaries and allowances due to health workers as reflected in Annexure N1 [to the first respondent's affidavit] was effected after the strike by medical personnel. This represents a victory to the striking medical personnel ...

8.1 Medical personnel did not make any representations through the first respondent other than the *pro forma* letter which has been produced. In any event, the adverse decision had already been made, that is, the dismissal of the application [meaning applicants] without them being heard. What has been challenged *in casu* is unlawful termination which at the time that the *pro forma* letters to [meaning "of"] dismissals [were sent] had already been effected.

8.2 The reference to the common law *in casu* [that the respondents were in any event

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entitled to summarily dismiss the appellants under common law for deliberate absenteeism or failure to work] is irrelevant for the simple and good reason that the first respondent did not rely on common law in effecting its dismissals. In any event, it is at common law itself that you find well entrenched principles of natural justice binding public bodies such as the first respondent" (the emphasis is mine).

Mr *Biti* submitted that there were four issues on which this matter could be resolved. These are: (a) whether within the context of this case it was not unfair for the respondents to terminate the appellants' contracts summarily; (b) whether the exclusion of the *audi alteram partem* rule was justified on the basis of an emergency; (c) whether or not ss 5 and 7 of SI 258 of 1990 are *ultra vires* ss 11 and 18 of the Constitution of Zimbabwe; and (d) whether or not ss 5 and 7 of SI 258 of 1990 are *ultra vires* s 25 of the Public Service Act.

I will first consider the first and second issues, that is, the fairness of the respondents' summary dismissals and whether the exclusion of the *audi alteram partem* rule was justified on the basis of an emergency.

In this connection, Mr *Biti* submitted that the learned judge in the court *a quo* seemed to accept the importance of the *audi alteram partem* rule - that an opportunity to make representations in cases of this nature was essential.

The learned judge, after a consideration of many of the relevant cases on the matter - *Health Professions Council* v *McGown* 1994 (2) ZLR 329 (S) at 337; *Zimbabwe Teachers Association* v *Minister of Education* 1990 (2) ZLR 48 (H); *Holland & Ors* v *Minister of Public Service, Labour and Social Welfare* 1997 (1) ZLR 186 (S); *Taylor* v *Minister of Higher Education* 1996 (2) ZLR 772 (S); *Chairman, Public Service Commission* v *Zimbabwe Teachers Association* 1996 (1) ZLR 637 (S); *National Foods Ltd* v *Masukusa* 1994 (1) ZLR 66 (S); *Dube* v *Chairman, Public Service Commission* 1990 (2) ZLR 181 (H) at 190-191; *Sachs* v *Minister of Justice* 1934 AD 11 at 38; *Marumahoko* v *Chairman, Public Service Commission* 1991 (1) ZLR 27 (H) at 44; *South*

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African Roads Board v *Johannesburg City Council* 1991 (4) SA 1 (A) at 10; *du Preez* v *Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 231; and *Doody* v *Secretary of State for the Home Department* [1993] 3 All ER 92 (H) at 106-107 - said at p 606 of his judgment (*Jiah & Ors* v *Public Service Commission & Anor* 1997 (1) ZLR 595 (H)):

> "It follows, absent countervailing powerful considerations, advance disclosure and an opportunity to make representations will be required very often but not always, in the interests both of fairness and informed decision-making. Without this, such a decision may not be right and even if it is, it will clearly not be fair. But this does not mean that, in every instance, the mere enactment of a statutory provision that excludes an opportunity to make representations will make it in violation of s 18 [of the Constitution] unless it can be shown that the context within which the decision is to be made under such a statutory provision is unfair to the aggrieved person."

The learned judge went on to justify the exclusion of an opportunity for

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making representations, and therefore the validity of the summary dismissals, on the ground that notification was given in advance about the action which would be taken should the striking nurses and doctors not return to work and on his finding that there was an emergency and therefore an *ex parte* action was lawful.

Mr *Biti* submitted that, in the first instance, there is nowhere in the founding affidavit of the first and second respondents any reference to newspaper announcements, on which the learned judge based his finding that the appellants received the said notification. And that in the circumstances there is no justification for the finding that:

> "It is not disputed by the applicants that advance notification was given about the action that would be taken should these 'striking' nurses and doctors not return to work."

I agree that a perusal of the record does not reveal any mention of the newspaper announcements and no copies of these are attached to the papers. Mr *Biti*, by way of explanation, stated that there was a supplementary affidavit filed by one Finne Hudson Munyira, the Permanent Secretary in the Ministry of Labour, which was filed on 15 January 1997, some eight days after the opposing affidavits had been filed. It is presumed that it is that affidavit which may have contained some mention of the newspaper announcements. The affidavit is not on the record. Its exclusion is justified by Mr *Biti* on the ground, that for it to have been included, leave of court had to be granted. But such was never applied for or granted. He also stated that as the Minister of Labour was not party to the proceedings, he had no basis for filing a supporting affidavit without leave of court. Mr *Musimbe*, for the respondents, did not make any submission on this issue.

I agree with Mr *Biti's* submission that the newspaper announcements should not in the circumstances have been the basis for the above finding.

Mr *Biti's* alternative submission on notification also has some validity. He submitted that, even if the newspaper announcements were to be taken into account, the publication thereof could not be taken to be certificates of service on the appellants. It could not be taken as a fact, and it was never alleged or contended by the respondents and accepted by the appellants, that the

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appellants saw the newspaper announcements. Further, the newspaper articles do not specify that the appellants faced summary dismissal if they did not return. They talk of "serious consequences that will follow". This could have meant other disciplinary proceedings short of summary dismissal. Again the announcements gave little time for the appellants to comply - at most three days.

Mr *Biti* also submitted that the crucial issue in the matter is not whether someone has received advance notice of his actions or omissions but that he has had an opportunity to be heard before the administrative action is taken

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to his prejudice. See *Holland & Ors* v *Minister of Public Service, Labour & Social Welfare supra at* pp 194-195. The complaint is not that there was no notice, but rather that the respondents did not hear the appellants before punishing them.

I agree. The fact that there was never any application of a judicious mind before any of the decisions were made is indicated by the absence of the record in terms of r 260 of the High Court Rules. This is compounded by what the Chairman of the first respondent, one Mariyo Mariyawanda Nzuwah, said about the matter in paras 2, 3 and 4 of his affidavit. He said:

> 2. The applicants were summarily dismissed in terms of s 5 of the Public Service (Maintenance of Service) Regulations SI 258/90.
>
> 3. In the circumstances, there was no formal and ordinary proceedings which were undertaken and as a result there was no record of proceedings as envisaged and required in terms of r 260 of the High Court of Zimbabwe Rules.
>
> 4. Further our records contain only copies of letters summarily dismissing the applicants from employment ... "

The facts in this case are, in my view, on all fours with those in the South African case of *Administrator, Transvaal & Ors* v *Zenzile & Ors* 1991 (1) SA 21 (A). In that case, hospital workers, who were temporarily employed in a full time capacity, were summarily dismissed after, as in this case, participation in a work stoppage. In terms of the public service code applicable to them (similar to our SI 258 of 1990), employees could also summarily be dismissed for misconduct or unsatisfactory service or on twenty-four hours' notice. The dismissed employees were also not given hearings prior to their summary dismissal. In a hearing before the Witwatersrand Local Division, the dismissals were declared unlawful. The employers appealed.

The appellants' arguments on appeal were similar to those presented in this case by Mr *Musimbe* for the respondents and were to the effect that the contractual relationship with employees was simply one of master and servant, governed exclusively by common law, and that participation in a work stoppage amounted to unlawful repudiation of contract, entitling the employer summarily to dismiss them. Alternatively, the appellants argued that the legislature intended to exclude the operation of the *audi alteram partem* principle and to deprive temporarily employees of a right to prior hearing before summary dismissal. The Appellant

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Division held the following, as per the case's headnote at pp 22-23:

"*Held,* that in the instant case, being concerned as it was with the summary dismissal of employees on grounds of alleged misconduct, the power exercised by the employer against the employees was one of a disciplinary or punitive nature.

Held, further, as to the respondents' argument that the matter fell beyond the purview of administrative law, that the case was concerned not with mere employment under a contract of service between two private individuals, but with a form of employment which

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invested the employee with a particular status which the law would protect: the employer and decision-maker in this instance was a public authority whose decision to dismiss involved the exercise of a public power.

Held, further, that the element of public service injected by statute necessarily entailed that the respondents had been entitled to the benefit of an application of the principles of natural justice before they could summarily be dismissed for misconduct.

Held, further ...

Held, further, that when a statute empowered a public body to give a decision prejudicially affecting an individual in his liberty or property or existing rights, the latter had a right to be heard before the decision was taken, unless the statute expressly or by implication indicated the contrary.

Held, further, that in the instant case the decision summarily to dismiss had affected the respondents prejudicially in their rights.

Held, further ...

Held, further, that it was logically unsound and wrong in principle to postulate that the *audi alteram partem* principle had no application to 'purely contractual relations'; the existence of a contractual relationship could not alter the essential nature of the inquiry which, with reference to any particular provision of a statute, was always (1) whether a public official had been empowered to give a decision affecting the existing rights of an individual and, if so, (2) whether the right of the individual to be heard before the decision was taken had been excluded either expressly or impliedly.

Held, further, that the exercise by public officials of the statutory power to dismiss the respondents had not deprived that power of its intrinsic jural character simply because a corresponding right to dismiss existed at common law or that provision for it might have been made in a contract.

Held, further, that the common law or contractual right to dismiss gained an added dimension and was invested with special significance by its express enactment in a statute, and that that consequence laid the foundation for the classic formulation of the *audi alteram partem* principle.

Held, further ...

Held, further ...

Held, accordingly, that the *audi alteram partem* principle had been applicable to the facts of the case and that the appeal should therefore be dismissed."

See also *Administrator, Natal & Anor* v *Sibiya & Anor* 1992 (4) SA 532 (A) and *Ntshotsho* v *Umtata Municipality* 1998 (3) SA 102 (Tk) at 109-112.

In my view, the tenor of the Public Service Act [*Chapter 16:04*] and of its subsidiary legislation,

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that is, SI 258 of 1990 and others, cannot be said to exclude the *audi alteram partem* principle, either directly or by implication. In the circumstances, I agree that the respondents ought to have given the appellants a hearing before summarily dismissing them.

As for the second basis for the court *a quo* upholding the validity of the summary dismissal - that there was an emergency and therefore an *ex parte* action was lawful - the learned judge relied for his finding on the sentiments expressed by Gubbay CJ in *Health Professions Council* v *McGown supra*. The learned judge in the court *a quo* stated the following at pp 607-608 of his judgment:

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"... Gubbay CJ spoke about the general rule that once a decision has been made a subsequent hearing will be no real substitute. He then cited the exceptions to that rule set out by Professor Baxter as follows:

'(i) Where a statute authorises emergency, *ex parte* action, it might be implicit in the statute that, unless natural justice is excluded altogether, a hearing need only be given after the decision is taken. If there is no urgency, however, the court will require natural justice to be observed beforehand.

(ii) A court may accept as sufficient compliance with natural justice a hearing after the decision had been taken where

- there is sufficient interval between the decision and its implementation to allow for a fair hearing;
- the decision-maker retains a sufficiently open mind to allow himself to be persuaded that he should change his decision; and
- the affected individual has not already suffered prejudice.

These are concessions to the demands of administrative efficiency, but they are limited. A hearing held after the decision can only be acceptable if, in all the circumstances, it was sufficiently fair as to have the effect of "curing" the failure to hold one before.'

Reference was made to *Momoniat* v *Minister of Law and Order* 1986 (2) SA 264 (W) at 275 and *Omar Fani* v *Minister of Law and Order* 1987 (3) SA 859 (A) at 906. In *Monomiat's* case Goldstone J held that, having regard to both the terms of the Act and the practical difficulties of observing the *audi alteram partem* rule, ... the exclusion of the right to notice and the right to be heard prior to the decision was acceptable since that Act authorised emergency, *ex parte* action in relation to which a hearing need only be given after the decision had been taken."

The learned judge went on to find in this case that the exclusion by s 7(1) of SI 258 of 1990 of a prior hearing and representations complained of by the appellants had been mitigated by the provisions of s 7(2) of SI 258 of 1990, which authorises written representations subsequently in the matter. This reads:

"Any member or former member who is aggrieved at having been prohibited, suspended or summarily dismissed in terms of s 5 may, within one month after being notified of the prohibition, suspension or summary dismissal, make written representations in the matter to the Commission."

In the learned judge's view, this put the dismissal provisions in the category of the exceptions set out by Baxter in the above quoted passage.

Mr *Biti*'s submission on the issue was, firstly, that, whilst it was correct that the above

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exceptions are valid under common law, they would not in this case prevail against the mandatory provisions of s 18(9) of the Constitution. In this connection, he cited the case of *Chairman Public Service Commission & Ors* v *Hall* S-49-89, where McNally JA said at p 7 of the cyclostyled judgment:

"It may be arguable that, in a case dealt with wholly under the 1986 Regulations, there could be a breach of the *audi alteram partem* rule. It may be that in a country with a justiciable Bill of Rights one cannot apply the *dictum* of Stratford ACJ in *Sachs* v *Minister of Justice* 1934 AD 11 at 38 where he said: 'Sacred though the maxim (*audi*

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alteram partem) is held to be, Parliament is free to violate it'. Even if Parliament were free to violate it, one might ask whether a subordinate authority such as the Commission is free to do so. It may also be that the denial of legal representation under the 1986 Regulations, will have a bearing on whether a fair hearing is provided for under the Regulations."

See also *Holland & Ors* v *Minister of Public Service, Labour and Social Welfare supra a*t 195, where a section of an Act was held unconstitutional because it offended the *audi alteram partem* principle.

Mr *Biti* also submitted that, even if it were to be accepted that, because of the provisions of s 7(2) of SI 258 of 1990, the exceptions spelt out by Baxter were applicable in this case, this would still not protect the respondents. This was because, in his view, there was no emergency in this matter. On this issue, he argued that even though the situation in the hospitals was urgent and desperate, there was nothing urgent about the dismissals. I agree. Indeed that would not resolve the situation in the hospitals. It would make it worse because what the hospitals were in urgent and desperate need of were the services of doctors and nurses. I agree that the respondents could have easily suspended the appellants in terms of the Public Service (Disciplinary) Regulations 1992 (SI 65 of 1992) and dealt with their matters in terms of the provisions of those Regulations.

Secondly, Mr *Biti* submitted that the second "hearings", as envisaged in Baxter's exceptions, were not in this case sufficiently fair to have the effect of curing the failure to hold one before. I also agree. In this case it is conceded that no hearings were in fact held. All that happened is that the appellants submitted notices of appeal and that the respondents thereafter dismissed them without any hearings. Hearings would have determined whether the respondents' contentions that the appellants had led the illegal strike of junior doctors and nurses were justified. The conception that the appellants led the strike must have been gained from the fact that they represented the doctors and nurses in the negotiations with the Government - a factor which, in my view, should have been to their credit. As matters stand, one cannot escape the conclusion that the appellants were not re-employed on the unsubstantiated ground that they had led the illegal strike. This is because all the other persons who participated in the strike were reinstated. It appears that the respondents were simply intent on dismissing the perceived leaders of the strike - victimisation.

On the question of victimisation, see *National Union of Metalworkers of South Africa & Ors* v *Henred Fruehauf Trailers (Pty) Ltd* 1995 (4) SA 456 (A) at 463D-I where Nicholas AJA said:

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"It is manifest too that a go-slow (the appellants were in this case involved in a go-slow action) is a most insidious form of industrial action. It causes continuing financial loss to the employer while the employees continue to draw their wages. It is difficult to bring home to specific employees. There can be no doubt the conduct of the workforce was reprehensible

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in the extreme. In the words of Goldstone JA in the *PACT* case [*Performing Arts Council of Transvaal* v *Paper Printing Wood & Allied Workers' Union & Ors* 1994 (2) SA 204 (A)], it was 'illegal, unreasonable and prejudicial'. But the matter does not rest there. It must be borne in mind that the forty-four employees were not alone. They comprised only about 2% of the total workforce of some 2 000, all of whom participated in the go-slow strike. They were engaged in one shop in one factory belonging to a company whose operations were countrywide. *The forty-four employees were the only employees dismissed: the others, whose conduct was equally reprehensible, were left undisturbed in their positions. The only thing which set the forty-four employees apart from the remaining 98% of employees was the fact that they were victims of an unfair labour practice. But they became the whipping boys.*

Equity requires that the courts should have regard to the so-called 'parity principle'. This has been described as a basic tenet of fairness which requires that like cases should be treated alike. (See Brassey *The Dismissal of Strikers* (1990) 11 *ILJ* 213 at 220-30). So it has been held by the English Court of Appeal that the word 'equity', as used in a United Kingdom statute dealing with fairness of dismissals, '*comprehends the concept that employees who behave in much the same way should have meted out to them much the same punishment* (*Post Office* v *Fennel* [1981] IRLR 221 at 223). The parity principle has been applied in numerous judgments in the industrial court and the LAC in which it constitutes an unfair labour practice ..." (the emphasis is mine).

It is similarly clear that in the present case the appellants were not the only ones to have gone on strike. Why they alone were singled out for the treatment they got after they and the rest of the strikers had written similar letters for reinstatement was never clarified. They simply became the "whipping boys" (or girls). This was in breach of the equity principle and should therefore also be classified as an unfair labour practice under our labour laws.

A hearing would also have determined whether the allegation by the second respondent, that the relations between the appellants and their respective superintendents had deteriorated to such an extent that they could no longer work together, had any substance. There were in that respect no representations either by the respective superintendents or by the appellants for consideration by the respondents.

From the above, it is clear that I agree with Mr *Biti*'s submission that even if it were to be accepted that the present case fell within Baxter's exceptions the respondents' actions did not fulfil what is required in the exceptions. In the circumstances, although I am inclined to agree with Mr *Biti's* first submission on the issue, that whilst the exceptions would be applicable under a common law situation they do not apply in a situation where there is a justiciable Bill of Rights, I feel on stronger ground to find in his favour on the alternative submission that, by failing to hold subsequent hearings, the respondents' actions fell short of what is required in the exceptions.

The above finding makes it unnecessary for me to go into the remaining two grounds upon which the appellants sought the same relief. I prefer to

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MUCHECHETERE JA

leave their resolution completely open, more particularly the question of whether ss 5 and 7 of SI 258 of 1990 are *ultra vires* ss 11 and 18 of the Constitution which would better be left open for a decision by the full court.

In the circumstances, since this matter came before the court *a quo* on review and involved the exercise by that court of its inherent power of review, all that the court should have done was set aside the dismissals without determining the issue of reinstatement. See *Muringi* v *Air Zimbabwe Corp & Anor* 1997 (2) ZLR 488 (S) at 490E-491C. That is the order to be substituted for that of the court *a quo*.

In the result, the appeal is allowed with costs. The order of the court *a quo* is set aside and the following is substituted instead:

"1. That the dismissals by the first respondent of the applicants by way of letters dated 30 October 1996, be and are hereby declared null and void.

2. That the first and second respondents pay the costs of suit jointly and severally, the one paying, the other to be absolved."

EBRAHIM JA: I agree.

Sandura JA: I agree, but wish to add that if in their opposing affidavits the respondents had contended that the work-stoppage had created such a crisis at the various hospitals that it would not have been possible to accord fully to the appellants the right to be heard before they were dismissed, I might have reached a conclusion different from the one I have reached. In that event, the opportunity granted to the appellants to make representations after their dismissals might have been adequate to satisfy the requirements of the *audi alteram partem* rule.

However, that was not their contention. Instead, they averred that in terms of the Regulations (SI 258 of 1990) the appellants had no right at all to be heard before they were dismissed.

Dealing with a case similar to the present one, Hoexter JA had this to say in *Administrator, Transvaal & Ors* v *Zenzile & Ors supra at* 40A-G:

"One last matter should be stressed. In the instant case, the appellants were content to rest their case on the proposition that the respondents had no right at all to be heard. That was the sole issue. It was no part of the appellants' case that in the situation obtaining at the hospital during the work-stoppage it would have been very difficult to give the respondents a hearing. In consequence, this court is relieved of the duty of trying to define what form of hearing would have satisfied the fundamental principles of fairness. A few general observations, however, may not be out of place.

The *audi* principle is a flexible one ... In a particular situation, it may not be possible to accord fully to an affected person his right to be heard. The thesis that from this fact it should be inferred that the relevant statutory enactment intended no right of hearing at all

SANDURA JA

was rejected by this court in *Attorney-General, Eastern Cape* v *Blom & Ors* 1988 (4) SA 645 (A) at 665A-666B.

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Nevertheless the inherent constraints imposed by a particular situation may require some attenuation of the affected person's right to be heard - see *Blom's* case *supra* at 669H-I. In the present case, the extent of the disruption in the functioning of the hospital resulting from the work-stoppage and the necessity for prompt action on the part of the Administration appear sufficiently from the following passage in the affidavit of Dr Kernes:

'I want to emphasise that the services of the applicants and other workers who participated in the work stoppage consisted *inter alia* of cleaning wards, theatres, laundry, changing linen and preparation and distribution of food to patients. These services are of an essential nature and had to be rendered on an ongoing basis.'

Suffice it to say that in the circumstances of the present case the crisis at the hospital precipitated by the work-stoppage was of such a nature that a very appreciable attenuation of the right to be heard might well have been inevitable."

However, as the appellants in that case had not relied upon that contention, the learned Judge of Appeal dismissed the appeal with costs.

In my view, the comments made by the learned Judge of Appeal apply to the present case with equal force. The appeal must, therefore, be allowed with costs.

Honey & Blanckenberg, appellants' legal practitioners

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

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SIBANDA & ORS *v* NKAYI RURAL DISTRICT COUNCIL 1999 (1) ZLR 32 (SC)

Citation	1999 (1) ZLR 32 (SC)
Case No	Judgment No. S-200-98
Court	Supreme Court, Bulawayo
Judge	McNally JA, Ebrahim JA, Kamocha AJA
Heard	November 30, 1998
Judgment	January 8, 1999
Annotations	None

Civil appeal

Flynote

Appeal - against default judgment - not an appeal on the merits - application should be made for rescission of judgment

Land - communal land - right to occupy - wild life sanctuary situated within communal land - not part of communal land - no right of dwellers of surrounding communal land to occupy sanctuary

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Headnote

The respondent council was granted an application by the High Court, for an order evicting the appellants from a wildlife sanctuary. The appellants were in default. At their instance, a provisional order was granted suspending execution of the order pending an application for rescission of the eviction order. The application for rescission was lodged. When it was finally set down, the appellants applied for a postponement. The application for postponement was refused, and the application for rescission was dismissed. The appellants appealed.

The Supreme Court *mero motu* considered the question of the status of the wildlife sanctuary and the right of dwellers of the surrounding communal land to occupy it.

Held, that the appeal against the order dismissing the application for rescission of the default judgment was effectively an appeal against a default judgment. What the appellants should have done was seek rescission of the order.

Held, further, that the sanctuary was not communal land. It was specifically excluded from the description of the surrounding communal land and was listed as a sanctuary under the wildlife legislation. Without a permit, no person was entitled to occupy the sanctuary.

Quaere: whether the respondent council had *locus standi* to bring the application for eviction.

Statutes Considered

Legislation considered:

Communal Land Act [*Chapter 20:04*], s 3

Parks and Wild Life Act [*Chapter 20:14*], s 31

Case Information

E Masina, for the appellants

R Moyo-Majwabu, for the respondent

Judgment

McNally JA: On 8 November 1996, the respondent (Nkayi Rural District Council) was granted an order by the High Court sitting in Bulawayo, for the eviction of the appellants from "the fenced-off Mbadze Wildlife and Bird

Sanctuary project in Ngomambi South Ward", with costs. The appellants were in default.

On 2 December 1996, the appellants were granted a provisional order suspending the execution of the order of 8 November pending the conclusion of an application for rescission to be lodged by 5 December. It seems this application was made without notice to the Nkayi RDC.

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It transpired that the suspension was too late. The evictions had already been carried out. The appellants had, at considerable expense, been re-settled elsewhere.

The application for rescission was duly lodged on 5 December. It was followed by another chamber application lodged on 12 December by the Nkayi RDC. The Nkayi RDC asked that, pending finalisation of the dispute, the appellants should be told to stay where they had been resettled.

On 13 December, the assistant registrar of the High Court wrote a letter in reply to the chamber application of the previous day, in which he "directed" that the appellants should not return to the area from which they had been evicted. The assistant registrar did not purport to speak in the name of the judge. I am not aware that the assistant registrar has any authority to issue "directives". Nor was the "directive" addressed to the lawyer representing the appellants as it should have been. The appellants did in fact return, and are still apparently in the Mbadze Bird Sanctuary.

Finally, the application for rescission was set down for hearing on 23 May 1997. On that date, both parties were represented, but it seems that the appellants' representative was briefed only to apply for a postponement. That postponement was refused and the application was thereupon dismissed with costs.

The present appeal is therefore against the order of 23 May 1997 dismissing the application for rescission of the order made on 8 November 1996.

That order of 23 May 1997, as I understand it, was effectively a default judgment. The practitioner who appeared for the appellants presented no submissions on the merits. There were no reasons given for judgment. Once the postponement was refused, the appellants were effectively in default. Procedurally, therefore, the appellants should have sought a rescission of the default judgment of 23 May, rather than appeal against it.

On this ground alone, the appeal must fail.

I am fortified in this conclusion by looking at the grounds of appeal in the notice of appeal. They do not relate in any way to the merits of the eviction. They read:

> "(i) The Honourable Judge erred in dismissing the application on the basis that Appellants had not applied for a postponement of the hearing on 21 February 1997, when in fact the matter had been taken off the High Court Roll of that day, 21 February 1997.

McNally JA

> (ii) The Honourable Judge erred in law in dismissing the application on 23 May 1997, without regard to the fact that one of the two applications dismissed on 21 February 1997, had not in fact been set down at all."

These are grounds for rescission, not grounds of appeal.

At a late stage just before the hearing, we were handed papers about the abortive 21 February hearing. But it does not seem to me to matter what took place on 21 February 1997. The essential fact is that the application for rescission was set down on 23 May 1997; the

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appellants' lawyer was refused a postponement; he was not briefed to make submissions on the merits; accordingly, and in default of appearance, the application was dismissed. If the matter was to be taken further, there should have been an application for rescission of the judgment of 23 May 1997.

Although it is not strictly necessary to go further, I think it is desirable to try to resolve a conflict which has never been properly dealt with by either side. Otherwise, I foresee that the Bulawayo High Court will be faced by an application for condonation for the late filing of an application for rescission of the default judgment of 23 May 1997.

Evicting people is a serious matter. When the RDC initially sought to evict the appellants it relied upon averments which were bald and, for want of a better expression, unlawyerlike.

It was said that the appellants were living in a wild life and bird sanctuary. It was "a protected area with no one allowed to settle in it". It was a "protected area in terms of the National Parks Act". Later it was called "a designated nature reserve". No attempt was made to refer to any specific statutory basis for these assertions. The National Parks Act has been repealed since 1975. There was no such thing as a "protected area" under that Act. What law says people cannot live in a bird sanctuary? What law says this is a bird sanctuary? If we are dealing with Parks and Wild Life land, why is the Rural District Council involved?

Both legal advisers should have checked the facts before involving their clients in expensive litigation.

The facts appear to be these:

1. *The land concerned is not Communal Land*

   Communal land, in terms of s 3 of the Communal Land Act [*Chapter 20:04*], is land which was previously Tribal Trust Land in terms of Act 6 of 1979. Tribal Trust Land, in terms of s 7 of that Act, was land which, under the Land Tenure Act [*Chapter 148 of 1974*] was Tribal Trust Land. Under Chapter 148, Tribal Trust Land was set out in Part IV of the Second Schedule. In that part, under the heading "Nkai district" the description ends with the words "but excluding Mbaze Pan Parks and Wild Life Land". (The spelling varies but it is the same place). Similarly,

under Part II of the Second Schedule, under the heading "Parks and Wild Life Land - Nkai district" there is the following entry:

> "Item 5. Mbaze Pan Parks and Wild Life Land. Area 40 hectares. The area of land surrounding and including Mbaze Pan, which is situated in Nkai Tribal Trust Land, approximately 700 metres east of the Shangani River and opposite a point on this river approximately 10 km direct upstream from the confluence of the Shangani and Gwelo rivers."

(The area was first proclaimed on 18 October 1963, in terms of RGN 569 of 1963.)

It may be noted that, in terms of s 27(2) of the Land Tenure Act "no person shall

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occupy or lease parks and wildlife land in the African Area, otherwise than on such terms and conditions as may be prescribed".

In the absence of any evidence that a permit was issued, it is clear therefore that no right of occupation vested in the appellants or anyone else while that legislation (repealed on 2.2. 1979) was in force.

Act 5 of 1979, which was the repealing Act, amended the Parks and Wild Life Act 1975 so as to declare Mbadze Pan a "sanctuary on parks and wild life land" in which "all birds" were "specially protected". The pan was defined as in the previous legislation.

Thus, at least since 2 March 1970 (when the Land Tenure Act came into effect), the 40 hectare area around Mbadze Pan has been parks and wild life land.

The current situation is that, in terms of the Communal Land Act the Minister, acting in terms of s 5, has published a description of the area of communal land. Statutory Instrument 69 of 1985 specifically excludes from Nkayi District Communal Land, the area of Mbadze Pan Sanctuary (see item 130). SI 222 of 1990 has apparently increased the original area.

The current Parks and Wild Life Act [*Chapter 20:14*] provides in s 31 for the establishment of sanctuaries, and in the Third Schedule Mbadze Pan (40 hectares) is constituted a sanctuary for all birds.

2. *The land with which we are concerned is therefore Parks and Wild Life Land.*

3. *There is no right on the part of appellants to occupy the land.*

I have already pointed out that the land was constituted a sanctuary at least as long ago as 2 March 1970 under the Land Tenure Act [*Chapter 148 of 1974*]. Section 27(2) of that Act denied anyone without a permit the right to occupy such land. Section 130 of the Parks and Wild Life Act preserves pre-existing rights of occupation, but it is clear that there was in this case no such right. The appellants have not produced any permit to contradict the general position. They have simply asserted their right

to live in communal land. Since this is not communal land, the contention leads nowhere.

4. *The locus standi of the Nkayi Rural District Council*

In the circumstances, and because the appeal has been decided on a procedural basis, I do not propose to resolve the question whether the Rural District Council had the authority to evict the appellants. It is not possible on the papers to ascertain whether the Nkayi Rural Districti Council has or has not jurisdiction over the area in question. SI 361 of 1992 defines the boundaries of the district by reference to a map which is not before the court. The appellants raise the issue of *locus standi* only by

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reference to the fact that the Rural District Council does not own the land. But ownership has nothing to do with jurisdiction. Accordingly, I am compelled to leave this question open.

For the reasons stated at the beginning of this judgment, the appeal is dismissed with costs.

EBRAHIM JA: I agree.

KAMOCHA AJA: I agree.

S K M Sibanda & Partners, appellants' legal practitioners

James, Moyo-Majwabu & Nyoni, respondent's legal practitioners

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CRUSADER REAL ESTATE CONSULTANCY (PVT) LTD *v* CENTRAL AFRICA BUILDING SOCIETY 1999 (1) ZLR 37 (HC)

Citation	1999 (1) ZLR 37 (HC)
Case No	Judgment No. HH-2-99
Court	High Court, Harare
Judge	Omerjee J
Heard	November, 11 1998
Judgment	January 13, 1999
Annotations	None

Special case

Flynote

Practice and procedure - execution - sale - sale by auction not confirmed by sheriff - property thereafter sold by private treaty for higher price - whether auctioneer entitled to commission

Headnote

A judgment creditor was the highest bidder at a sheriff's auction, where a house was being sold. The sheriff refused to confirm the sale on the grounds that the highest bid was not reasonable. The sheriff sought a higher pricSSSe, and sale was negotiated by private treaty at a higher price, again to the judgment debtor. Neither the auctioneer nor any other agent was involved in the second transaction, but the auctioneer claimed commission on the sale price, only the basis that it introduced the eventual buyer to the Sheriff.

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Held, that the auctioneer could claim only if there was some link between the auction and the eventual sale. The eventual buyer was already in contact with the seller, by virtue of its status as judgment creditor. No introduction was required. It might have been otherwise if the Sheriff had asked the auctioneer to conduct the negotiations with the eventual buyer.

Cases Considered

Case cited:

John Meacock & Co v *Abrahams (Loescher third party)* [1956] 3 All ER 660

Case Information

M R D Stonier, for the plaintiff

A J Dyke, for the defendant

Judgment

Omerjee J: This action arises from the sale, by the Sheriff of the High Court, of property known as Stand 623 A Greystone Township 8. It is brought by way of special case under Order 29 and for that reason only facts pertinent to my decision are recited. That sale was to the defendant in this matter. It was a sale by private treaty in accordance with Order 40 r 358(2). It followed an auction, conducted by the plaintiff in this matter under Order 40 r 354, wherein in the Sheriff declined to declare that the highest bidder was the purchaser. The Sheriff made that decision because she was not satisfied that the highest price offered was reasonable. In the circumstances, her decision was most reasonable.

The highest offered at the auction sale was $1.3 million. The price realised

in the subsequent sale by private treaty was $2.5 million. Both of these offers came from the same source - this defendant. The question that now comes before this court for determination, by way of a special case, is a simple one. What commission, if any, is this subsequent purchaser by private treaty liable to pay to the original auctioneer instructed by the Sheriff of the High Court?

It is clearly the case that, had the Sheriff confirmed the sale to the highest bidder at this auction which took place on 9 December 1994 (or was it 16 December 1994 as the newspaper advertisement produced suggests?), the successful bidder would have been liable to pay, *inter alia*, the auctioneer's commission. This is apparent from the "Conditions of Sale" of the auction, at which the defendant made his unsuccessful bid. Commission would in those circumstances have been payable on the bid price of $1.3 million.

It is this provision, contained in para 7(a) of the conditions of sale prepared by the Sheriff in accordance with Order 40 r 353, which transfers the burden of the selling costs from the Sheriff to the purchaser. A similar transfer of the costs incurred by the Sheriff in the process of sale

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takes place under condition 4 of the standard Memorandum of Agreement of Sale, used in circumstances where the Sheriff sells property by private treaty. The original agreement for the auction sale of this property is, however, between the Sheriff and the plaintiff auctioneer. Similarly, an agreement between the Sheriff and an estate agent for sale by private treaty is an agreement between those two parties, the Sheriff and the estate agent.

That the burden of paying the costs of sale is transferred from the Sheriff to a purchaser does not detract from the principal obligation of the Sheriff to pay her agents in the first instance (although I agree that this transaction may not in fact happen). A Sheriff's report was obtained which the court found most helpful in setting out the Sheriff's practice with regard to sales of this type.

It is a fact that the defendant was not only the highest bidder at the auction sale and the eventual purchaser by private treaty, but also the judgment creditor in the matter that gave rise to the sale by the Sheriff in the first instance.

From the agreed facts, it is apparent that the Sheriff was not prepared to and did not in fact confirm the highest bidder at the auction to be the purchaser. The property was eventually sold for a higher price, as it happens to the highest bidder at the auction. This came about as a result of the request of the Sheriff to solicit a higher purchase price. It is apparent from the documents produced that neither the original auctioneer nor any other agent was involved in this latter transaction. The correspondence in regard to this transaction was copied, as a matter of courtesy, by the Sheriff to the plaintiff.

Thus, the only way in which this action could be successful, in the sense

that the plaintiff could recover commission against one of the parties, is to find that there is some link between the auction and the eventual sale. This link, in the submission of the plaintiff, is that the auctioneer introduced the eventual seller to the Sheriff, and was thus the *causa causans* of the sale, in accordance with established principles of agency.

The court was referred to a number of authorities in support of that contention of the plaintiff. None of these authorities were concerned with a sale subsequent to auction to a purchaser as in this case. The eventual purchaser was already in contact with the seller and had an interest in this sale by virtue of its status as judgment creditor. This status, in my view, is crucial to the decision as to whether the auctioneer could be said to have introduced the eventual purchaser to the seller. No introduction was required from the auctioneer as between these parties.

It is also worthy of note that at this stage the Sheriff had no authority under the Rules to instruct an auctioneer to do anything other than conduct an auction. The power to sell by private treaty that was ultimately exercised by the Sheriff had not yet arisen.

As I understand the practice of the Sheriff, the original auctioneer will be asked to conduct subsequent negotiations in a situation where the Sheriff declines to accept the highest offer from the auction. The entitlement to commission for negotiating that sale by private treaty on

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behalf of the Sheriff arises, not from the holding of the auction, but from the subsequent request of the Sheriff to the agent to undertake those negotiations. This proposition is clearly demonstrated in practice, as it is not suggested that commission is payable on both the auction and the subsequent sale by private treaty.

There have been a number of irregularities in the course of this transaction, which I do not propose to dwell upon in the course of this judgment, save to say that they are so numerous as to suggest that they do not found a sufficiently solid base on which to act. It is a matter for the Sheriff to consider, but I agree with the practice, departed from in this instance, to instruct the original auctioneer to conduct the negotiations with prospective purchasers in the subsequent with a view to sale by private treaty.

Had that practice been followed in this instance, the dispute over commission would not have arisen. However, it was not, and, consequent upon that, the plaintiff in this instance, and on the particular facts of this case, is not entitled to receive payment by way of commission from his principal or, through transfer, from the eventual purchaser. The circumstances remind this court of the judgment of Denning LJ (as he then was) in *John Meacock & Co (a firm)* v *Abrahams (Loescher Third Party)* [1956] 3 All ER 660 where he said:

"I sometimes think it would be a good thing if auctioneers and estate agents, in case a sale did not go through, stipulated for a reasonable remuneration for their time and labour;

but I suppose that would not be good business. They always claim to be entitled to full commission, and by so doing, take their chance on the sale going through to completion."

A stricter view of these proceedings may well have been taken by this court, in that the plaintiff sought to recover against a party in circumstances where another - the Sheriff - had the principal obligation, if any, to the plaintiff. For that reason alone, this claim must fail. However, since this cause of action arose in 1994 and the plaintiff would face insuperable difficulties now in bringing a claim against the Sheriff, the court has sought to give its view, for the reasons outlined above, as to the liability that would attach to the Sheriff in circumstances such as these, and thence to a purchaser.

Accordingly, the answer to the question sought is that the plaintiff is not entitled to receive commission.

The question of costs was not canvassed before me. The point raised is one that required clarification for the benefit of all parties. Accordingly, I make no order as to costs.

Wintertons, plaintiff's legal practitioners

Scanlen & Holderness, defendant's legal practitioners

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PEEBLES *v* DAIRIBOARD ZIMBABWE (PVT) LTD 1999 (1) ZLR 41 (HC)

Citation	1999 (1) ZLR 41 (HC)
Case No	Judgment No. HB-20-99
Court	High Court, Bulawayo
Judge	Malaba J
Heard	October 9, 1998
Judgment	January 15, 1999
Annotations	None

Civil action

Flynote

Prescription - when prescription commences - debt not due until aware of facts from which debt arises - meaning of - plaintiff injured in motor accident - awareness of relevant facts on date of accident

Headnote

A trailer came unhitched from a lorry. The trailer careered across the road and collided with an oncoming car. The plaintiff, who was in the car, suffered injuries as a result of this collision. He wished to claim damages from the company which owned the vehicle. He approached a lawyer who told him he would not be able to prove his claim. He did not accept this advice so he consulted another lawyer who advised him to institute legal proceedings to claim damages. Summons was then issued. The defendant filed a special plea that the claim had become prescribed. The period of prescription for the bringing of this claim was three years.

In terms of s 16 of the Prescription Act [*Chapter 8:11*], prescription starts to run as soon as the debt becomes due and this debt becomes due when the creditor becomes aware of the identity of the debtor and the facts from which the debt arises. However, he will be deemed to have become aware of these facts if he could have acquired knowledge of them by the exercise of reasonable care.

In the present case, the plaintiff had known of the identity of the debtor on the day of the accident. The critical question was when the plaintiff acquired knowledge of the facts from which the debt arose.

Held, that the onus was on the person raising prescription, the defendant in this case, to show that, more than three years prior to the date on which the summons was served upon the defendant, the plaintiff had knowledge of the facts on which the debt arose or would have had such knowledge if he had used reasonable care .

Held, further, that the phrase "the facts from which the debt arises" means all the material or

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broad facts from which the cause of action arises, that is, all the facts that a plaintiff has to prove to in order to support his claim and obtain a judgment in his favour. In the present case, the facts from which the debt arose were the damage and loss suffered, how the damage was caused and wrongful conduct accompanied by negligence. The plaintiff will have such knowledge if he is aware of the cause of the damage or injury and is aware that he has been wronged by the conduct of the defendant, even though he may not have been aware of all the facts relating to the wrongdoing.

Held, further, that in the present case the plaintiff was aware, immediately after the accident, of what had happened to him, how his injuries had been caused, its wrongfulness and the identity of the wrongdoer. He was aware that the trailer had crashed into the vehicle in which he was a passenger after the trailer had become disconnected from the lorry that was

pulling it. He must have been aware that the coupling system was defective and that trailer had not been safely secured to the lorry. It was enough that the plaintiff knew that he had been wronged due to the uncoupling of the trailer.

Held, further, that even if he did not have the requisite knowledge of the particulars of negligence required by s 16(3) of the Prescription Act, he would have been aware of these facts if he had exercised reasonable care. Where a vehicle has gone out of control and has veered across the road and collided with another vehicle, the plaintiff does not have to wait until he has acquired specific knowledge of the actual details of how the vehicle has gone out of control. He knows he has been wronged by the defendant's conduct and that this is probably due to negligent conduct. In the present case, the plaintiff did not have to consider the possibility that the uncoupling of the trailer might have been due to a latent defect in the tow-hitch which might have meant that the defendant had not been negligent. That fact would not form part of his particulars of claim and would have been for the defendant to prove as his defence to the action. In such circumstances, the plaintiff would not have to wait until he had specific knowledge about how the trailer became unhitched before commencing action. He was entitled to assume that his injuries had resulted from the failure by the defendant company to ensure that the trailer was safely secured to the lorry.

Held, further, that the fact that the plaintiff had received wrong legal advice did not affect the position because the plaintiff had acquired the required knowledge at the time of the accident and was thus able to reject the first lawyer's advice.

Held, therefore, that prescription ran from the time that the plaintiff first acquired knowledge of the required facts and, since more than three years had elapsed from this time until issue of summons, his claim had prescribed.

Cases Considered

Cases cited:

Brand v *Williams* 1988 (3) SA 908 (C)

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Denton v *Contr of C & E* HH-216-89

Dube v *Banana* 1998 (2) ZLR 92 (H)

Drennan Maud & Partners v *Town Bd, Township of Pennington* [1998] 2 All ER 571

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

Gericke v *Sack* 1978 (1) SA 821 (A)

Hodgson v *Granger & Anor* HH-133-91

Jolly v *Eli Lilly* 2d Cal 751 (1929)

Letang v *Cooper* [1965] 1 QB 232

Oslo Land Co Ltd v *Union Govt* 1938 AD 584

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

Read v *Brown* (1888) 22 QB 131

Ward v *City of Alliance* (1988-89) 22 Creighton LR 449

Statutes Considered

Legislation considered:

Prescription Act [*Chapter 8:11*], s 16(1) and (3)

Case Information

S Takundwa for the plaintiff

R Moyo, for the defendant

Judgment

Malaba J: At about 5 pm on 9 May 1994, the plaintiff (Mr Peebles) was travelling as a passenger in a Datsun 1200 pick-up that was being driven along 13 Avenue, Bulawayo. At about the same time, a motor vehicle

belonging to the defendant which was drawing a trailer was being driven in the opposite direction by its employee within the course and scope of employment by the defendant.

As the two motor vehicles approached each other the trailer uncoupled from the mechanical horse and whilst out of control careered across the path of the on coming motor vehicle into which it crashed. The mechanical horse remained on its correct side of the road. The disconnection of the trailer from the motor vehicle that drew it was caused by the breaking of the

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tow-hitch.

As a result of the collision, Mr Peebles suffered bodily injuries. He received abrasions on the right eye-brow and right forearm. There was an undisplaced fracture of the right tibia. He was admitted to Bulawayo Central Hospital an hour or so after the accident. The doctor who attended to him on admission observed that he was "fully alert". The right leg was put in plaster. On 13 May 1994, Mr Peebles was discharged from hospital. The plaster was removed on 26 July 1994 when the fracture was pronounced to have united.

On 26 September 1994, Mr Peebles made a claim on Eagles Insurance Co Ltd (Eagle Insurance) (the insurers of Dairiboard) in terms of s 20 of the Road Traffic Act [*Chapter 13:11*]. The claim was for compensation for damages and financial loss in an amount of $30000 of which $15000 was claimed for pain and suffering and $15000 for loss of earnings. On receipt of the claim, Eagle Insurance referred it to Dairiboard's lawyers.

On 11 October 1994, Dairiboard's legal practitioners wrote to Mr Peebles acknowledging receipt of the claim and advising that the allegations of negligence on the part of Dairiboard in the causation of the damages for which compensation was claimed by him were being investigated.

In the meantime, Mr Peebles approached a firm of lawyers for legal advice. On 8 February 1995, he held an interview with his legal practitioner. He was told that from the information received "it appeared that the tow-hitch connecting the trailer" to the mechanical horse "probably suffered from metal fatigue and broke off through no negligence on the part of the DMB or its representative".

Mr Peebles was further told by his lawyer that, in light of the fact that the horse and trailer remained in the possession of Dairiboard and the trailer subsequently was repaired, it was "very difficult to collect any evidence to show anything to the contrary". The conclusion reached was that "the incident was a freak accident" and the blame was not attributed to any person.

Mr Peebles did not accept the legal advice. He consulted the present legal practitioner who advised him to issue summons against Dairiboard, claiming damages for bodily injuries on the ground that the company was negligent, in that, through its employees, it failed to ensure that the trailer was safely

secured to the mechanical horse and that it was roadworthy before it caused or permitted its use on the road.

On 16 September 1997, Mr Peebles had summons issued by which he claimed payment of damages for bodily injuries and financial loss in the sum of $108 821.25. In the declaration, Mr Peebles set out the particulars of his claim relating to the damages suffered; how they were caused and their attribution to Dairiboard's negligence. The particulars of negligence were stated as being that:

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"(a) defendant failed to ensure that the vehicle trailer was securely fastened.

(b) defendant omitted to ensure that the vehicle was roadworthy at the time it was driven."

The summons and declaration were served on Dairiboard on 1 October 1997, three years, four months after the date the collision in which the bodily injuries were sustained occurred. Dairiboard filed a special plea contending that the claim had become prescribed.

It is common cause that the period of prescription applicable to this type of claim is three years. Dairiboard alleged that the period of prescription had commenced running immediately after the accident on 9 May 1994 when Mr Peebles suffered damages and the right of action (correlative of the debt) arose and completed the running on 9 May 1997 (the date on which the right of action ought to have been exercised), four months before the service of summons. In terms of the special plea, the debt became due on 9 May 1994.

In the replication to the special plea, Mr Peebles denied that his claim had become prescribed. He said the debt did not become due until 8 February 1995 when he received legal advice from his erstwhile lawyer. Mr Peebles relied on the provisions of s 16(3) of the Prescription Act [*Chapter 8:11*] ("the Act").

These provisions are to the effect that a debt is not to be deemed due until the creditor has become aware or is deemed to have become aware of the identity of the debtor and of "the facts from which the debt arises".

Mr Peebles said he only became aware of the "facts constituting negligence" on the part of Dairiboard on 8 Febraury 1995. In terms of the replication prescription only commenced to run from that date by reason of the provisions of s 16(3) of the Act. He said the running of the period of prescription was interrupted by the service of the summons on Dairiboard on 1 October 1997.

It is necessary at this stage to set out the provisions of s 16 of the Act. The section reads as follows:

"(1) Subject to subsections (2) and (3), prescription shall commence to run as soon as a debt is due.

(2) ... (not relevant).

MALABA J

(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."

It is found as a fact that Mr Peebles had knowledge of the identity of Dairiboard as his debtor on 9 May 1994. The replication did not deny the allegation of that fact contained in the special plea.

It is also not in dispute as far as I can ascertain from the papers, that "the facts from which the debt arises" happened on 9 May 1994. That is the date when the alleged negligent conduct (delict) of Dairiboard caused the bodily injuries to Mr Peebles in respect of which damages

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became claimable.

It is trite that a delictual debt arises when wrongful conduct which is not *per se* actionable but is accompanied by *culpa* causes injury or damage to the person of another or his property. In *Oslo Land Co Ltd* v *Union Govt* 1938 AD 584 Watermeyer JA said at p 590:

"the right of action in such a case is complete as soon as damage is caused to the plaintiff by reason of the defendant's negligent act."

"The facts from which the debt arises" are terms which have been interpreted to mean all material facts from which the cause of action arises: *Drennan Maud & Partners* v *Town Board of the Township of Pennington* [1998] 2 All ER 571. A cause of action was defined by Lord Esther MR in *Read* v *Brown* (1888) 22 QB 131 as 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.

In the same case, Lord Fry at 132-133 said the phrase meant everything which if not proved gives the defendant an immediate right to judgment. In *Letang* v *Cooper* [1965] 1 QB 232 at 242-3 Diplock LJ (as he then was) said a cause of action is simply a factual situation the existence of which entitled one person to obtain from the court a remedy against another person. See also *Patel* v *Controller of Customs & Excise* 1982 (2) ZLR 82 (H); *Denton* v *Director of Customs & Excise* HH-216-89; *Hodgson* v *Granger & Anor* HH-133-91; *Dube* v *Banana* 1998 (2) ZLR 92 (H).

In this case, "the facts from which the debt arises" are the facts relating; to the damage and loss (the nature and extent of the bodily injuries; the pain and suffering that ensued; the loss of earning); how the damage was caused (the collision, the disconnection of the trailer, the defect in the coupling system) and the wrongful conduct accompanied by *culpa* (the omission to inspect the coupling system; the duty to do so), to which the cause of the damage is attributable: *Evins* v *Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 388H-839A.

MALABA J

The question for determination here is, when did Mr Peebles first have knowledge or is he to be deemed to have first had knowledge of the above mentioned facts from which the debt arose? The onus is on Dairiboard, which raised the defence of prescription, to show that Mr Peebles first had knowledge or should be deemed to have first had knowledge of such facts on any date more than three years prior to the date on which the summons was served on it, that is to say, a date between 9 May and 30 September 1994: *Gericke* v *Sack* 1978 (1) SA 821 (A); *Brand* v *Williams* 1988 (3) SA 908 (C) at 910B.

The rule applied is the discovery or knowledge rule. In the application of the rule contained in s 16(3) of the Act to decide whether Dairiboard has shown, on a balance of probabilities, that Mr Peebles acquired during the relevant period the requisite knowledge of the facts from which the cause of the action arose it is not necessary to seek knowledge of meticulous particulars of the cause of action. The court must look at all the circumstances of the case and decide whether Mr Peebles had or should be deemed to have had knowledge of the broad or material facts

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establishing the essential elements of the cause of action.

Loubser *Extinctive Prescription* (1996) in n 281 on p 104 makes reference to the case of *Jolly* v *Eli Lilly* 2d Cal 751 (1929) to illustrate the application of the discovery or knowledge rule. The plaintiff in the case suffered cancer as a result of her mother's ingestion of a harmful drug during pregnancy. The California Supreme Court applied the discovery or knowledge rule to bar the claim where the plaintiff was aware of the injury and its cause and could have suspected that she had been wronged although still unaware of facts establishing wrongdoing on the part of the drugs manufacturer.

It was held in that case that the discovery of the injury and its cause was enough to have triggered the running of the limitation period, even though the plaintiff was still unaware of all the facts establishing a failure to test the drug or a failure to warn about its possible effects by the manufacturer.

In n 300 on p 109, the learned author also makes reference to *Ward* v *City of Alliance* (1988-89) 22 Creighton LR 449. This was a case of a municipal employee who suffered various ailments and cancer as a result of direct skin exposure to oil in an electric transformer which was later discovered to contain a toxic chemical. A one-year limitation period was applicable to the employee's action against his employer. The discovery or knowledge rule was applied. It was found that the claimant knew or should have known of the causal relationship between his exposure to the chemical and his ailments more than one year prior to instituting action.

The learned author then states:

"The issue in this type of case is whether discovery should entail knowledge or imputed

MALABA J

knowledge of the injury and causation only or also knowledge or imputed knowledge of wrongful or negligent conduct by the defendant ... In the *Ward* case, the court required knowledge of the ailments and the causal relationship between the ailments and exposure to the toxin or *in appropriate circumstances* [the emphasis is mine] knowledge that the injury resulted from wrongful conduct of the defendant. The latter may be a consideration for determining accrual in some circumstances, but what is contemplated is only an imputed awareness of wrongful cause and not actual determination of negligent conduct or fault. Thus, the plaintiff need not be aware of the actionability of a claim or have knowledge of wrong doing at the level of certainty for the claim to accrue.

... In the *Ward* case, a test for discovery was accepted which is not constrained by rigid discovery articulation and permits the court to determine objectively the most equitable point of claim accrual based on the amount of information the injured party knows or should know."

Mr Peebles knew on 9 May 1994 what had happened to him its wrongfulness and the identity of the wrongdoer. He was involved in the collision and had the opportunity of acquiring the knowledge of some of the crucial facts relating to the cause of action through experience. In that way, he had knowledge of the nature and extent of the bodily injuries and the degree of the pain and suffering he underwent.

He gained knowledge of how the injuries were caused in that he appreciated that the trailer belonging to Dairiboard disconnected from the motor vehicle drawing it and crashed into the

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motor vehicle in which he travelled as a passenger. He became aware of the fact that the collision was caused by Dairiboard's trailer. Mr Peebles was *compos mentis* at the time of his admission to hospital in the afternoon of the day of the accident. This means that he was capable of rational thinking and could engage in the reflection on the value and significance of the facts relating to what he had seen and experienced.

The disconnection of the trailer from the mechanical horse was a fact within Mr Peebles' knowledge. He knew that the tow-hitch had broken. That to me must have suggested to him that the coupling system was defective. It must have indicated too that the trailer had not been safely secured to the mechanical horse.

Mr Peebles did not, in my view, have to consider the possibility of the uncoupling of the trailer having been due to a latent mechanical defect in the tow-hitch. That fact would not form part of the particulars of his claim. It would be for Dairiboard to allege and prove that fact as a defence.

In my view of the facts, Mr Peebles knew immediately after the collision that he had been wronged. He did not blame the driver of the motor vehicle that was drawing the trailer for the bodily injuries he suffered. This means that he did not locate the origin of wrongdoing in the manner of driving. He located it in the faulty maintenance of the coupling system.

MALABA J

In making a claim on Dairiboard's insurers on 26 September 1994, Mr Peebles demonstrated that he believed that Dairiboard, in its capacity as the owner of the trailer, was guilty of the wrongful conduct that caused him the bodily injuries. He could only make a claim for damages on Eagle Insurance on the ground that Dairiboard was liable for them.

This means that by 26 September 1994, Mr Peebles had knowledge of the complete cause of action. He did not have to have knowledge of the particulars of wrongdoing. It is sufficient, for the purposes of the Prescription Act, that he exhibited knowledge of the fact that the damage he suffered was attributed to wrongful conduct on the part of an identifiable person as opposed to it being due to what is called an "inevitable accident".

Even if I am wrong in holding that what he knew was enough for purposes of s 16(3) of the Act, I am of the view that Mr Peebles could have acquired the requisite knowledge of the particulars of the negligence he considered Dairiboard to be guilty of, by the exercise of reasonable care in terms of the proviso to s 16(3) of the Act. Particulars of negligence are often inferred from known facts or circumstances of the case.

When a plaintiff alleges that the defendant failed to keep a motor vehicle under proper control for example, he is not declaring knowledge of the exact act of omission by which the loss of control is evidenced. All he is saying is that from all the known facts the collision must have emanated from wrongful conduct on the part of the defendant which in all probability is failure to exercise proper control of the motor vehicle. It is up to the defendant who is privy to the manner of driving of the motor vehicle to say for example, that the motor vehicle went out of his control not because of fault on his part in handling it, but due to a latent defect in the steering wheel

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mechanism.

The point being made here is that the plaintiff does not have to wait before instituting action for damages for bodily injury alleging particulars of negligence against the defendant in such a case until he has acquired specific knowledge of the actual acts constituting the culpable omission in the proper control of the motor vehicle.

In reasoning by inference, Mr Peebles could have concluded from the fact of the disconnection of the trailer from the mechanical horse, that Dairiboard had failed to ensure that the trailer was safely secured to the "mechanical horse" before it caused or permitted the trailer to be used on the road. The reflection in which Mr Peebles had to engage his mind to be able to allege such particulars of Dairiboard's negligence did not require exceptional intelligence or prudence.

Knowledge of the particulars of the wrongful conduct on the basis of which Mr Peebles held Dairiboard culpable for the damage he suffered in the collision is therefore imputable to him by the application of the proviso to

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MALABA J

s 16(3) of the Act. I note in passing that Mr Peebles did not allege in his application that the constructive knowledge envisaged in s 16(3) could not be imputed to him in terms of the proviso.

Mr *Takundwa* argued that Mr Peebles only had knowledge of the particulars of Dairiboard's negligence on 8 February 1995. It is clear from the substance of the legal advice given to him that Mr Peebles did not receive knowledge of the facts relating to his cause of action. He received, instead, knowledge of the facts which if alleged and proved, would entitle Dairiboard to judgment.

Mr Peebles was able to reject the legal advice because he had already acquired knowledge of the fact that Dairiboard had committed wrongful conduct accompanied by *culpa* or fault which had caused him bodily injuries. He was unable to accept the suggestion that the damage he suffered was a result of an "inevitable accident" without fault on the part of Dairiboard. He could not therefore have acquired knowledge (actual or constructive) of such facts on 8 February 1995. The facts came to his knowledge on a date prior to 8 Febraury 1995.

I am satisfied that the defendant has discharged the onus of showing on a preponderance of probabilities that by 30 September 1994. Mr Peebles had acquired knowledge (actual or constructive) of the facts from which the debt arose.

The special plea of prescription is upheld and the claim dismissed with costs.

James, Moyo-Majwabu & Nyoni, plaintiff's legal practitioners

Coghlan & Welsh, defendant's legal practitioners

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S *v* BANANA 1999 (1) ZLR 50 (HC)

Citation	1999 (1) ZLR 50 (HC)
Case No	Judgment No. HH-11-99
Court	High Court, Harare
Judge	Chidyausiku JP & Assessors
Heard	January 18, 1999
Judgment	January 18, 1999
Annotations	None

Criminal trial

Flynote

Criminal procedure (sentence) - suspension - condition of suspension - compensation for damage or injury - personal injury - wrongful sexual acts performed upon complainant - civil claim long since prescribed - no application for compensation made or permissible - compensation made condition of suspension of portion of sentence

Headnote

The accused had been convicted of several counts invoving sexual offences with other men, in most cases without the consent of the men concerned. One of the complainants had effectively been raped and had other unnatural offences committed against him on numerous occasions over a three year period. The complainant had brought a civil action against the accused, claiming damages, but the claim had failed because it had prescribed. The complainant himself had been convicted of murder, the court in that case holding that the complainant was suffering from post-traumatic stress disorder as a result of the accused's acts upon him. No application for compensation was made by the complainant or the family of the person killed by the complainant, nor could such an application be made, since the amount of compensation was not easily ascertainable.

Held, that the fact that the debt was prescribed and compensation could not be claimed under s 365 of the Criminal Procedure & Evidence Act [*Chapter 9:07*] did not preclude the court from making compensation a condition of suspension of portion of the prison sentence. Section 358(3) of the Act gave the court a very wide discretion regarding the conditions of suspension of sentence. The court was also entitled under s 358(3)(h) to have regard to the interests of any other person. Compensation for damage included damage of the kind suffered by the complainant; and the complainant's victim fell within the ambit of s 358(3)(h). Accordingly, portion of the sentence would be suspended on condition that compensation was paid to the

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complainant and to the family of the complainant's victim.

Statutes Considered

Legislation considered:

Criminal Procedure & Evidence Act [*Chapter 9:07*], s 358(3)

Case Information

A V M Chikumira, for the State

J C Andersen SC, for the accused

Judgment

Chidyausiku JP: The accused in this case was found guilty of sodomy on two counts, one count of committing and unnatural act, seven counts of indecent assault and one count of common assault.

CHIDYAUSIKU JP

In my view, two of the eleven counts are extremely serious while the other eleven counts range from serious to not so serious. Counts 2 and 3 involving complainant Jefta Dube are the ones that are very serious. I intend to treat those as one for the purpose of sentence. Before dealing with them I will deal with the less serious counts first.

COUNT 1: Count one involves consensual sexual intercourse *per anum* between the accused and the complainant Ngwenya. In my view, this is something that went on between consenting adults. Taking into account the age of the accused, his medical condition which I shall revert to, this count does not merit a severe sentence.

Counts 2 and 3 I will deal with later.

COUNT 4: The facts in respect of count 4 as already set out in the judgment are that Patrick Gunda, a general hand at the time at State House, was led into one of the guest rooms. He was pushed on the bed. The accused placed his member in between the complainant's legs. The accused went through the sexual motions and ejaculated. This was repeated on a second occasion but on the third occasion the complainant escaped. Apart from Counts 2 and 3 this is the most serious of the other counts. The assaults were grossly indecent and the complainant was extremely offended and humiliated. The accused grossly abused his position by subjecting the complainant, a lowly employee at State House, where accused was President. This offence is serious even if one takes into account the following mitigating features:

1. the poor health of the accused set out in the medical report;

2. the age of the accused;

3. the delay in prosecuting this matter. A period of over 19 years has elapsed since the

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occurrence of this offence.

COUNT 5: Count 5 involves the complainant Fortune Masawi. He was invited to the accused's office. At the accused's office the accused invited the complainant for a dance. During the dance, the accused's penis became erect and the accused made sexual movements. He attempted to kiss the complainant who broke away from the accused and left. I do not wish in anyway to trivialise this offence but this offence is not particularly serious.

COUNT 6: 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 advances kissing the complainant in the mouth. The complainant broke away and insisted he wanted to leave.

Again in my view, this offence is fairly serious, even if one takes into

account the mitigating features referred to above and the delay in prosecution.

COUNT 7: The complainant Gwatidzo was 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 bandoleer. The 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 my view, this is a fairly serious offence that might have prompted a lengthy custodial sentence if a prosecution had been launched soon after the occurrence.

COUNT 8: The complainant Christopher Machingauta was invited to the accused's office. He was offered a drink. The accused discussed general matters and took the 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. The accused received real punishment by the irate Machingauta. Not only was he pushed, but he was also thrown into the swimming pool.

COUNT 9: Lovemore Dundu, the complainant, was one of the accused's *aides-de-camp* who 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. No harm was sustained, although the complainant must have felt very humiliated by the accused.

COUNT 10: Christopher Ndonya is the complainant. He too was an *aide-de-camp* to the

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accused. He was invited to the accused's office. He was offered some drinks. He was then invited to play a game of cards. After that, the accused switched on some music and invited the complainant to a dance. During the dance, as the 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.

COUNT 11: This 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

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and more tight and the accused was pushing him closer 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.

The evidence of the accused's conduct shows that the accused is in need of medical or psychiatric help. The accused would appear to be sick. The court feels that the accused would benefit from psychiatric assessment and treatment. The court strongly recommends that the accused should seek medical help. The court, in deciding on an appropriate sentence, has taken into account the accused's record of achievement and contribution to society, as set out in the document handed to the court by Mr *Andersen* in mitigation. The court has also taken into account the accused's medical condition, in particular, the fact that the accused has previously suffered a heart attack and is likely to suffer another attack if he goes to prison. Taking these factors into consideration, the court has decided on the following in respect of Counts 1, 4, 5, 6, 7, 8, 9, 10 and 11: 24 months' imprisonment with labour of which 1 year is suspended for 3 years on condition the accused does not during that period commit an offence involving an assault of an indecent nature for which he is sentenced to a term of imprisonment without the option of a fine.

I now turn to deal with the counts involving Jefta Dube. The evidence clearly establishes that the accused subjected Jefta Dube to the most degrading and humiliating treatment. He in effect persistently and consistently raped Jefta Dube over a period from 1983 to 1986. The accused had anal penetration of Jefta Dube against his will or without his consent on numerous occasions. He had sexual intercourse with him and committed other unnatural acts on him. Jefta Dube was the accused's *aide-de-camp*. Dube needed his job. The accused demanded of him that he submit to being sodomised by him at will. The accused used his position and authority as President to reduce the complainant into submission. This was the most blatant and unmitigated abuse of power the court has ever known. The complainant must have felt trapped. He reported the matter to both the Police Commissioner Nguruve and Mkurazhizha but received no assistance. He was only transferred from the accused through the intervention of the then Deputy Prime Minister. Thus it can be inferred that the State knew, through its top police officers, of the accused's conduct towards the complainant and took a conscious decision not to prosecute the accused for forcibly sodomising the complainant. Given this situation, the

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approach to sentence in this matter has to be unique to suit the unique facts of this case. The unique facts of this case are that the State completely let down the complainant by its conscious decision not to prosecute or offer the complainant any form of assistance in his predicament. Given this situation, when it comes to sentence, the interests of society or the

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State has to take the back seat, while the interests of the complainant takes the front seat. The focus in sentencing the accused in this case must focus on doing justice as between the accused and the complainant. Justice for the complainant must mean receipt of some form of compensation for the abuse he received at the hands of the accused, while the State merely looked on, oblivious of its duty to protect the complainant.

In my view, a sentence of at least 8 years' imprisonment with labour is the least that should be imposed on the accused for counts 2 and 3. These two counts involve multiple commissions of forcible sodomy and unnatural acts. A perusal of decided cases reveal that 8 to 10 years is normally imposed for an incident of rape. What the accused did to Jefta Dube is no less serious than rape. In my view, an effective prison term, with a portion suspended on good behaviour, is a must on the facts of this case. However, such a sentence would leave the victim high and dry. There is need therefore in this case, for compensation for the complainant and the secondary victim, the person or family of the person killed by Jefta Dube for having called him the "wife of Banana". 1 (3)On this approach, I have decided to suspend a large portion of the sentence which the accused should serve on condition that the accused pay a restitution.

In this regard, both counsel were advised of the court's thinking in this regard and made submissions on the question of restitution. In my view, the accused was given an opportunity to be heard on the issue. Although the accused was aware of the court's thinking, very little was brought before the court by way of evidence of the accused's means. Whatever conditions of suspension I impose must be reasonably capable of fulfillment. The restitution I order must also be such that it represents fair compensation for the victims and be reasonably capable of being met by the accused.

In considering that I have taken into account that the accused can afford the best legal defence available in the country. Indeed, that defence team must, going by rates provided for in the High Court Rules on tariffs, have cost the accused close to or more than $1000000. In deciding the level of compensation to be paid, I have also taken into account Jefta Dube's amended claim of $250000, which has since prescribed. 2(4) In my view, for the abuse that the complainant suffered that figure is eminently reasonable. A similar figure for the secondary victim of the accused's action, namely Patrick Mashire, is equally eminently fair. It may be on the low side, but it does not in any way affect by way of limitation whatever civil claim he might have.

I now wish to turn to the question of whether it is competent for this court

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to suspend a portion of the sentence on condition of payment of compensation.

Section 365 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] empowers a court to award compensation to any person who has suffered personal injury as a direct result of the offence. An award made in terms of this section is subject to certain limitations. The amount of damages and the extent of the accused's liability should be easily ascertainable, and the convicted person must not suffer prejudice. See s 366 of the Act. The award in terms of s 363 has to be applied for and cannot be granted by the court *mero motu*. An award made in terms of the above provisions is virtually a civil judgment and can be enforced as such after compliance with certain requirements.

Section 375 provides that an award made in terms of Part XIX of the Act, namely, the above provisions, shall not derogate from any other law relating to compensation or restitution. Compensation to the complainant in this case cannot be awarded in terms of the above provisions for a number of reasons, namely, it is not easily ascertainable and it was not been applied for.

However, in my view, it would be quite proper to suspend a portion of the term of imprisonment I intend to impose on the accused on condition, the accused pays compensation for the damage caused to the complainant Dube and any other person in terms of the provisions of s 358 of the Act.

In terms of s 358, where a person is convicted of any offence, other than a Seventh Schedule offence, a court may pass sentence but suspend the whole or part of it for up to five years on any such conditions as the court may specify. The conditions that the court may imposed are set out in s 358(3) of the Criminal Procedure and Evidence Act, which reads as follows:

> "Conditions specified in terms of paragraph (a) or (b) of subsection (1) may relate to any one or more of the following matters -
>
> (a) good conduct;
>
> (b) *compensation for damage* or pecuniary loss caused by the offence:
>
> Provided that no such condition shall require compensation to be paid in respect of damage or loss that is the subject of an award of compensation in terms of Part XIX;
>
> (c) the rendering of some specified benefit or service to any person injured or aggrieved by the offence;
>
> Provided that no such condition shall be specified unless the person injured or aggrieved by the offence has consented thereto;
>
> (d) the rendering of service for the benefit of the community or a section thereof;
>
> (e) submission to instruction or treatment;
>
> (f) submission to the supervision or control of a probation officer appointed in terms of the Children's Protection and Adoption Act [*Chapter 5:06*] or regulations made under section *three hundred and eighty-nine*, or submission to the supervision and control of any other suitable person;
>
> (g) compulsory attendance or residence at some specified centre for a specified purpose;
>
> (h) any other matter which the court considers it necessary or desirable to specify having

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regard to the interests of the offender or of *any other person* or of the public generally" (the emphasis is mine).

It would appear to me that this section confers on the court a very wide discretion regarding the conditions of suspension of sentence. In particular, the restrictions imposed on a court when making an award do not apply to the granting of compensation for damages as alternative to a custodial sentence. While I accept that most of the orders for compensation that have been made by the courts in terms of s 358 have related to proprietary loss, I see no basis for a restricted interpretation of the words "compensation for damage" as to mean damage to property only. In my view, Jefta Dube has suffered damage at the hands of the accused. Jefta Dube's condition, brought about by the accused's actions, caused Dube to kill the deceased, Patrick Mashire. This, in my view, is sufficient to bring Dube's victim within the ambit of s 358(3)(h). In my view, it is also in the interests of the accused that he be given the option of paying compensation in exchange for a lengthy period of incarceration. This is particularly so if one takes into account the accused's health. The accused is also not prejudiced by the order for compensation because the period of effective imprisonment I intended to impose remains the same. It is not affected by the option of compensation. An effective 5 years' imprisonment with labour is an appropriate sentence for counts 2 and 3. So should the accused fail to pay compensation for whatever reason he will not be prejudiced in any way, because the court is satisfied that 8 years' imprisonment with labour, with 3 years suspended on condition of good behaviour for counts 2 and 3 is an appropriate sentence, with or without the option to pay compensation.

In the result, having taken into account all the mitigating features, particularly the accused's health on the one hand and the aggravating features on the other hand the accused is sentenced as follows:

Counts l, 4, 5, 6, 7, 8, 9, 10 and 11 are taken as one for the purpose of sentence and the accused is sentenced to 2 years' imprisonment with labour, of which l year is suspended for 3 years on condition that the accused does not during that period commit an offence of which indecent assault is an element and for which the accused is convicted and sentenced to a term of imprisonment without the option of a fine.

Counts 2 and 3 will be taken as one for the purpose of sentence and the accused is sentenced to 8 years' imprisonment with labour, of which 2 years is suspended for 3 years on condition that the accused does not during that period commit an offence involving the carnal or the anal penetration of another person without that person's consent for which he is sentenced to a term of imprisonment without the option of a fine. A further 4 years' imprisonment with labour is suspended on condition that the accused pays

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the sum of $500000 to Jefta Dube and the deceased estate of Patrick Mashire for distribution to that deceased's dependants. The money should be paid to the Registrar of the High Court, who

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will in turn transmit $250000 to Jefta Dube and $250000 to the deceased estate of Patrick Mashire. The money should be paid by 30 June l999.

It is ordered further that the effective 1 year's imprisonment with labour imposed on counts l and 4 to 11 run concurrently with the effective l year's imprisonment with labour imposed in counts 2 and 3.

Midzi, Ziweni & Partners, accused's legal practitioners

BARROS & ANOR *v* CHIMPHONDA 1999 (1) ZLR 58 (SC)

Citation	1999 (1) ZLR 58 (SC)
Case No	Judgment No. S-1-99
Court	Supreme Court, Harare
Judge	Gubbay CJ, Ebrahim JA, Muchechetere JA
Heard	January 14, 1999
Judgment	January 25, 1999
Annotations	None

Civil appeal

Flynote

Appeal - power of court on appeal - exercise of discretionary power by lower court - interference with - principles

Sale - immovable property - property fraudulently sold to two different buyers - second buyer becoming aware of prior sale before transfer had taken place - whether first buyer entitled to claim specific performance

Headnote

A seller had fraudulently sold her immovable property to two different buyers. The first buyer had paid the purchase price in full. Subsequently the seller had sold the same property to a second buyer, a company which was represented by its managing director. At the time of the second sale, the second buyer was unaware of the first sale. Subsequently, however, its managing director had become aware of the rights of the first buyer but she had deliberately held her tongue so that nothing would delay or upset the passing of ownership to the second buyer. Title to the property had then been registered in the Deeds Registry office in the name of the second buyer. The first buyer instituted proceedings in the High Court. The judge (Robinson J) found in favour of the first buyer, holding that at the time it took transfer the second

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buyer had knowledge of the first sale. The first buyer was entitled to the remedy he claimed, namely, specific performance, there being no special circumstances affecting the balance of equities. The second buyer appealed against this decision. In dismissing the appeal,

Held, that the first buyer in a double sale situation has the stronger legal claim and the onus is on the second buyer to prove a preponderance of equities in his favour. Put differently, it was for the second buyer to prove special circumstances which rendered it inequitable to apply the maxim *qui prior est tempore potior est jure.*

Held, further, that the finding by the trial judge that there were no special circumstances for preferring the second buyer above the first was an exercise of judicial discretion. The exercise of this discretion may only be interfered with on limited grounds. It is not enough that the appellate court thinks that it would have taken a different course from the trial court. It must appear that some error had been made in exercising the discretion, such as acting on a wrong principle, allowing extraneous or irrelevant considerations to affect its decision, making mistakes of facts or not taking into account relevant considerations. In the present case, the trial judge had exercised his discretion correctly and there was no basis whatsoever for interfering with his decision in favour of the first buyer.

Cases Considered

Cases cited:

BP Southern Africa (Pty) Ltd v *Desden Properties (Pvt) Ltd* 1964 RLR 7 (G)

Campbell v *First Consol Hldgs (Pty) Ltd* 1977 (3) SA 924 (W)

Chimphonda v *Rodriques & Ors* 1997 (2) ZLR 63 (H)

Crundall Bros (Pty) Ltd v *Lazarus NO & Anor* 1991 (2) ZLR 125 (S)

Farmers' Co-op Soc (Reg) v *Berry* 1912 AD 343

Hofgaard v *Registrar of Mining Rights* 1908 TS 650

Kohling v *McKenzie* (1902) 19 SC 287

Kruger Ex p 1936 (2) PH A56 (C)

Le Roux v *Odendaal & Ors* 1954 (4) SA 432 (N)

Lindsay v *Matthews & Anor* 1972 (1) RLR 186 (G)

Pienaar & Anor v *van Lill* 1928 CPD 299

van der Merwe v *Scheepers & Ors* 1946 TPD 147

Case Information

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P Nherere, for the appellants

H Simpson, for the respondent

Judgment

Gubbay CJ: This appeal is against the judgment in *Chimphonda* v *Rodriques & Ors* 1997 (2) ZLR 63 (H). It granted with costs an order directing the second appellant, Prompt Builders Company (Pvt) Ltd, then the third defendant, to cause transfer of Lot 2 of Stand 98 of Prospect ("the property") to be registered in the name of the respondent, then the plaintiff.

Litigation arose as a result of the first defendant, Junia Patricia Rodriques, transacting a double sale of the property, first to the respondent and then to the second appellant, as represented by its managing director, Betty Felicity Barros, now the first appellant. Both purchasers were victims of a fraud perpetrated by Mrs Rodriques. Each paid her in full for the property. Which of them deserved to win?

Thus, in this court, the issues debated were confined to:

(a) whether the facts and circumstances preceding the transfer of the property to the second appellant were such as to preclude the respondent from seeking the positive enforcement of his preemptive right to the property; and

(b) whether, in the event of it being considered that the second appellant had notice or knowledge of the respondent's rights prior to the passing of ownership, the balance of equities were such that its title to the property should not have been disturbed.

The background to this unfortunate dispute, involving as it did two wronged and innocent persons, was substantially uncontroversial. It may be set out as follows:

1. On 17 March 1994, the respondent entered into a written agreement of sale with Mrs Rodriques, in terms whereof he purchased the property for the sum of $150000, payable as to deposit of $30000, as to the sum of $30000 on or before 30 April 1994 and as to the balance by monthly

instalments of $7000, with interest at the rate of 22 *per centum* from 1 May 1994. Reference to this instalment sale agreement was not endorsed on the title deeds of the property pursuant to s 64 of the Deeds Registries Act [*Chapter 20:05*].

2. At all material times, the respondent resided in Malawi where he operated a public transport business. His agent in this country was Mrs Gladys Masunda. By the end of May 1995, Mrs Rodriques had received an amount of $190000 in respect of the sale of the property. She had been overpaid by the respondent.

3. On 29 November 1995, Mrs Rodriques sold the property to the second appellant for $135000, payable as to a deposit of $13000, with the balance due against registration

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of title.

4. At the date of the second sale, the first appellant was unaware of the existence of the prior sale to the respondent.

5. Shortly thereafter, the first appellant learned of the sale of the property to the respondent. She was assured, however, by Mrs Rodriques, in the presence of the latter's legal practitioner, Mr P C Paul, that such sale had been cancelled. Both the first appellant and Mr Paul were totally convinced that Mrs Rodriques had spoken the truth.

6. During February 1996, the second appellant commenced to effect certain improvements to the property. An amount of $30 000 was expended thereon.

7. On 30 April 1996, the second appellant paid Mr Paul the balance of the purchase price of the property together with all conveyancing charges.

8. On the evening of 1 June 1996, Mrs Masunda telephoned the first appellant. She had heard that the first appellant had paid $20 000 to Mrs Rodriques in respect of the property. She advised the first appellant that the property had been sold to, and paid for in full, by the respondent, and that Mrs Rodriques was a crook. The first appellant told Mrs Masunda that any problem the respondent had about the sale of the property should be taken up with Mrs Rodriques. She emphasised that she was going ahead with the sale, that everything had been done legally, and that she had all the papers relating to the property. The first appellant did not think it fit to inform Mrs Masunda that the purchase price as well as transfer fees had been paid or that transfer of the property to the second appellant was imminent.

9. On 6 June 1996, Mr Paul lodged with the Registrar of Deeds all the documents required to effect transfer; and on 13 June 1996 title to the property was duly registered in the name of the second appellant.

10. On no occasion between 1 and 13 June 1996, did the first appellant contact Mr Paul, or attempt to do so, in order to inform him of the

telephone conversation she had held with Mrs Masunda. Nor did the first appellant query with Mrs Rodriques whether it was true that the sale of the property to the respondent had not been cancelled. She simply kept her silence.

11. After speaking to the first appellant, Mrs Masunda and the appellant's brother approached Mrs Rodriques. She denied having sold the property to anyone other than the respondent.

12. On 25 June 1996, Mr Pail paid to Mrs Rodriques the net proceeds of the sale of the property to the second appellant, namely $83 000.

13. Three days later the respondent instituted proceedings against Mrs Rodriques and the

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two appellants by way of a chamber application. After opposing affidavits had been filed, the matter was referred to trial for determination, with the appellants being ordered in the interim not to sell or otherwise alienate the property.

In the far distant past, the Court's approach to the situation of a double sale of immovable property was to hold that because neither the first nor the second purchaser had a better right than the other, specific performance would not be granted to either, or would be granted only with an alternative of damages. See *Kohling* v *McKenzie* (1902) 19 S 287 at 288; *Ex p* Kruger 1936 (2) PH A56 (C) at 143. Soon it was appreciated that this solution was unsatisfactory, because it left the choice to the seller who had caused the problem, more often than not by bad faith; and additionally it paid insufficient regard to the principle enshrined in the maxim "*qui prior est tempore potior est jure*". See *Pienaar & Anor* v *van Lill* 1928 CPD 299 at 301 *in fine*- 302; *van der Merwe* v *Scheepers & Ors* 1946 TPD 147 at 154; *Campbell* v *First Consolidated Hldgs (Pty) Ltd* 1997 (3) SA 924 (W) at 928G-929B. Another principle, apparently conflicting, was applied in *Holgaard* v *Registrar of Mining Rights* 1908 TS 650 at 654 and *Miller* v *Spamer* 1948 (3) SA 772 (C) at 779, namely, that specific performance should be granted to the purchaser who can show a balance of equities in his favour. But in *Le Roux* v *Odendaal & Ors* 1954 (4) SA 432 (N) at 443B-F a compelling persuasive combination of these principles was suggested by Broome JP. It is that approach which has been applied by the courts of this country. See *BP Southern Africa (Pty) Ltd* v *Desden Properties (Pvt) Ltd* 1964 RLR 7 (GD) at 11H-J; *Lindsay* v *Mathews & Anor* 1972 (1) RLR 186 (GD) at 193A; *Crundall Brothers (Pty) Ltd* v *Lazarus NO & Anor* 1991 (2) ZLR 125 (S) at 133A-B.

Mr *Nherere,* who appeared for the appellants, had no option but to accept that prior to transfer the second appellant had notice or knowledge, through the first appellant, of the prior existing sale of the property to the respondent. This fact notwithstanding, counsel argued that the second appellant had acquired an indefeasible right to the property, because by 1 June 1996 the first

GUBBAY CJ

appellant had done all that was required of her for transfer to be passed into the name of the second appellant. Accordingly, so the argument proceeded, to apply the doctrine of notice to the present case would be to oblige the first appellant, who initially had acted in ignorance of the respondent's rights, subsequent to 1 June 1996 to have taken steps to reverse what had been done in good faith. In short, it was argued that the doctrine of notice does not go as far as to impose a duty upon a second purchase to undo what was done in good faith.

Innovating as this contention is, I do not believe that the gloss it seeks to impart to the doctrine of knowledge or notice is maintainable. The crux of the matter is that the second appellant, through the first appellant, became aware of the respondent's right before the passing to it of ownership in the property. The first appellant deliberately held her tongue. She omitted to tell Mrs Masunda that transfer of the property to the second appellant was imminent. She did not do so for fear that some action might be taken which would delay or upset the passing of ownership to the second appellant. She did not disclose to Mr Paul that, contrary to what Mrs Rodriques had told them, according to Mrs Masunda the sale of the property to the respondent

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had not been cancelled. If Mr Paul had been appraised, it is more than probable that he would have withheld lodging the deed of transfer for registration and made his own enquiries. I would stress therefore, that as at 1 June 1996, the position had not been reached at which transfer of ownership of the property to the second appellant was inevitable and beyond the control of the first appellant to prevent.

Consequently, I am satisfied that Robinson J, who presided at the trial, correctly applied the principle that as the second appellant had knowledge at the time that it took transfer of the prior sale, the respondent had a right to specific performance (which was the remedy claimed) unless there were special circumstances affecting the balance of equities.

The attack upon the determination of the learned judge that there were no special circumstances for preferring the second purchaser above the first - one which clearly involved the exercise of a judicial discretion - may only be interfered with on limited grounds. See *Farmers' Co-operative Society (Reg.)* v *Berry* 1912 AD 343 at 350. These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account relevant some consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution,

GUBBAY CJ

provided always has the materials for so doing. In short, this court is not imbued with the same broad discretion as was enjoyed by the trial court.

One further point needs to be underscored. It is that the second appellant bore the burden of establishing a preponderance of equities in its favour. This is because a material equity attached to the respondent's claim to have his prior sale with a bona fide contracting party protected by law. See *BP Southern Africa (Pty) Ltd* v *Desden Properties (Pvt) Ltd supra* at 11G-H; *Le Roux* v *Odendaal & Ors supra* at 444D-E; the *Crundall Brothers* case *supra* at 135D. Put differently, it was for the second appellant to prove the special circumstances which rendered it inequitable to apply the maxim "*qui prior est tempore est jure*" in favour of the respondent.

Now Robinson J gave the most careful thought to all pertinent special circumstances. His reasons for giving effect to the first sale are reported at 66C-69G of the judgment. I do not propose to repeat them. Suffice it to say that I regard them as impressive and cannot improve upon them. They reveal no ground justifying interference. Indeed every feature relied upon by Mr *Nherere* in support of the proposition that the remedy of specific performance ought to have been denied the respondent, had been raised before the learned judge and is convincingly answered in the judgment.

Finally, Mr *Nherere* submitted, rightly in my view, that the learned judge should not have awarded costs against the first appellant. She was not the purchaser under the agreement of

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sale and transfer of the property was not registered in her name. Therefore, she ought not to have been cited by the respondent as a party to the proceedings.

In the result, the appeal insofar as it concerns the award of costs against the first appellant succeeds with costs. Paragraph 3 of the order of the court *a quo* is amended by the deletion of the word "2nd". For the rest, the appeal is dismissed, with costs to be paid by the second appellant.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Honey & Blanckenberg, appellants' legal practitioners

Mushonga & Associates, respondent's legal practitioners

BENYU & ORS *v* ART CORPORATION LTD 1999 (1) ZLR 64 (SC)

Citation	1999 (1) ZLR 64 (SC)
Case No	Judgment No. S-6-99
Court	Supreme Court, Harare
Judge	McNally JA, Muchechetere JA
Heard	February 1, 1999
Judgment	February 1, 1999
Annotations	None

Civil Appeal

Flynote

Practice and procedure - consolidation of actions - discretion of court - claims against multiple defendants - several features common to all the claims but amounts claimed being different - consolidation permitted, provided evidence led in respect of the particular facts relating to each individual's case

Headnote

An employer had set up a housing scheme for its employees. The employer had ended up claiming varying amounts from each of a large number of employees for amounts expended on behalf of the employees, the basis of the claims being unjust enrichment. The employees entered appearance to defend and the employer sought summary judgment. The employer asked for what was in effect a consolidation of trials in terms of Order 1 r 19 of the Magistrates

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Court (Civil) Rules.

Held, that consolidation was sensible in the circumstances as it allowed for evidence on matters such as the nature of the housing scheme to be given only once. However, each individual employee had his own particular case and the magistrate would have to receive evidence in each individual case as to such matters as whether there was a sound basis for the actual amount claimed against each employee.

Held, further, that in the circumstances summary judgment was not appropriate.

Cases Considered

Cases cited:

Beresford Land Plan (Pvt) Ltd v *Urquhart* 1975 (1) ZLR 260 (A)

Case Information

The 52nd appellant, for the appellants

L Mazonde, for the respondent

Judgment

McNally JA: This is a dispute between a well intentioned employer and an unhappy group of its employees. The employer (Art) decided to help its employees to obtain housing. It contracted on their behalf with a builder, supported their applications for building society loans, and the scheme proceeded.

Then problems arose. There were delays, price increases, cost overruns and alleged defects. It ended with Art suing 88 of its employees for amounts it had expended on their behalf. It issued 88 summonses claiming various amounts within the jurisdiction of the Magistrates

McNALLY JA

Court, on the grounds of unjust enrichment. Then, when they entered appearance to defend, Art sought summary judgment. It also sought what it called "joinder" In reality, it was asking for consolidation of trials. See the Magistrates Court (Civil) Rules, r 19, Order 1 (2)(g); High Court r 92, van Winsen *Civil Practice of the Supreme Court of SA* 4 ed p 190.

The order for consolidation of trials is an apparently sensible one, and we do not propose to interfere with it. But it must be remembered that each individual has his own particular case. The value of consolidation is that much of the evidence can be led once, rather than 88 times. That would apply to evidence of the nature of the scheme, and expert evidence. But the magistrate will have to ensure that he receives evidence in the case of each of the employees. He will have to give 88 decisions.

The award of summary judgment was however a matter that disturbed us, and we were very glad to hear Mr *Mazonde* say, at the beginning of the resumed hearing (we first heard it on 15

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October 1998 and postponed it in the hope of a settlement) that he did not insist on supporting the summary judgment.

In the circumstances, we do not find it necessary to detail the many reasons why summary judgment was not appropriate in these cases. We did not have the 88 separate summonses before us; we did not know the dates of the 88 entries of appearance; we could not judge in each case whether the proper time limits had been observed. There were no allegations that appearance had been entered solely for purposes of delay. And there were various defences suggested in the opposing affidavit.

The most serious defect, however, was the supplementary affidavit filed on behalf of Art. On what basis may a supplementary affidavit be filed in summary judgment proceedings? Magistrates Court (Civil Court) Order 15, r 2(2) expressly excludes any affidavit other than the founding affidavit. The ruling in *Beresford Land Plan (Pvt) Ltd* v *Urquhart* 1975 (1) ZLR 260 (A) encourages some expansion in the founding affidavit, but certainly does not suggest that a further affidavit is permissible. Otherwise, summary judgment applications become opposed motions. That is not the intention. See van Winsen *op cit* 4 ed p 439 and n 44.

Finally, we would observe that in the special circumstances of this case we have not made any point of the fact that one of the appellants took it upon himself to represent all his colleagues. This, however, should not be seen as setting a precedent.

In the result, we made the following order:

1. By consent, the summary judgment is set aside with costs.

McNALLY JA

2. The order for consolidation of trials is to stand.

3. The appellants/defendants are to file their pleas on or before 1 March 1999.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Dube Manikai & Hwacha, respondent's legal practitioners

ZIMBABWE UNITED PASSENGER CO *v* CHISVO 1999 (1) ZLR 67 (SC)

Citation	1999 (1) ZLR 67 (SC)
Case No	Judgment No. S-1-99
Court	Supreme Court, Harare

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Judge	McNally JA, Muchechetere JA
Heard	February 1, 1999
Judgment	February 1, 1999
Annotations	None

Civil appeal

Employment - contract - termination - dismissal - wrongful dismissal - remedies - damages - how to be assessed - reinstatement - when should be ordered

Headnote

A bus conductor had been dismissed for two offences. The first was that he had stolen a small amount by overcharging the passengers on the tickets issued and pocketing the difference and the second was that he had been short of a small amount at the end of the day when the tickets and the takings were reconciled. On appeal,

Held, that the Labour Relations Tribunal had correctly decided that neither offence had been proven. As regards the second offence, shortages must be a common occurrence on busy bus routes and this could not amount to a dismissible offence unless there are special circumstances such as frequency of errors and size of deficits.

Held, further, that although s 96(1)(c) of the Labour Relations Act [*Chapter 28:01*] provides that the alternative of damages is an essential part of any order of reinstatement, there are cases where reinstatement is the equitable remedy unless the employee does not want to be reinstated or cannot be reinstated for health or other reasons. In the present case, there was no difficulty or awkwardness in the relationship between the employee and his employer if he were to be reinstated and damages would not make up for a long-time job unjustifiably lost. Thus reinstatement was the proper remedy in this case.

Held, obiter, it is unsatisfactory that the Labour Relations Act does not make provision as to how damages for wrongful dismissal are to be calculated but it appears that the *quantum* of damages in a case like the present one should be sufficiently high to suggest to the employer that reinstatement is the more appropriate and equitable alternative.

Case Information

T Magwaliba, for the appellant

F G Gijima, for the respondent

Judgment

McNally JA: It is a real human tragedy that this simple case should have taken over six years to resolve. The respondent ("Chisvo") was a bus driver/conductor employed by the appellant ("ZUPCO"). He was dismissed for issuing 70c tickets to seven passengers and charging them

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$1.40 each, thus allegedly pocketing 70 cents in each case. He was also found to be $6.55 short at the end of the day when his tickets and takings were reconciled.

McNALLY JA

The evidence that he committed the first and more serious offence is simply not there. There is no statement from any of the passengers as to what they paid and what tickets they were given. Eight torn tickets were produced, but whether they came from the floor of the bus or from passengers we do not know. It is said that one 70c ticket consists of a piece of paper on which the figures "70c" appear twice. But that is self-evidently not so, since there are separate serial numbers accompanying each "70c". In other words, if a passenger holds a piece of paper with two "70c" appearing on it, he has a receipt for $1.40.

As to the alleged second offence, he paid in the sum as soon as it was pointed out. Shortages and probably also occasional surpluses must be a common occurrence on busy routes, and we cannot believe that it is a dismissable offence unless there are special circumstances (frequency of the error, size of the deficit, etceteras).

In any event, this alleged offence seems to have been thrown in as a make-weight. The stress was on the first allegation, which was utterly unproved.

We agree entirely with the decision of the Labour Relations Tribunal ("the Tribunal"). They have certainly not grossly misdirected themselves on the facts, which would be the only basis upon which we might be able to interfere "on a point of law".

The appeal must therefore be dismissed with costs. It is perhaps appropriate that we should make some comment on the order of the Tribunal which was an order for reinstatement with an alternative of damages.

We are aware that the alternative of damages is an essential part of any order of reinstatement, in terms of the clear provisions of s 96(1)(c) of the Act [*Chapter 28:01*]. But there must be cases, and this would appear to us to be one of them, where reinstatement is the obviously equitable solution, unless of course the employee does not want to be reinstated or has for health or other reasons become incapable of reinstatement. There is no question of there being any difficulty or awkwardness in the relationship between employer and employee if he is reinstated. And one may also venture to say that no amount of damages can make up for a long-term job unjustifiably lost.

The Act makes no provision for a basis upon which damages are to be calculated, and this is unsatisfactory. The question has never come before this court, and we are not aware of the principles which the Tribunal applies in calculating damages in such cases.

Since we have not heard specific argument on the question - what principles should be applied in determining damages - we do not propose to make any ruling on the point. However, it would appear to this court that the *quantum* of damages in a case like the present should be sufficiently high

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McNALLY JA

to suggest to the employer that reinstatement is the more appropriate and equitable alternative.

The appeal is dismissed with costs.

MUCHECHETERE JA: I agree.

Winterton, Holmes & Hill, appellant's legal practitioners

F G Gijima & Associates, respondent's legal practitioners

PERTSILIS *v* CALCATERRA & ANOR 1999 (1) ZLR 70 (HC)

Citation	1999 (1) ZLR 70 (HC)
Case No	Judgment No. HH-19-99
Court	High Court, Harare
Judge	Smith J
Heard	January 8, 1999
Judgment	February 3, 1999
Annotations	None

Civil Application

Flynote

Flynote

Company - shareholders - rights - minority shareholder in company - whether can be appointed as managing director and signatory

Legal practitioner - conduct and ethics - conflict of interests - former client of legal practitioner involved in litigation against present clients of the same legal practitioner - whether ethical for legal practitioner to so act - whether ethical for partner or employee of such legal practitioner to act

Headnote

A partner in a law firm had acted at different times for all three persons involved in the current litigation, namely the applicant and the two respondents. Acting in accordance with proper ethical standards, the partner had declined to act for any of the parties in respect of the present

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litigation. However, a legal practitioner employed by the partner's law firm was engaged to act for the respondents. The applicant's legal practitioner objected to the employee of the same law firm as the partner who had recused himself representing the respondents.

The applicant, who owned one-third of the shares in a company, sought an order that he be accepted as the managing director, company secretary and public officer and as a signatory in the company.

Held, that a legal practitioner owes a duty of loyalty to his client and is duty bound to advance and defend his client's interests. A legal practitioner who represents the adversary of his own client or former client in litigation clearly violates his duty of loyalty to his client or former client and the common law rules against conflict of interests. Representation of one whose interests diverge from those of a client or former client is improper. Such conflict of interests may inhibit the legal practitioner's exercise of judgment on behalf of his present client or may lead the legal practitioner to divulge or utilise the secrets and confidences of his other client. Justice must not only be done but it must manifestly be seen to be done. Therefore, a legal practitioner must decline or cease to act, not only where the interests of a client are prejudiced if the legal practitioner continues to act for the other client, but also where the client's interests might appear to be prejudiced.

Held, further, that where the partner in a law firm cannot act for a client because of a conflict of interests it is unethical for another partner or an employee of the law firm to act for that client. If a partner or an employee has acted for a litigant previously, the litigant would be fully justified in fearing that his interests would be prejudiced if another member or employee of the same firm were to act for an opponent in the litigation. However, in the

present case the legal practitioner should be allowed to continue to act because of the special circumstances. The application had been brought as an urgent application. No allegation had been made that the respondents' legal practitioner had acquired information from papers in the possession of the firm that could be used to applicant's disadvantage or that any real prejudice would in all probability result from the respondents' legal practitioner continuing to act. Furthermore, the applicant's legal practitioner had no objection to the opposing papers and heads of argument prepared by the respondents' being accepted. There could be no prejudice to the applicant in allowing the respondents' legal practitioner to be heard as he could not introduce any evidence from the bar but could only make submissions on the papers already filed.

Held, further, that the court could not possibly order that a minority shareholder be accepted as managing director, company secretary and public officer and as a signatory for cheques issued by the company. This would have given him *carte blanche* to run the company as he saw fit, despite the wishes of the majority shareholders. The majority shareholders would appoint a majority of the directors and it is these directors who would have the authority to appoint one of their numbers to be the managing director. The most the court could do was to declare that the applicant still owned one-third of the shares in the company and was entitled to exercise such rights as derived from such share-holding.

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Cases Considered

Cases cited:

Benmac Mfg Co (Pvt) Ltd v *Angelique Entprs (Pvt) Ltd* 1988 (2) ZLR 52 (H)

R v *Chisvo & Ors* 1968 (2) RLR 54 (A)

R v *Hepworth* 1928 AD 265

R v *Sussex Justices* Ex p *McCarthy* [1924] 1 KB 256

Case Information

F Gijima, for the applicant

J Samkange, for the respondents

Judgment

Smith J: In February 1987, the three parties formed a company, National Bakers & Confectionery (Pvt) Ltd (hereinafter referred to as "NBC"), with each party holding a third of the shares. The applicant (hereinafter referred to as "Pertsilis") was appointed as managing director, public officer and company secretary of NBC and was an authorised signatory for cheques drawn by NBC. In August 1994, he left for Greece, he says on vacation, but the respondents allege that he was emigrating.

In his founding affidavit, Pertsilis makes the following allegations. After his return from Greece he found "things at the company greatly changed". He and the first respondent (hereinafter referred to as "Calcaterra") quarrelled and the latter threatened him. He was barred from entering the premises of NBC. He tried to solve the problem, through the good offices of Mr Venturas, a legal practitioner, but to no avail. He then approached his present legal practitioners who filed this application on his behalf. He claims that he had decided to sell his shares in NBC to the first or second respondent for $4 million. After the agreement of sale was drawn up, however, he refused to sign it because the respondents had misrepresented the true financial

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position of the company. Since 1994, the respondents have not been paying him any dividends as a shareholder and have prevented him from carrying on his duties as managing director and public officer of NBC. They have also refused to account to him as to how they have been running the company since 1994. He has not been paid his salary.

Pertsilis is claiming an order declaring that:

(a) he is still a shareholder of NBC;

(b) he is still managing director, public officer and company secretary of NBC;

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(c) he be permitted to enter the company premises so as to be able to carry on his duties;

(d) he be paid the dividends and salary due to him since 1994, with interest;

(e) the respondents produce company accounts for the period from 1994 to date.

The application was filed as an urgent application. The claim for urgency is based on the allegation that the respondents are building a bakery in Bulawayo and are taking money and machinery from NBC to establish the bakery in Bulawayo. They will soon be moving to Bulawayo and are likely to engage in activities likely to result in NBC being struck off the Companies' Register or else they will incur debts on behalf of, or do acts prejudicial to, NBC. If money is withdrawn from NBC and used for other purposes not related to the company and the NBC books of account and records are altered or concealed, it would be difficult for Pertsilis to institute an action or try to recover anything from the company.

The respondents oppose the application. Calcaterra deposed to the opposing affidavit in which the following is said. He and the second respondent (hereinafter referred to as "Tumazos") each own half the shares in NBC and his son is the general manager. Pertsilis, whilst he was still managing director of NBC and therefore fully aware of its true financial position, sold his shares in the company to the respondents. He was paid the agreed price of $4 million. After selling his shares he was not entitled to any dividend or salary. The respondents are not engaged in a scheme to plunder NBC funds. In May 1998, NBC commissioned a new plant at the bakery which cost $2.7 million. Pertsilis had lodged false complaints and reports with the police which had resulted in Calcaterra's son being harassed by the police. The respondents are not building a bakery in Bulawayo. Pertsilis unlawfully withdrew $481 259.55 from the NBC bank account. NBC is going from strength to strength. The application is not urgent and is an abuse of court process; it should be dismissed with costs on the higher scale.

Tumazos also filed an opposing affidavit in which he reiterated and confirmed much of what was said in the opposing affidavit filed by Calcaterra.

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A further affidavit was signed by the general manager of NBC, Calcaterra's son. He complained that Pertsilis had recently drawn three cheques on the NBC account for amounts which totalled $481 259.55. Prior to these cheques being signed, Pertsilis had not signed a company cheque since 1989 or 1990. He had asked the bank official why the cheques had been met, since Pertsilis was not an authorized signatory, but had not received an explanation. On 28 December 1998, Pertsilis, in the company of a police constable and a member of the CIO, came to the NBC premises. The constable said that he had been tasked by his superiors to evict him (Calcaterra junior) from the premises and get him to hand over the keys to Pertsilis. He refused to comply with their orders and the constable and CIO member eventually left after about one and a half hours.

Prior to the hearing of the application, Mr *Samkange* filed heads of argument on behalf of the respondents. At the hearing, Mr *Gijima* objected to Mr *Samkange* appearing on behalf of the respondent, since he is employed by the firm of Byron Venturas & Partners and Mr Venturas

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had, in the past, acted for all three parties. He referred to a letter, dated 18 November 1987, which was written by Mr Venturas and addressed to the secretary of NBC, in which Mr Venturas said that he had been approached by NBC and Pertsilis with regard to the impasse between the three parties and continued - "I have acted for all three parties from time to time and, to avoid any misunderstanding in the event that any party desires to litigate, I will not act for any party and you will, therefore, have to seek alternative legal representation". Mr *Gijima* argued that the stand taken by Mr Venturas was entirely ethical and appropriate in the circumstances and that when Mr Venturas said that he could not act for any party, that meant that his firm, likewise, could not act for any party. Mr *Gijima* argued that it would be unethical for Mr *Samkange* to appear on behalf of the respondents. He referred the court to the cases of *R* v *Chisvo & Ors* 1968 (2) RLR 54 (A), *Robinson* v *van Hulsteyn & Ors* 1925 AD 12 and *Benmac Mfg Co (Pvt) Ltd* v *Angelique Entprs (Pvt) Ltd* 1988 (2) ZLR 52 (H). When asked whether his submission included the proposition that the opposing affidavits and heads of argument filed by Mr *Samkange* should be disregarded and the matter adjourned so that the respondents could obtain another legal representative, he said that, because of the urgency in the matter, he was prepared to accept that the opposing papers and heads of argument be admitted, but that Mr *Samkange* be not heard.

Mr *Samkange* argued that it was Mr Venturas who had been involved with the parties and had acted for each of them. He, personally, had not had any previous contact with the parties until the respondents approached him in this matter. Mr Venturas was outside the country and had been away since before the respondents approached him and so he had not discussed the matter with

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Mr Venturas, neither had he looked at any files in the office containing papers relating to any of the parties. He contended that the assertion by Mr Venturas, in his letter dated 18 November 1987, that if any of the parties wanted to litigate he would not act for that party, did not extend to other members or employees of his firm; it was personal and applied only to the author of the letter.

Legal practitioners owe their clients a duty of loyalty. They are duty bound to advance and defend their client's interests. A legal practitioner is expected to devote his or her energy, intelligence, skill and personal commitment to the single goal of furthering the client's interests as those are ultimately defined by the client - see *Modern Law Ethics* by Charles W Wolfram, 1986 ed p 578 at 10.3.1. A legal practitioner who represents the adversary of his own client in litigation would clearly be violating his or her duty of loyalty and the common law rules against conflict of interests. Nearly 150 years ago, in the American case of *Stockton* v *Ford* 52 US (11 How) 232, 247; 13 L Ed 676 (1850) the fundamental and important point of the place and role of legal practitioners was made in the following words:

"There are few of the business relations of life involving a higher trust and confidence than that of attorney and client, or, generally speaking, one more honourably and faithfully discharged; few more anxiously guarded by the law, or governed by sterner principles of morality and justice; and it is the duty of the court to administer them in a corresponding spirit, and to be watchful and industrious, to see that confidence thus reposed shall not be used to the

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detriment or prejudice of the rights of the party bestowing it."

The same point is made slightly differently by Julian Disney *et al* in *Lawyers* (Sweet and Maxwell, London) at p 616 as follows:

"Representation of one whose interests diverge from those of a former client is generally recognised to be improper. The divergence might inhibit the lawyer's exercise of judgment on behalf of his current client. It might also impair the obligation of loyalty owed by the lawyer to his former client. Thus the lawyer might divulge or utilise the secrets and confidences of his former client for the benefit of the current client."

The *Guide to The Professional Conduct of Solicitors* issued by The Council of the Law Society of England states at p 9:

"... where a solicitor acts for one client and is asked to act for another client whose interests conflict or appear likely to conflict with those of the first client, he must refuse to act for the second client. On the basis of the principle that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done', a solicitor must decline or cease to act not only where the interests of a client are prejudiced if the solicitor continues to act for the other client but also where that client's interests might appear to be prejudiced."

So seriously and jealously have the courts guarded these principles that in *R* v *Sussex Justices* Ex p *McCarthy* [1924] 1 KB 256 a conviction made by a trial court was quashed, on the ground that the judge's clerk who had

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retired with the justices after the trial to consider the verdict, even though he did not participate in the proceedings, had been a member of the law firm which had acted for another person who had sued the accused for damages over the same accident. In that case, Lord Hewart CJ observed at pp 258-259 as follows:

"It is clear, that the deputy clerk was a member of the firm of solicitors engaged in the conduct of proceedings for damages against the applicant in respect of the same collision as that which gave rise to the charge that the justices were considering. It is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him and that he scrupulously abstained from referring to the case in any way. But while that is so, a long line of cases shows that it is not merely of some importance, but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."

In this country, in the *Chisvo* case *supra*, counsel had been instructed on behalf of two accused and, during the course of the trial, he renounced agency on the part of one of them and proceeded to cross-examine him. The court held that such conduct was irregular because counsel must have obtained information in conference while acting for the accused in question; such information was strictly privileged and counsel should never make use of it against his former client, even if he has renounced his agency. At p 55, Beadle CJ said:

"It was quite impossible for Mr *Taylor* not to have been influenced in his cross-examination of the eighth appellant by

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confidential information he had acquired at conferences with the eighth appellant when he was acting for him. Information acquired by counsel in the course of conferences with their clients is confidential and strictly privileged, and should not be divulged to the prejudice of their clients, nor should counsel make any use of it at any time against their former clients, even if they renounce their agency."

It is for the court to regulate the conduct of legal practitioners and to ensure that they comply with the high standards that are required of them. This principle was enunciated in the *Robinson* case *supra*, where Wessels JA said:

"According to our law, a solicitor is an officer of the court; the court exercises a jurisdiction over him and will see that in the conduct of his professional work he displays towards the court and towards his clients a very high standard of conduct."

In the *Benmac* case *supra*, Reynolds J, at p 55, referred with approval to

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Robinson's case, and also to the *dictum* of Curlewis JA in *R* v *Hepworth* 1928 AD 265 where the learned judge said:

"A judge ... has not only to direct and control the proceedings according to recognised rules of procedure, but to see that justice is done."

The facts in the *Benmac* case, in so far as they are relevant, are as follows. During the course of the trial, the managing director of the defendant approached the court with a request that counsel for the plaintiff be asked to withdraw because he had previously represented the defendant in another matter and had thereby acquired confidential and privileged information relevant to the present matter. In addressing this issue, Reynolds J at p 57 said:

"I think that it is necessary at this stage to examine the position regarding counsel acting for opposing parties in Zimbabwe. As I understand it, legal practitioners here rely to a large extent on the authoritative work of Lewis *Legal Ethics* in determining standards of ethical conduct which govern their practice of the law. This work relates almost exclusively to the duties of 'attorneys', as opposed to 'advocates', towards their clients. But, as already mentioned, with the fused Bar and Side-Bar situation in Zimbabwe, this distinction is not truly applicable, despite the existence of a *de facto* Bar in Harare. In general terms, I believe that the code of professional conduct in the English legal system is also very similar to that in Zimbabwe. This is set out in some detail in *Halsbury*'s *Laws of England* 4 ed Vol 3 under the heading 'Barristers', at p 586 *et seq*."

The learned judge, after a careful perusal of the various principles of professional ethics, was satisfied that counsel had not offended against any of the stated rules of conduct. He said that the essence of the objection was the allegation, firstly, that counsel was acting for and against the defendant at the same time in two different actions and, secondly, that, whilst dealing with both matters, counsel had access to and acquired information that could be used or manipulated to the prejudice of the defendant. In dealing with the allegation, the learned judge said at pp 57-58:

"I do not think that there is anything inherently improper in a legal practitioner representing opposing parties in different matters, subject to certain stringent safeguards being employed. Indeed, it happens frequently that this situation arises concerning single transactions, such as in conveyancing and leasing matters. The parties may each have engaged the particular legal practitioner on other occasions, and neither would like a stranger to handle their affairs. It may also happen that, by employing the one practitioner, a considerable saving of expenses is effected by

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both parties. Considerations of this nature sometimes justify a single practitioner handling opposing parties, and I do not think that the principle would differ where there are two or more transactions, provided that no conflict of interests arise in any matter. It is this aspect that is of importance in the present dispute.

It is clear, in my view, that the onus of establishing this claim lies on the defendant. The position is referred to in *Robinson* v *van Hulsteyn & Ors supra* at 21 & 22 as follows:

> '... the court will restrain a solicitor in whom confidences have been reposed by a client from acting against such client where it is made clear to the court, in the words Cozens Hardy MR:
>
> > "that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act".'"

Again at p 23, the report of this judgment reads:

> 'He must show to the court that the respondents did in fact become acquainted with his secrets and that they used the confidential information reposed in them to his detriment.'

Reference was also made to the judgment of Fletcher-Moulton LJ in *Rakusen* v *Ellis & Ors* [l 912] 1 ChD 831 at 841 where it was said:

> 'As a general rule the court will not interfere unless there be a case where mischief is rightly anticipated. I do not say that it is necessary to prove that there will be mischief, because that is a thing which you cannot prove, but where there is such a probability of mischief that the court feels that, in its duty as holding the balance between the high standard of behaviour which it requires of its officers and the practical necessities of life it ought to interfere and say that a solicitor shall not act'."

The learned judge, in applying the above-quoted principles to the case before him, found that the allegations made by the general manager of the defendant had not been established and so he refused the application. He did go on, however, to say that he fully understood and sympathised with the alarm and concern experienced and expressed by the general manager at finding himself in the situation he did. It was his legal practitioner, Mr Scott, who was to blame for the problems that had arisen. In this connection, at p 59, the learned judge expressed himself as follows:

"Mr Scott's blameworthiness, however, also serves to indicate, in my view, the inadequacies of the existing practices and safeguards that have been adopted and applied by the practitioners. I entertain grave doubts as to whether any practitioner, in a divided or a fused profession, should ever put himself in the position whereby he may find himself acting both for and against a client in the same or in different matters. The only exception to this general rule, in my opinion, should be in the most unusual of cases in which the parties have expressly, and in writing, fully, freely and understandingly consented to that course. It would be a concomitant requirement that full disclosure of the practitioner's role and the possible implications should be made before such consent is even mooted."

In this case, the position adopted by Mr Venturas is entirely proper and ethical. As he rightly pointed out, he could not act for any of the parties in litigation *inter se*. Furthermore, I consider that the position he adopted must extend to any partner or employee of his. Justice must not only be done; it must manifestly and undoubtedly be seen to be done. It would be no consolation, in my opinion, for a litigant to be told that the legal practitioner who is appearing for his opponent is not the legal practitioner who formerly acted for him, it is only his partner or his employee. If one member or employee of a legal firm has appeared for a litigant, the litigant would be fully

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justified, I feel, in fearing that his interests would be prejudiced if another member or employee of the same firm acted for an opponent of his in any litigation.

Ordinarily, therefore, I would have held that Mr *Samkange* could not appear for the respondents. However, this is an application which was brought as an urgent application. There is no allegation by Pertsilis that Mr *Samkange* had acquired information from papers in the possession of his firm which could be used to Pertsilis' disadvantage or that there would be any "real mischief and real prejudice" that would in all probability result if Mr *Samkange* were allowed to continue to act for the respondents. Furthermore, as Mr *Gijima* said that he had no objection to the opposing papers and heads of argument prepared by Mr *Samkange* being accepted, I considered that there could be no prejudice to Pertsilis if I allowed Mr *Samkange* to be heard. After all, he could not introduce any evidence "from the bar" and could only make submissions on the papers already filed.

For the reasons set out above, I agreed to hear Mr *Samkange*. The allegations made by Pertsilis were sufficient, in my opinion, to justify hearing the application as a matter of urgency. If it were established that the respondents were indeed stealing money and property from NBC and destroying or concealing the records and other documents of the company, then urgent action to stop the rape of NBC would be required. However, even if the allegations made by Pertsilis had been established, this court could not possibly have granted an order in the terms sought. NBC is a private company. Pertsilis claims that he owns one-third of the shares in NBC. Therefore, even on the facts alleged by him, the respondents own the majority of shares. The court cannot possibly order that he be accepted as the managing director, company secretary and public officer and as a signatory for cheques issued by NBC. To do so, would be to give him *carte blanche* to run the company as he saw fit, despite the wishes of the majority shareholders. He would be able to use the assets of NBC as he wanted, without let or hindrance, and would be answerable to no-one. The court cannot possibly bring about such a situation.

It appears from the papers that Pertsilis left Zimbabwe in 1994. After he left, the son of Calcaterra was appointed general manager and he has been acting in that position to the present. It is for the board of directors to appoint the general manager and authorise people to sign company cheques. Ordinarily the court cannot do so. Accordingly, it is not possible to grant the order sought. However, even if the court could have granted such an order, Pertsilis has come nowhere near establishing that he is entitled to resume his former position. Even if he had established that he still owns one-third of the shares in NBC, that does not mean that he would thereby automatically be entitled

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to be the managing director. The majority shareholders would appoint a majority of directors; it is they who would have the authority to appoint one of their number to be managing director or they could appoint an employee to be the general manager. The most that the court could do

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would be to direct that Pertsilis still owned one-third of the shares in NBC and was entitled to exercise such rights as were conferred on him by virtue thereof. That would not include the right to enter the premises of NBC and carry out any work for the company. Neither would it include the right to be a signatory to company cheques. The action taken by Pertsilis in issuing the three NBC cheques after his return from Greece seems to me to be very questionable.

Pertsilis has not established that he is still the owner of shares in NBC. He concedes that he wanted to sell his shares to the respondents but says that he did not sign the agreement of sale because the respondents had misrepresented to him the true financial position of the company. The respondents claim that there was an agreement of sale and that they paid Pertsilis for his shares. This issue is fundamental to the dispute between the parties and cannot be resolved on the papers. Accordingly, the application must be dismissed.

Mr *Samkange* argued that the application should be dismissed with costs on the legal practitioner and client scale. The reasons he advanced were: the matter was not urgent; there is a dispute of fact on the papers which cannot be resolved on the papers and Pertsilis must have known this before he lodged the application; Pertsilis has been dishonest with the court and in the manner he has used public officials; the application is misconceived, since Pertsilis does not deny that he sold his shares - his only claim is for the unpaid balance of the purchase price.

The letter from Mr Venturas which has been referred to earlier, was dated 18 November 1997. In that letter, Mr Venturas referred to a letter of his dated 22 January 1996 in which he said that Pertsilis was alleging that before, and at the time, the agreement of sale was entered into he was misled and misinformed as to the viability of the company. So, as long ago as January 1996, Pertsilis was wanting to cancel the agreement for the sale of his shares. This dispute has therefore dragged on for over three years. As Pertsilis has not established that the respondents are in fact raping the company, it follows that this application is misconceived. It is not urgent and the relief sought cannot be granted. Furthermore, Pertsilis must have been well aware, when he lodged this application, that the papers would reveal the fundamental dispute between the parties as to the sale of his shares which was not capable of resolution on the papers. Even in his founding affidavit, Pertsilis does not attempt to make his case in this regard. It is not clear whether he is alleging that in fact there was no actual agreement, and therefore no sale, or that there

was a sale but that, because he was mislead as to the financial situation of NBC, he has cancelled the agreement. This application should never have been brought.

The application is dismissed with costs on the legal practitioner and client scale.

Sawyer & Mkushi, applicant's legal practitioners

Byron Venturas & Partners, respondents' legal practitioners

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CITY CENTRE HOTEL (PVT) LTD *v* NYAMANHINDI 1999 (1) ZLR 81 (HC)

Citation	1999 (1) ZLR 81 (HC)
Case No	Judgment No. HH-34-99
Court	High Court, Harare
Judge	Mubako J
Heard	November 24, 1998
Judgment	February 11, 1999
Annotations	None

Civil application

Flynote

Company - directors - authority - ostensible authority to enter into contract - when can be presumed by person contracting with company - director not having taken part in company activities for long period due to stroke - no ostensible authority to bind company

Company - directors - meeting - notice of board meeting not given - meeting not valid

Company - shareholders - resolution by - whether company assets may be disposed of by resolution of shareholders

Headnote

A company owned three pieces of land. Purportedly acting on behalf of the company, one of its directors, T G P Nyamanhindi, sold these pieces of land and undertook to give the buyer vacant possession. P Nyamanhindi was occupying these pieces of land and refused to vacate them.

T G P Nyamanhindi and P Nyamanhindi were directors in the company. Each owned a 1% share in the company. The other 98% of the shares were owned by the Nyamanhindi Family Trust. T G P Nyamanhindi claimed that at an extraordinary meeting of the company, at which he was the sole person in attendance, a resolution had been passed giving him power to sell the properties of the company and to determine at his discretion the purchase price. He had attended this meeting in two different capacities, namely as a director and as the sole representative of the Family Trust.

Held, that P Nyamanhindi had not been given notice of the extraordinary meeting and this invalidated the proceedings at that meeting.

Held, further, that even if the resolution at the extraordinary meeting was validly passed, the resolution was described in the minutes as a resolution of the shareholders. Selling company

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assets may be recommended by the shareholders but disposing of the company assets is an executive act which can only be done through the directors. The resolution of the shareholders thus needed to be sent to a meeting of the Board of Directors and no such meeting was held.

Held, further, that the purchaser could not claim that T G P Nyamanhindi had ostensible authority such that the sale should be enforced on the basis of the rule in the *Turquand* case. T G P Nyamanhindi was only a director and not a managing director and a buyer of

company property cannot assume that a single director who is not the managing director has the power to enter into the contract. Furthermore, the buyer should have been put on his inquiry as to the authority of T G P Nyamanhindi, a director who had been dormant in the company for ten years since suffering a crippling stroke and who was in a wheelchair.

Held, therefore, that the purported sale was null and void.

Cases Considered

Cases cited:

African Organic Fertilizers & Assd Industries Ltd v *Premier Fertilizers Ltd* 1948 (4) SA 233 (N)

Automatic Self Cleansing Filter Synd Co Ltd v *Cunningham* [1906] 2 Ch 45

Houghton & Co v *Nothard, Lowe & Wills Ltd* [1927] 1 KB 256 (CA)

Howard Smith Ltd v *Ampol Petroleum Ltd* [1947] 1 All ER 1136

Royal British Bank v *Turquand* (1856) 6 E & B 119

Union Hall Silver Co Ltd Re (1870) 22 LT 400

Warden & Hotchkiss Ltd Re [1945] 1 All ER 507

Wolpert v *Uitzigt Properties (Pvt) Ltd* 1961 (2) SA 257 (W)

Case Information

L T Biti, for the applicant

S Mushonga, for the respondent

Judgment

Mubako J: Through its director, Mr T G P Nyamanhindi, the applicant company seeks the authority of this court to compel the respondent to vacate three pieces of land in Mutare. The exact order prayed for reads:

"1. The respondent be and is hereby ordered to forthwith vacate stands 619, 620 and 632 Umtali failing which the Deputy Sheriff be and is hereby authorised to eject the respondent there from.

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2. The respondent shall bear the costs of this application."

The applicant owned the three stands mentioned in the draft order and on 25 November 1997 purported to sell them to Chirag Motiwala (Pvt) Ltd. The applicant undertook to give vacant possession of the stands to the purchaser by 1 December 1997.

However, the stands were occupied by the respondent who is one of the directors of the applicant company. The respondent was given notice to vacate but he refused to acknowledge the letter of demand by signing it and he continues to occupy the said properties.

The respondent refuses to vacate because he does not recognise that:

(a) the applicant company validly sold its assets to Chirag Motiwala (Pvt) Ltd on 25 November 1997 on the ground that T G P Nyamanhindi who conducted the sale had no authority to act on behalf of the applicant company;

(b) the applicant company validly evicted him, again because he alleges that T G P Nyamanhindi had no authority to speak on behalf of the applicant; and he charged that,

(c) the company assets were being sold incompetently, or fraudulently at a price below the market value (at $6 million, instead of $11 million);

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(d) he also alleges that most members of the Trust passed a resolution rejecting the sale because the price is ridiculously low. The Trust holds 98% of the shares in the company;

(e) finally, he opposes this application because he alleges that there is "a material dispute of fact not capable of being resolved on the papers".

The respondent holds the remaining 1% of the shares of the applicant company. He did not attend the crucial meeting of 5January 1998 and says he had not received any notice of such an extraordinary general meeting.

On his part, Mr T G P Nyamanhindi avers that due notice had been served on the respondent. However, he does not even attempt to show when, where, and how the notice was served. His remains a bare assertion. There is no proof of service of notice on the respondent and in a situation in which T G P Nyamanhindi and the respondent are at loggerheads and in which the former alone attends the meeting (albeit in two capacities) and passes a resolution giving himself unlimited powers to dispose of the main assets of the company, the probabilities are that no notice was served on the respondent as he says. In any case, the onus to show that there was service of notice lies on T G P Nyamanhindi and he has failed to discharge it.

It follows therefore, that the meeting which Mr T G P Nyamanhindi claims gave him power to dispose of the property of the applicant was not properly convened in accordance with its articles of association for notice of every general meeting must be given to every member except where the member of a company has no address in Zimbabwe: Re *Warden & Hotchkiss*

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Ltd [1945] 1 All ER 507; *African Organic Fertilizers & Associated Industries Ltd* v *Premiar Fertilizers Ltd* 1948 (3) SA 233 (N); Re *Union Hill Silver Co Ltd* (1870) 22 LT 400.

The general rule is that failure to give notice to one or more members is an irregularity which invalidates the proceedings of the meeting. However, as stated above, in case of difficulties in contacting a member the courts will take a common sense view and may not invalidate the proceedings. In the present case the members are members of the same family and there was no question of difficulty of contacting the respondent personally, by post or by advertisement. There was no reasonable explanation for the irregularity and I would pronounce the subsequent proceedings invalid.

The central issue about the validity of the purported sale is to appreciate in what capacity Mr T G P Nyamanhindi acted on behalf of the company. He claims to have derived his authority to sell on behalf of the company from a resolution passed at a meeting of the company's shareholders consisting of himself *alone* but *in two capacities* (representing T G P Nyamanhindi - 1% share, and the Nyamanhindi Family Trust - 98% shares). That resolution authorised T G P Nyamanhindi to sell the three properties of the company and

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"*to determine at his discretion the purchase price*; and to enter into an agreement of sale with the purchaser" (the emphasis is mine). He claims to have derived authority to represent the Trust from the Trust Deed which the respondent disputes.

The respondent deposed that T G P Nyamanhindi lacked authority to act on behalf of the applicant company because he is physically and mentally incapacitated. The evidence shows that T G P Nyamanhindi suffered a stroke about 1988 and became paralysed in his legs, but he remained mentally normal. As a result of that disability, he surrendered the management control of the company to the respondent. However, he retained his functions as a shareholder, and as a director of the applicant company as well as sole agent of the Nyamanhindi Family Trust.

It was also submitted that T G P Nyamanhindi lacked authority to speak on behalf of the applicant company because, by a resolution passed by seven Trustees of the Nyamanhindi Family Trust, he was removed for health reasons, from being the sole agent of the Trust which held 98% of the shares of the applicant company. The evidence showed that the resolution even if valid could not affect the sale of the properties which is in issue since the resolution was passed after the sale. Besides the resolution may not have been effective for the purpose of removing T G P Nyamanhindi since he was appointed by notarial deed and can only be removed in the same manner of his appointment. In my opinion these are compelling submissions and I must find that Mr T G P Nyamanhindi remains sole agent of the Nyamanhindi Family Trust and remains a shareholder under two capacities and a director of the applicant company.

Assuming that the above resolution was validly passed, it is described in the minutes signed by the applicant as a resolution of the shareholders. Selling company assets may be recommended by shareholders but disposing of a company's assets is an executive act which

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would have to be done through the directors. The applicant does not even allege that there was any role for directors in the sale. Directors, not the shareholders, are the officials of the company. Only directors can act in this way on behalf of the company. Shareholders cannot exercise any powers over the decisions of the directors or on behalf of the company as a legal entity. It is the directors, and only they, who can exercise the administrative functions of a corporate entity.

The shareholders cannot brush the directors aside and begin appointing or dismissing company chauffeurs, signing company cheques or selling its assets. Shareholders may express their wish about these matters but it is up to the directors to implement that desire as they see fit. This separation of powers was expressed forcefully by Wilberforce LJ when he said:

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"It is established that directors, within their management powers, may take decisions against the wishes of the majority of shareholders, and indeed that the majority of shareholders cannot control them in the exercise of these powers while they remain in office."

See *Howard Smith Ltd* v *Ampol Petroleum Ltd* [1947] 1 All ER 1136.

In an earlier case, *Automatic Self Cleaning Filter Syndicate Co Ltd* v *Cunningham* [1906] 2 Ch 45, Collins MR had expressed the same principle as follows:

"I cannot see anything in principle to justify the contention that the directors are bound to comply with the votes or the resolutions of a simple majority at an ordinary meeting of the shareholders."

In the case at hand, the resolution by the shareholders needed to be sent to a meeting of the board of directors but there is no record of the board having held a meeting on the matter of disposal of the said property of the company.

Whether such a board meeting was held or even called is not an issue which crossed the mind of the applicant. Yet it is a matter of crucial importance.

It is also not clear what the total composition of the board of directors was. Who and how many were the directors? There is a suggestion in the papers that both Mr T G P Nyamanhindi and Patrick Nyamanhindi were directors. Perhaps we can assume that these two were the only directors. We know that these two did not hold a board meeting together, let alone agree on a resolution.

Secondly, we must ask, was there a managing director, *de jure* or *de facto* between them? Was it T G P Nyamanhindi or the respondent? If T G P Nyamanhindi was the managing director, the purchaser might be able to claim ostensible authority on the basis of the rule in *Turquand*'s case (*Royal British Bank* v *Turquand* (1856) 6 E & B 119) so as to enforce the sale. But the papers describe Patrick Nyamanhindi as the managing director of applicant's hotel operations (opposing affidavit para 8(a)), a fact recognised by T G P Nyamanhindi who calls it "forced control of the company's business at City Centre Hotel" (answering affidavit para 7). If T G P Nyamanhindi was not the managing director then he could not act alone without the authority of the board of directors. An ordinary person cannot bind the company unless expressly authorised by the board of directors or by the articles of association: *Wolpert* v *Uitzigt Properties (Pvt) Ltd*

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1961 (2) SA 257 (W) at 267. This is a trite rule of law supported by a respectable pedigree of authority and common sense. Sargent LJ stated the rule as follows in *Houghton & Co* v *Nothard Lowe & Wills Ltd* [1927] 1 KB 246:

"I know of no case in which a single director, acting without authority in fact, has been held capable of binding a company by a contract with a third party, merely on the ground that that third party assumed that the director had been given authority by the board to make the contract."

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Professor L C B Gower *Modern Company Law* 2 ed p 147 enunciated the rule with his usual clarity as follows:

"If therefore, the third party is dealing with the board of directors as a whole or with a managing director, he will usually be safe because, as we have seen, it is usual to confer the widest powers of management on those organs. But if *he is dealing with an individual director (not being a managing director) he will not normally be protected, because a single director usually has no authority to bind the company*" (the emphasis is mine).

The present case would appear to fall outside any recognised exception, in which event the outsider acts at his peril. Furthermore, when a director who had been dormant for ten years because of a crippling stroke goes out on his wheel chair to conduct a sale of this magnitude single handed it is fair conclude that the outsider was put on his inquiry in which case the *Turquand* rule affords him no protection: *Houghton & Co* v *Nothard, Lowe & Wills supra*.

I come to the conclusion that T G P Nyamanhindi did not have actual or implied authority to bind the company in this contract of sale.

From the above, it is clear that there was no meeting of the board of directors and hence no resolution of the board of directors which authorised the sale of the company's property or which adopted, for implementation, the directives of the shareholders meeting to dispose of the company property. Indeed it is not disputed that no board meeting was ever held on the subject of the disposal of the three properties. Mr T G P Nyamanhindi prefers to rely on the powers he granted himself at the special shareholders meeting discussed above. He could not seriously contend that a meeting of the board of directors took place in the absence of the respondent who is the only other director.

T G P Nyamanhindi did not have two capacities as director, he was only one director and as such could not constitute the quorum of two which is required in order to hold a board meeting. Without a board meeting and a board resolution, T G P Nyamanhindi, being only a single director, had no authority to dispose of the property of the company as he purported to do; neither, in my view, does he have the authority to sue on behalf of the applicant company. For these reasons, this action must fail.

It is not necessary to decide whether or not the sale was bona fide in the interest of the company or whether the proper market value of the properties was $11 million or $6 million.

In my opinion, the purported sale is null and void.

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The application is dismissed with costs.

Henning Lock Donagher & Winter, applicant's legal practitioners

Mushonga & Associates, respondents' legal practitioners

MARIMBA *v* MARIMBA 1999 (1) ZLR 87 (HC)

Citation	1999 (1) ZLR 87 (HC)
Case No	Judgment No. HH-22-99
Court	High Court, Harare
Judge	Gillespie J
Heard	January 11, 1999
Judgment	February 3, 1999
Annotations	None

Divorce action

Flynote

Family law - husband and wife - divorce - property division - effect of misconduct on division - extent to which misconduct may affect division - effect of fault on costs - provision for minor children - creation of trust for maintenance of minor children, administered by the Master

Headnote

Fault and misconduct are not relevant to the existence of grounds for divorce. Once evidence establishes the irretrievable breakdown of marriage, it is neither helpful nor proper to enquire into whether those grounds constitute misconduct. Misconduct is relevant to the question of whether a party is fit to have custody of minor children. Reluctant though the courts are to delve into the general issue of marital misconduct, they will not shrink from the task if it will assist in determining the best interests of children.

The related principle is more difficult to formulate when it is suggested that the conduct of a party should have a bearing on a property distribution order. While the court sets its face against invitations to delve into the minutiae of ancient domestic grievances, the relevant legislation specifically preserves the potential relevance of marital misbehaviour to the question of a division of the property. The difficulty is defining where it would be just to permit the misconduct of a spouse to influence an order apportioning the marital estate or for maintenance. For example, the blameworthy conduct of a spouse might affect the distribution of

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property where that behaviour has enabled the spouse to acquire a morally indefensible financial advantage. The principle is that, in its overall effort to order a fair division of assets or of maintenance, the court may permit considerations of the conduct of the parties to affect the final order to the extent to which that would be just. This is left to the court's discretion; but it is never just to penalise a person for an unhappy marriage.

The misbehaviour of a party may also be relevant to the question of an award of costs. Although in matrimonial matters the courts may be less inclined to order costs to follow a finding of substantial success, an award of costs against the misbehaving party may be granted to signify the court's repugnance at his behaviour.

Where the facts suggest the unreliability of a parent as regards future maintenance of the minor children, the court may order the creation of a trust for the minor children, out of a portion of that parent's share, administered by the Master, for the benefit of the minor children.

Cases Considered

Cases cited:

Beaumont v *Beaumont* 1987 (1) SA 967 (A)

Kassim v *Kassim* 1989 (3) ZLR 234 (H)

Ncube v *Ncube* 1993 (1) ZLR 39 (S)

Wachtel v *Wachtel* [1973] 1 All ER 829 (CA)

Statutes Considered

Legislation considered:

Matrimonial Causes Act [*Chapter 5:13*], s 7(3)

Case Information

R M Fitches, for the plaintiff

M Hungwe, for the defendant

Judgment

Gillespie J: Matrimony, for the plaintiff, has been anything but a blessed state. Rather, it has been an infernal ordeal. The defendant is a most abusive man. He has battered his wife and his children. When not bruising their bodies he has been wounding their psyches. He denies it. But I do not believe him.

As the plaintiff recounts the history of her married life, she fell pregnant in 1981 soon after meeting the defendant. She was married to the defendant according to customary rites in March 1981. They started living together in his flat in Luck Street, Harare. He had a bed and a

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bookshelf. She had blankets, pots and a two-plate stove. She resigned from employment because of complications with her pregnancy. her first beating at his hands was during the pregnancy. their first child, a daughter, T, was born in September 1981. After the birth, the plaintiff returned to her employment at the bank where she haw worked ever since.

Verbal and physical abuse by her husband became a regular part of her life. She complained and sought assistance within the extended family. She was advised on each occasion that every marriage had its difficulties and that she should persevere. On each occasion, feeling that she had no alternative, she followed this dubious course. Her dedication was always rewarded with further abuse. Violent behaviour by the defendant would be triggered by the most insignificant disagreement. His consumption of alcohol was usually a contributing factor. Once moved to anger, the defendant would "Yell half the night", and perhaps two or three times a week, would assault the plaintiff. Frequently, injuries were caused - swelling and bruising to the face and eyes which would cause her to miss work to avoid exhibiting the stigmata of her suffering. She used to count herself very fortunate if as much as a week went by without him laying violent hands upon her.

Despite the ill-treatment to which she was subjected in private, the plaintiff did all she could to procure and project an air of normalcy about her marriage. With her background and training in banking, she has maintained, as best she could, a family budget. Income was pooled. Major purchases were discussed. For much of their married life, the income of one was roughly equivalent to that of the other. The parties prospered.

GILLESPIE J

They moved out of the flat in 1982. They took a rented cottage in Belvedere. There they lived until 1985. In that year, they bought a home in Mabelreign. The second child, their son N, was born in 1986. In that same year, the parties formalised their customary relationship by having it registered in terms of legislation.

The external indications belied the continuing turbulence behind closed doors. The pattern of abuse already described continued. The plaintiff occasionally fled, sometimes for two or three days at a time, to the house of her relatives to seek refuge from the defendant's malevolent temper.

Unfortunately, this malevolence was extending to the children. Whatever they were doing of an afternoon, would cease when he came home. Off they would go to their bedrooms to hide from his hectoring until he should depart to the public house. Then out they would come for supper. One typical example remains green in the plaintiff's memory from 1987. The defendant was aggrieved by some insignificant affront or importunity. He ordered the children's supper to be fed to the family dog. He then sat down to his own meal. The plaintiff refused to eat if her children were unfed and then had to suffer the abusive consequences of her show of spirit.

By 1989, she felt she could take no more. She left the house and stayed away for three months. The defendant was evidently troubled by this development. He caused pressure to be applied to the plaintiff to attend marriage guidance counselling with the organisation, Connect. She was

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too angry to do so, but eventually allowed herself to be persuaded to return to him. He was always so remorseful after he had beaten her. He always tried so hard to get her to come back when she left. This, she says, is why she always returned to him and persisted in her efforts to build a marriage.

These efforts produced the boy K, their third child. He entered the world in 1991. Further attempts at rapprochement are demonstrated by the parties' remarriage under the general law on 29 January 1993. Neither event, however, signalled any permanent abatement of the domestic reign of terror. This continued until the next major separation. For six months in 1995 and 1996, the plaintiff once again left the defendant. She even sued out an order binding him to keep the peace. He again exerted himself to win her return to his sway. On this occasion, his cause was furthered by a minister of the plaintiff's church. Taking advantage of his wife's faith, the defendant persuaded her pastor to cause the return of the sheep to the wolf's fold.

This fidelity led to her darkest despair. In 1997, the plaintiff attempted suicide. She took an overdose of a medication and drew this to the defendant's attention in time for him to take her to hospital. Still, he cynically refuses to acknowledge that there was anything amiss. True, this has the appearance not

of a determined attempt on her life, but rather the archetypal plea for help. That help, eventually, seems to have been forthcoming.

The plaintiff has since this incident, had the benefit of the treatment and counselling of a Dr M. The two are on friendly terms. I get the impression, though nothing directly has been said, that much of the plaintiff's rehabilitation of herself is owed to Dr M's influence. Certainly, there was no immediate break with the defendant. In fact, it took yet another bout of egregious brutality by the defendant to cause the final break.

On the night of 30 July 1998, the plaintiff suffered a beating such as she had seldom suffered before. As he beat her, he accused her of coming between him and his children. As he beat her, she screamed her pain. As he beat her, his children looked on, shivering, from the corner. She swore to herself that should she survive this final ordeal, she would never again suffer at his hands. True to her resolution, the next morning she went to work as usual, taking nothing with her. She secured that T should meet her and that together they would seek refuge. The younger two she had no alternative, but to leave with their father.

She found succour with the Musasa Project. This foundation, so I understand, gives refuge and counselling to oppressed women, including battered wives. With the assistance of the officers of this organization, the plaintiff has been protected from the defendant's efforts to secure her return. She has been put in touch with lawyers. She has obtained another peace order. She has an order for custody of all her children. She has found the fortitude and determination to insist upon her rights.

Even after the final separation, and institution of these proceedings, however, the plaintiff has not been immune from violence or threats of violence by the defendant. This gives rise to the

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real fear, expressed by the plaintiff, of future possible harassment by, or confrontation with, the defendant.

If this seems a one-sided recitation of the events of a marriage, I have to say that the evidence persuades me that it is nevertheless true. The plaintiff is an attractive, intelligent and articulate woman. It is easy to believe her. So easy that I have been careful to question in my mind all that she has said. Her testimony survives this scrutiny. Most compelling to me is the lack of rancour with which she speaks. I see in much of her evidence the undoubted influence of professional counselling and careful introspection. This enables her to accept, in retrospect, many remarkable facts as simply symptomatic of an abusive relationship. For instance, her failure to leave him sooner; his unfailing remorse and attentiveness - until the next time. The moderation with which she presses her claim is also most impressive. The plaintiff has made important and thoughtful concessions, for instance on the question of

access by the father. Her undoubted concern that the opportunity be given for the development of a normal relationship between father and children is most commendable. Her very claim for a property division is advanced in terms which are never stated beyond the extent to which they are supportable. As a third consideration, the plaintiff's demeanour was impeccable. The hurt was obvious. The tears, though always suppressed, were never far away. The appeals to emotion. however, were completely absent. It would be an injustice to this woman to disbelieve her.

I nevertheless took care to seek some further confirmation of her account. I interviewed the seventeen year old daughter T in chambers. I did not speak to the boys, thinking them too young to be subjected to that. I was aware of the possibility that T might be unduly supportive of her mother and took care to provide for that. I put to her no leading questions and did not press her for detail. For all my care, I was unable to spare her copious tears of hurt and humiliation as she recounted incidents when her father would beat not only his wife, but also his children, until it seemed that nothing but the sight of the blood he might draw could bring about some surcease.

Finally, the defendant's own showing leaves me in no doubt whatever that he wreaks violence on his family. He admits that he occasionally beat his wife in the early days. Never since 1985. Strangely, the marriage was happy in those early days. But never since 1985. The plaintiff never deserted the home before 1985. Since then she has always been running home to mother. That is the real cause of the breakdown, he says. That and an inability to communicate. Dr M, he says, is to blame for the breakdown. She is an interfering woman. The Musasa Project is to blame. He pretends at first not to know of its business but later claims it as focussing on "gender issues". It takes the side of a woman who runs away and will not listen to a man. These self-serving excuses are entirely unconvincing. In fact, they serve to convince one of the complete truth of the plaintiff's testimony. I accept her word against his, whenever they are in contradiction.

The great bulk of the evidence, then, has addressed the issue of fault and misconduct. I

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permitted this upon Mr *Fitches*' assurance that the treatment would prove relevant. My judgment thus far has traversed the same topic exclusively. It is therefore time now to demonstrate the relevance of the material.

Certainly, it is not relevant to the existence of grounds for divorce. Once evidence establishes the irretrievable breakdown of the marriage, then it is neither helpful nor proper to enquire further into whether those grounds constitute misconduct by, or disclose the fault of, either party unless the existence of misconduct is relevant to some issue other than grounds for divorce.

GILLESPIE J

For instance, the alleged misconduct of one or other party might be advanced in support of the proposition that that party is not fit to be a custodian of minors. Reluctant as the courts are to delve into the general issue of marital misconduct, they will not shrink from the task if it will assist in determining the best interests of children.

The related principle is more difficult to formulate when it is suggested that the conduct of a party is such that it should have a bearing on a property distribution order. Mindful of the move away from the fault system of divorce, 1(5) judges in this jurisdiction have set their faces against any invitation to delve into the "minutiae of ancient domestic grievances". 2 (6)They have declined to permit counsel "to resurrect the old spectre of guilt and innocence and drag the judge to hear their mutual recriminations and go into their petty squabbles of days on end, as he used to do in the old days". 3(7) And rightly so.

Nevertheless, the relevant legislation specifically preserves the potential relevance of marital misbehaviour to the question of a division of property. The court is enjoined to -

"endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses ... in the position they would have been in had a normal marriage relationship continued ... " 4(8)

The difficulty has come in attempting to define when it would be just to permit the misconduct of a spouse to influence an order apportioning the marital estate or for maintenance.

Hence judges, in this jurisdiction and in others with similar legislation, while emphasising the reserve and caution that must affect any decision to permit the misconduct of a spouse to affect an apportionment on the grounds of misconduct, have been bound to acknowledge that such a decision may in a proper case be reached. Frequently cited to this effect is a *dictum* of Lord Denning who referred to -

"a residue of cases where the conduct of one of the parties is ... 'both obvious and gross' so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice." 5(9)

Although this passage specifically refers to maintenance, the learned judge was certainly not laying down a rule that only a maintenance order may be affected by misconduct. This is merely an example to illustrate the true thrust of his point that in relatively rare cases the degree of misconduct

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of one party to a marriage is such that it would be unjust to make an order in respect of property or maintenance while excluding this misconduct from consideration.

Likewise, the South African Appellate Division has stated that in a divorce:

"Both parties will inevitably suffer hardship because of the parting of their ways. In relation to the areas of uncertainty it is impossible to assess accurately the relative degrees of hardship which each of the parties will suffer, depending on what assumptions are to be made. Where choices are to be made and decisions to be taken in the dark as it were ... it would be fair, because of the appellant's misconduct, to allow the scales of justice to be tipped in favour of the respondent and against the appellant, rather than the reverse." 6(10)

This *dictum* again exemplifies one way in which relevant misconduct might be taken into account. It does not lay down any all-inclusive rule.

In Zimbabwe, both of these decisions have been cited with approval. 7(11) Indications have been given that the blameworthy conduct of a spouse might affect a distribution of property where that behaviour has enabled the spouse to acquire a "morally indefensible financial advantage from the failed marriage" 8(12) or would do so if the proper steps were not taken. It is said that it can never be proper to use the provisions of the Act to impose a penalty for misconduct. 9(13) The overall word of caution has been given that where the parties'

"mutual recriminations appeared to counter-balance each other, and the conduct of one was not more great than the other, there was no duty on the court to dwell on the conduct of the parties in its assessment of what would otherwise be a fair and just apportionment of the assets of the spouses." 10 (14)

which, of course, leaves unspoken the converse: that where the excessive and culpable conduct of one party exceeds mere mutual recrimination from an unhappy marriage, there may be a duty to consider the extent to which that should influence the division of assets.

For all the helpful examples and indications given in these cases, there is little attempt to state the overall principle. It would be a mistake to treat the various *dicta* as a complicated network of rules, for that is not the strength of our legal tradition. We prefer to identify the guiding principle and to apply that in all cases. It seems to me that just such a principle emerges. The relevant legislation entrusts to the court a wide discretion to achieve a just result in the division of the assets of the spouses and the maintenance of a spouse or a child. That discretion is a judicial discretion to be exercised upon a proper consideration of all relevant factors. The aim

is expressly to place the parties in the position they would have been in had a normal marriage relationship persisted. This aim is qualified by considerations of reasonableness, practicality and justice. The overall desideratum of justice, however, is itself expressly related by the clear words of the Act to the conduct of the parties.

The principle may thus be stated : in its overall effort to order a fair division of assets or of maintenance, the court may permit considerations of the conduct of the parties to affect the final order to the extent to which that would be just. What is just in any case is left to the judicial

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discretion of the court. It may generally be said, however, that it is never just to penalise a person for an unhappy marriage. Only serious cases of predominantly one-sided misbehaviour will be permitted to influence the order that would otherwise have been made based on considerations excluding the question of misconduct.

In this case, I am completely satisfied that it would be just to take into account the prolonged and brutal misbehaviour of the defendant and to allow that to a certain extent to mould the order I make.

The final issue to which fault might be relevant is that of costs. The relevance is obvious. I turn now, therefore, to consider the decision I make on the various issues.

Having made the unequivocal finding that the defendant is an abusive man, I have no hesitation in awarding custody of the minor children to the plaintiff. The defendant's claim for custody was never particularly compelling. It involved the separation of the children, since he effectively conceded custody of T to the plaintiff. Even in claiming custody of the two sons, as Mr *Hungwe* fairly and properly conceded, he did not seriously make out any case. The court is always slow to separate children from each other by an order of custody. The defendant would have to have made a very good case indeed to have succeeded. The best he could suggest, however, was that the plaintiff, in deserting him, had left the young boys with him and that the *status quo* should be preserved.

I dismiss this out of hand. Unfortunate as it may be that the boys have been left alone with an abusive father for some time, the plaintiff can hardly be blamed for that. The evidence in this case demonstrates to me that it is both practically and emotionally exceedingly difficult for a battered wife to escape from an abusive relationship. If, in the end, all she can manage is her own flight with later attempts, from a place of safety, to secure her children's position, then she deserves understanding and assistance rather than blame for leaving her children behind.

The question of access is one, given the history of the mother, that has troubled me greatly. On one hand, one does not wish to expose the children to further violence. On the other, both the children and the defendant, as the

plaintiff with quite commendable longanimity has conceded, deserve the opportunity to foster a more normal relationship. I have therefore concluded that it would be in the best interests of the minor children to permit their father access to them.

I am unable, however, to accept the plaintiff's concession of alternate school holidays to the defendant. It seems to me that more restricted access is required. The evidence of the plaintiff satisfies me that the defendant is given to drinking and that the consumption of alcohol aggravates a propensity to violence. This drinking habit has been to go out to a bar of an evening. If access is to be exercised by the defendant to his children, I consider that it ought to be on condition that he does not go out, squandering on his drinking friends the time that should be devoted to his children. The time will be better spent building a relationship with his offspring.

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Similarly, since the domestic violence has seemed historically to spring from petty disputes, I will forbid the defendant to do any violence to the children at all - even to the extent of forbidding parental chastisement by him. It is dangerous for the defendant to start using force on people weaker than himself because he does not know when nor how to stop.

It is my hope that regular, periodical access undertaken with discretion and sensitivity might improve the position to one where more extended access can be given. It seems to me that the plaintiff is capable and confident enough to be entrusted with the responsibility of permitting such further access, given due notice, according to her assessment of the interests of the children. I will therefore allow for that too in my order.

As for maintenance, the decision is relatively simple. The plaintiff in her pleadings, claims $700 monthly for T and $500 each for the two boys. The defendant offers much less. The individual amounts claimed are, as all of us well know, insufficient to keep a child at the middle class level which this family is used to. The plaintiff is clearly catering for a not inconsiderable contribution from her own pocket. The defendant can, in my estimation, offer the amount claimed. In fact, he can pay more with no loss to himself. It is a condition of his employment that he can recover from his employer, his children's proven school fees. The facility exceeds the present requirements of the family. I will therefore, place this additional burden upon him.

Unfortunately, the defendant, according to the plaintif's evidence, cannot be counted upon to make necessary payments timeously. I have therefore, attempted to devise a method that will ensure that the plaintiff's very precarious cash flow position is not jeopardised by any dilatory payment by the defendant of his dues. The need to pursue such payments urgently is also precisely the sort of dispute which could be a further occasion of violence. It seems to me that a capital settlement in favour of the children, upon which

the plaintiff can draw in need, is called for. I have therefore allowed for this in my order dividing the immovable property of the parties.

Referring to the disposal of the movable property, I am faced with the submission that the parties are *ad idem*. Mr *Hungwe* argues that the common position is that the property be divided equally. In fact, although the defendant has accepted this, the plaintiff has claimed that all the property required by the children should be awarded to her and only the balance distributed equally. Unfortunately, there has been no detailed treatment of the property at issue. This makes it difficult for me to particularise an award. The difficulty is compounded by the fact that a motor car claimed by the plaintiff was sold by the defendant prior to the trial. He has not properly accounted for the proceeds, but has given some money to the defendant, claiming that to be her share of the proceeds. Unfortunately, even if he is truthful on his issue, the amount he handed over on his evidence is nowhere sufficient for the plaintiff to purchase a replacement car. She has therefore had to incur considerable debt in order to acquire the car that, from the standard of living of the parties, she reasonably requires. That indebtedness will make it very difficult indeed for the plaintiff to acquire the furniture and appliances needed in a home of the standard

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to which the family had been living.

I therefore deem it to be my duty to make a division of property that will enable the plaintiff to acquire and furnish a new house, for the benefit of the children, immediately and without incurring further debt. Her contribution to the purchase of the existing movables has been considerable. Much of the property has been purchased by loans obtained by the plaintiff from her employer, repayments being deducted from her salary. The interests of the children demand that they have a properly equipped family home as soon as possible. The conduct of the defendant, finally, has been such that if temporary difficult is to be suffered by any party as a result of the division of property, that hardship should be his. I have accordingly, decided to award to the plaintiff all items of movable property, save the defendant's motor car and his personal clothing and effects.

The only immovable property at issue is the former matrimonial home in Mabelreign. This home is in the name of the defendant. Its purchase was funded by a loan given by the defendant's employer and secured by a mortgage in its favour. Repayments were deducted from his salary. The bond was transferred to a building society on a later date when certain improvements were done to the house funded by a fresh advance from the society. At the time, the nett income of the parties was pooled for budgeting purposes. In addition, the plaintiff as I have intimated already, purchased movable assets from her own funds. Her own material contribution, therefore, is undeniable.

GILLESPIE J

It is also considerable. For most of their married life, the parties means have been roughly equivalent. More recently, the plaintiff, if anything, has earned somewhat more than the defendant. At present, she earns, a gross $17000 monthly whereas his gross income is $11000 per month. This is a marked improvement in her situation which has come about only in the last two years or less.

The plaintiff states her belief that her contribution is best assessed at sixty *per centum*. She claims, however, only a fifty percent share in the proceeds of the house, the sale of which she demands. She declines any offer of occupation of the house saying that her tenure would not be secure from harassrnent by the deprived and indignant defendant. For his part, the defendant offers the plaintiff twenty percent of the property's value for her interest in it. He is alternatively prepared to permit her, the occupation of the property so that it can be preserved for the children.

In determining the division of property here, I have borne in mind the questions of contributions and means already set forth. I take into account other benefits of the marriage lost to the plaintiff by the divorce. She has no insurance. Her only provision for the future is the pension plan with her employer. The defendant does have life insurance cover as well as his pension fund membership. Both parties are confident of the availability of finance for the purchase of a home. The interests of the children suggest to me the advisability of setting them in a new house, moving away hurtful associations, as soon as possible. Finally, the conduct of the defendant disinclines to show favour to propositions more convenient to his own interests where the

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counter-proposal itself is not unreasonable.

I therefore, favour the immediate sale of the matrimonial home. In calculating the division of the proceeds, I see no reason to deny the plaintiff the fifty percent she claims. As I mentioned earlier, I perceive the need, in the interests of the minor children, for a capital settlement in their favour. This settlement should come from the defendant's portion of the proceeds. I am satisfied that this is fair, since the plaintiff will bear the practical burden of the children's upbringing for some time to come. It should not be thought that this is designed as a punitive measure for the defendant's misconduct. It must be acknowledged, however, that if the defendant had not shown himself to be a violent and somewhat unreliable man, I might have found less reason to order such an arrangement. As it is, however, I have no doubt that it can reasonably be foreseen that the plaintiff might encounter occasions of difficulty in obtaining due payment by the defendant of his responsibilities. It would, therefore, be wise to avoid, if possible, any occasion of violence or confrontation. This cause I hope to advance by settling upon the minor children ten percent of the nett proceeds of the property.

GILLESPIE J

Finally, as to costs, I consider the plaintiff the substantially successful party and deserving of an award of costs, notwithstanding that in matrimonial matters courts may be less inclined to order costs to follow a finding of substantial success. Not least of the factors influencing this award is the thoroughly reprehensible treatment the defendant has meted out to the plaintiff over the past eighteen years. It is not a husband's place to beat his wife nor a wife's lot in life meekly to endure. It is most regreitable that the advice given to the plaintiff for so many years only served to perpetuate her submission to abuse. My order of costs signifies the repugnance with which marital violence is viewed.

It is ordered:

1. THAT a decree of divorce shall issue.

2. THAT custody of the minor children T, N and K be and is hereby awarded to the plaintiff;

3. THAT the defendant shall be entitled to the access to the minor children as set out below:

   (a) the defendant may have the minor children stay with him every alternate weekend from 6 pm on Fridays to 6 pm on Sundays on condition

      (i) that he should not leave them in the care of any other person but shall spend his time with them; and

      (ii) that he should not physically chastise or assault them in any way;

   (b) the defendant may exercise such other access to the minor children consisting of visits to them at their home and taking them on holiday as the plaintiff may consent to after having been given reasonable notice by the defendant;

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4. THAT the defendant shall contribute to the maintenance of the minor children:

(a) by paying to the plaintiff the sum of $700 monthly for T and $500 monthly each for N and K, the first such payment for the month of January 1999 to be made forthwith and subsequent payments to be made on the first day of each succeeding month; and

(b) by paying all school fees, including tertiary education, or reimbursing the plaintiff for school fees paid, promptly on the production of invoices or receipts for as long as his conditions of employment provide the benefit of payment of educational expense, whereafter he shall pay fifty percent of all such costs;

(c) by settling in their favour the sum referred to in paragraph 5(f)(iii) below.

5. THAT the assets of the parties shall be divided as follows:

GILLESPIE J

(a) The Ford Cortina motor vehicle is declared to be the exclusive property of the defendant;

(b) The defendant's personal clothing, toilet requisites and items of masculine jewellery and watches, etc are declared to be the personal property of the defendant;

(c) The Mazda 323 motor vehicle is declared to be the property of the plaintiff;

(d) All other movable property in the matrimonial house shall be and is hereby awarded to the plaintiff;

(e) Any other property not herein mentioned shall be deemed to be the property of the plaintiff;

(f) The Master shall be and is hereby directed to appoint an estate agent from his registered panel of valuers to sell the matrimonial home on the open market to best advantage as soon as is reasonably possible. The nett proceeds of the sale shall be divided as follows:

(i) Fifty percent thereof shall be disbursed to the plaintiff;

(ii) Forty percent thereof shall be disbursed to the defendant;

(iii) Ten percent thereof shall be held by the Master in trust for the minor children in an interest bearing account from which funds may be disbursed by the Mastert:

A. from time to time and in such amounts as may be required for the maintenance and education of the minor children, provided, however, that where any such disbursement is necessitated by a failure on the part of the defendant to pay any amount which he is obliged to pay, then such payment shall be recovered from the defendant and shall be paid into the trust; and

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B. upon the attainment by each minor child of the age of 21 years, in which event:

I. one-third of the balance in trust shall be paid to T upon her 2lst birthday; and

II. one-half of the balance in trust shall be paid to N on his 21st birthday; and

III. the full amount of the balance in trust shall be paid to K on his 21st birthday.

6. The defendant shall pay the costs of suit.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

Manase & Manase, defendant's legal practitioners

MAGAYA *v* MAGAYA 1999 (1) ZLR 100 (SC)

Citation	1999 (1) ZLR 100 (SC)
Case No	Judgment No. S-210-98
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA, Ebrahim JA, Muchechetere JA, Sandura JA
Heard	November 2, 1998
Judgment	February 16, 1999
Annotations	None

Civil appeal

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 23 - protection against discrimination - discrimination on grounds of sex - exemption of customary law from prohibition of discrimination

Customary law - succession - heir at customary law - whether female able to inherit late father's estate

Human rights - women's rights - discrimination on the grounds of sex - whether Legal Age of Majority Act had created positive rights or had only removed legal disabilities

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Headnote

The deceased died intestate. His estate consisted of a house and some cattle. He had entered into marriages with two wives, both marriages being according to African law and custom. The appellant, a female, had been born 1941 and was the child of the deceased's first wife. The respondent, a male, had been born in 1946 and was the child of the deceased's second wife. The appellant was thus the eldest child of the deceased. The respondent was not the eldest male child of the deceased, but the eldest male child had declined the heirship.

A community court had originally appointed the appellant as heir to the estate, but on application from the respondent to the community court, the appointment of the appellant had been set aside and, after a hearing at which all the interested parties were present, the court ruled in favour of the respondent. The grounds for this ruling were that a woman cannot be appointed as heir to her father's estate when there was a male heir. The respondent thus had to be appointed as heir in place of the appellant. In coming to this conclusion, the court relied on s 68(1) of the Administration of Estates Act [*Chapter 6:01*] which, at that time, provided that if an African married according to customary law or custom dies intestate his estate must be administered and distributed according to the customs and usages of the tribe or people to which he belonged.

Held, that under the applicable customary law relating to succession, males are preferred to females as heirs.

Held, further, that *prima facie* this customary law which prefers males over females appears to be a breach of the anti-discrimination provisions in the Constitution contained in s 23.

However, at the time that this matter arose that was no provision explicitly forbidding discrimination on the ground of sex or gender. 1(15) Even if the court took into account Zimbabwe's adherence to gender equality enshrined in international human rights instruments, s 23(3) of the Constitution exempts from the prohibition against discrimination matters involving marriage, divorce, burial, succession and other matters of personal law and, generally, matters involving African customary law. Additionally, s 89 of the Constitution sanctions the application of customary law generally. Discriminatory aspects of customary law applicable in this situation are thus sanctioned by the Constitution.

Held, further, that in passing the Legal Age of Majority Act 1982 (now s 15 of the General Law Amendment Act [*Chapter 8:07*]) the legislature intended to emancipate women by removing disabilities when they reach the age of eighteen by giving them *locus standi* and competencies in all matters generally, especially under common law. It was never contemplated that the courts would interpret the Legal Age of Majority Act so widely that it would give women new or additional positive rights which interfered with or distorted aspects of customary law. It was intended that the majority status of women would co-exist with customary law and not replace it.

Held, further, that in the past the courts had wrongly interpreted the Act too widely. *Katekwe* v *Muchabaiwa* 1984 (2) ZLR 112 (S), which had been followed in a number of subsequent Supreme Court cases, had been wrongly decided. 2(16) The sole purpose of the delict of

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seduction under customary law is to compensate the guardian for the diminution in the *lobola* value of the female to which he personally was entitled. Only the guardian can claim seduction damages; the woman cannot claim. The Supreme Court had been wrong in deciding that the effect of the Act was that now the seduced female who was a major could herself claim for seduction damages. The Act had not bestowed on the woman a new right to sue herself for seduction damages which she did not have under customary law.

Held, further, that the court in the *Katekwe* case based its conclusion upon the reasoning that the discrimination and disabilities suffered by women under customary law were due to their perpetual minority status. This was not correct. The concepts of minority and majority status were common law concepts which were not known to customary law and these concepts should only be used in customary law situations with great care. The disabilities and discrimination suffered by women did not arise from the perpetual minority status of women. It arose from the nature of nature of African society. The family is the heart of the African socio-political order. In patrilineal societies, the head of the family is the senior man who exercises control over the property and lives of women and juniors. The perpetual discrimination against women in such societies stems mainly from the fact that women are always regarded as persons who, after payment of *lobola,* would eventually leave their original family on marriage to join the family of their husbands. Once a woman was with the husband's family, she was part of that family and would no longer be expected to look after her original family. She could therefore not be appointed as heir to her father's estate because she would be likely to use the estate for the benefit of her husband's family instead of the members of her original family.

Held, further, that while the court fully accepts that there is a need to advance gender equality

in all spheres of society great care must be taken when customary law is under consideration. Firstly, it must be recognised that customary law has long directed the way African people conduct their lives, especially the majority of Africans who live in rural areas. Customary law will not readily be abandoned, particularly those such as senior males who stand to lose their positions of privilege. Secondly, the application of customary law generally is sanctioned by the Constitution and some would elevate this to a right that has been conferred by the Constitution. Thirdly, the application of customary law, especially the law relating to inheritance and succession, is in a way voluntary. Africans have a choice as to whether to marry according to African law and custom - in which case customary law will apply - or under the Marriage Act [*Chapter 5:11*] - in which case general law will apply. It is therefore prudent to adopt a pragmatic approach and bring about change gradually as this is more likely to win long term acceptance than the approach of sudden and revolutionary change that the courts had engaged in previously. Further, the courts do not have the capacity to make new law in a complex area of law such as inheritance and succession. Matters of reform should be left to the legislature. The role of the court is simply to uphold the actual and true intention and purport of African customary law. The fact that the legislature is best suited to reform the law is illustrated by the process that led to the amendment of s 68 of the Administration of Estates Act in 1997, which provision applies to cases where persons die intestate on or after 1 November 1997. The legislature had undertaken this reform to the law relating to succession under customary law after extensive consultation with interested groups. This resulted in new and detailed provisions

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which the courts could obviously not have introduced during judicial proceedings. Because of the wide consultation process the new provisions seem to have gained acceptance from most people.

Cases Considered

Cases cited:

Antonio v *Antonio* 1991 (2) ZLR 42 (S)

Bull v *Taylor* 1965 (4) SA 29 (A)

Chihowa v *Mangwende* 1987 (1) ZLR 228 (S)

Jenah v *Nyemba* 1986 (1) ZLR 138 (S)

Katekwe v *Muchabaiwa* 1984 (2) ZLR 112 (S)

Masuku v *Zikhali* S-60-95

Matambo v *Matambo* 1969 (2) RLR 154

Mhango v *France* 1940 SRN 100

Moyo v *Moyo* 1990 (2) ZLR 81 (S)

Mudzinganyama v *Ndambakuwa* S-50-93

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

Murisa NO v *Murisa* 1992 (1) ZLR 167 (S)

Mwazozo v *Mwazozo* S-121-94

S v *Musikavanhu* S-208-98

Vareta v *Vareta* S-126-90

Statutes Considered

Legislation considered:

Constitution of Zimbabwe 1980, s 23

General Law Amendment Act [*Chapter 8:07*], s 15

Case Information

Mrs *R Makarau*, for the appellant

M Mtombeni, for the respondent

W Ncube, as *amicus curiae*

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Judgment

Muchechetere JA: This is an appeal against the decision of the magistrate, Harare, the effect of which was to appoint the respondent heir to the estate of the late Shonhiwa Lennon Magaya ("the deceased").

The facts in the matter are that the deceased died intestate. He had two wives. The first wife was the mother of the appellant (born in 1941) and the second wife is the mother of the respondent (born in 1946). The first wife had only one child, the appellant, and it appears that the second wife had three children, the respondent and two other sons, namely Frank Shonhiwa Magaya (born in 1942) and Amidio Shonhiwa Magaya (born in 1950). The property in the deceased's estate included house number 767 Old Mabvuku in Harare ("the said house") and some cattle at the communal home.

It is apparent from the above that the appellant is the eldest child of the deceased and is female. The respondent is not the eldest male child of the deceased. He, however, claimed the heirship because the eldest male child, Frank Shonhiwa Magaya, declined to claim the heirship on the ground that he was not able to look after the family.

Soon after the death of the deceased in 1990 the appellant, with the support of her mother and three other relations, went to claim the heirship of the estate in the community court and it was granted to her. The respondent later discovered this and applied to the community court for the cancellation of the appointment on the ground that he and the other persons interested in the deceased's estate were not summoned to the hearing at which the appellant was appointed heir - failure to comply with the provisions of s 68(2) of the Administration of Estates Act [*Chapter 6:01*] ("the Act").

The appointment was duly cancelled and all interested parties were summoned to and did attend a new hearing on the matter on 14 October 1992. After hearing from the claimants, that is, the appellant and the respondent, and the other interested parties, the presiding magistrate awarded the heirship to the respondent. The magistrate stated the following in arriving at his decision:

"... The first claimant (the respondent) is not the first born son but the first born, Frank, refused to be appointed heir because he is not able to look after the family, this is the view of all members of the family. There are only two contestants, that is, (the respondent) and Venia. *Venia is a lady (and) therefore cannot be appointed to (her) father's estate when there is a man*" (the emphasis is mine).

The provisions of s 68(1) of the Act read as follows:

"*If any African who has contracted a marriage according to African law or custom* or who, being unmarried, is the offspring of parents married according to African law or custom, *dies intestate* his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged" (the emphasis is mine).

MUCHECHETERE JA

It was not in dispute that the deceased was an African who contracted his two marriages

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according to African law and custom. And it was taken for granted that the deceased belonged to the Shona tribal grouping in Zimbabwe. It was also conceded that the Shona and Ndebele tribal groupings in Zimbabwe have broadly similar customs and usages on succession and inheritance. These, I gather, are similar to many tribal groupings in South Africa.

I therefore agree with what Bennett said at p 126 of his book entitled *Human Rights and African Customary Law under the South African Constitution*:

"In customary law, succession is intestate, universal and onerous. Upon the death of a family head his oldest son (if the deceased had more than one wife, it would normally be the oldest son of his first wife) succeeds to the status of the deceased. *Emphasis on the term 'status' implies that an heir inherits not only the deceased's property but also his responsibilities, in particular his duty to support surviving family dependants*" (the emphasis is mine).

See also Goldin and Gelfand's *African Law and Custom in Rhodesia* at p 284 where the authors say:

"The principles and practice of rules and customs concerning succession are subject to variation and differences as is all customary law. *There are, however, two broadly or generally similar systems, that which prevails among the Shona and secondly among the Ndebele.* The most significant difference is that under Shona law a deceased's eldest son is his heir but under Matabele law the heir is the eldest surviving son of the deceased's principal or 'great house'. Each wife establishes a 'house' or independent family and economic unit. Thus if a man has three wives there will be three 'houses' in existence. *An Ndebele heir **(indhlalifa)** inherits the family property **(ilifa)** as absolute owner exclusive of the assets of the junior houses.* The senior house is known as *'indhlu nkulu'*. The seniority of the houses is not necessarily automatic according to the chronological order of establishment ...

The Shona have no system of ranking of wives for the purpose of inheritance or succession. *A Shona heir does not acquire the estate in his individual capacity but as the representative of the deceased. He, therefore, also inherits his father's obligations such as the maintenance of his father's dependants (*Child *Tribal Law in Rhodesia* 55)" (the emphasis is mine).

What is common and clear from the above is that under the customary law of succession of the above tribes males are preferred to females as heirs. See also *Mhango* v *France* 1940 SRN 100; *Matambo* v *Matambo* 1969 (2) RLR 154; *Chihowa* v *Mangwende* 1987 (1) ZLR 228 (S) at pp 230C-231E; *Vareta* v *Vareta* S-126-90 at p 8 of the cyclostyled judgment; *Moyo* v *Moyo* 1990 (2) ZLR 81 (S) at 82C-D; *Antonio* v *Antonio* 1991 (2) ZLR 42 (S) at 44E; *Mwazozo* v *Mwazozo* S-121-94 at p 2 of the cyclostyled judgment; *Mudzinganyama* v *Ndambakuwa* S-50-93; and *Masuku* v *Zikhali* S-60-95 at p 5 of the cyclostyled judgment.

MUCHECHETERE JA

The said rule which prefers males to females as heirs to the deceaseds' estates constitutes a *prima facie* discrimination against females and could therefore be a *prima facie* breach of the Constitution of Zimbabwe ("the Constitution"). See subss (1) and (2) of s 23 of the Constitution, which at the relevent time read:

> "(1) Subject to the provisions of this section:
>
> *(a)* no law shall make any provision that is discriminatory either of itself or in its effect; 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.

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(2) For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour or creed are prejudiced -

(a) by being subjected to a condition, restriction or disability to which other persons of another such description are not made subject; or

(b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description;

and the imposition of that condition, restriction, or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour or creed of the persons concerned."*(17)

However, it seems to me that these provisions do not forbid discrimination based on sex. But even if they did on account of Zimbabwe's adherence to gender equality enshrined in international human rights instruments, there are exceptions to the provisions. The relevant exceptions are contained in subs (3)(a) and (3)(b) of s 23 of the Constitution, which reads as follows:

" (3) Nothing contained in any law shall be held to be in contravention of subsection (1)(a) to the extent that the law in question relates to any of the following matters:

(a) adoption, marriage, divorce, burial, *devolution of property on death or other matters of personal law*;

(b) *the application of African customary law in any case involving Africans or an African* and one or more persons who are not Africans where such persons have consented to the application of African customary law in that case; ..." (the emphasis is mine).

In my understanding of the above provisions, matters involving succession are exempted from the discrimination provisions, firstly, because they relate to "devolution of property on death or other matters of personal law", and, secondly, in this case because they relate to customary law being applied between Africans. The application of customary law generally is sanctioned under s 89 of the Constitution. That subss (3)(a) and (3)(b) of s 23 of the Constitution exempt customary law from the application of the provisions forbidding discrimination is accepted by Bennett *op cit* at p 22 where, in n 87, he says:

MUCHECHETERE JA

"This idea comes from Zimbabwe where, although s 23(1) of the Constitution forbids discrimination, s 23(3)(b) shields customary law from that provision."

I would therefore dismiss the appeal on the grounds that this matter is, firstly, concerned with devolution of property on death and, secondly, that it relates to customary law being applied to an estate of an African who married according to African law and custom. In both cases, the discriminatory aspects of the law applicable are saved by the exemptions in the Constitution.

There is, however, need to discuss the effect of the Legal Age of Majority Act 1982 (No. 15 of 1982) (now s 15 of the General Law Amendment Act [*Chapter 8:07*]) ("the Majority Act") on customary law. Subsections (1) and (3) of s15 of that Act read:

"(1) On and after 10 December 1982, a person shall attain the legal age of majority on attaining eighteen years

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of age ...

(3) Subsections (1) and (2) shall apply for the purpose of any law, including customary law and, in the absence of a definition or any indication of a contrary intention for the construction of 'full age', 'major', 'majority', 'minor, 'minority' and similar expressions in -

(a) any enactment, whether passed or made before, on or after 10 December 1982; and

(b) any deed, will or other instrument of whatever nature made on or after that date."

The first opportunity to interpret the above provisions was in the case of *Katekwe* v *Muchabaiwa* 1984 (2) ZLR 112 (S). This was a seduction damages case brought by the guardian of an unmarried female where sexual intercourse had taken place between the female and the seducer with consent. The purpose of an action of this nature, under customary law, is to compensate the guardian for the loss in the female's potential *lobola* price.

I should say at the outset that, in my view, the court in that case laboured under what I consider was the wrong view or conclusion that seduction damages under customary law belong to the seduced female. They belong to the guardian. He is the person who charges and receives *lobola*. The action belongs to him in all circumstances and the seduced female does not have the right of action in the matter. When a guardian sued under customary law he did not sue as a representative of the seduced female. He sued in his own capacity because he was the person who had suffered loss - diminution of *lobola*. See Ncube's "The decision in *Katekwe* v *Muchabaiwa*: A Critique", published in (1983-4) *Zimbabwe Law Review* Vols 1 and 2, p 217 at p 220. Although the learned author in the end agreed with the court's decision, he had initially stated the following:

"Under traditional customary law, the delict of seduction is defined as sexual intercourse with a woman, with her consent, but without her guardian's consent. *The delict is committed not against the woman, but against her guardian, who, as the wronged party,*

is entitled to claim damages. The woman is merely an object through whom the delict is committed. Customary law does not recognise a woman's right to claim damages for her seduction. A guardian cannot succeed if he has consented (to) or encouraged the seduction, as such action amounts to collusion. Damages are awarded to him for the diminution in the *lobola* value of the girl" (the emphasis is mine).

In the circumstances, the following sentiments expressed by Dumbutshena CJ at pp 125H-126A only apply, in my view, under common law:

"The action for seduction embraces in our general law two claims; one is for satisfaction for the defloration of the girl and the other for lessening her chances of a successful marriage. The girl seduced is entitled to be compensated for the loss of her virginity, and for her diminished chances of making a suitable marriage. See *Bull* v *Taylor* 1965 (4) SA 29 (A) at 39."

Indeed the case cited in support of the above sentiments (*Bull* v *Taylor supra*) was concerned with seduction under common law. In the circumstances, the new "age, status and capacity" - *Jenah* v *Nyemba* 1986 (1) ZLR 138 (S) - of a woman would not bestow on her rights she never possessed. On that basis, I would also say the case was wrongly decided.

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The court in the *Katekwe* case *supra* also assumed without, in my view, a full consideration of the matter, that the "disability" or "discrimination" suffered by women under customary law was due to "their perpetual minority". From that position, it went on to hold that, on the passing of the Majority Act, once they gained majority all the "disabilities and discrimination" fell away. In this connection, Dumbutshena CJ said at pp 124-125:

"It seems to me that an African woman with majority status can if she so desires, allow her father to ask for *roora/lobola* from the man who wants to marry her. She and she alone can make that choice. If she does agree to her father asking for *roora* from his future son-in-law before marriage, the father can go through the contractual procedures required before an African marriage is effected. The position, as from 10 December 1982, when the Legal Age of Majority Act came into effect, is that an African woman of majority status can contract a marriage, whether that marriage be in terms of the African Marriages Act [*Chapter 238*] or the Marriage Act [*Chapter 37*] without the consent of her guardian."

And at p 128:

"In my view, the above was the intention of the legislature and the object the legislature sought to achieve was the liberation of African women from the legal disadvantages of perpetual minority ..."

The above case was followed in *Jenah* v *Nyemba supra*; and *Chihowa*'s case *supra*, a case which was, as is this, concerned with succession problems. And it received to some extent approval in *Murisa NO* v *Murisa* 1992 (1) ZLR 167 (S).

The question to consider is whether the "disabilities" and "discrimination" suffered by women under customary law were based on "their perpetual minority". In *Mwazozo*'s case *supra*, I came to the conclusion that they were

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not based on their perpetual minority but on the nature of African society, especially the patrilineal, matrilineal or bilateral nature of some of them. I reasoned that the concepts of "minority" and "majority" status were not known to African customary law but that they were common law concepts which, in my view, should only be used in customary law situations with great care. And I attempted to explain why allowing female children to inherit in a broadly patrilineal society, such as in the present case, would disrupt the African customary laws of that society. Although my explanations may have been too general, I still consider them broadly correct. In an article by Ncube entitled "Voodoo Law Brewed in an African Pot: Judicial Reconstruction of the Customary Law of Inheritance", published in (1995) 12 *Zimbabwe Law Review* at 106-110, it was stated that the sentiments I expressed on the matter were not persuasive because they were not based on "a single legal sociological or anthropological authority". This view was repeated in the submissions made by Mr *Ncube*. Although no "authorities" were cited, the sentiments were based on the court's knowledge, experience, understanding and appreciation of African customary law (the court's composition included two Africans). I observe that the submissions which were made by all counsel in this case were, apart from being in most cases unnecessarily and unjustifiably partisan, intemperate and, as Mr *Ncube* put it, "trenchant" articles written by academics criticising various cases of this court, also largely not backed by "authorities".

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I agree with what Bennett *op cit* says at p 5 about the nature of African society. The learned author states that at the heart of the African socio-political order lay the family, a unit that was extended both vertically and horizontally to encompass a wide range of people who could be called "kin". The family was therefore the focus of social concern. In the circumstances, individual interests were submerged in the common weal and the system stressed individual duties instead of his/her rights. And the legal relationships of most consequence in customary law were those of a family's dealings with other families, not those flowing from one person's relations with another.

At the head of the family there was a patriarch, or a senior man, who exercised control over the property and lives of women and juniors. It is from this that the status of women is derived. The woman's status is therefore basically the same as that of any junior male in the family. Mr *Ncube* conceded that males in a family are as subordinate to the patriarch as females until they are "liberated". The liberation generally comes with the death of the patriarch and the male "taking over" or with the male moving away from the family and founding his own family. An example of the male's status was demonstrated in a recent criminal case this court dealt with - *S* v *Musikavanhu* S-208-98. In that case, the appellant, who was married and had a family of

his own, was accused of having indecently assaulted one of his nieces. The father of the complainant, a relation, went and reported the matter to the father (patriarch) of the appellant so that the appellant could be disciplined. The father of the appellant and other relatives had to hold a meeting (a *dare*) where the appellant was forced to answer the allegations and was thereafter reprimanded for his actions. Clearly, the appellant, even at his stage in life, was still not liberated. He was, to use the inappropriate term, still "a minor".

In my understanding of African society, especially that of a patrilineal nature, the "perpetual discrimination" against women stems mainly from the fact that women were always regarded as persons who would eventually leave their original family on marriage, after the payment of *roora/lobola*, to join the family of their husbands. It was reasoned that in their new situation - a member of the husband's family - they could not be heads of their original families, as they were more likely to subordinate the interests of the original family to those of their new family. It was therefore reasoned that in their new situation they would not be able to look after the original family. It was also reasoned that the appointment of female heirs would be tantamount to diverting the property of the original family to that of her new family. This would most likely occur on the death of a female heir. Then her property would be inherited by her children who would be members of her new family. This, in my view, would be a distortion of the principles underlying customary law of succession and inheritance.

Mr *Ncube*, in his submissions, sought to divide succession into two, that is, succession to the name and status of the deceased male within the family and succession to his property. He went on to submit that whilst one person succeeded to the name and status of the deceased, several people, the deceased's children both males and females, would inherit the property.

I do not understand how this submission is supposed to support the main argument he

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advances in this case. This is because if he now accepts the position that males are properly preferred to inherit in the limited sphere of the name and status of deceased males, it would still bring us back to the question of females being discriminated against in that limited sphere.

As to the question of whether or not the heir also inherited the property of the deceased, the accepted position is, on all the authorities (see the cases already cited above), that the heir inherits the property and responsibilities of the deceased. The term "status", when used in inheritance and succession, includes, as I have already found, property of the deceased. What, I consider, is being confused here is that after the death of the deceased some of his property is distributed to or divided amongst various relatives and acquaintances. This may be done because of the wishes of the deceased,

expressed before his death, or because of the heir's desire to discharge his responsibilities of looking after the family. And, in my understanding, this is always done with the approval and consent of the heir. In the circumstances, this is not inheriting but distribution of property.

On this issue, I should say that, whilst I agree with most of the sentiments in the passage cited by Mr *Ncube* in support of his submission, I disagree with the last sentence thereof. The passage reads:

"The combination of misconceived versions of custom, judicial ossification and legislative prescriptions have their conjunction in the interpretation of the rôle of heir. The rôle of the heir was primarily one of assuming the status of the deceased while the property of the deceased was distributed more widely. It would appear that at customary law, prior to its 'construction' by the courts, the rôle of the 'heir' was to guide the family, care for the needs of minor children in conjunction with the widow as well as seeing to her needs. *Instead, the courts translated it into an all powerful patriarchy who inherited all the property of the deceased and could do with it as he chose ...*" (the emphasis is mine).

See Dengu-Zvobgo *et al*, *Inheritance in Zimbabwe; Law, Customs and Practices* WLSA, Harare, 1994 at 260. The first sentences of the above passage, in my view, correctly describe the rôle of the heir and also correctly state, as I have stated above, that the property gets "distributed" in pursuance of the heir's responsibility.

What I disagree with is that the courts have departed from the above view of the rôle of an heir. Earlier on in this judgment I indicated that the heir assumes the responsibilities of the deceased, which responsibilities include those indicated in the above article. In *Chihowa*'s case *supra,* Dumbutshena CJ said at pp 231H-232D:

"In *Masango* v *Masango* S-66-86 (unreported), this court considered the responsibility falling on the eldest surviving son of the deceased, the intestate heir of his father's estate, to maintain and support the customary law junior wife of his deceased father and her three children. The heir had refused to support his late father's third wife. Beck JA, as he then was, said at 3:

'In the absence of making it possible for the appellant to find such alternative accommodation for herself and the children as would be reasonable in all the circumstances, I do not consider that the respondent is entitled to insist upon their eviction from what is admittedly now his house. To order their eviction without suitable alternative provision having been made for their shelter would be tantamount to sanctioning an avoidance by the respondent of his customary law obligation to care for his father's wife and children.'

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See also *Matambo* v *Matambo* 1969 (2) RLR 154 (A) at 155F; 1969 (3) SA 717 (R A) at 717G.

In *Masango*'s case *supra*, the eldest son was heir to his father's estate and in the instant case it is the eldest daughter who was appointed intestate heiress. What the two share in common is the responsibility to administer their respective estates for the benefit of their father's dependants according to African custom and usage ..."
Clearly, the courts have always maintained the proper position on this issue

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and "an all powerful patriarchy who inherited all the property of the deceased and could do with it as he chose" would never receive the sanction of the courts.

From the above, it is clear that, in my view, the discrimination against women was not because of their "minority" but mainly because of the consideration in African society which, amongst other factors, was to the effect that women were not able to look after their original family because of their commitment to the new family. In the circumstances, I consider that *Katekwe*'s case *supra*, *Chihowa*'s case *supra*, and those cases which followed them were decided wrongly in that respect. They defined the provisions of the Majority Act too widely.

I am also of the view that the finding in *Katekwe*'s case *supra*, *Chihowa*'s case *supra* and other cases which followed them is tantamount to bestowing on women rights which they never had under customary law. A woman, as is gathered from the above, had no rights under customary law to heirship, demanding payment of *lobola* (it never depended on her acceptance), or to contract a marriage under the Customary Marriages Act [*Chapter 5:07*] without the consent of her guardian and others. In this connection, see Bennett *Human Rights supra* at 93-94, where the learned author discussed an Age of Majority Act passed in Natal and Kwazulu which is similar to our Majority Act. He said:

"If the Age of Majority Act is applied to African women, our courts would be advised to avoid the course taken by the Zimbabwe Supreme Court. With the specific aim of empowering women, conditions there for recognition of customary law were amended to allow the Legal Age of Majority Act to apply to persons subject to customary law. When this reform came to be implemented in *Katekwe* v *Muchabaiwa supra*, however, the Supreme Court went much further than simply allowing major women *locus standi*. Dumbutshena CJ found that when a woman attained the age of eighteen years she was completely emancipated; in consequence she no longer required a guardian to assist her in pursuing legal rights or incurring obligations. As a result the Chief Justice held that a father lost his right to sue for damages for the seduction of his major daughter since the right had passed to the woman.

Dumbutshena CJ went even further to say (although this was an *obiter dictum*) that, in view of the Legal Age of Majority Act, a father no longer had an independent legal entitlement to demand bridewealth (*lobola/roora*) when his daughter married. If women gained full contractual powers when they turned eighteen, they could contract marriages without the consent of their guardians. It followed that a father's consent was irrelevant to the marriage and that he could not insist on bridewealth, the seal of a valid union (under customary law).

Arguably, this case was wrongly decided. *Majority status gives women powers (or competencies) that they formerly lacked. It does not necessarily give them additional rights. Women subject to customary law never had the right to sue for damages for their own seduction*

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(the delict was conceived to be in the interest of their guardians) nor did they have a right to claim bridewealth for their own marriages. The fact that a woman's

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capacity is governed by common law does not mean that her substantive rights should be determined by the same system" (the emphasis is mine).

As I have already indicated, under customary law women did not have the right to heirship and majority status would not give them that additional right.

In the result, I consider that the above consideration also shows that the said cases were wrongly decided.

On the intention of the legislature in passing the Majority Act, my view is that although it wanted to emancipate women by giving them *locus standi* and "competencies" in all matters generally, especially under common law, it was never contemplated that the courts would interpret the Majority Act so widely that it would give women additional rights which interfered with and distorted some aspects of customary law. As already indicated above, matter such as "marriage, divorce, burial, devolution of property on death or other matters of personal law", and customary law in general, were specifically exempted from the provisions of the Constitution forbidding discrimination - s 23(3) (a) and (b) of the Constitution. It was therefore not expected that any interpretation of the Majority Act would interfere with these. That the legislature considered the court's interpretation of the Majority Act as being too wide and out of its contemplation was shown by the widespread calls in and out of Parliament for the Majority Act to be amended so as to reflect its true wishes. In this connection, see Ncube's "Critique on *Katekwe* v *Muchabaiwa*" *supra* at pp 217-219. In that article, the learned author says at p 217:

"... The Prime Minister (now the President of Zimbabwe) replied that 'if there has been a flaw in drafting the regulation (the Majority Act) that flaw will be amended'. He added, apparently in a moment of jest, that if his sister were to get married, he would demand *lobola* and if the intended husband pointed to the *Katekwe* judgment, he would say to him: 'OK that is the judgment. Do you want to marry my sister or not?' (*Hansard*, 12 September 1984)."

The various Ministers involved in the drafting of the legislation promised to look at the Majority Act and make changes if necessary. However, the important words were that changes would be made "if there had been a flaw in drafting". My view is that there was no flaw in the drafting and that it was the court which wrongly interpreted the Majority Act too widely. There was, therefore, in my view, no need to amend the Majority Act.

Mr *Ncube* and Mrs *Makarau* both urged this court to, in any event, exercise its discretional law-making rôle to ensure that women are not excluded from being appointed heiresses at customary law. This, they submitted, would be achieved by supporting in full the decisions in the *Katekwe* and *Chihowa* cases *supra*. They argued that this was necessary because the system of appointing single male heirs had caused untold hardship to the deceased's

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widows and dependants in that the heirs have too often not lived up to their responsibilities and used all the deceased's property for their own personal benefit. They also argued that the change would be proper because culture and custom are dynamic and change with changes in society and in particular the fact that urbanisation has made African society less and less patriarchal. It was further argued that the change would be in keeping with the principle of advancing gender equality enshrined in the international human rights instruments to which Zimbabwe is a party.

Whilst I am in total agreement with the submission that there is a need to advance gender equality in all spheres of society, I am of the view that great care must be taken when African customary law is under consideration. In the first instance, it must be recognised that customary law has long directed the way African people conducted their lives and the majority of Africans in Zimbabwe still live in rural areas and still conduct their lives in terms of customary law. In the circumstances, it will not readily be abandoned, especially by those such as senior males who stand to lose their positions of privilege. On this aspect, see Ncube's "Critique on *Katekwe* v *Muchabaiwa*" at 217-219, and Ncube's "Customary Law Courts" published in (1989-90) 7-8 *Zimbabwe Law Review* at p 15, on the hostile reaction received by the court's decision on the Majority Act.

Secondly, the application of customary law generally is sanctioned by the Constitution and some would elevate this to a right having been conferred by the Constitution.

Thirdly, the application of customary law, especially in inheritance and succession, is in a way voluntary, that is, to Africans married under customary law or those who choose to be bound by it. It could therefore be argued that there should be no or little interference with a person's choice. This aspect of choice was stated in *Mujawo* v *Chogugudza* 1992 (2) ZLR 321 (S), where it was held that when an African contracts a marriage according to African law and custom s 69(1) (now s 68(1)) of the Act lays down that customary law will apply to the administration of the estate of the African. And that, on the other hand, the general law will apply to marriages under the Marriages Act [*Chapter 5:11*].

In view of the above, I consider it prudent to pursue a pragmatic and gradual change which would win long term acceptance, rather than legal revolution initiated by the courts.

Further, I do not consider that the court has the capacity to make new law in a complex matter such as inheritance and succession. In my view, all the courts can do is to uphold the actual and true intention and purport of African customary law of succession against abuse, as was done in the *Masango* case *supra*. See also Bennett *op cit* at p 6, where the learned author states:

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"The obligation to care for family members, which lies at the heart of the African social system, is a vital and fundamental value, which Africa's Charter on Human and People's Rights is careful to stress. Paragraph 4 of the Preamble to the Charter urges parties to pay heed to 'the virtues of (the African) historical tradition and the values of African civilisation', and Chapter 2 provides an inventory of the duties that individuals owe their families and society. Article 29(1), in particular, states that each person is obliged to preserve the harmonious development of the family

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and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need."

Matters of reform should be left to the legislature. In this connection, see Bennett *op cit* at pp 94-95 where the learned author commented on the South African scene as follows:

"Comparison of a woman's lack of rights in matters of guardianship and succession gives a clearer indication of the scope of judicial review under the Constitution (there is no such review under the Constitution of Zimbabwe). The customary rules governing parental rights to children are flexible and the courts have already decided that in custody orders the interests of the children must come first. The indeterminate nature of customary law, and the fact that reform has already begun, are reasons to continue the process by applying a norm of non-discrimination to mothers who claim rights to their children.

To abolish the principle of agnatic succession is a different matter. Customary rules of succession are firmly established and no attempts have yet been made to change them (see below for the Zimbabwe situation). *Even more to the point is the court's capacity to make new law. In the case of guardianship, a court has only to declare that a mother has the same right as the father. In the case of succession a court could not simply rule customary norms void; it would have to stipulate how much widows could inherit and in what circumstances. Details of this nature cannot be determined in judicial proceedings. The proper medium for reform would be legislation, which permits full investigation of the social context and consultation with interested groups*" (the emphasis is mine).

And indeed our legislature, after what I understand was wide consultation with interested groups, has undertaken the reform of succession in estates of persons subject to customary law. In s 3 of the Administration of Estates Amendment Act 1997 ("the amendment"), it repealed the said s 68 of the Act. The amendment went into detailed provisions about all matters of concern in succession. Those details could never have been undertaken during judicial proceedings. The impression that these provisions are acceptable to most of the persons concerned is given by the fact that there was wide consultation before the promulgation of the amendment and there has so far been no outcry about the provisions.

In the circumstances, if the deceased in this case had died on or after 1 November 1997, his estate would have been administered in terms of the amended s 68 of the Act. So as far as succession under customary law is concerned the law has now been reformed.

Mrs *Makarau* made submissions to the court about what she considered were the peculiar circumstances of this case. These were to the effect that the respondent, as the child of the deceased's second wife, was unlikely to look

after the deceased's first wife and her child (the appellant). It was also submitted that because an heir under customary law inherited "any immovable property or any rights attaching thereto forming part of the estate of such deceased person" in his individual capacity, the respondent would evict the deceased's first wife and the appellant from the said house to do with it as he pleased. This, she submitted, would work a hardship on both the first wife and the appellant because the said house was acquired by the deceased and the first wife without the

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participation of the second wife and because when the deceased died he was living in the said house with the first wife and both were being looked after by the appellant. If this was the position - some of the matters were partly challenged by the respondent and his witnesses - it would be the same as that which obtained in the *Matambo* case *supra*. In my view, it would be resolved in the same way as the *Matambo* case *supra* if the matter were to be brought before the courts.

I should state that the court would like to express its appreciation for the thorough, well-researched and helpful submissions made by the three counsel in this matter. As the issues raised in this case were of importance not only to the parties but also to the clarification of the law on succession it would be an injustice to saddle either party with costs. I consider that there should therefore be no order as to costs.

In the result, the appeal is dismissed. There will be no order as to costs .

GUBBAY CJ: I agree.

EBRAHIM JA: I agree.

SANDURA JA: I agree.

McNally JA: The central point made by Muchechetere JA, which compels me to accept the weight of his reasoning, is that the Legal Age of Majority Act, now [*Chapter 8:07*], removed disabilities but was not intended (except for the reduction in age from twenty-one to eighteen) to create positive new rights. Thus a woman of eighteen years of age in the communal area who wished to marry without her father's consent might do so, under the Marriage Act. But she could not do so under the provisions of customary law. She could not, as it were, accept and reject customary law at the same time.

Similarly, where by statute it was provided that immovable property, in a deceased estate to which customary law applied, passed to the heir in his individual capacity and not as a representative of his family (s 7 of the African Wills Act [*Chapter 240*], later s 6A of the Customary Law and Primary Courts Act No. 6 of 1981, later s 7 of the Customary law (Application) Act

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[*Chapter 8:05*], finally repealed with effect from 1 November 1997 by Act 6 of 97), the courts did not treat that enactment as a repeal of the heir's duty to maintain the dependants of the deceased. This was made very clear by Beck JA in the passage cited by my brother Muchechetere, in his main judgment above, from *Masango* v *Masango* S-66-86 (unreported). The statutory amendment had to co-exist with customary law. It did not replace it. So the majority status of women had to co-exist with customary law. It did not replace it. If no suitable male heir were available, a woman could lawfully be appointed heir. But the customary law preference for a male heir was not eliminated.

Happily, these conflicts have now been resolved by the new Part IIIA of the Administration of

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Estates Act, introduced by Act 6 of 97. If there are problems in future, the Act will provide a fresh starting point for their solution.

I respectfully agree with the main judgment.

Makarau & Gowora, appellant's legal practitioners

Pro deo, for the respondent

MUKONO *v* GWENZI 1999 (1) ZLR 117 (SC)

Citation	1999 (1) ZLR 117 (SC)
Case No	Judgment No. S-212-98
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA, Muchechetere JA
Heard	November 16, 1998
Judgment	February 16, 1999
Annotations	None

Civil appeal

Flynote

Delict - adultery - claim under customary law - woman committing adultery with man - whether woman married to the man in customary law marriage can sue adulterous woman

Human rights - discrimination - on grounds of sex - whether intention of legislature in passing Legal Age of Majority Act now included in the General Law Amendment Act [Chapter 8:07] was to eliminate discrimination against all women over the age of eighteen

Headnote

A woman who was over the age of eighteen married a man in terms of the Customary Marriages Act [*Chapter 5:07*]. The wife had successfully claimed damages against a woman who had committed adultery with the her husband. On appeal:

Held, that a customary marriage under the Customary Marriages Act is potentially polygamous, whereas as a marriage under the Marriage Act [*Chapter 5:11*] is monogamous. The two types of marriage are different and confer different rights and obligations upon the parties to the marriage. The parties can only enjoy the rights under the type of marriage they have chosen. When a woman opts to enter into a customary law marriage, she must be taken to have been

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fully aware of the rights available to her under that type of marriage.

Held, further, that under customary law a married woman is not entitled to claim damages against a woman who has committed adultery with her husband. Under customary law a married woman seldom has a right of action in her own name. The husband of a married woman is her guardian and he would normally bring the action but obviously not in a case where he has committed adultery with another woman. Only the adulterous woman's father or husband can sue the erring husband.

Held, further, that although the Legal Age of Majority Act (now part of the General Law Amendment Act [*Chapter 8:07*]) had given women over the age of eighteen legal capacity to sue in their own names, it did not give them new causes of action which did not exist previously. If the legislature had intended to do away completely with the differences between customary law marriages and general law marriages and to eliminate all disabilities and discrimination arising from customary law, it would have provided for this in the Legal Age of Majority Act.

Held, therefore, that despite the passing of Legal Age of Majority Act, a woman over eighteen who is married in a customary law marriage cannot sue for damages the woman who has committed adultery with her husband.

Cases Considered

Cases cited:

Chihowa v *Mangwende* 1987 (1) ZLR 228 (S)

Katekwe v *Mubaiwa* 1984 (2) ZLR 112 (S)

Magaya v *Magaya* 1999 (1) ZLR 100 (S)

Takadini v *Maimba* 1996 (2) ZLR 737 (S)

Case Information

H Zhou, for the appellant

T A Toto, for the respondent

Judgment

Muchechetere JA: This is an appeal against the decision of the Magistrate's Court, Masvingo, on 10 April 1997 in which the appellant was found to have committed adultery with the respondent's husband. The court the respondent damages in connection with the adultery in the sum of $3 000 together with interest and costs of suit.

The facts in the matter are that the respondent was married to one Felix Yosef Gwenzi ("Gwenzi") in terms of the Customary Marriages Act [*Chapter 5:07*]. Although the marriage was, on 27 September 1992, blessed in a Christian Church it was never registered in terms of the Marriage Act [*Chapter 5:11*]. In the circumstances, the marriage was a potentially polygamous

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union.

On 21 August 1995, the respondent issued summons in the magistrate's court against the appellant alleging that the latter had committed adultery with Gwenzi. In her first and second pleas, the appellant denied that she had anything to do with Gwenzi. It was only in her third and final plea that she raised that issue that she was married under customary law to Gwenzi and that in the circumstances her association with Gwenzi was not adultery.

The learned magistrate rejected the appellant's evidence on her allegation that she was Gwenzi's second wife. I agree with the finding. If the appellant had indeed been married by Gwenzi she would have said as much in her first and second pleas - she was at the time represented by a legal practitioner. If, as the appellant alleges, the respondent must have known and accepted that the appellant was Gwenzi's second wife why would the respondent apply for a binding order case against the appellant seeking that the appellant stops from communicating with Gwenzi. The appellant's reaction and defence to that action was to deny the allegations on the basis that the respondent (then plaintiff) only "thinks that I am in love with *her husband*" and not on the basis that she was in fact also married to Gwenzi. And why would the respondent have harassed the appellant to the extent of tearing her dress and sue for adultery? No proper explanation was given to these questions.

The appellant's case also suffers from the fact that she did not call either a go-between or her guardian to support her allegation of a customary marriage with Gwenzi. These would testify on the negotiations that took

place when the marriage was being contracted and the roora/lobola charged.

In the result, I consider that the appellant's allegation was an afterthought. It must have come into her consideration when it became clear to her that the marriage between the respondent and Gwenzi was not in terms of the Marriage Act [*Chapter 5:11*] but in terms of the Customary Marriages Act [*Chapter 5:07*]. She therefore failed to prove that she was married to Gwenzi under customary law.

After the above finding, the next question to consider is whether a woman married in terms of the Customary Marriages Act [*Chapter 5:07*] is entitled under customary law to sue to adultery. I agree with Mr *Zhou*'s submissions for the appellant that the law is to the effect that under customary law a wife whose husband commits "adultery" has no cause of action for damages against the woman who commits adultery with her husband. See Goldin & Gelfand's *African Law Custom in Rhodesia* at p 216 where the learned authors say:

"A wife whose husband commits adultery has no right of action for damages against the woman with whom the adultery is committed. This accords with the customary principle that a woman seldom has a right of action in her own name and as a married woman her husband is her guardian, who would obviously not be able to claim."

See also *Takadini* v *Maimba* 1996 (2) ZLR 737 (S) at p 739F-G where McNally JA said:

"In customary law, there is no action by a wife whereby she can claim damages from the woman who commits

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adultery with her husband. It would be the adulterous woman's father or husband who would sue the erring husband. So the action (of suing for adultery) is available only to wives married under the Marriage Act [*Chapter 5:11*]."

Mr *Toto* for the respondent submitted that the above position has changed since the promulgation of the Legal Age of Majority Act 1982 (No. 15 of 1982) (now s 15 of the General Law Amendment Act [*Chapter 8:07*] ("the Majority Act"). He took the view, which was upheld in *Katekwe* v *Mubaiwa* 1984 (2) ZLR 112 (S) and *Chihowa* v *Mangwende* 1987 (2) ZLR 228 (S), that the "disabilities" or "discrimination" suffered by women under customary law, such as in this case where a woman was said not to be entitled to sue for adultery damages, were due to "their perpetual minority". And that on the passing of the Majority Act women gained majority and all the "disabilities" and "discrimination" fell away. He therefore, argued that women can now sue for adultery damages on the facts of the present case.

I, however, agree with Mr *Zhou*'s submissions which were to the effect that whilst the Majority Act gave women *locus standi* in all aspects it did not given them new causes of action. He went on to submit that the issue in this case is whether the delict of adultery is available to a married woman under

MUCHECHETERE JA

customary law and not whether a wife under customary law has legal capacity to sue or be sued in her own name. The Majority Act does not create a cause of action in the sense of providing that a wife under a customary law marriage can now sue for adultery damages. If the intention of the legislature was to completely do away with the differences between customary law marriages and general law marriages, the legislature would have provided for that in the Act. As it is, the two types of marriage are different and confer different rights and obligations upon parties to them. As is stated above, the customary law marriage is potentially polygamous, whereas the marriage under the Marriage Act is monogamous. A woman under the former cannot turn around, as the respondent intends to do now, and want to enjoy the benefits applicable to an entirely different marriage regime, otherwise there would be no difference between the two types of marriage.

I also agree that because parties choose one or the other type of marriage, they can only enjoy the rights under the type of marriage which they have chosen. The respondent in this case had a choice, if she so desired, to have her marriage solemnised and/or re-registered under the Marriage Act. When the respondent opted for the customary law marriage she must be taken to have been fully aware of the rights available to her under that type of marriage.

See the recent case of *Magaya* v *Magaya* S-210-98[*] on the whole question of the Majority Act and discrimination against women. The views expressed in that case are the same as those submitted by Mr *Zhou* above.

As this case was in a way a test case and heard during the same period as the *Magaya* case *supra*, I consider that it would be inappropriate to award costs against either party.

In the result, the appeal is allowed. There will be no order as to costs.

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GUBBAY CJ: I agree.

McNALLY JA: I agree.

Mwonzora & Associates, respondent's legal practitioners

JESSE *v* ATTORNEY-GENERAL 1999 (1) ZLR 121 (SC)

Citation	1999 (1) ZLR 121 (SC)
Case No	Judgment No. S-15-99
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA, Ebrahim JA, Muchechetere JA, Sandura JA
Heard	February 18, 1999
Judgment	February 25, 1999
Annotations	None

Constitutional application

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - referral to Supreme Court of constitutional issue - applicant on trial in inferior court - no request made to trial court to refer matter to Supreme Court - applicant not entitled to apply directly to Supreme Court

Headnote

The applicant was on trial at the regional court on various criminal charges. Before the trial had reached the stage of the prosecution case being closed, the applicant lodged an application with the Supreme Court alleging that the statutory provisions under which he was being charged offended against the presumption of innocence. He had not made any application to the trial court under s 24(2) of the Constitution.

Held, that resort to this procedure was impermissible. The applicant should have requested the trial court to refer the constitutional issue to the Supreme Court. If the request had been refused, he would only have been entitled to raise the constitutional issue in the event of conviction, as a ground of appeal.

Cases Considered

Cases cited:

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

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

Statutes Considered

Legislation considered:

Constitution of Zimbabwe 1980, s 24

Case Information

Applicant in person

P Muziri, for the respondent

Judgment

Gubbay CJ: The applicant was charged in the Regional Court, Eastern Division, with: (i) the offence of kidnapping; (ii) a contravention of s 7(1) of the Children's Protection and Adoption Act [*Chapter 5:06*] (the ill-treatment or neglect of children or young persons); and (iii) a contravention of s 4(4)(a) of the Firearms Act [*Chapter 10:09*] (the purchase, acquisition or possession of ammunition without the holding of a firearms certificate in respect thereof). He pleaded not guilty to all counts.

GUBBAY CJ

On 19 March 1998, and at the stage when the trial before the regional magistrate had reached the closure of the prosecution case, there was lodged with this court an application purportedly brought pursuant to s 24(1) of the Constitution of Zimbabwe. It was founded upon the allegation that the provisions of both s 7(1) of *Chapter 5:06* and s 4(4)(a) of *Chapter 10:09* fell foul of the presumption of innocence guaranteed by s 18(3)(a) of the Declaration of Rights in the Constitution and, therefore, should be declared invalid.

The application was opposed by the respondent solely on the ground that neither impugned provision places an evidential burden on an accused person to prove his innocence rather than on the State to prove guilt beyond a reasonable doubt.

At the inception of this hearing, a preliminary procedural point was raised by the court. It was whether the applicant was entitled to have recourse to s 24(1) of the Constitution since he had omitted to request the regional magistrate to refer the alleged constitutional questions to the Supreme Court in terms of s 24(2). Put differently, whether an applicant may, during the course of proceedings in the High Court or in any court subordinate to it, simply ignore the provisions of s 24(2) and utilise the procedure laid down in s 24(1).

I entertain not the slightest doubt that the resort by the applicant to s 24(1) of the Constitution was impermissible.

The right to apply directly to the Supreme Court under subs (1) of s 24 is made "subject to the

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provisions of subsection (3)", which in turn reads:

"Where in any proceedings such as are mentioned in subsection (2) any such question as is therein mentioned is *not referred* to the Supreme Court, then, without prejudice to the right to raise that question on any appeal from the determination of the court in those proceedings, *no application for the determination of that question shall lie to the Supreme Court under subsection* (1)" (my emphasis).

The effect of s 24(3) of the Constitution was considered in *S* v *Mbire* 1997 (1) ZLR 579 (S) in relation to the refusal by a regional magistrate to accede to the request for a referral under s 24(2). I pointed out at 581H-582B that:

"It is clear from the wording of this provision that where a referral has been refused by the High Court or by any court subordinate to it, albeit the opinion that the raising of the constitutional question was merely frivolous or vexatious was manifestly erroneous, there is to be no interruption in the proceedings. They are to continue to the stage of determination, which in a criminal case is when the accused is convicted and the final sentence delivered ... Thereafter, the right to raise the constitutional question as a ground of appeal against such determination becomes permissible."

These remarks apply with even more cogency to the present matter. For without even seeking to obtain a referral under s 24(2), the applicant is claiming an entitlement to bring questions, which ought to have been raised

GUBBAY CJ

before the regional magistrate, directly before this court. That is precisely what is prohibited by the closing words of s 24(1), as read with s 24(3).

Counsel for the respondent sought an order for costs, notwithstanding that he had failed to oppose the application on the ground of its procedural defect. He declined the suggestion by the court that the Attorney-General should consent to an order that each party bear its own costs. In the event, it seems to me that in a situation like this a court is bound by the approach to costs laid down in *Jesse* v *Chioza* 1996 (1) ZLR 341 (S). In that case, I said at 347F that where a point is successfully raised by the court itself on appeal, the usual order is that the loser pays the costs; the reason being that it is for the party seeking relief to satisfy himself that the matter is properly before the court.

It is true that the applicant is not a qualified legal practitioner, but neither is he without any knowledge of the law, as is evident from the frequent extent to which he has represented himself in litigation in all courts over the past few years. In the circumstances, I do not consider that a relaxation of the rule in his favour is warranted.

It follows that the application must be dismissed with costs. This order is, however, without prejudice to the applicant's right to raise the constitutional questions on any appeal from the determination of the regional magistrate in the current criminal proceedings.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

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MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

SYFRETS MERCHANT BANK *v* JARDINE & ORS 1999 (1) ZLR 124 (HC)

Citation	1999 (1) ZLR 124 (HC)
Case No	Judgment No. HH-57-99
Court	High Court, Harare
Judge	Devittie J
Heard	February 26, 1999
Judgment	February 26, 1999
Annotations	None

Civil action

Flynote

Practice and procedure - locus standi - cedent of debt - cession effected after institution of proceedings - effect on locus standi of date cession effected

Headnote

The plaintiff advanced a sum of money as a loan to a company, and the loan capital was paid to the respondents as a cash advance. The company was subsequently placed under voluntary liquidation. The plaintiff claimed the amount outstanding. The defendants raised several defences, one being that the plaintiff had no *locus standi*, having ceded the debt to a third party some two months after the summons was instituted.

Held, that a cession is a juristic act which transfers a right from the estate of the creditor (the cedent) to that of another (the cessionary), who thereby becomes the creditor in his stead. The general principle is that the cession deprives the cedent of all of his rights. Where cession takes place before the issue of summons, the cedent can have no *locus standi*. There can be no difference in principle where the cession is effected after the issue of summons but before *litis contestatio.* In this situation, though, the cession is not fatal to the proceedings, provided an application is made to substitute the cessionary. As no such application had been made, the plaintiff had no *locus standi*.

Cases Considered

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Cases cited:

Barrie Marais & Seuns v *Eli Lilly (SA) (Pty) Ltd & Ors* 1995 (1) SA 469 (W)

Clark v *van Rensburg* 1964 (4) SA 153 (O)

Kotsopoulos v *Bilardi* 1970 (2) SA 391 (C)

Philotex (Pty) Ltd & Ors v *Snyman & Ors* 1994 (2) SA 710 (T)

Sentrakoop Handelaars Bpk v *Lourens & Anor* 1991 (3) SA 540 (W)

Standard General Ins Co Ltd v *Eli Elly (SA) (Pty) Ltd* 1996 (1) SA 382 (W)

Thomas Barlow & Sons (Natal) Ltd v *Dorman Long (Africa) Ltd & Anor* 1976 (3) SA 97 (D)

Waikiwi Shipping Co Ltd v *Thomas Barlow & Sons (Natal) Ltd & Anor* 1978 (1) SA 671 (A)

Case Information

D P Carter, for the plaintiff

A J Dyke, for the defendants

Judgment

Devittie J: On 9 December 1992 in terms of a written agreement, the plaintiff advanced to Russell Construction (Pvt) Limited a loan of $1.8 million. Before the loan capital was disbursed an arrangement was reached in terms of which the loan capital was paid to the respondents as a cash

advance. The practical reason for this was that the formalities in respect of the notorial deed and the mortgage bond had not been formalised. For reasons which are not relevant for present purposes, the security was only put in place in October 1993, on which date a book entry was made in terms of which the proceeds of the loan were credited to the cash advance.

On 26 January 1995, Russell Construction (Pvt) Ltd was placed under voluntary liquidation on the grounds that it was unable to pay its debts. The plaintiff's claim is for the amount outstanding on the loan as from the date of liquidation including interest. It claims payment of $1220450.32 and interest on that amount of 39% *per annum* with effect from 27 January 1995 to the date of payment.

Several defences are raised to this claim. Firstly, it is pleaded that the cash advance was made by the plaintiff to the company in terms of a separate agreement, which has not been pleaded. Secondly, the quantum of the amount claimed is placed in dispute. Thirdly, it is argued that plaintiff has no *locus standi* to continue these proceedings, having ceded the debt to a third party. I propose to deal firstly with the argument that plaintiff does not have *locus standi* on

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account of the fact that the debt was ceded to a third party. The present proceedings were instituted on 8 August 1996. After the institution of proceedings and before *litis contestatio*, the plaintiff ceded the debt which is the subject of these proceedings to a third party. The cession agreement, executed on 30 September 1996 provides *inter alia*, as follows:

"With effect from 30 September 1996, Syfrets cedes transfers and makes over into and in favour of Climax the debts set forth in the schedule.

The cession of debts in terms of the agreement is an outright cession for value and Climax shall have no recourse against Syfrets in respect of any debts which it may fail to collect."

Before the hearing, the defendant's plea was amended by consent. The defence raised in the amendment is that plaintiff has no cause of action having ceded its rights in the debt. The plaintiff in response, pleaded that:

"The plaintiff avers that prior to the institution of the present proceedings, an oral agreement of cession was concluded between Climax (Investments) (Pvt) Ltd and the plaintiff in terms of which the right of action reverted to the plaintiff."

Mr *Dyke* cited several authorities in support of the contention that the plaintiff had no *locus standi*. Mr *Carter* submitted that where a cession is effected after the institution of proceedings, the right to continue the action is retained.

The general principle is that a cession deprives the cedent of all his rights.

Until perhaps recently, South African law was clouded in some uncertainty on the question whether a cedent could act on behalf of the cessionary.

A long line of decisions drew an analogy between cedent and cessionary

DEVITTIE J

and agent and an undisclosed principal, and concluded that a cedent could sue in his own name on behalf of a cessionary (as undisclosed principal)

In *Clark* v *van Rensberg* 1964 (4) SA 153 (O) at 159 it was held that a plaintiff who had ceded his claim after action had been instituted was, in terms of the agreement with the cessionaries, entitled to prosecute an action in his own name on behalf of the cessionaries as his undisclosed principals. In *Kotsopoulos* v *Bilardi* 1970 (2) SA 391 (C) at 398 Corbett J (as he then was) seemed to approve of the reasoning in *Clark*'s case, in stating that in certain circumstances a cedent may, after cession, institute action in his own name as agent for the cessionary

In *Barrie Marais & Seuns* v *Eli Lilly (SA) (Pty) Ltd & Ors* 1995 (1) SA 469 (W) it accepted the argument that after cession, the cedent may institute an action in his own name as agent for the cessionary, the undisclosed principal.

However, in *Sentrakoop Handelaars Bpk* v *Lourens & Anor* 1991 (3) SA 540 (W) at 543F-I the reasoning in *Clark*'s case was disapproved by Marais J:

"Hofmeyer J takes the case of the agent for an undisclosed principal who in contract requires the right to sue in his

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own name and then applies that to the procedural question of whether an agent, who has no right arising from a contract entered into by himself and with the defendant, is procedurally entitled to sue as plaintiff.

The point is that agents contracting for undisclosed principals have a substantive right to sue on the contract, but what was contended for in *Clark*'s case and is in this case contended for is a procedural right to sue in your own name in a case where substantive rights to sue vest in somebody else. In my view, Hofmeyer J clearly blurred the distinction between the two sets of circumstances and erred in so doing ... I am therefore unable to agree with the jump in reasoning by which the learned judge says that, as an agent for an undisclosed principal can sue, therefore a creditor who has divested himself by way of cession of his right to sue, can also sue in his own name."

In *Waikiwi Shipping Co Ltd* v *Thomas Barlow & Sons (Natal) Ltd & Anor* 1978 (1) SA 671 (A) at 680 Jansen JA expressed reservations on the reasoning in *Clark*'s case.

In *Thomas Barlow & Sons* v *Dorman Long (Africa) Ltd & Anor* 1976 (3) SA 97 (D) at 103, it was held by Kriek J:

"that the effect of an out and out cession is that the cedent retains no rights whatever and I have been referred to any authority which persuades me that the position is any different after *litis contestatio*."

In *Standard General Insurance Co Ltd* v *Eli Lilly (SA) (Pty) Ltd* 1996 (1) SA 382 (W), the decision in *Clark*'s case received disapproval. Streicher J cited with approval the reasoning of Marais J in *Sentrakoop*'s case.

It seems clear therefore, that where cession takes place prior to the issue of summons, an action instituted in the name of the cedent gives the plaintiff no *locus standi*. In my view, there can be no difference in principle where the cession is effected after the issue of summons, but before *litis contestatio*.

DEVITTIE J

I do not, however, consider that the institution of proceedings by a cedent before cession or the ceding of a debt after summons is fatal to the proceedings. The cedent should make an application to substitute the cessionary. Until substitution is granted, the cedent has no *locus standi* to continue to prosecute the claim, because the right will have been transferred to the cessionary. This is the position that the plaintiff finds itself in, in the present proceedings. No application was made for substitution. Accordingly, I must find that the plaintiff, having ceded its right, has no *locus standi* to continue the action. The plaintiff's claim is accordingly dismissed with costs.

A cession is a juristic act which transfers the right from the estate of the creditor to that of another (cessionary) who thereby becomes creditor in his stead. It would seem to follow that after a cession, only the cessionary has *locus standi* to initiate legal proceedings relating to the ceded rights against the debtor or to continue such legal proceedings, if they were initiated prior to the cession. This is the position even where the cession is not "out and out" but only *in securitatem debiti*: *Philotex (Pty) Ltd & Ors* v *Snyman & Ors* 1994 (2) SA 710 (T) at 715.

The aforegoing examination of the authorities leads me to the conclusion that whether cession is effected before or after the issue of summons, the cedent has no *locus standi* until such time

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as substitution is granted.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

Kantor & Immerman, defendants' legal practitioners

MINISTER OF INFORMATION *v* PTC MANAGERIAL EMPLOYEES WORKERS COMMITTEE 1999 (1) ZLR 128 (SC)

Citation	1999 (1) ZLR 128 (SC)
Case No	Judgment No. S-24-99
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA, Ebrahim JA, Muchechetere JA, Sandura JA
Heard	February 18, 1999
Judgment	March 1, 1999
Annotations	None

Civil appeal

Flynote

Administrative law - audi alteram partem rule - observance of - power of Minister to "designate" posts in statutory corporation - effect of designation to freeze salaries of persons in those posts - no right of employees to be heard before posts designated

Administrative law - review - decision of Minister - decision of Minister in fixing salaries etc - legitimate expectations of employees affected - Minister's decision not beyond scrutiny of courts

Employment - statutory corporation - power of Minister to "designate" posts in Corporation - whether Minister may designate by reference to posts or to named incumbents

Headnote

Over a period of years, anomalies had arisen between the salaries being received by senior employees of the Posts and Telecommunications Corporation. The effect of the anomalies was that some employees were getting salaries greater than those received by their superiors. In an attempt to rectify the anomalies, and acting in terms of s 39 of the Audit and Exchequer Act [*Chapter 22:03*], the Minister of Information "designated" certain employees. The employees were not consulted before the designation took place.

The practical effect of the designation was that the salaries of those employees were frozen,

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and they did not receive the increments in salary and allowances that were received by other employees. The respondent, which represented the affected employees, brought the Minister's decision on review before the High Court. The court remitted the matter the Minister and ordered him to review the salaries and allowances payable to the employees.

The Minister appealed, on the grounds, among others, that his decision in approving salaries to designated employees was not reviewable and that any irrational anomalies in the pay structure was due to the Corporation's board rather than to him. The respondent cross-appealed, arguing that "designation" was subject to the *audi alteram partem* rule and that the employees had a legitimate expectation that had to be respected before designation took place.

Held, that designation under s 39 may be by reference to the post held by the employee. It is not confined to the particular employee by name. The purpose of designation is to rationalise

the payment of emoluments, which are related to the post rather than to the individual holding the post.

Held, further, that designation does not affect any existing rights of the holders of the affected posts, nor does it involve any interference with or modification of the terms and conditions of the posts. The possibility of designation forms an integral component of the contractual relationship between the Corporation and its employees. The right to be heard cannot be invoked by any employee of a statutory corporation as a precondition to the act of designation by the responsible Minister.

Held, further, that the Minister's power to approve or disapprove the fixing or increasing of salary, allowances and other remuneration is nonetheless susceptible of judicial review. While generally the determination of salaries remains within the domain of the Minister, not that of the courts, in this case there had been a job evaluation exercise which recommended significant salary increases for the employees who were subsequently designated. This created a legitimate expectation on their part that their remuneration would be adjusted to remove the anomalies and the Minister's decision as to the actual increase was not beyond the scrutiny of the courts.

Held, further, that there had been irrationality present, not in the failure of the Minister to adjust the emoluments of the designated employees to the level recommended in the job evaluation exercise, but rather in the omission to adjust them so as to do away with the anomalies.

Cases Considered

Cases cited:

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

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

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

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Holland & Ors v *Min of the Public Service* 1997 (1) ZLR 186 (S)

Metsola v *Chrmn, PSC & Anor* 1989 (3) ZLR 147 (S)

Muwenga v *PTC* 1997 (2) ZLR 483 (S)

Nyambirai v *NSSA* 1995 (2) ZLR 1 (S)

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

Reilly v *The King* [1934] AC 176

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

Statutes Considered

Legislation considered:

Audit and Exchequer Act [*Chapter 22:03*], s 39

Case Information

B Patel, for the appellant

A P de Bourbon SC, for the respondent

Judgment

Gubbay CJ: This is both an appeal and a cross-appeal against the judgment in *PTC Managerial Employees Workers Committee* v *PTC & Anor* 1998 (1) ZLR 444 (H), in which Chinhengo J issued the following order:

" (1) The matter be and is remitted to the second respondent (who is the present appellant).

(2) The second respondent shall review the salaries, allowances and other remuneration payable to the applicant's members on the basis of the job evaluation exercise conducted in 1992 with a view to removing the anomalies between the remuneration

GUBBAY CJ

to be paid the designated employees and the remuneration payable to non-designated employees.

(3) The second respondent shall pay the costs of this application."

The appeal was noted on the grounds that the learned judge erred:

(a) in holding that the appellant's discretion in approving salaries for designated employees in terms of s 39 of the Audit and Exchequer Act [*Chapter 22:03*] ("the Act") was ordinarily reviewable either on the ground of irrationality or on any other ground;

(b) in finding that the irrational anomalies obtaining in the pay structure of the Posts and Telecommunications Corporation were attributable to the appellant rather than to the

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actions and omissions of the Corporation's Board and senior management;

(c) in making an order requiring the appellant to review the salaries of the respondent's members on the basis of the 1992 job evaluation report.

The cross-appeal complained that the learned judge erred:

(d) in interpreting the word "employee" to include the post which a person was holding at that time;

(e) in his view that "designation" under s 39(1) of the Act was to subject to the *audi alteram partem* rule;

(f) in contending that there was no legitimate expectation or enforceable bundle of rights that had to be respected before designation by the appellant and/or the decision by him to approve the fixing or increasing of salary, allowances or other remuneration.

The factual backgrounds relied upon by the parties in support of their respective contentions is comprehensibly and accurately narrated in the judgment at 448C-453C. It is only necessary therefore to underscore the material chronological events which gave rise to the dispute. In doing so, I shall refer to the appellant as "the Minister" and the cross-appellant as "the respondent".

(1) On 25 September 1991, the then Minister, Mrs Victoria Chitepo, designated the Postmaster-General in terms of s 39(1) of the Act. The effect of such designation was to prohibit the Posts and Telecommunications Corporation ("the Corporation") from fixing or increasing the salary, allowances or other remuneration of the Postmaster-General without the approval of the Minister.

(2) On 23 December 1991, Minister Chitepo designated the Senior Deputy Postmaster-General and the five Deputy Postmaster-Generals.

(3) Thereafter with effect from 1 July 1991, Minister Chitepo approved salary increased for the Postmaster-General, the Senior Postmaster-General and the Deputy Postmaster-Generals.

(4) In early 1992, the Corporation invited a leading firm of accountants to

undertake a job evaluation exercise with the object of nullifying certain anomalies affecting its employees. The recommendation contained in the report was that there had to be significant salary gains for many employees, including the members of the respondent.

(5) On 12 June 1992, Minister Chitepo wrote to the Acting Chairman of the Corporation's Board expressing her agreement to the implementation of the job evaluation exercise, save insofar as it related to the seven designated employees. It was duly implemented

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in respect of all non-designated employees considered.

(6) Thereafter the newly appointed Minister, Mr David Karimanzira, approved salary increases for the Postmaster-General, and the Deputy Postmaster-Generals, but as they had not benefited from the job evaluation exercise, their salaries were now lower than that of the Directors subordinate to them.

(7) On 17 May 1993, Minister Karimanzira designated all Directors as well as those employees of equivalent grades. He did so in an effort to redress the anomaly created.

(8) In early 1995, the anomaly had arisen that Assistant Directors, who up to that stage had not been designated, were earning more salary than the Postmaster-General.

(9) On 23 February 1995, and in an effort to redress the anomalies, all Assistant Directors, as well as those employees of equivalent grades, were designated. The result was that the salaries of Assistant Directors ended up lower than their subordinates.

(10) On 14 November 1995, salaries and allowances for designated employees were approved payable with effect from 1 July 1995. They were well below those recommended under the job evaluation exercise for that year.

(11) On 20 May 1997, the Chairman of the Corporation's Board wrote to the then Minister, Mr Chen Chimutengwende, pointing out that:

> "inconsistencies exist not only between the designated levels alone, but also between designated and non-designated levels. The net effect of all this is a fall in productivity as the general staff do not see the merit of increased responsibility and accountability. To some extent, the authority of management was undermined because subordinates were earning more than superiors."

The Minister did not take issue with the correctness of this statement.

(12) During July 1997, non-managerial employees (ie non-designated) obtained, in respect of the 1997-98 year, an increase of 32% in salary and 52% in allowances. With regard to designated employees salary increments which were under consideration were held in abeyance pending the outcome of the threatened litigation, which was instituted on 27 October 1997.

GUBBAY CJ

The picture emerging from these events is well described by Chinhengo J in these words at 464G-H:

"There is no doubt that the salary structure and the remuneration system at the Corporation is a mess. Junior employees of certain categories are earning more than the Chief Executive, not because they hold particular technical skills which would entitle them to such higher remuneration but principally because of the administrative misunderstanding that has been the hallmark of the conduct of the Minister. They are earning more because of the implementation of the job evaluation exercise in respect of them and not in respect of the designated employees."

Section 39(1) of the Act reads:

"'Notwithstanding any other Act, no statutory corporation which, in terms of any such Act, is empowered to employ

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persons shall, on and after 26 October 1973, fix or increase the salary, allowances or other remuneration of any employee designated by the responsible Minister unless that Minister approves the fixing or increasing of such salary, allowances or other remuneration."

It is a provision which applies to all statutory corporations and controls the salary, allowances or other remuneration paid to their employees. Its rationale derives from the economic relationship between the State and its statutory corporations in terms of which the State invariably is requested to meet any budgetary deficit incurred. In the case of the Corporation in question, subs (2) of s 30 of the Posts and Telecommunications Corporation Act [*Chapter 12:03*] recites that the State may meet any such deficiency, though in terms of subs (3) any payment by the State is regarded as a loan to the Corporation. Inasmuch as s 39(1) is of application notwithstanding what may be mandated in any other Act, it is of overriding force. In the words of the learned judge, it is designed to ensure that the Minister's control over the expenditure of statutory corporations is not "distorted or scuttled by increases which the parastatal may effect to the remuneration of its employees outside the scope of his control" (see at 458F). Once the responsible Minister has had recourse to the power to designate, the statutory corporation concerned cannot fix or increase the emoluments of its employees without the Minister's approval, even if the corporation is fully empowered to do so under its enabling Act.

Two separate powers are reposed in the responsible Minister by s 39(1). They are:

(i) the power to designate any employee of a statutory corporation;

(ii) the power to approve (and, implicitly, to disapprove) the fixing or increasing of any salary, allowances or other remuneration of such employee.

It is in relation to the nature and exercise of these two powers that five issues, as foreshadowed in the notices of appeal and cross-appeal, arise for determination. I propose to deal with each in the same order they were argued before this court.

GUBBAY CJ

(1) *Does s 39(1) of the Act, which permits the responsible Minister to designate employees, apply to designation by reference to the posts held by such employees or only to the name incumbents of such posts?*

The burden of the submissions addressed to this court were no different from those entertained by the court *a quo*. They are set out and analysed by the learned judge at 463B-464A of the judgment. I can do no better than to refer to what was said:

"Mr *de Bourbon*'s second argument is that the designations by the Minister are improper in that, whereas s 39 only permits the Minister to designate employees, the Minister has in fact designated posts. He submitted that what the Minister sought to do is to designate whoever the person might be holding a particular post without reference to office and not with reference to the employee concerned. This, he said, is not appropriate because if the lawmaker's intention was to allow a post to be designated, then such an appropriate word would have been used rather than 'employee', which pertains to a particular person and not to a particular post.

Mr *Patel* made a counter-argument on this point with which I agree. The clear intention of s 39 is to designate an employee, as submitted by Mr *de Bourbon*. In my view, however, designation

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may be by reference to post held and not only by reference to the particular incumbents. Mr *Patel* contended that if designation were to relate to particular individuals as employees that would lead to an absurdity. At every change of the incumbent a re-designation would have to be done. This would lead to administrative nightmares. Section 39, he said, is designed to enable the Minister to rationalise the payment of emoluments in the parastatal sector on a uniform basis with regard being had to the nature of work, qualifications and experience required for that work. It is not concerned with the actual persons appointed to carry out the work but with the scale and amount of remuneration to be paid in respect thereof. The designation of employees must be based on objective factors relating to the post and not on personal characteristics of the incumbent. One of the cardinal rules of statutory interpretation is to interpret a provision without giving it an absurdity if that can be done without doing violence to the clear and unambiguous ordinary meaning of the words used.

Mr *Patel*'s argument is not acceptable in its entirety. Indeed, s 39(1) requires that the Minister should designate an employee. How, it may be asked, is an employee identified? Quite evidently, an employee is identified by means either of his name or by the office he holds. There is always an individual who holds a particular office. In reference to such individual it is quite normal to identify him by name or by the post he holds. The Minister's letters designated the individuals by reference to the offices they held. He could well have referred to them individually by name. I do not see that it makes a difference. No evidence was put before me that the reference by post

held was liable to be misunderstood. There is nothing on record to indicate that any doubt was created as to which employee was being designated. There is no evidence that the affected persons were in any way prejudiced by the designation by reference to post held and not by their names.

I find this reasoning beyond criticism and I accept the inevitable conclusion resulting from it as correct. I would merely add that the use by the lawmaker of the word "employee" in contradistinction to that of "post" or "office" may well have been influenced by the prior reference to the statutory corporation being "empowered to *employ* persons". Consistency of terminology was aimed at.

(2) *Must the exercise of the power to designate be preceded by observance of the* audi alteram partem *rule?*

It was not in contention that, on the occasions the power to designate was exercised, an opportunity to be heard was not first afforded to the employees so designated. The point is simply whether the respective Ministers were mandated by the rule of natural justice to do so.

It was Mr *de Bourbon*'s submission that the reason why such a hearing ought to have been given to those employees whom the Ministers proposed to designate was that para 13 of the Schedule to the Posts and Telecommunications Corporation Act empowers the Corporation's Board to pay its employees such remuneration, allowances and bonuses as it may consider fit.

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Accordingly, if it were minded to interfere with that *contractual* right, the Minister was obliged to have regard to the precept of natural justice; for the decision to designate prejudicially affects not only the property or existing rights of the employee concerned but his or her legitimate expectations as well. Cited in support of this proposition was the *dictum* in *Holland & Ors* v *Minister of the Public Service, Labour and Social Welfare* 1997 (1) ZLR 186 (S) at 190G-H.

Mr *Patel*, on the other hand, argued that designation does not prejudicially affect any existing rights of the incumbents of posts which are designated. It does not extinguish or diminish the emoluments attaching thereto; it merely stays any increase in the prevailing pay structure until Ministerial approval is given. And furthermore, designation does not involve any interference with or modification of the terms and conditions of the posts since the possibility of its occurrence forms an integral component of the contractual relationship between the Corporation and its employees. Stated otherwise, the contract of every Corporation employee is governed by the implied term of being the subject of designation under s 39. To buttress this submission, counsel referred to the case of *Reily* v *The King* [1934] AC 176. The facts

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were that the appellant had been appointed to a statutory office, namely, a Federal Appeal Board of Canada. His appointment was extended to August 1930 on the understanding that it might be terminated at any time in the event of reduction in the Board's work to an extent sufficient to permit of its performance by fewer members. This event never arose. But on 30 May 1930, the Board was abolished by an Act passed by the Dominion Parliament. The appellant claimed that there was a contract between himself and the Crown and that the contract had been breached. In dismissing the appeal, Lord Atkin, who delivered the opinion of the Judicial Committee of the Privy Council, held at 180 that:

"There was no right acquired under the appointment to the office except a right which from the inception was subject to be determined by the office being abolished by statute."

In short, abolition of office by Parliament was to be regarded as written into the appellant's appointment by implication. In the same way, so the argument ran, the possibility of being subjected to designation by the Minister was an integral part of the contract between every employee and the employer corporation.

The final submission advanced by *Mr Patel* was that the power of the Corporation to increase the remuneration of its employees does not confer a corresponding right upon the employees to any such payment. The Corporation is not obliged to pay increases in emoluments. Any claims made for improved remunerative packages by employees of a statutory corporation are subject to the ordinary processes of negotiation and agreement. As such they do not constitute a right.

To my mind, the arguments advanced by Mr *Patel* are unassailable and I accept them. It follows that the right to be heard cannot be invoked by any employee of a statutory corporation as a precondition to the exercise of designation by the responsible Minister.

(3) *Is the exercise of the power by the Minister to approve (or disapprove) the fixing or*

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increasing of salary, allowances or other remuneration susceptible of judicial review?

I regard it as now beyond contention that the principles of natural justice apply to all administrative decisions except those which are classified as of a purely administrative nature; and that the legitimate expectations test may be used to determine whether such principles apply to a particular administrative decision. See *PF-ZAPU* v *Minister of Justice, Legal & Parliamentary Affairs* (2) 1985 (1) ZLR 305 (S) at 313G-H.

It has been said that legitimate expectations include expectations which go

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beyond enforceable rights, provided that they have some reasonable and rational basis. See *Administrator, Transvaal & Ors* v *Traub & Ors* 1989 (4) SA 731 (A) at 756G. In that case, Corbett CJ cited with approval English authorities which lay down that even where a person claiming some benefit or privilege has no legal right to it, if he has a legitimate expectation of receiving the benefit or privilege, the court will protect the expectation by judicial review as a matter of public law. And that legitimate expectation may arise from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue. The doctrine was approved by this court in *Metsola* v *Chairman, Public Service Commission & Anor* 1989 (3) ZLR 147 (S); *Health Professions Council* v *McGown* 1994 (2) ZLR 329 (S); *Taylor* v *Minister of Education & Anor* 1996 (2) ZLR 772 (S); and *Mawenga* v *PTC* 1997 (2) ZLR 483 (S).

In general, it is probably correct to say that it is not within the province of the courts to determine salaries payable to designated employees of statutory corporations. Such an exercise remains within the domain of the responsible Minister, who merely approves the fixing or increasing of emoluments set by the Corporation itself. See *Nyambirai* v *NSSA* 1995 (2) ZLR 1 (S) at 9H-10B. It is the Board which has the actual power to increase salaries and allowances albeit subject to approval in the case of designated employees. There is also no obligation upon the Minister to approve the fixing or increasing by the Board.

The present case, however, exhibits a distinctive feature which I believe takes it out of the general rule. The job evaluation exercise, which covered the years July 1992 to July 1997, recommended that there be significant salary increases for many employees, including the seven senior employees who had been designated prior to the furnishing of the report, and those designated subsequently. On 12 June 1992, Minister Chitepo wrote to the Acting Chairman of the Board signifying her acceptance of the report and consenting to the immediate implementation of its recommendations insofar as they related to non-designated employees. Appreciating that such implementation would cause anomalies *vis-à-vis* designated and non-designated employees, she indicated that consideration would be given to "the position of designated employees as soon as we have assessed the impact of their cost to PTC". What this conveyed to the seven designated employees, so it seems to me, was an adjustment by the Minister of the anomaly, in which by virtue of the implementation of the job evaluation exercise certain non-designated employees would be in receipt of emoluments greater than themselves; and that there would be no salary anomalies within the designated ranks. But the assurance did

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not mean that

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such adjustments would be necessarily in accordance with the recommendations of the report.

This feature constituted good ground, in my opinion, for the designated employees at the time, and those designated after them, having a legitimate expectation that when the Minister decided to approve an increase of their emoluments - which approval could be to an extent less than that set by the Corporation - the type of anomalies referred to would be taken account of and removed. Expressed differently, they had a right to expect that their remuneration would be adjusted so as to give recognition to seniority of ranking of designated employees; and, further, that no non-designated employee would be allowed to remain in receipt of a salary, allowances or other remuneration greater than that of the presently designated employees.

Representations were made to the Minister, either directly or through the Corporation's Board, and meetings were held, to redress the existing inequities. Yet, the anomalies were not rectified and the situation worsened somewhat as a result of the salary and allowance increases to non-designated employees of 32% and 52% respectively.

That in a sense the complaints were "heard" before decisions were made whether or not to approve an increase, strikes me as an implicit acknowledgement by the Minister that the exercising of the power was amenable to judicial review.

Since it is my view that the exercising of the power to approve or disapprove affected the legitimate expectations of the designated employees, I hold that the decisions made from time to time as to the extent of the increases to be awarded, and actually awarded, are not beyond the scrutiny of the courts.

(4) *Did the Minister, in the exercise of the power to approve the fixing or increasing of the salary, allowances or other remuneration of designated employees, act in an irrational manner?*

The challenge to the exercise by the Minister of the power to approve the emoluments of designated employees was based upon the irrationality of the consequent decision. Irrationality, in the meaning that the decision was so outrageous in its defiance of logic, or of accepted moral standards, that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion, is recognised in this jurisdiction as a ground upon which an administrative act is subject to judicial review. See *PF-ZAPU* v *Minister of Justice (2) supra* at 326E-G; *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 670C-E.

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In holding that irrationality was present, Chinhengo J stated at 467E-G that:

"the mere fact of designation is not of itself the root cause of the problem here. It is rather the Minister's refusal to adjust the salaries of the designated employees to take account of the changes in the salary structure brought about

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by the job evaluation exercise. I think that the situation obtaining at the Corporation is untenable. The applicant's members should not be in receipt of salaries and allowances that are exceeded in some instances by those received by their junior managers. Equally, the junior managers should not be in receipt of salaries which are disproportionately close to those received by the designated employees without suitable adjustment of the latter's salaries and allowances. That cannot be said to be in the interests of the Corporation. The applicant adverted to the dangers and detrimental effects of such a salary and allowances structure. It is disastrous for the Corporation."

I respectfully agree with these remarks. The irrationality lay not in the failure of the Minister to adjust the emoluments of the designated employees to the level recommended in the job evaluation exercise, but rather in the omission to adjust them to a level which did away with the present anomalies.

I am conscious of the argument that the pay structure anomalies were in part attributable to the Corporation's Board because its failure to contain the emoluments of non-designated employees at appropriate levels resulted in the need to designate successive levels of management from time to time. However, in increasing the remuneration of non-designated employees to the levels it did the Board was acting in accord with the increases recommended in the job evaluation report which, as I have mentioned, had obtained the approval of Minister Chitepo. She accepted the validity of the report and consented to its implementation in respect of non-designated employees.

(5) *Does the job evaluation exercise afford a proper basis for the order made by the court* a quo?

Insofar as the order may tend to suggest that the Minister *must* approve the emoluments of designated employees in conformity with the increases recommended under the job evaluation exercise, I agree with Mr *Patel* that he is not obliged to do so. All that is required of him is that he approve all increase of emoluments of designated employees at levels which remove the anomalies between the remuneration to be paid to them and the remuneration payable to non-designated employees.

It follows from this disposition of the five issues that both the appeal and cross-appeal fail.

Save for the deletion from para 2 of the order of the court *a quo* of the

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GUBBAY CJ

words "on the basis of the job evaluation exercise conducted in 1992", I dismiss the appeal with costs and make a similar order in respect of the cross-appeal.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

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

Honey & Blanckenberg, respondent's legal practitioners

MATIZA *v* PSWARAYI 1999 (1) ZLR 140 (SC)

Citation	1999 (1) ZLR 140 (SC)
Case No	Judgment No. S-40-99
Court	Supreme Court, Harare
Judge	Gubbay CJ, Muchechetere JA, Sandura JA
Heard	March 9, 1999
Judgment	March 9, 1999
Annotations	None

Civil appeal

Flynote

Evidence - onus - civil case - mutually destructive versions by parties - approach to be taken by court - plaintiff giving three inconsistent versions of his story - defendant dishonest but version not improbable - onus not discharged by plaintiff

Headnote

In a civil claim, the plaintiff gave three versions of his evidence, one in his declaration, one in a letter, and the third in his evidence in court. The three versions were inconsistent and in some aspects improbable. The defendant was also dishonest, although his version could not be said to be improbable.

Held, that where there are mutually destructive stories, the court must be satisfied that the version given by the party on whom the onus rests is true and the other false. Unless this can be found, the plaintiff cannot be said to have discharged the onus on him.

Cases Considered

Cases cited:

Kombayi v *Berkhout* 1988 (1) ZLR 53 (S)

National Employers Mutual General Ins Assn v *Gany* 1931 AD 187

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Case Information

T Masendeke, for the appellant

D P Carter, for the respondent

Judgment

Sandura JA: This is an appeal against the judgment of the High Court which dismissed the appellant's claim for an order directing the respondent to take all such steps as were necessary to transfer to the appellant his right, title and interest in Stand No. 11780, Salisbury Township, otherwise known as No. 42 Mbirimi Drive, Beatrice Cottages, Mbare ("the premises"). After hearing both counsel, we dismissed the appeal with costs and indicated that our reasons for that decision would be given in due course. I now set them out.

The background facts in this matter are as follows. In April 1969, the respondent signed a Deed of Sale in terms of which he purchased the premises in question from the City of Salisbury ("the Municipality") for £1 600 and was required to pay a deposit of £40. That deposit was paid to the Municipality by the appellant following an oral agreement between the appellant and the respondent.

SANDURA JA

Clause 23 of the Deed of Sale provided as follows:

"*THE PURCHASER* shall not part with possession of the property, nor cede or assign this Deed of Sale or any rights hereunder to any person without the previous consent in writing of the Municipality."

However, notwithstanding the provisions of clause 23, the respondent, without the Municipality's consent, allowed the appellant to occupy the premises in terms of an oral agreement between the parties. The terms of that agreement were not common cause.

The respondent's version was as follows. When he purchased the premises he and his family were living in a house in Highfield Township, and the appellant was his lodger in that house. As he did not want to move to the new premises, he indicated to the appellant that he, the appellant, could occupy the premises as his tenant, provided that he paid the deposit of £40 and the monthly instalments to the Municipality. The appellant agreed and, after paying the deposit, occupied the premises. It was never agreed that the appellant was to be the owner of the premises.

On the other hand, the appellant's version was as follows. At the relevant time he was earning a low salary and did not, therefore, qualify to purchase the premises being offered for sale by the Municipality. In the circumstances, he asked the respondent, whose salary was higher than his, to make an application in his own name but on the understanding that if the application was successful the appellant would be the real purchaser and, therefore, the real owner of the premises. The respondent agreed and, when the application made by him was successful, informed the appellant who then paid the deposit of £40 to the Municipality. Thereafter, the

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appellant occupied the premises and paid the monthly instalments to the Municipality.

After hearing both versions the learned trial judge concluded that the appellant had failed to prove his claim on a balance of probabilities. He found that each version contained probabilities as well as improbabilities. In my view, that conclusion was correct. It was apparent from the evidence that the probabilities did not favour the appellant more than the respondent.

In his attempt to prove his claim, the appellant encountered several difficulties. The first difficulty was that, according to his own version of the events, he had been dishonest with the Municipality right from the beginning. He knew that the Municipality was of the view that the respondent was the purchaser of the premises, but was quite happy that the Municipality should be ignorant of what, according to him, was the true position for a period of over twenty years.

The second difficulty was that the appellant's version was not a consistent one. In his declaration, the appellant averred that in April 1969 he and the respondent entered into an agreement in terms of which the respondent

SANDURA JA

surrendered or donated to him his personal rights with the Municipality, including the right to occupy the premises. This averment is inconsistent with the contents of a letter, a copy of which was annexed to the appellant's summary of evidence, and which was intended to be part of the summary of evidence. That letter was written to the respondent by the appellant's legal practitioners. The relevant part of the letter reads as follows:

"At all material times you have simply been the nominal holder of the personal right, title and interest in the said stand ..."

It is significant that the letter did not say that there had been an agreement in terms of which the respondent had surrendered or donated his personal rights to the appellant.

A third version appeared when the appellant gave evidence and stated that the agreement had been that he would pay all the instalments before the respondent transferred the premises to him. Once again, it is significant that the appellant did not say that there had been an agreement in terms of which the respondent had surrendered or donated his rights to him. It is also significant that in his evidence the appellant did not say that the respondent had been "the nominal holder of the personal right, title and interest in the stand". What he said was that the parties had agreed that the respondent would cede his rights in the premises to him as soon as he, the appellant, paid all the instalments of the purchase price.

In the circumstances, there were distinct differences between the version given by the appellant in his declaration, the version given in the letter annexed to the appellant's summary of evidence, and the version given by the appellant in court.

Furthermore, there was another aspect of the appellant's version which did not appear to be in accordance with the probabilities. That was the appellant's allegation that he did not, at the relevant time, qualify to apply for the premises being offered for sale by the Municipality

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because he earned a low salary. That allegation was contradicted by the respondent, who said that at the relevant time the appellant was employed as a dispatch clerk by an oil company and would have been earning the same or more than he himself was earning as a Government clerk. In this regard, it was the appellant's evidence that his salary at the time was £60 per month. In my view, that salary was not inconsiderable in 1969 terms. Accordingly, the appellant's allegation that he was financially disqualified from making the application sounds improbable.

As far as the respondent is concerned, he too was dishonest with the Municipality because he did not want to occupy the premises right from the outset but did not inform the Municipality. Nevertheless, his version that the appellant occupied the premises as his tenant cannot be described as improbable.

SANDURA JA

In the circumstances, I am satisfied that the probabilities do not favour the appellant more than the respondent.

Commenting on mutually destructive stories, Wessels JA (as he then was) had this to say in *National Employers Mutual General Insurance Association* v *Gany* 1931 AD 187 at 199:

"Where there are two stories mutually destructive, before the *onus* is discharged, the court must be satisfied upon adequate grounds that the story of the litigant upon whom the *onus* rests is true and the other false. It is not enough to say that the story told by Clark is not satisfactory in every respect. It must be clear to the court of first instance that the version of the litigant upon whom the *onus* rests is the true version, and that in this case absolute reliance can be placed upon the story as told by A Gany ..."

I entirely agree with the learned Judge of Appeal.

In the present case, it cannot be said that the appellant's version is true and that the respondent's version is false. The appellant did not, therefore, prove his claim on a balance of probabilities.

More recently, Korsah JA had this to say in *Kombayi* v *Berkhout* 1988 (1) ZLR 53 (S) at 59C-D:

"Where the question on an appeal from the decision of a judge is one of credibility, and the interests of the parties cannot but affect their testimonies, even where the story told by either party may be true, or the probabilities do not appear to favour one party more than the other, an appellate court would be loathe to reverse the conclusions arrived at by the trial judge, who had seen and heard the witnesses, unless it is clearly demonstrated that he had fallen into error ..."

I am in complete agreement with the views expressed by the learned Judge of Appeal.

In the circumstances, the learned trial judge correctly found that the appellant had failed to prove his claim on a balance of probabilities. His dismissal of the appellant's claim with no order as to costs cannot be faulted in any way.

GUBBAY CJ: I agree.

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MUCHECHETERE JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

WILSON *v* MINISTER OF DEFENCE & ORS 1999 (1) ZLR 144 (HC)

Citation	1999 (1) ZLR 144 (HC)
Case No	Judgment No. HH-39-99
Court	High Court, Harare
Judge	Chidyausiku JP, Gillespie J
Heard	February 26, 1999
Judgment	March 12, 1999
Annotations	None

Civil application

Flynote

Costs - deprivation - successful party - court discharging provisional order for contempt - court still awarding costs to applicant because of special circumstances

Court - contempt of - failure to obey court order - person held illegally in custody of army - court ordering release - person continued to be held in custody so applicant instituting civil contempt proceedings - failure to obey court order must be wilful - contempt purged by release of the detained person

Headnote

A weekly newspaper published a story about a failed coup attempt. The editor of the newspaper was then illegally detained in military custody for questioning about the story. The Minister of Defence had instructed the military to investigate the matter, but had not instructed them to take the journalist into military custody. The managing director of the newspaper commenced legal proceedings to secure the release of his editor. A series of applications were made to the High Court.

A court application was first issued, citing the Minister of Defence in his official capacity and an army major as the respondents. The papers were not served on the army major, as the person attempting to serve the papers was denied access to the military barracks where the officer was said to be. The papers could not be served on the Minister but were instead left with an official of the Ministry of Defence. The Minister was in fact out of the county when this was done. An

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application was then to a High Court judge for an order against the Minister and the army officer for the release of the journalist. Smith J granted the order and authorised the applicant's legal practitioners to effect service on the respondents. The legal practitioners were unable to serve the papers on the Minister of Defence or the army major. However, when the applicant's legal practitioner was attempting to locate the Minister of Defence, he encountered the Permanent Secretary of Defence. He tried to serve the order on the Permanent Secretary. He explained what the court order entailed and the consequences of disobedience to this order. The Permanent Secretary uttered words to the effect that he would not take any action in relation to the order as the judges could not direct them, that they were working at their own pace and that when people involve themselves in military matters, they fall under military jurisdiction.

The journalist continued to be held in illegal custody. Because what had been said by the Permanent Secretary had led the applicant to believe that the order for the release of the journalist would be flouted, the applicant applied to the High Court for an order for the

committal for contempt of the Minister of Defence, the Permanent Secretary and the army major. Eventually, the matter came before Devittie J who issued the provisional order sought by the applicant against the three respondents. This order directed the respondents to appear before him and produce the illegally detained journalist. The order also required the respondents, in their personal capacities, to show cause why they should not be declared to be in contempt and fined specified amounts for this contempt and why they should not be made personally liable for the costs of the application on the scale as between legal practitioner and client. This order required personal service on the respondents.

A copy of the order was left at the residences of the Minister and the Permanent Secretary. The Deputy Sheriff could not effect any service upon the army major because he was again refused access into the military cantonment where the major was thought to be. The Minister was out of the country at the time the order was left at his residence and he only became aware of it after the date upon which he was ordered to appear in court. As the respondents did not appear as ordered, the judge reissued the order, but in the meantime, the journalist had been surrendered to the police, although subsequently he, and another journalist from the same newspaper who had surrendered himself over to the police were handed over to State agents by the police. The journalists were allegedly taken to a place where they were subjected them to brutal torture by the State agents. No attempt was made to serve the reissued order for committal for contempt, presumably because the journalist had been released into police custody. Before the return date for the provisional order for committal for contempt of the three respondents, both journalists were released from custody. On the return date of the order issued by Devittie J, the matter was heard by two High Court judges. The three respondents all attended at court. The applicant's counsel conceded that no order for committal could properly be made against the Minister, the army major or the Permanent Secretary. In respect of the first two, the concession was made on the basis that no contempt was disclosed and in respect of the Permanent Secretary the concession was made on the basis that as the journalist in respect of whom the proceedings had been brought had already been released the applicant no longer had *locus standi* to prosecute a prayer for committal for contempt. The applicant's claim was restricted to

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a claim for costs on the legal practitioner and client scale.

Held, that a party can only be committed for defiance of a court order if is established that he was aware of the constraint imposed upon him by the court order and that he wilfully refused to comply with that court order. The three respondents were not in contempt of the order of Smith J because the order had not been served upon the parties and there was no factual basis for alleging that they had wilfully disobeyed or ignored the court order or that they had deliberately avoided service of the court process. The Minister of Defence had been out of Zimbabwe when proceedings had commenced to try to secure the release of the journalist and had only become aware of the legal proceedings after the date on which he was ordered by Devittie J to appear in court.

Held, further, that where after civil contempt proceedings have been commenced the contempt has been purged, then it is no longer competent for the applicant to proceed with the contempt proceedings. He is confined to his remedy for a claim for costs. In the present case, any possible contempt had been purged by the release of the journalist, even though it was not the respondents had not done anything to secure his release.

Held, further, that the remarks and conduct of the Permanent Secretary for Defence were reprehensible in the extreme and provided a sufficient basis for awarding costs against the Ministry of Defence. He had failed lamentably in his duty in respect of the order of Smith J against the Minister in his official capacity. As Permanent Secretary, he had a duty to communicate the order to the order to those who could comply with it. However, the best

way to deal with his derogatory remarks *ex facie curiae* was for a criminal investigation to be commenced with a view to charging him with criminal contempt. The court had seriously considered awarding cost against the Permanent Secretary personally. It had not done this, however, as he was not a party to the proceedings before Smith J that had resulted in the order with which he allegedly failed to comply and there was some doubt as to his legal obligation to accept the order on behalf of the Minister.

Held, *per* Chidyausiku JP, that the normal rule was for costs to follow the result and ordinarily the respondents would have been entitled to their costs because the provisional order of Devittie J could not be confirmed and must be discharged. However, the circumstances of this case demanded a departure from this general rule. Firstly, the conduct of the Permanent Secretary clearly led the applicant to believe that sterner legal measures, in the form of litigation for contempt, were necessary to secure the release of the unlawfully detained journalist. Secondly, the applicant had come to court to seek his release from unlawful military detention. It would offend against the most elementary notions of justice to make a party that approaches the court in these circumstances bear his own costs, let alone those of the party ultimately responsible for the unlawful arrest and detention.

Held, *per* Gillespie J, that the court has a discretion in a civil contempt case where the contempt has been purged. The court will take into account all relevant factors when deciding upon how to exercise this discretion. Critical factors include whether it is necessary to order a committal to secure future compliance with an order that will be ongoing in its effect; whether the alleged

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contempt has a criminal element and whether the contempt is better dealt with by a criminal prosecution of the offender. Although the applicant had committed some errors and omissions in the course of these proceedings, the proceedings were necessitated by the illegal detention of the journalist and a perceived determination to flout that order, which perception was reasonable in the circumstances. Litigation was therefore necessary and reasonable and costs must follow. The various errors and omissions are, however, relevant to the question whether costs should be awarded on the higher scale.

Held, *obiter, per* Gillespie J, that where personal service is proving problematical the applicant should seek directions from the court as to substitutionary service. In a case like the present one the applicant should cite persons he knows can compel compliance with the order sought. The appropriate parties here would have been the Minister of Defence *nomine officio*, the Commander of the Army and possibly the Attorney-General. The applicant should have sought a provisional order for an interdict *de libero homine exhibendo*, requiring the respondents to attend before the court urgently to show cause why the detained journalist should not be released.

Held, *obiter*, *per* Gillespie J, that the refusal by the military to allow access by the person lawfully attempting to serve process was most disturbing.

Held, further, that although the provisional order was discharged costs of the application on the ordinary scale were to be borne by the Minister of Defence in his official capacity.

Cases Considered

Cases cited:

Cape Times Ltd v *Union Trades Directories (Pty) Ltd & Ors* 1956 (1) SA 105 (N)

Dreyer v *Berry* (1862) 1 Roscoe 25

East London Municipality v *Ellis & Anor* 1907 EDC 309

Harare West Rural Council v *Sabawu* 1985 (1) ZLR 179 (H)

Naidu & Ors v *Naidoo & Anor* 1993 (4) SA 542 (D)

S v *Benatar* 1984 (1) ZLR 296 (S)

S v *Beyers* 1968 (3) SA 70 (A)

Scheelite King Mining Co (Pvt) Ltd v *Mahachi* 1998 (1) ZLR 173 (H)

Smit v *Bloom* (1910) 20 CTR 374

Case Information

E W W Morris, for the applicant

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Mrs *L Goredema*, for the respondents

Judgment

Chidyausiku JP: The applicant in this case obtained a provisional order from this court on the 18 January 1999. Today is the return day of that provisional order. The terms of the provisional order as set in the order were as follows:

> "That the respondents show cause to this Honourable Court why a final order should not be made in the following terms:
>
> 1. That the respondents be and are hereby declared guilty of contempt of court.
> 2. That the first respondent, second respondent and third respondent in their personal capacities are each fined $15000 for their contempt.
> 3. That the respondents shall, jointly and severally, the one paying the other to be absolved and the second and third respondents in their personal capacities, pay the costs of this application on the scale as between legal practitioner and client.
>
> **INTERIM RELIEF GRANTED**
>
> 1. That the respondent shall by 10 o'clock pm on the 18 January 1999 attend themselves and shall, in addition, procure the attendance before this court in the Chambers of Mr Justice Devittie of Mark Chavunduka and shall then and there forthwith and unconditionally release the said Mark Chavunduka from their custody, and shall thereafter implement fully all the conditions of the Order of this Honourable Court in Case No. HC-403-99.
> 2. That should the respondents fail properly and timeously and fully to comply with the immediate proceeding paragraph, being paragraph 1 of the Interim Relief, the applicant shall be entitled on these papers to apply for an order directing the Commissioner of the Zimbabwe Republic Police or, if he is not available, his Deputy to procure one or more members of the Republic Police as may be necessary to effect the arrest of second and third respondents and their committal to Harare Central Prison until such time as they purge their contempt in Case No. HC-403-99.
>
> **SERVICE OF ORDER**
>
> 1. That a copy of this order shall be served on the Commissioner of Police.
> 2. That this order be served *personally* upon the respondents" (the emphasis is mine).

It was a specific direction of the presiding judge that the order was to be served on the respondents personally. As no leave was granted to depart from the rules the service of the provisional order had to be effected by the Sheriff or his Deputy in terms of r 31(1) Order 5 of the High Court Rules.

The Deputy Sheriff, Mr Manogara, attempted to serve this order on the first and second respondents a few hours after it was issued at their respective residences at 8.15 pm and 9.00 pm for them to appear before a judge in

chambers with Chavunduka within a little over an hour's time. Both respondents were not at home at the time of the attempted service and as the court order required personal service

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there was in effect no service. The first and the second respondents did not appear before the judge at 10 o'clock. Their failure to appear in court was due to the failure to serve the court order. The respondents were unaware of their required presence before the judge in chambers. On these facts, it cannot be said the first and second respondents took a conscious and deliberate decision to disobey a court order to appear before Devittie J at 10 o'clock pm on 18 January 1999. Service on the third respondent could not be effected because the Deputy Sheriff was not allowed access into KG VI military cantonment. It is not clear on whose orders access was refused and why. However, even if access had been granted it is doubtful that service would have been effected by the Deputy Sheriff at that time of the day - 9 o'clock in the evening. The probabilities are that the third respondent would have left his place of work for home by that time of the day. In any event the applicant has abandoned his claim against the third respondent in the light of the contents of the third respondent's affidavit. The applicant accepts the third respondent has no case to answer for contempt. I will therefore not dwell in any detail on the facts that relate to him.

The first respondent's evidence, which was not challenged was that the provisional order was handed to him by one of the police officers manning the gate to his residence the following day Tuesday 19 January 1999. This is consistent with the Deputy Sheriff's report that he left the provisional order with a police officer at the gate. By the morning of Tuesday 19 January, the time the respondents were required to appear before the judge, that is 10 o'clock the previous night, had elapsed. It was therefore not possible to comply with the order. Minister Mahachi's evidence was that upon receipt of the provisional order he handed it to the Attorney-General with instructions to oppose the confirmation of the provisional order. It is also Minister Mahachi's evidence that on that same day, 19 January 1999, he was advised that Chavunduka had been released into the custody of the police. According to the presiding Judge's hand written notes, he too was advised at the 10.00 pm hearing of Monday 18 January that Chavunduka had been released to the police.

During the hearing in chambers at 10.00 pm on 18 January 1999, Devittie J postponed the hearing to 3.00 pm of the following day, 19 January 1999. The respondents were not in attendance at 3.00 pm on 19 January 1999 because they had not been notified of the set down. The case was then postponed to 3.00 pm of 20 January 1999. At that hearing, the attendance of the Attorney-General was requested. According to the record the Attorney-General was unable to attend until 21 January because of prior commitments.

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There is nothing in the judge's record to indicate what transpired on 21 January 1999. According to the answering affidavit, Chavunduka and Choto were placed on remand on that date. I can only assume the parties felt there was no need to proceed with this matter now that two journalists had been released on bail.

Were Minister Mahachi, Secretary Whabira and Major Mhonda in contempt of court by reason of failure to appear before Devittie J? The answer is clearly no. The returns of service by the Deputy Sheriff, which were handed to the court by Mr *Morris* for the applicant during the hearing, show that there were two attempts to serve the orders to attend on the respondents, on

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1 February and 5 February 1999, that is more than a week after the respondents were required to appear before the judge or ordered to release the journalists. In my view, the respondents cannot be said to have failed to comply with orders that were served on them long after the time for compliance had expired. There is nothing on the record to suggest that there was any cat and mouse chase between the respondents and Deputy Sheriff. The returns of service show that the Deputy Sheriff went to the third respondent's place of work on 1 and 5 February 1999 and he was not at work. He went to the second respondent's office on 1 and 5 February 1999 and the second respondent was not in his office. On 1 February, the Deputy Sheriff went to Minister Mahachi's office and found him not in the office. At 6.00 am on 5 February he drove to the Minister's house and was advised the Minister had left home. It is quite apparent that by the time of the attempted service the time for appearance before the judge had expired by over a week and the journalists had been released. On these facts, there can be no factual basis for alleging that court orders were disobeyed or ignored by any of the respondents. There is also no factual basis for suggesting that the respondents were deliberately avoiding service of court process. There was only one relevant attempted service and that is the attempted service of the evening of 18 January 1999.

This then leads me to one other order that was issued in this case which order really gave rise to these proceedings. On 14 January 1999, Smith J issued the following order:

"In the matter between

CLIVE WILSON	Applicant
and	
THE MINISTER OF DEFENCE	1st Respondent
and	
MAJOR MHONDA	2nd Respondent

Harare, 14 January, 1999.

Before the Honourable Mr Justice Smith

CHIDYAUSIKU JP

Mr S G J Bull	for the applicant
Mrs Goredema	for the respondents

WHEREUPON, after reading documents filed of record and hearing Counsel,

IT IS ORDERED:

1. That the respondents be and are hereby directed to release forthwith and unconditionally MARK CHAVUNDUKA from their custody.

2. That the respondents be and are hereby restrained, with immediate effect, from interfering with or attempting to interfere with the freedom of movement or the liberty of MARK CHAVUNDUKA and from contacting or attempting to contact him, either directly or indirectly.

3. That the respondents, jointly and severally, the one paying the other to be absolved, pay the legal costs of this application on the scale of legal practitioner and client.

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4. That this order may be served on the respondents by the Applicant's legal practitioner.

BY THE JUDGE"

In this case, Clive Wilson is the applicant and the Minister of Defence and Major Mhonda are the respondents. Mr Whabira, the Permanent Secretary, is not cited, and therefore was not a party to those proceedings. The respondents were represented by Mrs *Goredema* of the Attorney-General's Office. In para 4 of the order, the judge directed that the order may be served on the respondents by the applicant's legal practitioners. Normally, when parties are legally represented they will be assumed to have knowledge of the court order through their legal practitioner who is their agent. However in the above order, the judge directed that the order may be served on the respondents by the applicant's legal practitioners. I am not sure what significance, if any, can be attached to departure from the norm.

Following the granting of this order, Mr Bull for the applicant in the company of Mr Chavunduka (senior) and Mr Wilson proceeded to the Ministry of Defence to serve the order. At the Ministry, they did not see the Minister of Defence, the first respondent in those proceedings. They met with Mr Whabira, the Permanent Secretary for the Ministry of Defence. Mr Wilson sets out his version of what transpired during this encounter in paras 8 and 9 of his founding affidavit. These read as follows:

> "7 Mr Whabira was very disparaging about the Order and indeed of CHAVUNDUKA ("Ah, the one who tells me of coups") and it was obvious immediately that he was being and would likely continue to be non co-operative.
>
> His initial expression on hearing of the release order was more to the effect "we would not do that" (ie release him).

8. He agreed to us all going to his office to discuss the matter more formally and directed the Director of Military Intelligence should also be present.

9. Mr Bull then outlined very clearly and specifically that he was serving on First

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> Defendant via Second Defendant a copy of the Order (having shown him the original to read) and which order called upon both the Minister of Defence and Major Mhonda to immediately release CHAVUNDUKA.
>
> Astonishingly Mr Whabira made it very clear that "we" (the Army presumably) had no intention of obeying the order, that he did not take directions from a judge and that they would do things in accordance with their procedures.
>
> I attach, marked Annexure "B", a copy of the longhand notes (plus a typed transcript thereof) I was recording of what was said by the Second Respondent in response to Mr Bull pointing out the implications failing to obey it."

Mr Bull also gave evidence before us. His evidence substantially corroborates the allegations of Mr Wilson. Mr Whabira filed an opposing affidavit. His affidavit is short. It reads as follows:

"1. I am the Permanent Secretary in the Ministry of Defence and the Second Respondent in this matter.

2. At no time was Mr Chavunduka ever in my custody or held by persons who come under my command, direction or authority. The Zimbabwe National Army (ZNA) or the Zimbabwe Defence Forces (ZDF) are not under my

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command or direction or authority. As such I am wrongly cited as a party to these proceedings.

3. I am still puzzled by the decision of the Applicant to join me in these proceedings. The only explanation I can think of why the Applicant seeks to join me in these proceedings is the fact that I refused to accept service of court process intended for the first and third respondents. Refusal to accept service on behalf of other parties is not a refusal to abide by the order of the court and does not in my view constitute contempt of court.

4. Upon the Minister of Defence's return to the office on 18 January 1999, I informed him that there had been an attempt to serve on me court process intended for him.

5. In the circumstances, I deny that I have:

   (a) disobeyed any order of court;

   (b) committed an act of contempt of the court.

6. I make this affidavit conscientiously believing the same to be true.

7. Accordingly, I pray this Honourable Court to dismiss the application with costs."

Mr Whabira did not specifically deny having uttered the statements attributed to him by both Mr Wilson and Mr Bull. He was given an opportunity to give evidence before us and he declined. On these premises, we accept as substantially truthful the allegation of Mr Wilson which are corroborated by Mr Bull.

I find Mr Whabira's remarks and conduct reprehensible in the extreme and provide a sufficient basis for awarding costs against the Ministry of Defence. That attitude I am happy to note is at variance with the attitude of his Minister. In his evidence to this court, the Minister's attitude was that court orders must be complied with. It is common cause that at the time of the issuance and the service of the court order by Smith J the Minister of Defence was out of the country and that he only became aware of the existence of that court order on

the same day he was advised that Chavunduka had been released into the custody of the police.

Given these facts, what then are the legal implications of Mr Whabira's conduct? In particular, faced with the Permanent Secretary's attitude was the applicant entitled to approach the court in his effort to secure the release of Chavunduka? I have no hesitation in concluding that the applicant was entitled to approach the court as he did. He applied for and was granted the provisional order by Devittie J, set out above. As is apparent from that order, the applicant sought two reliefs: firstly, he sought attendance of the respondents before Devittie J in chambers; and they were to bring Chavunduka with them so that Chavunduka could be released in terms of an order previously issued by the court. If respondents did not attend before Devittie J, and produce Chavunduka, the Commissioner of Police was directed to arrest the respondents. I have no problem with the applicant having sought this relief. It was eminently appropriate given the prevailing circumstances. It is the second relief I have some doubt as to its propriety.

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The applicant also sought a declaratory order. He applied for and was granted a provisional order for respondents to show cause why a final order should not be granted declaring the respondents guilty of contempt of court and that they be fined, in their personal capacities, the sum of $15000. The applicant also sought an order for costs against all the respondents in their personal capacities and for such costs to be awarded at a higher scale. In my view, the declarator sought by the applicant had no bearing on the efforts to secure the release of Chavunduka. The purpose of the declaratory order was to exact punishment on all the respondents for the apparent sins of Mr Whabira committed when Mr Bull attempted to serve the court order on him.

It is quite clear from the above facts that the first and third respondents are not guilty of any wrongdoing in their personal capacities in regard to the non-compliance with Smith J's order. This was virtually conceded by Mr *Morris* for the applicant.

Mr Whabira takes the stance, in his affidavit, that his refusal to accept service of a court order against his Minister is not a failure to comply with a court order. On this basis, he argued that he did not commit contempt of court. He maintains that he was not a party to those proceedings and had no legal obligation to accept the court order against his Minister. Whether or not Whabira is guilty of contempt of court by reason of failure to comply with a court order issued in proceedings to which he was not a party is debatable. It is, however, not necessary to determine that issue in order to dispose the question of costs in this case. Accordingly, I leave that question entirely open. What, however, is not debatable is that making disparaging remarks about a court order does constitute or can constitute contempt of court. Mr Whabira

does not dispute making disparaging remarks about the court order attributed to him. There is therefore, a *prima facie* case that Mr Whabira committed contempt of court order. That contempt of a court order is best dealt with by way of criminal prosecution following a proper investigation of the allegation. It is not the kind of contempt of court that is amenable to being dealt with by way of chamber or court application. That procedure in my view is inappropriate.

In arguing for the applicant's costs, Mr *Morris* has submitted that there was contempt of Mr Justice Smith's order by the first and second respondents. That contempt has since been purged by the release of Choto and Chavunduka. In the light of that it was no longer competent for applicant to proceed with civil contempt proceedings and was confined in his remedy to a claim for costs. For this submission, he relied on the cases of *Dreyer* v *Berry* (1862) 1 Roscoe 25, *East London Municipality* v *Ellis & Anor* 1907 EDC 309 and *Smit* v *Bloom* (1910) 20 CTR 374. I have some doubt on the soundness of this submission for a number of reasons. The contempt committed by Whabira relates to contemptuous remarks about a court order, an event that had occurred and was completed as opposed to a continuing non-compliance with a court order. I have some doubt as to whether it can be said he failed to comply with a court order. Indeed, it is doubtful if he had the competence to comply with the court order. The evidence of the Minister was that he is an accounting officer and cannot issue orders to the military who were holding Chavunduka. The most that he could do, and *should* have done, was to facilitate the compliance with the order. The terms of the provisional order in respect to the contempt are

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framed in such a manner that they really do not relate to the possible release of Chavunduka. They are intended, as I have already stated, to punish the respondents in their personal capacities for what occurred at the encounter between the applicant and Mr Whabira. It is quite apparent that an element of descending to a personal level had crept into these proceedings. With hindsight, it was ill advised for Mr Wilson to get involved in the service of court process. The rules of this court provide that court process be served by the Sheriff or his deputy to ensure neutrality. It is ill-advised for the injured party to participate in the service of court process. That is inviting trouble and trouble is what occurred here.

As I have already stated, I find the conduct of Whabira reprehensible in the extreme. I considered seriously awarding costs against him personally. I refrained from so doing for the following reasons. He was not a party to the proceedings that resulted in the order he is alleged to have failed to comply with. I have some doubt as to his legal obligation to accept the order on behalf of the Minister. I am quite clear in my mind that his responsibility as a

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Permanent Secretary demanded of him that he accept service and facilitate its compliance whether he was legally obliged to do so or not. In addition, when Mr Whabira conducted himself in the manner that he did, he was about the Ministry's business and not his personal business. Finally, the contempt that he committed in the form of making derogatory remarks of a court order is best dealt with by way of criminal investigation as opposed to a court application. That way the matter can be properly investigated before conviction and sentence. There is also an element of over-reaction by the applicant. There is nothing really justifying his claim that the respondents be fined $15000 in their personal capacities as sought in the draft contempt order. Ordinarily, the respondents would be entitled to their costs as the declarator sought cannot be granted. The normal rule is that costs follow the result. The applicant conceded that the third respondent is entitled to his costs against the applicant but has incurred none. As I have stated above, the general rule is that costs follow the result. On this approach, the applicant should pay the costs of the respondents as the provisional order cannot be confirmed. However the following consideration demand departure from that rule. Firstly, the conduct of Whabira as the Permanent Secretary of the Ministry of Defence must have clearly led the applicant into believing that further legal action was required to secure the release of Chavunduka from what is now accepted as unlawful arrest by the military. If he had assured the applicant that he, Whabira, would transmit the court order to the appropriate authority and would use his good offices to ensure compliance with the order, further litigation might have been avoided. On this basis alone, costs should be borne by the Ministry of Defence which he heads as Permanent Secretary.

Finally, when all is said and done, it must be accepted that the detention of Chavunduka by the military was unlawful. The applicant came to court to seek his release from such unlawful custody. Wherever the legal niceties of the matter might lie, it would offend against the most elementary notions of justice to conclude that a party that approaches the court in these circumstances should bear his own costs, let alone the costs of the party ultimately responsible for the unlawful arrest and detention. For these reasons, I am satisfied that although the

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respondents are successful to the extent that the provisional order is discharged, they should all the same pay the costs of the applicant.

In this application, answering affidavits containing allegations of torture were filed. I have not dealt with these allegations for the following reasons. The allegations are contained in an answering affidavit and the respondents have not had an opportunity to comment on them. I could have invited the respondents to file further affidavit in response to these allegations if they so wished if I felt the allegations were relevant to the issue of costs. Litigation

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involving the torture allegations is a virtual certainty and I do not wish to prejudge the issue.

In the result, the provisional order is discharged but the Ministry of Defence should bear the applicant's costs on the ordinary scale.

Gillespie J: I respectfully concur in the decision of Chidyausiku JP. There are some comments of my own which I would like to add to that which has already fallen from the learned Judge President. Such is the publicity, not to mention heat, which this affair has generated that I think it not inappropriate to state the facts of the matter. The facts as stated may at this stage properly be held to be beyond controversy, unless they are prefixed by the adverb "allegedly" or by some other intimation of dispute.

Over the weekend of 9 and 10 January 1999, a weekly newspaper, *The Standard*, published an article: "Senior Army Officers Arrest: Coup Plot Foiled". This purported to give details of a coup planned by mutinous officers of the army which had been detected and thwarted by the arrest of certain officers. On 11 January, on the personal instruction of the Minister of Defence, military officers commenced investigations into the publication of the article with a view to obtaining details of the newspapers sources and of any further allegations concerning the alleged affair. The editor of the newspaper, Mark Chavunduka, was approached by military policemen and asked to contact Major Mhonda at Army Headquarters.

On Tuesday 12, January the Minister of Defence left Zimbabwe on affairs of State. Mr Chavunduka voluntarily attended at Army Headquarters and was prevented from leaving. Although initially permitted to make telephone calls to the outside world on his cellular telephone, he was from about 2.00 pm on that day held incommunicado. Throughout the day various military officers attended at *The Standard*'s premises asking after the newspaper's chief writer, Ray Choto, and interviewed him briefly on one occasion. By the end of the day, Mr Chavunduka not having been released, the managing director of the publishers of *The Standard*, Clive Wilson, instructed lawyers to prepare an urgent application to this court for the immediate release of that individual.

On Wednesday 13, January there were various alleged sightings of Mr Chavunduka and communications with him the details of which ought perhaps to be regarded as disputed. He remained in military custody and access to him was denied. Further attempts were allegedly made to interview Mr Choto, who decided to hold himself aloof from contact with the military. The court application was issued, citing as respondents the Minister of Defence and Major

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Mhonda. It was served upon an official at the Ministry

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of Defence but could not be served upon the individual solder since the attorney's clerk was refused access to the military barracks where he was said to be. The papers were also served upon the Attorney-General. In the evening, military officers confronted Mr Wilson and allegedly threatened him with arrest.

On Thursday 14, January Mr Chavunduka remained in custody and incommunicado. The court application was placed before Smith J who caused an appointed time of hearing to be notified to the legal practitioners concerned. After allowing a postponement of the hearing in order to facilitate the obtaining of instructions by the law officer representing the Attorney-General, the learned judge made the order which is set out in the judgment of Chidyausiku JP. Since the law officer, unusually, could not assure the court that the respondents were in contact with the Attorney-General's office and undertake the responsibility of advising them of the proceedings and their outcome, service of the order was ordered and leave was given to the applicant's attorney to effect service. In the late afternoon, a deputation consisting of the applicant's attorney, Simon Bull, Mr Wilson, and Dexter Chavunduka, the father of the prisoner, encountered Job Whabira, in an attempt to serve the order upon the Minister of Defence. What transpired at that meeting I shall address separately below. There was no service of the order on Major Mhonda. On this day, the Minister of Defence learned of the detention of Mr Chavunduka through embassy briefs prepared for him but claims not to have been informed by this means of any court application.

On Friday 15 January, Mr Chavunduka had still not been released. For this reason, and because of what had transpired between Mr Bull and Mr Whabira, the applicant instituted the proceedings for committal for contempt which have ultimately led to this hearing. The court application cited as respondents the Minister of Defence, Mr Whabira and Major Mhonda. It claimed relief in an order releasing Mr Chavunduka from custody and committing the named respondents for contempt. The application was placed before Garwe J in the late afternoon. The learned judge declined to hear any argument on the matter or to give any order until such time as the papers had been served upon the respondents. He appointed as the date of hearing Monday 18 January at 4.00 pm. Mr Chavunduka thus remained in custody and out of contact with his family, friends and advisers for the entire weekend.

Late on Friday 15 January, the Minister of Defence returned to Zimbabwe. Again, he was briefed on current matters, including this affair, but claims not to have been made aware at any stage before his departure from the country on Sunday 17 January, of the court proceedings or the issue of a court order.

On Monday 18 January, Mr Chavunduka remained in military custody and

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cut off from contact with the world. The notice of the forthcoming hearing was served on the Attorney-General's office at 9.00 am; and at Defence Headquarters at midday. The scheduled hearing of the contempt application before Garwe J did not take place because of the indisposition of the learned judge. The file was reallocated to Devittie J who gave audience to the applicant in chambers at 6.00 pm. There was no appearance for the respondents. The learned judge made the provisional order set out in the judgment of the learned Judge President. This order directed the appearance before the judge of the various respondents and their production of the person of Mr Chavunduka at 10.00 pm that evening. It required personal service upon the respondents.

While this order was being awaited, a policeman, Detective Inspector Matema, approached Mr Bull. He allegedly intimated to him that the police had taken over investigations; assured him that legal procedures would be followed; and inquired after Mr Choto.

Purported service was effected upon the Minister and Mr Whabira by leaving a copy with a guard at the residence of each individual. No service was made upon Major Mhonda since the Deputy Sheriff was refused access to the military cantonment where he might be located. The Minister of Defence returned to Zimbabwe that evening but only became aware of the order of Devittie J at a time when he could not comply with it. There was accordingly no appearance before Devittie J that evening and the learned judge caused the reissue of that order requiring the return of the parties in the afternoon of Monday 19 January. He was informed of the approach by Detective Inspector Matema.

On Tuesday 19 January, Detective Inspector Matema allegedly undertook to Mr Wilson that should Mr Choto surrender himself, he and Mr Chavunduka would be properly dealt with according to the due process of the law. Mr Choto did surrender himself and Mr Chavunduka was placed in police custody. Mr Chavunduka was seen by his family and advisers just before giving a statement to police. The Minister of Defence, for his part, was informed of the encounter with Mr Whabira the previous week and of the various court orders but was also advised that the prisoner was now in the hands of the police. He took no further action save to inform the Attorney-General of events. There was no attempt to serve the fresh order given by Devittie J and no appearance before him by the respondents that evening. The applicant's legal practitioner appeared to advise the learned Judge of latest developments. The order was altered to the extent that it required the return of the parties on 20 January, the following day. The learned judge also specifically requested the attendance of the Attorney-General or of a law officer.

On Wednesday 20 January, Mr Chavunduka and Mr Choto were held incommunicado. It is alleged that despite the assurances given, they were handed over by police to military authorities and severely tortured. There was no appearance by the respondents nor by the Attorney-General who submitted a minute in explanation of his absence. The learned judge once again rescheduled the hearing but no service of a fresh order was made upon any of the respondents. In fact, no further hearing took place since on 21 January Mr Chavunduka and Mr Choto were taken before a magistrate; placed on remand on certain charges; and admitted to bail.

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On this recitation of events, it is beyond dispute that neither the Minister of Defence nor Major Mhonda can be subjected to any sanction for contempt of court. Wherever it is alleged that a party has defied a court order and his committal is sought in consequence thereof, it is fundamental that that party be constrained to act by a court order; that he be made aware of the constraint upon him; and that he wilfully refuse to comply. The order was never served upon Major Mhonda at all and there is simply no basis for holding him, on these papers, to be in contempt of court. There is, however, much of concern potentially connected to Major Mhonda relating to his amenability to court process that needs to be investigated. For instance, it is most disturbing that persons lawfully attempting to serve process were denied access to the relevant camps or barracks. One expects that military standing orders would provide for the facilitation of such lawful endeavours. It may well be that this is something the Attorney-General might care to investigate. It is easy to suppose that there was a plot afoot to keep the person to be served out of reach of the process server but that is mere conjecture. In the face of a failure to effect service, the applicant's remedy was to apply for an order of substituted service. That, however, was never done.

The position of the Minister is equally secure for the purposes of these proceedings. Although cited in an official capacity as respondent in the proceedings before Smith J, he was cited personally in the subsequent contempt proceedings. Had there been proper service upon him of the order of Smith J, together with proof of his failure to do all things required of him in his official capacity to comply with that order, then a personal contempt of court might have been established. As it is, however, there was no such service, and no such proof of non-compliance. The provisional order itself, therefore, citing him personally, was not sufficiently founded. Indeed, Mr *Morris* for the applicant has found himself obliged to concede that that part of the order was issued *per incuriam*.

Although it was apparent from the papers that there could be no complaint of contempt upheld against the Minister for any failure to comply with the order of Smith J, there were about his affidavit and explanation certain

features or omissions that caused the court, prior to the hearing, to see fit to give informal directions pertaining to the Minister's attendance at the day of hearing and to give leave to adduce evidence on oath additional to the affidavit. The area of concern pertained to compliance, not with the order of Smith J, but with that of Devittie J and was therefore not strictly relevant to the proceedings. The seriousness of the inability to bring about a hearing despite the many directions by Devittie J, however, was such that it was considered desirable to inquire into the matter.

On the date of hearing, the Minister took the court's concerns sufficiently seriously to proffer his evidence. This showed the various details, included in the summary of events above, as to the Minister's movements and knowledge of the matter. One might, perhaps, be forgiven a little scepticism towards the claim that the Minister was entirely unaware of the existence of the order of Smith J and of litigious proceedings in the matter generally but there is no basis on the evidence before the court upon which that claim may justly be rejected. Similarly, where the

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Minister initially professes no recollection of, and subsequently denies, an early approach allegedly made to him by the mother of Mr Chavunduka - the two families being close - one might well be inclined to favour the probability that such an approach was made. Even if that lady did request the Minister's personal intervention to secure the release of her son and was rebuffed, that, however, does not disclose any ground for holding the Minister to have defied court process. Finally, there is no basis for holding the Minister to blame for any failure to attend subsequent hearings before Devittie J. One might be inclined to be critical of the fact that he did nothing to secure the release of Mr Chavunduka (despite a submission to that effect, later withdrawn, by Mrs *Goredema*) but that is not a point properly before this court to decide in these proceedings. There is nevertheless no basis upon which the Minister may be said to have committed a contempt of court.

I should add, for completeness' sake, that the alleged act of surrendering Mr Chavunduka, and the newly arrested Mr Choto, from police custody to military custody has formed no part of these proceedings. One is unable to make a factual finding on the matter. It must be stated, however, that if a policeman did hand these gentlemen over to military custody then he acted unlawfully. He must share legal and moral responsibility for all that subsequently may have happened - as must the superior officers and political masters of any individual wrongdoers. There has in these proceedings, however, been no indication of the involvement of the Minister of Defence in any such subsequent acts as would entitle the court in this application to consider such involvement as part of a wide ranging inquiry into disobedience of a court order.

GILLESPIE J

Not only did the applicant concede that no order of committal could properly be made against either the Minister of Defence or Major Mhonda, the concession was extended to Mr Whabira. This extended concession, however, was on a very different basis. Whereas in respect of the first two persons, it was acknowledged that no contempt was disclosed, in the case of Mr Whabira, the ground for conceding was that the release of Mr Chavunduka had ultimately been brought about and that the applicant no longer had *locus standi* to prosecute a prayer for committal for contempt. On this basis, the applicant sought no substantive relief against any party other than an order of costs. The costs it claimed on the attorney and client scale.

The concession is correct in its effect. The contempt which has been drawn to the court's attention by these proceedings is in substance a so-called civil contempt. That is to say it is the disobedience by a party of a court order given in non-criminal proceedings. I say "in substance" because there is an element in the allegations against Mr Whabira of contempt in the sense of disparaging the dignity or authority of the court. It is well established that a civil contempt is nevertheless embraced within the criminal offence of contempt of court. 1(18) A civil litigant who is faced with such contempt has the right to bring the contempt to the notice of the court. He may do this in the capacity of a litigant, of an informer, or both. 2(19) Where he acts as an informer he will generally seek no relief and if the contempt is established can expect to recover his costs. If he makes it clear that he acts in good faith as informer, normally no order of costs will be made against him in any event. 3(20) Where he seeks substantive relief, the primary purpose of that relief is to enable him, as a litigant, to enforce compliance with the order in his

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favour. 4(21) It follows that if that purpose has fallen away by the compliance with the order, albeit in a manner or within a time not in accordance with the terms of that order, then the aggrieved party loses his capacity to institute action as a litigant. 5(22) It nevertheless seems to me that where those proceedings have been properly instituted, when the outstanding order remained uncomplied with and in order to bring about such compliance, the applicant, even where he acts as litigant, must retain *locus standi* to prosecute them to their conclusion. He may longer be able to claim the committal of the respondent but he has an interest in the outcome if only to protect his position as to costs. He can, of course,

consolidate his position by making it clear that his continued participation in the proceedings is only as informant and in order to recover costs. If he persists in claiming an order of committal, however, then he renders himself vulnerable to an adverse order as to costs.

As for the court's position when faced with an application for committal for civil contempt, which has before the hearing effectively been purged, this must remain a matter of discretion. 6(23) The exercise of that discretion depends upon all the relevant factors. Critical among these may be whether it is necessary to order a committal to secure future compliance with an order that will be ongoing in its effect; whether the alleged contempt has in addition a criminal element divorced from the civil disobedience aspect; whether the dignity and authority of the court requires any order; and whether any criminal aspect of the contempt is better dealt with by criminal prosecution of the offender.

In these proceedings, therefore, the applicant commenced as a litigant attempting to secure obedience to a court order and seeking substantive relief. Once that compliance was obtained, albeit in a manner scarcely submissive to the court's authority, the applicant sought no further relief of the respondent and appeared merely to move its costs. It did, however, move them on an attorney and client scale seeking this relief as a mark of the court's displeasure at the alleged contumelious conduct. It is therefore not present purely in the guise of an informant. Whether the applicant is to be awarded its costs depends, in my opinion upon the justification, if any, of bringing the proceedings in the first place; upon the correctness of the allegations of contempt; and upon all other factors relevant to the exercise of a broad discretion as to costs.

Determination of the first two of these factors involves consideration of the events alleged to have take place at the meeting between Messrs Bull, Wilson and Chavunduka (senior) on the one hand and Mr Whabira on the other. The affidavit of Mr Wilson, and the *viva voce* testimony of Mr Bull, may be summarised as follows. Having obtained the court order on Thursday 14 January, these gentlemen went to the offices of the Ministry of Defence where, fortuitously, they encountered Mr Whabira, the permanent secretary, in the lobby. They stated their business referring to the order and to Mr Chavunduka (junior). Mr Whabira responded with words to the effect, "Is this Chavunduka who talks about alleged coups?" After a short exchange Mr Bull suggested that all repair to the privacy of Mr Whabira's office. They did so. Into that office Mr Whabira also invited a gentleman whom Mr Bull understood to be the Director of Military Intelligence. The order was served

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GILLESPIE J

upon Mr Whabira and the nature and the exigencies of the order were fully explained by Mr Bull to Mr Whabira, who responded to the effect, "No, we are not going to do that". Mr Whabira also said, during the course of discussion words to the effect, "Judges cannot direct us, we are interrogating him ... We work at our own pace ... When people involve themselves in military matters they fall under military jurisdiction." All this in response to the intimation that the binding nature of the court order was undoubted and was ignored at peril. The words "Mark Chavunduka has become my friend" were also uttered and seem to have a rather sinister connotation.

None of this was denied by Mr Whabira in his affidavit. It is for this reason that the court afforded him too the opportunity of giving evidence in order to remedy any omissions from that deposition. In cross-examination of Mr Bull, Mrs *Goredema* for the State denied the utterances to the effect that the order would not be complied with and that the prisoner had come under military jurisdiction but denied no other details of the encounter. She suggested for Mr Whabira that he was not the appropriate officer upon whom to serve an order intended for the Minister personally; that he had no power to ensure compliance with the order, the matter being entirely within the Minister's hands; and that Mr Whabira did no more than decline to accept service on the basis of the Minister's absence. Without oral testimony from Mr Whabira rebutting the evidence adduced by the applicant the court would have no alternative but to regard that evidence as uncontradicted. Mr Whabira chose not to take the witness stand. In the event, the details of the encounter as stated by Mr Wilson and Mr Bull must be accepted.

On those facts, I have no doubt whatsoever that Mr Whabira failed lamentably in his duty towards the order. The order of Smith J was not directed against the Minister personally but in his official capacity. Mr Whabira, as the head of the Ministry, had a duty to ensure compliance with that order to the extent it was in his power. Given the uncontradicted fact that a high official from military intelligence, probably the director himself, was present at the meeting, one is inclined to treat with some scepticism the claim that Mr Whabira had no opportunity to influence events. Whatever the truth of the matter, his clear duty was to cause that order to be communicated to persons who could comply with it; to bring it to the attention of the Minister forthwith; and to solicit the advice and intervention of the Attorney-General. He did none of these. Not only that, but he intimated to those serving the order that he would do no such thing. He expressed in clear words the intention not only of himself, but of defence officialdom, not to be bound by the order. As the learned Judge President has stated, this conduct was reprehensible in the extreme.

It is my firm view that these circumstances, whether or not they constituted

GILLESPIE J

a contempt by Mr Whabira individually, undoubtedly served to cause the applicant reasonably to believe that the order would not be complied with unless sterner measures were taken. Indeed,

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notorious events which followed a press report of the circumstances, and the lack of any official disavowal of an intention not to comply with the order, show that such a belief was formed by other sectors of society. Having once determined that the applicant acted reasonably in instituting proceedings for contempt then I can do no better than respectfully to endorse the unequivocal sentiment expressed by the learned Judge President. Where persons have been unlawfully deprived of their liberty - and despite regrettable equivocation from Mrs *Goredema* on the point there can be no doubt that the arrest and detention of Mark Chavunduka was unlawful - and it is necessary to resort to litigation, even litigation for contempt, to secure their release, then one's sense of justice would be appalled at an approach which deprives the injured party of its costs, in favour of the party responsible for the injury, on the basis of an over-technical assessment of the correctness or otherwise of procedure adopted.

I would therefore concur with the learned Judge President in awarding costs of this application to the applicant. It must be said, however, that there are errors and omissions committed by the applicant in the course of these proceedings. It has already been pointed out that a failure to serve orders or to seek a directions as to substituted service has meant that court orders were not properly served. Similarly, the subject of adverse comment has been the erroneous citation of the Minister in his personal capacity for contempt. The choice of parties to cite as respondents in the first place was hardly the most inspired. One should cite in these circumstances persons whom one knows can compel compliance with the order sought. The appropriate parties would have been the Minister *nomine officio*; the Commander of the Army and any officer known to have the prisoner in his custody; and possibly the Attorney-General. The order initially sought might more advantageously have been a provisional order requiring all to attend before the judge urgently to produce the prisoner and show cause why he should not be released - the interdict *de libero homine exhibendo*. None of these circumstances, however, can be allowed to cloud that basic issue of an unlawful arrest and detention and a reasonably perceived determination to flout the first order given. Litigation was necessary and reasonable and costs must follow.

The various errors and omissions, however, are relevant to the question whether costs be awarded on a higher scale or not. Since neither the Minister of Defence nor Major Mhonda were properly cited personally and since no order could properly be made against them, strictly they might be said to be entitled to any costs personally incurred by them. They are, however, parties playing a real part in the wrongful treatment of Mr Chavunduka, although the

blameworthiness, if any, of that part has yet to be determined. If, for that reason, they are denied whatever limited costs they might personally have incurred (and it is unlikely they incurred any) their wrong citation is no little reason to decline to award costs to the applicant on a higher scale. As for Mr Whabira, he may consider himself fortunate that he is not required to contribute personally to the applicant's costs. As a further exercise of discretion, however, I align myself with the reasoning of the learned Judge President on the point. Although a contempt of court is *prima facie* disclosed, it is one which requires no order of the court to remedy. The freedom of Mr Chavunduka has been brought about. The contempt is one which,

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to the extent it bears a criminal element, was committed *ex facie curiae.* The dignity and authority of the court has been preserved by the submission to it of the Minister of Defence and Mr Whabira, as indicated by their attendance during these proceedings. If Mr Whabira's actions are to be pursued further then that should be by criminal prosecution. I am content to leave that decision with the Attorney-General and not to pre-empt or influence it by exemplary awards of costs. Moreover, in Mr Whabira's favour, is the consideration that he has not sought falsely to deny the evidence of Mr Bull and Mr Wilson. He has wisely and very properly refrained from challenging their evidence and I take his silence as acknowledgement of the truth of that evidence and submission to the determination of the court on that basis. Belated though this may be, it does significantly diminish what was otherwise a very serious affront to the court. In recognition of that submission, I would join with the learned Judge President in ordering that all the costs of the applicant be borne by the Minister of Defence in his official capacity.

Atherstone & Cook, legal practitioners for the applicant

Attorney-General's Office, legal practitioners for the respondents

BITI *v* MINISTER OF STATE SECURITY 1999 (1) ZLR 165 (SC)

Citation	1999 (1) ZLR 165 (SC)
Case No	Judgment No. S-19-99
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA, Sandura JA
Heard	February 16, 1999
Judgment	March 15, 1999
Annotations	None

Civil appeal

Flynote

Delict - vicarious liability - course of employment - test - whether servant engaged in affairs or business of employer - driver entrusted with vehicle - deviation from authorised route - whether deviation sufficient to convert act into "frolic of his own"

Damages - delictual - assessment - effect of decline in value of money - illegality of source of income of injured party - relevance of - date from which interest should run

Evidence - documentary - production of documents containing hearsay and/or opinion evidence - when permissible

Headnote

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The driver of a government vehicle was instructed to take three government officers home after work and then keep the vehicle safely overnight. In the morning he was to pick up the same officers and drive them to their work place. He was on call while not actively on duty.

About two and a half hours after he should have finished dropping the three officers, he rammed into a stationary taxi owned by the plaintiff, badly damaging the taxi and severely injuring the plaintiff. The accident occurred at a place which was about a 5 km deviation from the routes he would have had to have taken to drop off the government officers. There was some evidence that the driver was heavily intoxicated and that he had his girlfriend in the car. The trial court had held that the Ministry which employed the driver was not vicariously liable. On appeal:

Held, that the standard test for vicarious liability requires the court to decide whether the wrongdoer was engaged in the affairs or business of the employer when he committed the delict. In the present case, the business of the government driver included not only the transporting of passengers to their homes, but also keeping the vehicle in safe overnight custody. Although the driver had deviated from his from his authorised route, the deviation, in terms of time and space, from was not such as to convert it into "a frolic of his own." The improper mode of exercising his duty of keeping the vehicle safely overnight was still done within the course of his employment and the Ministry which employed him was vicariously liable.

Held, further, that the Civil Evidence Act [*Chapter 8:01*] is not a wholesale licence for the indiscriminate production in a civil trial of pieces of paper containing hearsay and/or opinion evidence.

Held, further, that as regards general damages it is not safe to obtain guidance from other countries, given that our economies have changed so greatly and so differently. When referring to a comparable earlier Zimbabwean case, the fall in the value of money must be taken into account. The consumer price index should be used to calculate the equivalent figure in the present case of the damages awarded in the earlier case.

Held, further, that as regards the claim by the plaintiff for loss of earnings, the claim for such damages should not be dismissed because he was earning that income by operating unregistered taxis or taxis that did not have certificates of roadworthiness. However, only the figure conceded by the defendant for such loss should be awarded because the courts cannot regard it as consistent with public policy to encourage the use of unregistered and/or unroadworthy vehicles as taxis.

Held, further, that in the present case it would not be fair to make interest run from the date of the accident, since general damages were calculated as at the date of judgment. Interest was ordered to run from the date of service of summons.

Cases Considered

Cases cited:

Ess Kay Electronics Pte Ltd v *First National Bank of Southern Africa* 1998 (4) SA 1102 (W)

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Feldman (Pty) Ltd v *Mall* 1945 AD 733

General Accident Versekeringsmaatskappy SA Bpk v *Bailey NO* 1988 (4) SA 353 (A)

Macala v *Maokeng Town Council* 1993 (1) SA 434 (A)

Mankebe NO v *AA Mutual Ins Assn Ltd* 1986 (2) SA 196 (D)

Marufu v *Mawona & Ors* 1996 (1) ZLR 593 (H)

Masuku & Anor v *Mdalose & Ors* 1998 (1) SA 1 (A)

Maxalanga v *Mpela & Anor* 1998 (3) SA 970 (Tk)

Min of Defence & Anor v *Jackson* 1990 (2) ZLR 1 (S)

Min of Law and Order v *Ngobo* 1992 (4) SA 822 (A)

Min of Police, Transkei v *Xatula* 1994 (2) SA 680 (TkA)

Mkize v *Martens* 1914 AD 382

Nott v *ZANU (PF)* 1983 (2) ZLR 208 (S)

Santam Ins Ltd v *Ferguson* 1985 (4) SA 843 (A)

Case Information

A P de Bourbon SC, for the appellant

Mrs *L M M Moyo*, for the respondent

Judgment

McNally JA: This is an appeal from a decision in the High Court dated 30 April 1997. It is a case involving a motor vehicle accident, but the issue as to liability is a purely legal one. There is no dispute that the driver of the government vehicle, an employee of the Central Intelligence Organisation, was wholly responsible for the crash, and for the serious injuries suffered by the appellant. He never denied his liability, and consented to judgment in the sum of $323300 plus interest.

The critical question is whether the Minister is vicariously liable. Obviously, the chances of Mr Biti recovering anything from the driver are remote. His only effective judgment would be against the Minister. The learned judge found that the Minister was not vicariously liable and dismissed Mr Biti's claim against him with costs.

McNALLY JA

The two issues on appeal are, therefore, whether the Minister is vicariously liable and if so, for how much?

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The relevant facts may be stated as follows. Clifford Chandipa was employed in Harare by the CIO as a driver. I will refer to him as "the driver". On either 11 or 13 November 1993 (the evidence is not clear), he was given a government car and instructed to take three CIO employees home after work. One lived in Tongogara Flats in Tongogara Avenue north of the city centre; one in Kuwadzana, west of the city; and one in Glen Norah B, south-west of the city. He was then to keep the vehicle safely overnight, either at his home, which was in Belvedere, just to the west of the city centre, or in some other secure place such as a police station. In the morning, his duty was to pick up the same officers and drive them to the office. So the vehicle was lawfully in his custody overnight. He was "on call" while not actively on duty.

He took them at about 7.30 pm and should have finished that duty by about 9.30 pm. However, at about 11 pm that night, he, driving the same government vehicle, rammed into the back of a stationary taxi owned and occupied by Mr Biti. The taxi had been malfunctioning and Mr Biti had driven it to the side of the road into an area where there was a bay for a bus-stop. He got out to check his parking lights, and as he was getting back in, the taxi was hit from behind by the driver. Mr Biti's back was broken and he remains with no control over bowel or bladder and with limited function and sensation below the waist.

The place of the accident was on Samora Machel Avenue near the Holiday Inn and Fifth Street. The driver said he was coming from Seventh Avenue (Street) on his way home. He gave no satisfactory explanation as to what he was doing in Seventh Street. It was clearly a deviation from his duty. He was to the east of the city centre. His duty did not take him there.

There is some evidence that he was heavily under the influence of alcohol and accompanied by a "girl friend" at the time. The status of that evidence is obscure. It is contained in the report of a board of enquiry which was "handed in" as Exhibit P8 by counsel for Mr Biti, during cross-examination of the Minister's witness Mr Marimo. Judicial officers should be careful to ensure that all parties are recorded as being agreed on the status of such documents before they are produced. Is it common cause that their contents are to be taken as true and factual or not? The same problem arises with Exhibit 1, the police report. It was apparently produced as evidence that the driver was on duty at the time. Counsel for the Minister did not accept that he was on duty. She should have objected to the production of the exhibit. The Civil Evidence Act, as I have remarked before, is not a wholesale license for the indiscriminate production of pieces of paper containing hearsay and/or opinion evidence.

McNALLY JA

The law on vicarious liability is, like other branches of the law, easy to state but difficult to apply. The learned judge below cited extracts from *Mkize* v *Martens* 1914 AD 382 at 390-391; *Feldman (Pty) Ltd* v *Mall* 1945 AD 733; and *Nott* v *Zimbabwe African National Union (Patriotic Front)* 1983 (2) ZLR 208 (S).

It may be noted in passing that in all three of those cases the employer was found to be vicariously liable.

The facts in *Feldman supra*, were remarkably similar to those in the present case. They are set

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out in the headnote as follows:

"A servant of the defendant had been given custody of a motor van and a number of parcels, with instructions to drive the van and deliver the parcels to various customers in a town. Having delivered the parcels he was to return the van to a certain garage. It appeared that after delivering the parcels he had driven the van to a place some miles away on his own business, and there drank enough liquor to make him incapable of driving the van with safety. Shortly after his departure from such place on his way back to the garage, he negligently collided with and killed the father of two children."

In *Feldman supra*, the deviation in point of time was about 3-4 hours. In this case it was about $1^{1}/_{2}$ hours. In *Feldman supra*, the deviation in point of distance was about $3^{1}/_{2}$ miles (5 kilometres). In this case, it was about the same. It is interesting that there is another similarity, not mentioned in the headnote. The court in *Feldman supra*, found, as a matter of probability, that there had been a woman in the car with the driver.

The decision in *Feldman supra*, was a 4 to 1 split decision. Watermeyer CJ, Tindall JA, Davis AJA and Fischer AJA agreed with Schreiner J in the court below that the employer was liable. Greenberg JA dissented. Yet the judge in the court *a quo* in this present case relied more on the minority judgment than on the majority judgment. He did so, I hasten to add, knowingly.

He did so because, he said, Beck JA in *Nott supra*, had followed the reasoning of Greenberg JA at 213A-F of the *Nott* judgment. With great respect, I do not think that is so. In the passage immediately following the one quoted in the court *a quo* Beck JA said:

"In the case of *African Guarantee and Indemnity Co Ltd* v *Min of Justice* 1959 (2) SA 437 (A), the tests enunciated by Watermeyer CJ and by Tindall JA (in *Feldman*'s case) were said by Ramsbottom JA to reveal no important differences, and were followed. In particular, the reference in Tindall JA's judgment to the respects of 'space and time' when assessing the degree of deviation was considered helpful in relation to the facts of the *African Guarantee* case *supra*, and I think that in relation to the facts of the instant case as well, these considerations of space and time form a useful yardstick by which to assess the degree of M's deviations from his appointed functions.

Indeed, considerations of space and time will in most instances be the respects that will most helpfully indicate whether a servant's deviation is of such a degree as to suffice to exonerate his master from liability, but it should not be thought that considerations of space and time will necessarily be the best touchstones in every case."

McNALLY JA

As I read that judgment, Beck JA was favouring the approach of Watermeyer CJ and Tindall JA, and was supporting the test of vicarious liability as expressed by them. I will not repeat the passages which are to be found at the foot of p 211 and the top of p 212 of his judgment. Those eminent judges applied those tests to the facts of *Feldman supra*, and found that a deviation of 3-4 hours and 5 kilometres was not, in the circumstances, enough to exonerate the employer. *A fortiori*, it seems to me, in the present case, where the only difference was a shorter deviation in point of time.

In addition, I favour some of the considerations set out by Davis AJA in *Feldman supra*. He spoke of his understanding of the phrase "scope of his employment" and said that it meant "the

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exercise of the functions to which he has been appointed" (p 783). He went on to say:

"Those (functions) in *Baloyi*'s case did not consist merely in the delivery of parcels in and about Johannesburg by the use of his master's van; they included the care and control of that van when it was in his possession, and they included also the duty to return it to the garage in Sauer Street at the close of the day's operations."

Thus the situation might have been different, as he pointed out at 785, if a servant who was not employed as a driver, and was asked to go on a short journey to convey a message, stole his employer's car in order to do so. In that situation, the employer could not have been liable. But in *Feldman supra*, the employer had entrusted the car to the driver. That is the very same situation we have in the present case.

This line of thought led Davis AJA to a further thought which appeals to me although it has not found subsequent favour. He expressed it thus, at p 787:

"The question is not whether he authorised, or indeed desired, some particular act of his servant, or whether it is to his benefit, but whether, whatever his attitude towards it, and whatever its consequences to him, that act of the servant flows sufficiently naturally from what he did authorise that he should have foreseen it as a likely result should the servant prove untrustworthy. For when he appointed the servant, he knew that he could in large measure only control him in theory, and yet he knew also that he was, in the words of Shaw CJ, 'bound to see that his affairs were conducted with due regard to the safety of others'."

In the present case, it seems to me that to entrust a motor vehicle to a relatively low level employee overnight is to place an enormous temptation in his way. He probably has no car of his own; there is probably no way of checking the next day whether or not he has exceeded a reasonable mileage in carrying out his duty. The employer is taking a risk which is easily foreseeable. If the risk materialises, the consequences are properly for his account. However, I do not rely on this consideration, being conscious of the criticism of this approach by Goldstone JA (as he then was) in *Macala* v *Maokeng Town Council* 1993 (1) SA 434 (A) at 440-1, and by Kumleben

McNALLY JA

JA in *Min of Law & Order* v *Ngobo* 1992 (4) SA 822 (A) - which, though reported earlier, was the later decision. I am content, therefore, to accept that the "creation of risk" approach is not one which has found favour with the courts. But in applying what has been called "the standard test" of vicarious liability, namely whether the wrongdoer was engaged in the affairs or business of his employer (*Ngobo* at 827 A-B), it is relevant to bear in mind that that business included not only the delivery of the passengers to their homes, but also the overnight custody of the vehicle. In my view, in the circumstances of this case, and by close analogy with *Feldman supra*, the deviation from his route was not too far removed, in time and space, from the driver's authorised mission, to convert it to what is called "a frolic of his own". It is properly to be seen, in the context of this case, as an improper mode of exercising his duty of overnight custody of the vehicle.

I have considered a number of cases of more recent vintage, including *Masuku & Anor* v *Mdlalose & Ors* 1998 (1) SA 1 (A) (which contains a useful historical analysis in the minority judgment of Olivier JA); *Maxalanga* v *Mpela & Anor* 1998 (3) SA 970 (Tk), which went the other way on its facts; and *Ess Kay Electronics Pte Ltd & Anor* v *First National Bank of Southern*

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Africa Ltd 1998 (4) SA 1102 (W). None of them takes the principle further. I am satisfied that the decisions in *Feldman supra*, and *Nott supra*, were wrongly applied in the court *a quo*, and that the Minister is to be held vicariously liable for the wrongdoing of the driver, in line with those decisions.

It remains then to consider the question of *quantum*.

The amount claimed in the declaration was $666 120.35. Judgment by consent was entered against the driver in the sum of $323 300. In this court, Mr *de Bourbon* conceded he could not ask for more than $317 137.31.

That figure is broken down as follows:

1.	Past medical expenses	-	$11 137.31
	This is now conceded.		
2.	Value of vehicle destroyed	-	$9 000.00
	This is now conceded.		
3.	Future medical expenses	-	$20 000.00
	This is also conceded.		
4.	General damages for pain and suffering, loss of amenities of life etc.		
	This is disputed. Appellant claims	-	$100 000
	Respondent concedes	-	$50 000
5.	Loss of earnings. This is disputed.		
	Appellant claims	-	$177 000
	Respondent concedes	-	$30 000

McNALLY JA

(in argument, increased from $10000 in the heads of argument).

I will deal with these two disputed items.

GENERAL DAMAGES

Nowadays it is not safe to obtain guidance on quantum from other countries, given that our economies have changed so greatly and so differently. The parties, conscious of this, have

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based their submissions on the one relevant case in this jurisdiction, namely *Minister of Defence & Anor* v *Jackson* 1990 (2) ZLR 1 (S), in which there was an award of $35 000 under this head.

Dr Jackson was a great deal younger (25 as compared to 52). And, although it is invidious to compare one set of horrible injuries with another, Dr Jackson's were certainly worse than Mr *Biti*'s.

The major consideration, to my mind, is that Dr Jackson's damages were awarded in May 1988, and Mr *Biti*'s would have been awarded, had he been successful as we have held he should, in April 1997. That these are the appropriate dates is established by *General Accident Assurance Co* v *Bailey NO* 1988 (4) SA 353 (A).

Those nine years saw a huge change in the value of money in this country. In South Africa, according to Robert J Koch's useful *Quantum Yearbook* for 1997, the cost of living index increased from 830.4 in 1988 to 2193 in 1997 (Base: 1970 = 100). So any award in 1988 would have to be multiplied by 2.64 to obtain the equivalent figure in 1997.

In Zimbabwe, I have been unable to go back further than 1990, because the consumer price index has been based on 1990 as 100. The figure for April 1997 was 490.9 (See *Quarterly Digest of Statistics*, Vol 3, for September 1997). So $35 000 in 1988 would have to be multiplied at least by 5 to obtain a comparable figure in April 1997. Dr Jackson's award, had it been made in April 1997, would have to have been at least $175 000 and probably well over $200 000. In the circumstances, one cannot say that the claim in this case, for $100 000 is excessive.

LOSS OF FUTURE EARNINGS

It must be said that this part of the claim is problematical for at least four reasons:

1. The information available is scanty;

2. Mr Biti's work is in what one may call the informal sector. His income was irregular and uncertain;

3. He has others working for him, so it is difficult to assess the extent to

which his disability (estimated by the doctor to be 50-60%) would affect his income.

4. Although his evidence was difficult to follow, Mr Biti seemed to concede tShat his 5 vehicles were either unregistered as taxis or lacked a certificate of roadworthiness.

Taking the last of these points first, Mrs *Moyo* for the Minister pointed to the decision in *Mba* v *Southern Insurance Association Ltd* 1981 (1) SA 122 (Tk). In that case, a widow's action for loss of support was defeated because her deceased husband's income was obtained from driving an uncertified taxi. There were a number of cases subsequent to that in which there were differing opinions on the point. However, in *Santam Insurance Ltd* v *Ferguson* 1985 (4) SA

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843 (A) it was confirmed that where the business was not only illegal but contrary to public policy, then a claim for damages for loss of support (and by necessary inference, for loss of future earnings) could not be sustained. This was followed in *Mankebe NO* v *AA Mutual Insurance Association Ltd* 1986 (2) SA 196 (D) at 201. But some reservations were expressed. Then in *Min of Police, Transkei* v *Xatula* 1994 (2) SA 680 (TkA) the law took a new turn. Counsel did not cite this decision (despite its being a decision of a court whose membership comprised three former judges of appeal in this country - Beck CJ, Goldin JA and Dumbutshena JA). However, the decision related to a claim by a dependant, and Goldin JA, who wrote the judgment, was careful to distinguish that situation from one in which the claimant is himself the earner of unlawful income. It was held that a dependant's claim could not be impeached by reason of the illegality of the source of income (684F-G). *Mba supra* was overruled.

It may be that Mr Biti can and will legalise his operations. But I do not think that the courts can regard it as consistent with public policy to encourage the use of unregistered and/or unroadworthy vehicles as taxis. In the circumstances, I do not think this court can go beyond the $30000 which Mrs *Moyo* was prepared to accept under this head.

Thus I would award Mr Biti, by way of damages, the following:

1.	Past medical expenses	$11 137.31	
2.	Value of vehicle	$9 000.00	
3.	Future medical expenses		$20 000.00
4.	General damages		$100 000.00
5.	Loss of future earnings	$30 000.00	
	Total		**$170 137.31**

Although this figure is considerably less than the figure awarded by consent against the driver, Mr Mandipa, it would not be right to let the two awards stand unrelated. This would, at least in theory, enable Mr Biti to

recover both amounts, which would be wrong. Because the amounts awarded are different, we cannot make them jointly and severally liable as is commonly done where there is an award of the same amount against two defendants. A slightly different formula will be necessary.

As far as interest is concerned, I am inclined to agree with the reasoning of Smith J in *Marufu* v *Mawona & Ors* 1996 (1) ZLR 593 (H) at 596, that it would not be fair to make interest run from the date of the accident, since general damages were calculated as at the date of judgment. In that case, his Lordship ordered that interest should run, in terms of s 6 of the Prescribed Rate of Interest Act [*Chapter 8:10*], from the date of service of summons on the insurers. The equivalent date in this case is the date of service on the Civil Division of the Attorney-General's Office, which was 17 March 1995. In the declaration, interest was sought from the date of accident. In

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argument, it was sought from the date of judgment. I propose to follow the middle course adopted by Smith J.

Accordingly, the appeal is allowed with costs. Paragraph b of the judgment of the High Court is set aside and in its place the following is substituted:

"b. Judgment is further entered in favour of the plaintiff against the second defendant, with costs, in the sum of $170 137.31 with interest thereon at the prescribed rate from 17 March 1995 to date of payment.

To the extent of the said sum of $170 137.31, the liability of the two defendants shall be joint and several, the one paying the other to be absolved."

GUBBAY CJ: I agree.

SANDURA JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

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

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MASARA & ORS *v* FORESTRY COMMISSION & ANOR 1999 (1) ZLR 174 (HC)

Citation	1999 (1) ZLR 174 (HC)
Case No	Judgment No. HH-44-99
Court	High Court, Harare
Judge	Smith J
Heard	February 19, 1999
Judgment	March 17, 1999
Annotations	None

Civil Action

Flynote

Prescription - interruption of - letters in negotiations over quantum of claim - not process whereby prescription is interrupted

Headnote

The plaintiff's husband was killed in a motor accident on 1 October 1994. The summons was issued on 12 December 1997. The second defendant, who was the driver of the other vehicle, was convicted of culpable homicide in October 1994. In March 1995, the plaintiff's lawyers

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contacted the first defendant, the second defendant's employer, and demanded damages. Negotiations as to the quantum of damages were conducted but they collapsed and the summons was issued. The defendants pleaded prescription.

Held, that negotiations and correspondence intended to reach a settlement are not court process and do not interrupt prescription. The plaintiff's lawyers' procrastination led to the prescribing of the plaintiff's claim.

Cases Considered

Cases cited:

Mountain Lodge Hotel (1979) (Pvt) Ltd v *McLoughlin & Anor* 1983 (2) ZLR 238 (S); 1984 (2) SA 567 (ZS)

Case Information

F M Katsande, for the plaintiffs

A J Dyke, for the respondents

Judgment

Smith J: The first plaintiff (hereinafter referred to as "Anna") is the mother of the other plaintiffs. On 1 October 1994, the second defendant (hereinafter referred to as "Langton"), who was driving a motor vehicle belonging to the first defendant (hereinafter referred to as "FCZ"), hit into Anna's former husband, as he was walking along the road with Anna and the fifth defendant. He, the former husband, died instantly from the injuries he received. At the time of his death, the plaintiffs were completely dependent on him for support. They claim that Langton was driving negligently and that his negligent driving was the sole cause of the accident. They are claiming damages from the defendants. The ages of the children on 1 October 1994 ranged from 16 years to six years; the second plaintiff became a major in 1996 and the others are still minors.

SMITH J

The defendants claim that the deceased was the sole cause of the accident; they say that he walked into the path of the vehicle as Langton was approaching him. Despite Langton taking reasonable steps to avoid the accident, he was unable to do so. They therefore deny liability. The FCZ admits that Langton was its employee at the time the accident happened and was acting within the scope of his employment.

The defendants raised a special plea - it is that the plaintiffs' cause of action is prescribed by virtue of the provisions of s 15 of the Prescription Act [*Chapter 8:11*] (hereinafter referred to as "Chapter 8:11"). The cause of action arose on 1 October 1994 and summons in this matter was issued on 12 December 1997. As that is more than three years after the cause of action arose, the claims must be prescribed, say the defendants. The plaintiffs argue that their claims have not been prescribed. Their submissions are as follows. The accident occurred on 1 October

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1994. Langton was drunk at the time. He appeared in the magistrates court on 14 October 1994, on a charge of culpable homicide and was duly convicted and sentenced to 2 years' imprisonment. On 10 March 1995, the plaintiffs' legal practitioners contacted the FCZ and demanded damages for loss of support; they threatened legal action. Negotiations as regards the quantum of damages were conducted but they finally collapsed and the summons was served on 17 December 1997. The claims of the second, third, fourth and fifth plaintiffs have not prescribed by virtue of the provisions of s 17 of Chapter 8:11. As regards the claim by Anna, the conviction of Langton interrupted the running of prescription; the judgment and sentence constitute process as defined in s 19(1) of Chapter 8:11: see *Phillips* v *Guest & Tanner Estates* HH-36-98. In addition, the correspondence between the legal practitioners in relation to the question of quantum also constituted "process" as defined in s 19(1) of Chapter 8:11 and therefore also interrupted the running of prescription.

The "debt" in this case is covered by s 15(d) of Chapter 8:11 and therefore the period of prescription is three years. In terms of s 17(1) of Chapter 8:11, if the "creditor" is a minor, the period of prescription is extended and is not completed until the expiration of one year after the minor attained his or her majority, ie the "debt" is prescribed on the date the "creditor" attains the age of 19 years. Since the third, fourth and fifth plaintiffs are still minors, it is clear that their claims against the defendants are not prescribed. The date of birth of the second plaintiff is not given in the papers. According to the further particulars filed by the plaintiffs on 30 March 1998, the second plaintiff was 16 years of age on 1 October 1994. Therefore, if she attained the age of 19 years on or after 17 December 1997, the date the summons was filed, then the period of prescription would not have expired and her claim would not have

become prescribed. If she turned 19 before 17 December 1997, her position would be the same as that of Anna.

Section 19(2) of Chapter 8:11 provides that the running of prescription shall be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt. In subsection (1), thereof, process is defined as including a petition, a notice of motion, a rule *nisi*, a pleading in reconvention, a third party notice and any document whereby legal proceedings are commenced.

The submission of Mr *Katsande* that the conviction and sentencing of Langton constitute "process" as defined in s 19(2) of Chapter 8:11 and therefore interrupt the running of prescription cannot be taken seriously. Even if the conviction does constitute process, which I doubt, it cannot, by any stretch of the imagination, be regarded as process whereby the plaintiffs were claiming payment of damages from the defendants. His next submission was that the letters by him to the legal practitioners of the FCZ in the negotiations attempting to reach settlement constituted process, as defined in s 19(1) of Chapter 8:11. In *Mountain Lodge Hotel (1979) (Pvt) Ltd* v *McLoughlin & Anor* 1983 (2) ZLR 238 (S) at 242; 1984 (2) SA 567 (ZS) at 571, Georges CJ said that, in his view, the term "process" in the corresponding section of the Prescription Act then in force was to be understood in its wide sense, which would include a statement of defence. The term cannot, however, in my opinion be given so wide a meaning as

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to include negotiations intended towards trying to reach a settlement. Such negotiations are not court process.

It appears that the plaintiffs legal practitioners are responsible for the long delay in finalising this matter and that their procrastination has led to the prescribing of Anna's claim and possibly that of the second plaintiff. They must act more speedily to settle this matter or bring it to trial.

Accordingly, it is found that:

(a) the claim by the first plaintiff is prescribed.

(b) the claim by the second plaintiff would have prescribed on the day she attained the age of 19 years. If she attained that age before 17 December 1997, then her claim is prescribed. If, however, she attained that age on or after 17 December 1997, then her claim is not prescribed.

Katsande & Partners, plaintiffs' legal practitioners

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

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S *v* GORE 1999 (1) ZLR 177 (HC)

Citation	1999 (1) ZLR 177 (HC)
Case No	Judgment No. HH-36-99
Court	High Court, Harare
Judge	Gillespie J
Heard	March 17, 1999
Judgment	March 17, 1999
Annotations	None

Referral by magistrate of criminal case

Flynote

Criminal procedure - admission of guilt form - constitutes previous conviction - signing by proxy - not permitted

Criminal procedure - plea - guilty - sentence of imprisonment without option of fine for offence - mandatory for magistrate to record his explanation of essential elements and accused's admission to facts and essential elements - failure to do this constitutes an irregularity - whether such irregularity always amounts to substantial miscarriage of justice leading to quashing of conviction

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Criminal procedure (sentence) - driving offences - persistent speeding violations - whether imprisonment of offender appropriate - whether should be imprisoned before first giving warning that such sentence will be imposed for next offence

Headnote

The accused had persistently violated the traffic laws by exceeding prescribed speed limits. For the present two offences, to which he had pleaded guilty, the magistrate had imposed a term of imprisonment of one month. In imposing a sentence of imprisonment, the magistrate had been influenced by the persistent refusal of the accused to conform to accepted driving standards. In respect of one of the offences, it emerged that the deposit fine originally imposed had been paid by a third party. On review:

Held, that for the purposes of a criminal charge the payment of a deposit fine is *prima facie* an unequivocal acknowledgement of guilt and when an acknowledgement of guilt and a deposit fine is confirmed by a magistrate, the offender will stand convicted and sentenced by a court. He cannot be convicted again in respect of substantially the same offence, as this will violate the *autrefois convict* rule. However, the plea of *autrefois convict* could not succeed in the present case. The deposit fine had been not been paid by the accused, but by a third party. An admission of guilt cannot be signed by proxy except in the case of a corporate body. It is improper for a policeman to allow any individual, other than the individual cited to appear in court, to sign an admission of guilt and pay a deposit fine. If a magistrate before whom the admission of guilt and other papers were laid proceeded to convict the accused, he did so irregularly.

Held, further, that in convicting the accused on the basis of his guilty plea the magistrate had failed to comply with the mandatory provisions of s 271(2)(b) of the Criminal Procedure

and Evidence Act [*Chapter 9:07*]. This provides that whenever the offence will attract a sentence of imprisonment without the option of a fine the magistrate must record his explanation of essential elements of the offence and the accused's admission to the facts and essential elements. The magistrate had failed to do these things and this amounted to an irregularity. However, in terms of s 29(3) of the High Court Act [*Chapter 7:06*], the High Court may not quash a conviction on the grounds of irregularity unless it considers that a substantial miscarriage of justice has occurred. So fundamental is the need properly to confirm a plea of guilty where the sentence is one of imprisonment that in most cases this will amount to a substantial miscarriage of justice which will lead to a quashing of the conviction. However, in some cases this irregularity may be only a technical irregularity and the court may decide that despite it there has been no substantial miscarriage of justice. In the present case there was no danger of a substantial miscarriage of justice. The charge was completely devoid of legal complexity and the accused, as an experience road user, knew full well to what he was admitting. The facts admitted to by the accused disclose the offence.

Held, further, imprisonment for the offence of speeding is not readily resorted to even in respect of a persistent offender and the court should normally give a warning before resorting to imprisonment. However, in the present case the court decided that there was no basis for interfering with the exercise of the magistrate's discretion as there had been no misdirection and

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the sentence imposed did not induce a sense of shock.

Cases Considered

Cases cited:

R v *Cowan* 1969 (2) RLR 18 (G)

S v *Musindo* 1997 (1) ZLR 395 (H)

S v *Sibanda* 1989 (2) SA 329 (S)

Statutes Considered

Legislation considered:

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 271(2)(b)

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

Judgment

Gillespie J: Many road users rail against the driving of commuter omnibus drivers. The accused is one such driver who gives the minibus drivers the general poor reputation for road responsibility that they as a class must suffer.

As at December last year, there were apparently outstanding against him two notices to appear in court, "speeding tickets" in common parlance, requiring him either to pay a deposit fine for the violations observed by the policeman, or to appear in court on the appointed day to defend himself. The first of these, numbered E985005, had been issued on 15 May 1998. The appointed day for attendance in court, in default of payment of a deposit fine, was 26 June 1998. The accused neither paid nor appeared to plead. A magistrate accordingly endorsed on the "ticket" the note:

> "D/F $200-00/20 days imprisonment with labour."

This indicates the imposition of a fine for contempt of court. He may also have issued a warrant of arrest, although this is nowhere noted.

GILLESPIE J

In like manner, on 18 June 1998, a similar "ticket" was issued to the same man for a similar offence. The appointed date of hearing was 23 July 1998. Again the accused defied both the fine and the notice to appear in court. The same magistrate (to judge from the handwriting) endorsed:

> "D/F $300-00/30 days imprisonment with labour."

Perhaps he issued a warrant of arrest as well.

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On 14 December, this menace on the roads was brought before the same magistrate. One assumes that an inquiry was held into both previous defaults. Indeed on each relevant "ticket" the word "confirmed" is written below the note of the imposition of the fine for default. In addition, the accused pleaded guilty to the charge of speeding on each count. He was convicted and sentenced to one month's imprisonment on each count, which sentences were ordered to run concurrently.

These proceedings are recorded by the following notes in the magistrate's hand on the respective tickets:

"Plea: G 271(1)(b)

Verdict: G as pleaded

Sentence : 1 month imprisonment with labour"

And:

"Plea: G 271(2)(b)
Verdict: G as pleaded
Sentence: 1 month imprisonment with labour to run concurrently with the sentence imposed on record B 1685/98."

A procedural irregularity is thus disclosed.

The irregularity is that there has been no record of an explanation by the magistrate of the essential elements of the charge. There has been no recording of an admission by the accused to the facts and the essential elements. In short, there has been no indication of compliance with s 271(2)(b) of the Criminal Procedure and Evidence Act. 1(24) The provisions of this section are mandatory wherever a sentence of imprisonment without the option of a fine, or a fine in excess of five hundred dollars is likely. 2(25) The explanation is essential and failure to give it is fatal to the State case. 3(26) The duty of recording the explanation, and the accused's admissions, has similarly been held to be indispensable. 4(27)

The matter came before me, however, for a different reason. This was that the prosecutor involved discovered that prior to the appearance on 14 December, in fact on 26 June - the very day the accused should have

appeared in court - the fine in respect of the first "ticket" had been paid. He therefore submitted the matter to a regional magistrate, querying whether the principles of *autrefois convict* should not protect the accused (at least in respect of the first "ticket"). This query the regional magistrate submitted to me. In doing so, he referred also to the absence of recording of an explanation of the elements of the offence on each case.

There is no merit in the point of *autrefois convict*. True it is that payment of the deposit fine is *prima facie* an unequivocal acknowledgement of guilt for the purposes of the criminal charge, 5(28) which may only be withdrawn if there is a reasonable possibility that otherwise a miscarriage of justice might occur. Equally true is it that when an acknowledgement of guilt and

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a deposit fine is confirmed by a magistrate, 6(29) the offender will stand convicted and sentenced by a court. 7(30) Nevertheless, there could be no proper conviction of the accused on this particular admission of guilt.

This is because examination of the documentation shows that the fine was not paid, and the acknowledgement of guilt was not made, by the accused. It was done by a third party. Someone named, if I decipher the signature correctly, Magumbo.

An admission of guilt cannot be signed by proxy, save in the case of a corporate body. 8(31) It is improper for a policeman to allow any individual, other than the individual cited to appear in court, to sign an admission of guilt and pay a deposit fine. If a magistrate, before whom the admission of guilt and other papers were laid, proceeded to convict the accused, he did so irregularly since the named accused did not acknowledge guilt.

The basis of any plea of *autrefois convict*, (or acquire) is a previous determination on its merits of the guilt or innocence of the same person for substantially the same offence. Where the accused was not "in legal peril of conviction" 9(32) twice on the same charge no such plea can be sustained. In this case, the accused was in no legal jeopardy on the first occasion. He could not properly have been convicted and any setting aside of that conviction is not a decision on the merits of the charge.

This brings me back to the irregularity arising out of the failure to record an explanation of essential elements and the apparent failure to give that explanation. My dilemma here is that on the one hand is the clear statutory requirement, reinforced by judicial decisions, for the giving and recording of that explanation. On the other hand is the equally clear statutory injunction

that a judge should not quash a conviction on the grounds of irregularity unless he considers that a substantial miscarriage of justice has occurred. 10(33) Is there conflict between these two positions?

In my judgment, there is not. If I might be permitted to explain the many *dicta* to the effect that failure to comply with s 271(2)(b) of the criminal code is a fatal defect, I would say this. So fundamental is the need to confirm a plea of guilty, where a sentence other than a trifling one may be imposed, that in the vast majority of cases one cannot be satisfied as to the absence of a miscarriage of justice if a magistrate has taken no steps, as are required by law, to confirm the plea by explaining the elements of the offence and recording that explanation and the accused's acknowledgement of guilt. This is not to say that in so such case can one be confident that there is no miscarriage of justice where such a failure has occurred. Indeed, as every judge knows, in the enormous volume of cases on review there are many occasions where one overlooks technical inadequacies or irregularities in s 271(2)(b) procedure because the justice of the result cannot be in doubt.

I consider that in this case there can be no fear that the convictions constituted a miscarriage of justice. The charge is one which is utterly devoid of legal complexity and innocent of any occasion for misunderstanding and ignorance. There can have been no doubt in the mind of

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the accused, a highly experienced road user, as to what he was admitting. There can be no doubt, that the facts recorded on the "tickets", admitted as they are by the accused, disclose the offence. I would therefore decline to interfere with the convictions for speeding.

The sentence of imprisonment is most unusual for a traffic offence. That does not mean, however, that it is necessarily inappropriate. In this case, the magistrate was clearly moved by proof of a considerable number of previous convictions. There were produced to him admissions of guilt in the name of the accused and executed in the same year, 1998. In all, there are seven such documents. All of them involve speeding in a restricted zone. In all fines totalling $930 were paid. Of the seven documents, two were certainly not signed by the accused. On the remaining five admissions of guilt, there are two entirely different specimens of a signature in the name Gore. There is no way of telling which, if either, is the genuine signature of the accused.

These circumstances, together with the non-compliance of the accused with the two relevant tickets, and the payment of one of them by a third party, leave room for only one inference. The accused is well aware of speed limits and has no intention of complying with them. As for the notices citing him for violations, these were attended to by other persons, presumably his

employer, the owner of the minibus he drives. The fines were no burden to the accused and are evidently regarded by the bus operator as a business overhead.

This persistent refusal of the accused to comply with the law and to conform to accepted driving standards take these offences out of the normal run of speeding violations. While speeding itself is not necessarily dangerous in all conditions, the calculated and consistent violation of traffic regulations, which these offences disclose, is seriously aggravating. Even so, imprisonment, for offences such as this, is not readily resorted to and ought generally to be preceeded by the warning of a suspended sentence of imprisonment or of community service. A committed violator, who ignores such a warning and eventually attracts a short, exemplary gaol term, will evoke no sympathy from the court.

The question I have asked myself, then, is whether the imposition of the present sentence, without prior warning, induces in me that fabled sense of shock which, in the absence of misdirection, is the only basis upon which I can properly interfere. I confess that I would have exercised my discretion differently. I would have given some warning before resorting to imprisonment. I am unable to discover in myself, however, the sense of injustice in this sentence which permits me to set aside the magistrate's discretion. I note, too, that the regional magistrate by whom these matters are referred has not commented unfavourably on the sentence itself. The sentence by now has been served.

In the result, I would set aside the conviction in respect of the admission of guilt, form Z69J No. 677183F, signed by one Magumbo and order the reimbursement to that person of $220 paid as a fine. In all other respects, the proceedings in respect of notices to appear in Court E 985005 and E 111396, CRB B 1685/98 and B 2388/98, are confirmed.

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Chatikobo J agrees.

S *v* SVOSVAI 1999 (1) ZLR 183 (HC)

Citation	1999 (1) ZLR 183 (HC)
Case No	Judgment No. HH-35-99
Court	High Court, Harare
Judge	Gillespie J
Heard	March 17, 1999
Judgment	March 17, 1999
Annotations	None

Criminal review

Flynote

Criminal procedure (sentence) - common law offences - indecent assault - forcible intercourse per anum with infant of 17 months - should be treated as rape

Headnote

An indecent assault consisting of the forcible buggery by a young adult of an infant of 17 months, the accused's own niece, is indistinguishable from rape and the accused should be sentenced accordingly. A sentence of 24 months' imprisonment was manifestly inadequate.

Cases Considered

Cases cited:

S v *Macheka* 1979 RLR 49 (A)

S v *Tendai* 1998 (2) ZLR 423 (H)

S v *Zaranyika & Ors* 1995 (1) ZLR 270 (H)

Judgment

Gillespie J: The accused has been convicted of indecent assault. The nomenclature of the offence tends to belie its seriousness. This is as mere

"touching of the genitals or other erotically significant portions of the body" 1(34)

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this is the forcible buggery by a young adult of an infant aged seventeen months, the accused's own niece. 2(35)

For all that the accused is a young man, a first offender who pleaded guilty. I am unable to view the lenient sentence imposed with any equanimity. The sentence was 24 months' imprisonment. This sentence suffers from all the worst aspects of all sentencing options. As a reformative sentence for a youngster who is a promising candidate for rehabilitation (assuming the accused to be such an one, it fails utterly. The magistrate failed to adopt the thorough and consultative sentencing approach I called for in *S* v *Tendai*; *S* v *Fungai*. 3(36) Even he had done so, an appropriate sentence would have been not less than three years' institutionalisation and a further three or four years

GILLESPIE J

probation of the type I suggested in *Tendai*'s and *Fungai*'s cases.4(37) If the accused does not merit considerate rehabilitative type management, but should be treated as a young adult with equitable discount for his youth and repentance, as proposed by Bartlett J in *Zaranyika*, 5(38) then imprisonment of up to 8 years, with perhaps two years suspended, would have been appropriate. An adult convicted of such an offence might expect the same sentence as any rapist: perhaps up to nine years' imprisonment with a portion suspended.

After all it is only in a semantic definition where this offence differs from rape. The violation of a woman or girl *per anum* can be no less traumatic or damaging to her emotional and physical well-being than a similar invasion *per vaginam*. The ordinary person calls each of these acts rape and is equally appalled by each. The fact that the law calls one rape and the other indecent assault in no way mitigates the enormity of the latter. There is simply no warrant for any distinction in sentences between forcible intercourse *per vaginam* (rape) and brutal penetration of the anus (indecent assault).

I consider the sentence manifestly inadequate and the sentencing procedure superficial and flawed. I am surprised that the Attorney-General has not appealed the sentence. I would have thought it the prosecutor's duty to refer the matter, through his senior public prosecutor, to the Attorney-General's office, with just such a recommendation.

I am unable to certify that the proceedings accord with real and substantial justice.

RESERVE BANK OF ZIMBABWE *v* SIWAWA'S ESTATE'S EXECUTOR 1999 (1) ZLR 185 (SC)

Citation 1999 (1) ZLR 185 (SC)
Case No Judgment No. S-25-99

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Court	Supreme Court, Harare
Judge	Gubbay CJ, Muchechetere JA, Sandura JA
Heard	March 8, 1999
Judgment	March 22, 1999
Annotations	None

Civil appeal

Flynote

Employment - appeals under labour legislation - appeal to Tribunal - employee dying before decision - Tribunal deciding that dismissal was nullity because of procedural irregularities - not possible to remit matter for re-hearing to decide matter following correct procedures - damages to be awarded - need to establish whether employee had mitigated his loss

Headnote

A bank had a registered employment code of conduct. The bank dismissed an employee on the grounds that he had contravened the employment code by substantially neglecting his duties and being grossly incompetent or inefficient, allegations that the employee had vigorously denied. The bank had dismissed the employee without following the procedures prescribed in the code, namely, they had not put specific charges to the employee, nor had they allowed him to make representations in regard to the charges. The employee appealed against his dismissal to the Labour Relations Tribunal. The Tribunal reserved its decision. While the decision was pending, the employee died. The Tribunal decided that the decision to dismiss the employee was unlawful and a nullity because the prescribed procedures had not been followed. It was pointless to order, in the normal manner, reinstatement with an award of damages as the alternative. The Tribunal therefore ordered pay the bank to pay into the deceased's estate his salaries and benefits owing up to the time of the date of his death. On appeal:

Held, that the death of the employee terminates the contract of employment by rendering it incapable of performance. Thus in the present case the issue as to whether or not the deceased would have been dismissed if the correct procedure had been applied is no longer an issue. It was no longer possible to remit the matter back to the bank for it to hold a procedurally fair hearing as the employee was now dead and could not be heard in his own defence. The question of whether, if the deceased were alive, and a properly conducted hearing held, he would have been entitled to recover damages for the period from the date the bank purported to dismiss him summarily to the date the hearing culminated with a finding that his contract of employment be terminated for misconduct previously alleged, should be left open.

Held, further, that the Tribunal had awarded the estate damages in substitution for specific performance and which amount to the same sum as would flow from an order for reinstatement in employment. This is not the correct measure of damages. Where dismissal is unlawful on either procedural or evidential grounds, the employee is entitled to be

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awarded the amount of wages or salary he would have earned had his contract of employment not been prematurely terminated. He may also be compensated for the loss of any benefit to which he was contractually entitled and of which he was deprived in consequence of the breach.

Held, further, that the employee must mitigate his loss. He must look for and accept any reasonable offer of alternative employment. If he fails to take other employment when it would be reasonable for him to take it, a deduction will be made in respect of the remuneration he would have earned from the substituted employment.

Held, further, that without evidence the Tribunal could not have known whether the employee made reasonable efforts to mitigate his loss in the period before his death. The bank may also have been able to make other contentions relevant to the issue of quantum. The Tribunal should thus have held a further hearing in respect of these matters. By failing to allow counsel for the bank to give evidence on these issues, the Tribunal had breached the *audi alteram partem* rule.

Held, therefore, that the matter should be remitted to the Tribunal for it to receive further evidence in relation to the quantum of damages.

Cases Considered

Cases cited:

Brown v *Sessell* 1908 TS 1137

Gauntlet Security Svcs (Pvt) Ltd v *Leonard* 1997 (1) ZLR 583 (S)

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

Mhowa v *Beverley Bldg Soc* 1998 (1) ZLR 546 (S)

Myers v *Abrahamson* 1952 (3) SA 121 (C)

S v *Molotsi* 1976 (2) SA 404 (O)

S v *P* 1972 (2) SA 513 (NC)

R v *Tremearne* (1917) 38 NLR 117

Case Information

J C Andersen SC, for the appellant

P Nherere, for the respondent

Judgment

Gubbay CJ: Felix Winson Siwawa died unexpectedly at Harare on 18 June 1998. He had been employed for many years by the Reserve Bank of Zimbabwe ("the Bank") as manager of its

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notes and coins department. His unit was the custodian of money stocks.

On 11 May 1995, an amount of $151000 was discovered missing from the vaults at the Bank. Investigations resulted in one of the vault custodians confessing to stealing $140000. It was considered that the theft had been facilitated by the failure of the deceased to ensure the efficiency and effectiveness of his unit. The allegation was that he had inadequately trained the vault custodians and, generally, had allowed the controls within the system to deteriorate to the extent of creating "a tempting atmosphere" for his subordinates. Vault cupboards and grills, where money was kept, were not being locked, money was being left scattered on the floor, and a time-lock, designed to prohibit entry into the vaults before the set time, was not being operated. Furthermore, it was said that the deceased rarely inspected the vaults and spot checks were not being carried out. In short, the deceased was

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accused of a high degree of negligence in that for a considerable period he had ignored, or omitted to apply, laid down security procedures. Any personal irresponsibility was, however, firmly disavowed by the deceased.

On 14 June 1995, a letter was addressed to the deceased advising that the Bank had decided to terminate his employment with immediate effect. It was stated that he had contravened the Bank's registered employment code of conduct in two major respects of misconduct, namely, s 6.3(g) - substantial neglect of duties, and s 6.3(h) - gross incompetence or inefficiency in the performance of work.

Two days later the deceased appealed to the Governor of the Bank against the dismissal. On 7 July 1995, he was informed in writing that his appeal had been refused. In that knowledge the deceased, on 12 July 1995, noted an appeal to the Labour Relations Tribunal ("the Tribunal") in terms of s 101(7) of the Labour Relations Act [*Chapter 28:01*] ("the Act").

At the hearing before the Tribunal on 11 May 1998, it was conceded by the Bank that it had failed to follow the procedure laid down in the code of conduct. This required that specific charges be put to the deceased with the opportunity for him to make representations with regard to them (see Appendix III, clause 1.1 to the code and s 101(3)(e) of the Act). Accordingly, the *audi alteram partem* rule had been breached.

On behalf of the deceased, it was suggested that if it were held that his employment had been terminated unlawfully, it was preferable that the Tribunal, upon evidence to be adduced before it, should itself determine whether such dismissal was justified; rather than remit the case to the disciplinary committee of the Bank. The Tribunal indicated that it was not averse to the proposal.

Counsel appearing for the Bank submitted to the Tribunal that the acceptance by the deceased of the payment of terminal benefits in itself, or taken in conjunction with the delay incurred by him in proceeding with the appeal, constituted a waiver of the right to reinstatement in employment; and that even if a waiver was not found, the deceased was nevertheless disentitled to seek reinstatement as he had failed to tender his services, and hold himself at the

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disposal of the Bank, over the ensuing three year period. It was further submitted that reinstatement was not an appropriate remedy as the Bank had lost confidence in the deceased's efficiency and, in any event, his post had been filled. Finally, it was urged that an award of damages ought not to exceed three months' salary.

The Tribunal reserved its decision. During the course of its deliberations, it was advised of the demise. Judgment was handed down on 8 July 1998. The finding was that the dismissal of the deceased was unlawful and a nullity as not being in compliance with the code of conduct; and that the right to claim

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reinstatement had not been waived. The judgment then went on to consider the appropriate remedy. Obviously, it was pointless to order, in the normal manner, reinstatement with an award of damages as an alternative thereto. See *Hama* v *National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at 678C; *Mhowa* v *Beverley Building Society* 1998 (1) ZLR 546 (S) at 551D. Holding that the deceased had died without having been lawfully dismissed and that his employment was terminated by death, the Tribunal allowed the appeal with costs and ordered the Bank to pay to the estate the deceased's salary and benefits with effect from the date of suspension (what was meant was from the date of summary dismissal) to the date of death. I assume this to be an assessment of damages based on what would have been owing if the Bank had opted for reinstatement.

It is beyond doubt that the death of an employee terminates the contract of employment by rendering it objectively incapable of performance. See Riekert's *Basic Employment Law* 2 ed at 129; Christie *Business Law in Zimbabwe* at 328. Thus the dispute as to whether the deceased waived the right to claim reinstatement by the acceptance of terminal benefits does not need to be addressed by this court. Plainly, the existence of such waiver would not affect a right to claim damages.

Mr *Andersen*, who appeared for the Bank, argued with much force and persuasion, that the matter should be remitted to the Tribunal for it to determine whether the deceased had committed the acts of misconduct alleged; for if he had and, in consequence, would have been liable for dismissal, how could it be just and sensible to regard his employment as subsisting to the date of death, thereby rendering the Bank liable in damages to the estate? Put differently, why should the estate be compensated for a *bona fide* procedural error where proper compliance with the code of conduct inevitably would have resulted in the termination of the deceased's contract of employment on the ground of serious misconduct?

Of course, the ensuing death altered the situation. There cannot now be a hearing to determine whether or not the contract of employment should be terminated. No disciplinary proceedings under the code of conduct can be brought against the deceased. He cannot be heard in his defence. And prior to death he made no admission of misconduct. To hold a hearing on the issue would be a breach both of the *audi alteram partem* rule and s 18(9) of the Constitution of Zimbabwe. It would be akin to prosecuting a dead accused for an offence alleged to have been committed during his lifetime. Indeed, an accused who died during the course of a trial upon a

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charge he denied could not be found guilty. Death ends the proceedings, even to the extent that where an accused dies after noting an appeal against conviction, the action does not survive unless a fine had been imposed which might have to paid out of the

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estate. In that event, the executor may be allowed to appeal. See *R* v *Tremearne (*1917) 38 NLR 117 at 121; *S* v *P* 1972 (2) SA 513 (NC) at 514D; *S* v *Molotsi* 1976 (2) SA 404 (O) at 406D-F; *S* v *January* 1994 (2) SACR 801 (A) at 809h-i.

I therefore accept Mr *Nherere*'s submission that once the contract of employment was terminated by death, the issue as to whether or not the deceased would have been dismissed if the correct procedure had been applied became a non-issue.

I prefer to leave open the question whether, if the deceased were alive, and a properly conducted disciplinary hearing held, he would have been entitled to recover damages for the period from the date the Bank purported to dismiss him summarily to the date the hearing culminated with a finding that his contract of employment be terminated for the misconduct previously alleged.

It is clear to me that the nature of damages the Tribunal awarded the estate is what was described by van Winsen J in *Myers* v *Abramson* 1952 (3) SA 121 (C) at 127C as "surrogate damages" - damages which are substituted for specific performance, and which amount to the same sum as would flow from an order for reinstatement in employment. That is not the correct measure of damages. As I ventured to explain in *Gauntlet Security Services (Pvt) Ltd* v *Leonard* 1997 (1) ZLR 583 (S) at 586C-D where a dismissal was unlawful, whether on procedural or evidential grounds:

"The employee is entitled to be awarded the amount of wages or salary he would have earned save for the premature termination of his contract by the employer. He may also be compensated for the loss of any benefit to which he was contractually entitled and of which he was deprived in consequence of the breach. See *Willenburg* v *Pickstone & Brother Ltd* 1922 CPD 13 at 14. But the employee must mitigate his loss. He must look for and accept any reasonable offer of alternative employment. He cannot just do nothing. See *Faberlan* v *McKay & Fraser* 1920 WLD 23 at 32; *Bulmer* v *Woollens Ltd* v *(in liquidation)* 1926 CPD 459 at 467-468; *Beeton* v *Peninsula Transport Co (Pty) Ltd* 1934 CPD 53 at 59. If he fails to take other employment when it would have been reasonable for him to do so, a deduction will be made in respect of the remuneration he would have earned from the substituted employment."

See also *Brown* v *Sessell* 1908 TS 1137 at 1143 *in fine*- 1144; Bowers on *Employment Law* at 164; Visser and Potgieter *Law of Damages* at 315-316.

I am satisfied that, in the absence of evidence, the Tribunal was not in a position to know, with the requisite degree of certainty, whether during the three years which preceded its determination, the deceased had obtained other employment, or had made an attempt to mitigate his loss. Moreover, there may have been other contentions the Bank could have raised relevant to the quantum of damages. Certainly, the Tribunal ought to have set down the issue of damages for further hearing. It should have enquired from counsel whether they wished to adduce *viva voce* evidence or merely furnish

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additional argument. In not doing so it was itself guilty of a failure to observe the *audi alteram partem* rule.

The irregularity must now be rectified by the setting aside of the order pertaining to the payment of damages.

I think it proper and fair that the costs of this appeal should be reserved for the determination of the Tribunal. Much will depend upon the finding of whether the measure of damages is substantially less than the amount which would have been earned from the date of the unlawful dismissal to the date of death.

But I am not inclined to interfere with the order for costs granted by the Tribunal. The appeal before it correctly succeeded inasmuch as the dismissal of the deceased from employment was set aside. That order, to my mind, warranted the grant of costs in favour of the estate.

In the result, I would order as follows:

1. The appeal is upheld to the extent that the award of damages as set out in para 2 of the order of the Tribunal is set aside.

2. The case is remitted to the Tribunal to assess the amount of damages to be awarded after receiving any additional evidence and argument.

3. The costs of the appeal are reserved for the determination of the Tribunal consequent upon its finding as to the measure of damages.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Coghlan, Welsh & Guest, appellant's legal practitioners

Chingore & Garabga, respondent's legal practitioners

S *v* DICKSON 1999 (1) ZLR 191 (HC)

Citation	1999 (1) ZLR 191 (HC)
Case No	Judgment No. HH-49-99
Court	High Court, Harare
Judge	Bartlett J

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Heard	March 24, 1999
Judgment	March 24, 1999
Annotations	None

Criminal review

Flynote

Criminal procedure (sentence) - extended imprisonment - warning of - when appropriate to warn

Headnote

The practice of the High Court is to resort to the sentence of extended imprisonment only when it is reasonably clear that past punishment has had no deterrent effect, and the stage has been reached that this sentence is necessary for the protection of the community. A warning of extended imprisonment should not be given prematurely. Factors to take into account include the duration and nature of the accused's criminal career of crime, the frequency of this offences and the ineffectiveness of the variety of punishments meted out to him in the past. Ordinarily, a magistrate should only issue a formal warning of extended imprisonment where there have been more than three previous convictions and a variety of punishments have been imposed, extending through fines, suspended sentences, community service, short effective terms of imprisonment and substantial effective terms of imprisonment. It is important that magistrates carefully analyse and consider all these relevant factors before warning an accused person of extended imprisonment. If a warning is given prematurely and without good cause and, because of this extended imprisonment is not imposed on the subsequent conviction, then the deterrent effect of the warning will be lessened.

Once a warning has been issued, the accused cannot be dewarned. A warning is not part of the sentence imposed by the court. It is, however, part of the court's order and it can be set aside, using the power in terms of s 29(2)(b)(ii) of the High Court Act [*Chapter 7:06*] to set aside any order of the inferior court if the order was not in accordance with real and substantial justice.

Judicial officers should refrain from making derogatory comments in their judgments.

Cases Considered

Cases cited:

S v *Erasmus* 1987 (4) SA 685 (C)

S v *Gwasira* GS-71-78

S v *Jam* GS-70-78

S v *Mache* 1980 (3) SA 224 (T)

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S v *Mandoro* 1977 (2) ZLR 245 (A); 1978 (1) SA 1186 (RA)

S v *Moyo* 1981 ZLR 222 (G)

S v *Munyenyewa* 1966 RLR 509 (G); 1966 (3) SA 667 (R)

S v *Velapi* GB-35-78

S v *Ziremba* GB-18-79

Judgment

Bartlett J: I am concerned in this matter with when it is

BARTLETT J

appropriate for a magistrate to warn an accused person of extended imprisonment.

Aaron Dickson was convicted on 22 February 1999 of housebreaking with intent to steal and theft and sentenced to 36 months' imprisonment with labour and warned of an extended term of imprisonment. He has three previous convictions for the same offence. On 18 June 1993, he was sentenced to 18 months' imprisonment. Then on 8 January 1996 to 3 years' imprisonment and 10 January 1996 also to 3 years' imprisonment - with the latter sentence being ordered to run concurrently with the former. It would seem, however, that those two latter matters ought more properly to have been sentenced together and to be regarded as a single as opposed to two previous convictions.

I am aware that if the accused were brought before the High Court after a further conviction that it might technically in terms of s 346 of the Criminal Procedure and Evidence Act impose a sentence of extended imprisonment. But as stated by Lewis J (as he then was) in *R* v *Munyenyewa* 1966 RLR 509 (G); 1966 (3) SA 667 (R) at p 668B-C:

"the practice of the High Court has been to resort to this sentence only when it is reasonably clear that past punishment has had no deterrent effect, and that the stage has been reached when, for the protection of the community, the accused must be physically prevented from continuing his criminal activities by being imprisoned for an indefinite period."

And then at p 668H:

"While it is not possible to lay down any hard and fast rule in the matter, generally speaking it seems to me that a magistrate should only issue a formal warning of the indeterminate sentence if, having regard to the duration and nature of the accused's career of crime, the frequency of his offences and the ineffectiveness of the variety of punishments meted out to him in the past, it appears probable to the magistrate that the accused will be indicted before the High Court if he offends again, and will receive the indeterminate sentence if convicted by the High Court."

This approach is underlined in *S* v *Mache* 1980 (3) SA 224 (T) and *S* v *Erasmus* 1987 (4) SA 685 (C) where it is emphasised that care must be exercised that such a warning is not given too soon or without sufficient reasons.

Looked at against these criteria, I have no doubt that warning of extended imprisonment was prematurely given. Without trying to inhibit a magistrate's discretion by undesirably laying down

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guidelines (see *S* v *Mache supra*) I would simply state the following. Ordinarily, there would be more than three previous convictions and a variety of punishments extending through fines, suspended sentences, community service, short effective terms of imprisonment and substantial effective terms of imprisonment, before a warning of extended imprisonment was given.

In addition, the provincial magistrate in his reasons for sentence does not

endeavour to say why he considered a warning of extended imprisonment necessary. He states that because of the accused's record only an effective custodial sentence with no part suspended would be appropriate. He does not, however, state or attempt to analyse and assess any of the considerations referred to by Lewis J in *R* v *Munyenewa supra*. He simply records on the rear of the indictment the warning as having been given after imposing sentence.

It is important that magistrates should carefully analyse and consider all the factors referred to by Lewis J in *R* v *Munyenewa supra* before warning an accused person of extended imprisonment. This importance is underlined when consideration is to be given to the further wise words of Lewis J, also in *R* v *Munyenewa supra* at p 668E-F:

"In my view, it is undesirable that a formal warning of the indeterminate sentence should have to be repeated on a second or third occasion before the indeterminate sentence is eventually imposed. If the warning is issued prematurely and without good cause, with the result that the accused, on his next conviction, does not receive the indeterminate sentence and has to be warned again, then it becomes rather like the cry of 'Wolf! Wolf!' because the heed which is paid by the accused to the repetition of the warning tends to be diminished."

See also the observations of Davies JA in *S* v *Mandoro* 1978 (1) SA 1136 (RA) at 1189A-B and F-G.

What then can I do to correct the premature warning? In *Munyenyewa*'s case, Lewis J stated that as the warning had been issued the accused could not now be dewarned and accordingly confirmed the proceedings.

A warning also is not part of the sentence imposed by the court - see the observations of Gubbay J (as he then was) in *S* v *Moyo* 1981 ZLR 222 (G) at 225D-G. It is, however, part of the court's order - see *S* v *Mache supra* and *S* v *Erasmus supra* - and I have the power in terms of s 29(2)(b)(ii) of the High Court Act [*Chapter 7:06*] to reduce or set aside the sentence *or any order* (my emphasis) of the inferior court, if I consider it not in accordance with real and substantial justice.

This court has also on a number of occasions set aside premature warnings of extended sentence. In *S* v *Ziremba* GB-18-79, Newham J, with the concurrence of Gubbay J (as he then was), stated at p 2 of the cyclostyled judgment:

"... The formal warning having been issued, the accused cannot now be dewarned. However, on the authority of *S* v *Velapi* GB-35-78, and the cases there mentioned, I order that the warning of the indeterminate sentence be set aside, and a note to that effect entered on the accused's record of previous convictions."

In *S* v *Velapi supra*, Gubbay J (as he then was), following the course adopted in *S* v *Jam*

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GS-70-78 and *S* v *Gwasira* GS-71-78, set aside a warning of the indeterminate sentence.

BARTLETT J

Before so doing in this matter, I wish to comment on one aspect of the wording used by the provincial magistrate in his reasons for sentence. The provincial magistrate concerned has always stood out amongst his peers as being particularly competent, efficient and thorough. He, however, in this matter stated that suspending any portion of the sentence imposed "would be akin to throwing pearls to pigs". While this may be a mis-quotation of the old English expression of "casting pearls before swine", it is derogatory and inappropriate in the context of the judgment. Derogatory comments have no place in a judgment. I might also add that I have given careful consideration as to whether a portion of the sentence imposed should have been suspended - as the accused has not previously had the possible beneficial restraining effect of having a suspended sentence hanging over his head. In view of the substantial effective terms of imprisonment he has previously served, I consider, however, that the decision not to suspend any portion of the present sentence was properly within the magistrate's discretion.

The proceedings are accordingly confirmed (including the conviction for contravening s 44(1) of the Criminal Procedure and Evidence Act) save that the warning of extended imprisonment is set aside.

The trial magistrate is to ensure that the setting aside of the warning of extended imprisonment is entered on the accused's record of previous convictions and that I am informed through the Registrar of the High Court when that has been done.

Chatikobo J agrees.

OLD MUTUAL PROPERTIES INVESTMENTS CORPORATION (PVT) LTD *v* TWAIN HOLDINGS (PVT) LTD 1999 (1) ZLR 195 (SC)

Citation	1999 (1) ZLR 195 (SC)
Case No	Judgment No. S-30-99
Court	Supreme Court, Harare
Judge	Gubbay CJ, Ebrahim JA, Muchechetere JA
Heard	March 4, 1999
Judgment	March 25, 1999
Annotations	None

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Civil appeal

Flynote

Contract - sale - locatio conductio operis - distinction between - lease allowing tenant to sell cameras, accessories and allied products - tenant installing machine for processing customers' films - whether prints produced from such films are products allied to sale of cameras

Headnote

The respondent was tenant of a shop in a shopping centre owned by the appellant. The lease agreement provided that the tenant was entitled to use the premises for the "sale of cameras, optical appliances, accessories and allied products" and for no other purpose. Shortly after taking occupation, the respondent installed an automated photographic processing machine, which was used for developing films brought in by customers and then printing photographs from the negatives. The customer could specify such requirements as the size of the print, the finish and so on. No particular skill or experience was required to operate the machine.

The appellant objected to the installation of the machine, claiming that processing of films was in breach of the lease. It gave the respondent notice to quit. When the respondent refused to do so, the appellant brought an application before the High Court. The High Court dismissed the application, holding that the operation of the processing machine was part of the general use permitted by the clause and incidental to the purposes for which the premises were let.

On appeal, it was argued for the appellant that the word "sale" in the lease related to "cameras, accessories and allied products". "Accessories", it was argued, were such secondary items as lenses, while an example of an "allied product" would be a film. It was argued that the processing of photographs was a contract of *locatio conductio operis*, not of sale, and thus prohibited by the lease.

The respondent's argument was that the production of a print was a contract of sale. The respondent was the owner of the materials used, in particular, the chemicals and the photographic paper. The customer was not the owner until the photograph was paid for. The operation of the machine required no special skill, and special skill in performing the work is usually the essence of the hire of services.

Held, that the distinction between a contract of sale and one of *locatio conductio operis* is often difficult to make. Much depends on which of the parties supplies the goods. Where both parties do so, the real test is the real substance or true essence of the contract. The determination of the substance is a matter of degree, involving an assessment of the relative weight of each element. In this instance, the customer supplies the undeveloped film, but

weighing the relative insignificance of this aspect against the provision by the respondent of the materials required to develop the negatives and print the photographs, the true and real nature of the contract is purchase and sale. The sale of photographic prints is the sale of products

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allied to the use of the premises for the sale of cameras.

Held, further, that had the intention of the parties been to prohibit the sale of photographic prints, the clause would have referred to the sale of cameras and "allied articles". The prints were clearly "products" and thus covered by the lease.

Cases Considered

Cases cited:

Clay v *Yates* (1856) 1 H & N 73

Lee v *Griffin* (1860) 30 LJ QB 252; [1861-73] All ER Rep 191 (QBD)

Newman v *Lipman* [1950] 2 All ER 832 (KB)

Robinson v *Graves* [1935] 1 KB 579; [1935] All ER Rep 935 (CA)

SAR&H v *Cemafrique (Pty) Ltd* 1978 (3) SA 388 (A)

SA Wood Turning Mills (Pty) Ltd v *Price Bros (Pty) Ltd* 1962 (4) SA 263 (T)

Tulloch v *Marsh* 1910 TPD 453

Case Information

R Y Phillips, for the appellant

J C Andersen SC, for the respondent

Judgment

Gubbay CJ: The appellant is owner of the recently constructed prestigious Westgate Shopping Centre, located in the Harare suburb of Bluff Hill. On 28 June 1995, it entered into a written agreement of lease with the respondent, in terms of which it let shop number 4 ("the premises") in the complex, from 1 April 1997 to 31 March 2002, with an option of renewal for a further period of five years. Clause 11:1 of the lease, under the heading "Use of Premises", provided that:

"The tenant shall be entitled to use the premises for the sale of cameras, optical appliances, accessories and allied products and for no other purpose whatsoever without the landlord's prior written consent."

Shortly after assuming occupation, the respondent installed at the premises an automated photographic processing machine for the production of prints from photographic negatives. The machine, which cost $700 000, is known as a "Fuji Mini-Lab".

Upon learning that the respondent had installed, and had commenced to operate, a mini-lab on the premises, the appellant voiced strong objection. It claimed that such activity, undertaken without the obtaining of consent, amounted to a breach of clause 11:1 of the lease. Pursuant to clause 31 thereof, it gave the respondent written notice to cease operating the mini-lab within ten days, failing which it warned of an intention to cancel the lease and resume possession of

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the premises.

The respondent stood firm. It disputed that the operation of the mini-lab was a breach of clause 11:1. This impasse led the appellant to bring an action before the High Court for orders, (i) declaring the lease to have been validly

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cancelled on 1 August 1997; and (ii), restoring to it possession of the premises.

The application, which was opposed by the respondent, was dismissed with costs by Devittie J. He held that the operation of the mini-lab was part of the general use permitted by clause 11:1 and incidental to the purposes for which the premises were let.

The central issue between the parties hinges upon a construction of clause 11:1 of the lease in relation to the use of the premises for no other purpose than "the sale of cameras ... accessories and allied products".

It was the argument of Mr *Phillips*, who appeared for the appellant, that the word "sale" qualified "cameras ... accessories and allied products"; that "accessories", in the sense of "a secondary, additional or non-essential item of equipment" (*per* Sutton JP in *R* v *Silke* 1947 (4) SA 297 (C) at 298), are such things as extra lenses or flash attachments; while a product "allied" to the sale of cameras, in the sense of an united or associated product (see *Funk and Wagnall's Standard Dictionary* 2 ed), is the sale of a film. Hence, the respondent is only permitted to sell cameras and articles accessory or allied to cameras; it cannot sell the mini-lab or hire out its services; and it cannot sell the photographs it prints because it is not the owner of the photographs. In sum, the use of the premises for which the respondent contends, is for the performance of contracts of *locatio conductio operis* (the processing of photographs in the mini-lab); such contracts, not being contracts of sale, are prohibited by the plain meaning of clause 11:1.

Per contra, Mr *Andersen* submitted that the contract between the respondent and a customer for the production of a photographic print from an undeveloped film supplied to it, constitutes a contract of sale and not one of *locatio conductio operis*. The respondent is the owner of the materials used, in particular, the developing chemicals and the photographic paper upon which the image from the negative is printed. The customer is not the owner of the photograph until it is paid for. Moreover, special skill, talent or expertise in performing the work is usually the essence of the hire of services. This element is absent in the operation of the fully automatic mini-lab.

The mini-lab consists of two separate units - one for developing, the other for processing. The film is unrolled from the spool and fed into an aperture at the top of the developing unit; the aperture is then shut. A small portion at the end of the unrolled film emerges from another aperture; to this is manually attached a short length of plastic. The film is then automatically exposed to the chemicals in the unit, and is washed and dried. The resultant negatives, in the form ultimately handed to the customer, are then removed and inserted into the processing unit which contains photographic paper. The unit is set to the customer's requirements with regard

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to the size of the

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photographs, whether they are to be "cropped", and the type of paper specified, namely, with a gloss or a matt finish. The printing process is monitored on a screen.

The gravamen of counsel's submission may be reiterated as follows. The customer supplies the respondent with an undeveloped film on which the desired subject matter has been taken by means of a camera. But this article is of worth to anyone until the images are produced on paper. That is the service the respondent provides through the use of modern automatic equipment involving expensive and specialised chemicals and photographic paper. What the customer pays for is the result of the whole process - the photographic print.

In support of the proposition that, on the facts, the transaction between the respondent and a customer constitutes a contract of sale, Mr *Andersen* cited two authorities. Neither, in my opinion, is very helpful.

In *Newman* v *Lipman* [1950] 2 All ER 832 (KB) the respondent, who had no street trading licence, photographed a woman who was passing in the street. He received from her a sum of money as a deposit for the price of the completed photograph. This was not delivered in the street but was subsequently sent to her. The respondent was charged with street trading without a licence. Lord Goddard CJ was prepared to assume at 833H-G that:

"if a photographer takes a photograph and offers to supply a copy of the photograph, he is selling an article or thing ... that there is a contract for the delivery of a chattel, namely a photograph,"

but held that no offence had been committed as the enactment was meant to deal with the offering of goods actually in the street. It did not apply to a contract or agreement made by two people in the street who were not at the time dealing with goods there physically present.

Even if the assumption made by the learned Lord Chief Justice was correct, as I believe it to be, the case is distinguishable in that nothing was supplied by the woman to the photographer. The latter possessed the camera loaded with a film. He took the picture, then developed the negative and printed the photograph.

The facts in the second decision referred to, that of *SA Wood Turning Mills (Pty) Ltd* v *Price Bros (Pty) Ltd* 1962 (4) SA 263 (T), were that the respondent contracted to print 1 000 catalogues for the appellant according to specifications - the descriptive matter and photographs being provided in the form of a complete dummy catalogue. Only 890 badly printed catalogues were supplied. These were accepted by the appellant and distributed amongst its customers. When the respondent sued for the cost of the catalogues delivered, the appellant raised the defence that the contract was a service contract and that,

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therefore, the respondent was only entitled to a *quantum meruit*. The respondent, on the other hand, claimed that the contract was one of purchase and sale and that the appellant's remedy, if any, lay in damages. Kuper J had no doubt that the contract was one of sale. Recalling the *dictum* of Innes CJ in *Tulloch* v *Marsh* 1910 TPD 453 at 455, the learned judge said, somewhat cursorily, at 266F-G:

"In the present case, it is true, the appellant gave the respondent a dummy catalogue, but that was only in the nature of a sample, and all the work that was done by the respondent was done on paper and other materials supplied by it and no portion of the finished article was made from anything supplied by the appellant."

The judgment has been criticised for the reason that a far sounder approach would have been to look at the substance of the contract and to ask whether the purpose and intention of the parties was to transfer an article (when made), or to employ labour and materials to produce a result. To express the question in different words: was the material or the labour the essential consideration for what was paid by the person acquiring the article? See H Luntz "Sale or Hire of Services?" (1963) 80 *SALJ* 19 at 22. In any event, it seems to me that it can hardly be asserted that an undeveloped film plays no part in the production of photographs. After all, the photographs originate from the film supplied by the customer.

The distinction between a contract of sale and that of *locatio conductio operis* has long given rise to controversy. Norman's *Purchase and Sale in South Africa* 4 ed at 14-16 mentions four situations in connection with movables in which there may be difficulty in deciding which side of the line such a contract falls. It is only where a person has performed services for reward without supplying the materials as well that causes no problem. The contract is purely one of *locatio conductio operis*. With regard to the remaining categories the respected author suggests that:

(a) Where the *locator* (workman) supplies the services and the materials and the real substance or true essence of the contract is the finished article, the contract is one of sale of goods.

(b) Where the *locator* supplies the services and the materials and the real substance or true essence of the contract is the skill, talent or efficiency of the *locator*, the contract is one of hire of services.

(c) Where the *locator* receives all the materials from the *conductor* (owner), the contract must be that of hire of services. The reason is that the *locator* does not sell a *res vendita*, but merely works on the article and returns the finished article to the *conductor*.

(d) Where both parties supply the materials, the test to apply is the real substance or true essence of the contract.

It is the last of these helpful categories that fits the facts in this matter. The

customer undoubtedly supplies the undeveloped film. Without it negatives cannot be produced and, without negatives, photographs cannot be printed. What then is the real substance or true

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essence of the contract?

I should mention, however, that English law has moved with some uncertainty from one test to another. At first, the criterion of the relative importance of the labour and the materials was adopted. The rule formulated by Pollock CB in *Clay* v *Yates* (1856) 1 H&N 73 at 78 was to this effect: in order to decide whether a given contract has the additional characteristic of a contract for work and materials, what must be looked at is its essence. If the essence of the contract is the materials supplied, it is a contract for the sale of goods *simpliciter*. If, on the other hand, the essence of the contract is the exercise of skill, it is a contract for the hire of services.

Then, in a shift of position, it was enunciated in *Lee* v *Griffin* (1861) 30 LJ QB 252; [1861-1873] All ER Rep 191 (QBD) at 193E-F, *per* Blackburn J, that any transaction, under which the work results in the production of an article that can be said to be the subject of a sale, is a contract of sale.

Finally, reverting in a modified way to the initial test, the Court of Appeal in *Robinson* v *Graves* [1935] 1 KB 579; [1935] All ER Rep 935 (A) laid down that where the parties have not settled the question by the form of their contract, the court will do so by having regard to the substance of the contract.

The application of this latter test is presently favoured, especially where, as *in casu*, the supply of the goods and the performance of the work are to some extent, at least, separate elements of the same bargain. The determination of "the substance" is, of course, a matter of degree involving an assessment of the relative weight of each element. See Benjamin's *Sale of Goods* 3 ed at para 42.

The leading case of *Robinson* v *Graves supra* held that a contract for the painting of a portrait was a contract for work and labour and not for the sale of goods, notwithstanding that ownership of the canvas and paints would pass. Greer LJ, in the course of his judgment, said at 939C-D that:

"one has to look to the substance of the contract. If you find, as the court did in *Lee* v *Griffin*, that the substance of the contract was a contract to produce something to be sold by the dentist to the dentist's customer, then that is a sale of goods. But if, on the other hand, the substance of the contract is that skill and labour have to be exercised for the production of the article, and that it is only as ancillary to that that there will pass from the artist to his client or customer some materials in addition to the skill involved in the production of the article, that does not affect the conclusion that the contract is one for work and labour and materials, because the substance of the contract is for the skill and experience of the artist in producing the article."

Slesser LJ, after approving the rule in *Clay* v *Yates supra*, went on to state at 941C-E:

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"I am of opinion that on the facts of this case it is here shown that the material, the paint and the canvas, were merely ancillary to the actual technical work of producing the work of art, and that, therefore, this is a contract for work and labour. I will only guard myself finally by saying that I only decide this case upon its own particular facts. There may be cases where portraits are ordered in circumstances which would constitute the contract one for the sale of a picture as a chattel. In the circumstances of this case, however, where the defendant gave a commission to an artist to paint the portrait of a lady impliedly contracting, as I think, that the lady should attend at the artist's studio that the work might be executed, it is impossible to say that the mere fact that there would result an ultimate delivery of the picture

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constituted the contract one for the sale of goods."

Upon an application, then, of the substance test, and weighing the relative significance of the supply of an undeveloped film by the customer against the provision by the respondent of the materials required to develop the negatives and print the photographs, together with the performance of that work, I am of the opinion that the true and real nature of the contract is purchase and sale. The following features have persuaded me to so decide:

(1) The principal materials, being the specialised developing chemicals and the photographic paper, are provided by the respondent. Their cost far exceeds that of the undeveloped film supplied by the customer, which is of no value until its images have been transformed into photographs.

(2) No technical skill or experience is needed by the respondent to produce photographs; the mini-lab is probably as easy to operate as a modern photocopier.

(3) The intention of the parties to the transaction is to transfer the article, the set of photographs, when printed; the materials and the labour are not the paramount consideration for what is paid by the customer; they are merely necessary to produce a result.

It follows that the finding must be that photographic prints from negatives are products *allied* to the use of the premises for the sale of cameras. Therefore their sale by the respondent does not fall foul of clause 11:1 of the lease.

There is yet another ground upon which I consider this appeal cannot succeed. I shall deal with it briefly. It involves the proper meaning to be assigned to the word "products" in clause 11:1 of the lease.

It was cogently argued on behalf of the respondent that if the intention of the parties, when entering into the lease, had been to prohibit the sale of photographic prints produced by the respondent from a film supplied by a customer, the relevant portion of clause 11:1 would have simply read: "sale of cameras ... and accessories ..." (with the omission of the term "allied products"); or "sale of cameras ... accessories and allied *articles*".

It seems to me that the deliberate use of the word "products" in

contradistinction to "accessories" and instead of "articles" is of importance. The difference in meaning may not be overlooked.

A "product" is something which is brought into existence or worked up from raw materials, or as a result of a process, fabricated or manufactured, either by natural means, by hand or tools, machinery, chemicals or the like. See Black's *Law Dictionary* Abrid 5 ed; *Chambers 20th Century Dictionary*; *Oxford English Dictionary*; and, *South African Railways & Harbours* v *Cemafrique (Pty) Ltd* 1978 (3) SA 388 (A) at 394H. This, in my view, is the meaning that most

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appropriately fits the context of clause 11:1.

Thus a product allied to the sale of cameras is something which has been brought into existence as a result of a process. That is precisely the type of activity the respondent is undertaking. It is bringing into existence by means of a specific process photographic prints from undeveloped films supplied to it by customers. Such photographs are *products* allied to the use of the premises for the sale of cameras.

For the aforegoing reasons, I am satisfied that the order of the court *a quo* was correct. The appeal is accordingly dismissed with costs.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Scanlen & Holderness, appellant's legal practitioners

Ali Ebrahim, respondent's legal practitioners

SAWYER *v* CHIOZA & ORS 1999 (1) ZLR 203 (HC)

Citation	1999 (1) ZLR 203 (HC)
Case No	Judgment No. HH-33-99
Court	High Court, Harare
Judge	Gwaunza J
Heard	January 20, 1999
Judgment	March 30, 1999
Annotations	None

Opposed application

Flynote

Contract - option - lease of immovable property - provisions giving lessee right of first refusal if lessor decided to sell - meaning of "right of first refusal" - lessee's remedy in case of breach of duty to offer first refusal - second purchaser - distinction between bona fide and mala fide purchaser - protection given to second purchaser - price to be paid by lessee exercising right of first option

Headnote

The applicant leased a farm in terms of a contract which gave him the right of first refusal in the

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event of the lessor deciding to sell the farm. The lessor nonetheless sold the farm to another person, without giving the lessee the opportunity to exercise his right of first refusal. The lessee sought an order setting aside the sale and requiring the transfer to him of the property at the price offered by the other person.

Held, that the right of first refusal imposes a duty on the seller to offer the property to the lessee at the price which the other would-be purchaser has offered. If the lessee accepts that price, the lessor must sell it to him at that price. If he refuses, the right of first refusal falls away and the lessor is entitled to sell to the other person.

Held, further, that the lessee's remedies, where the right of first refusal is not offered, depend on whether the other purchaser was acting *mala fide* or *bona fide* and, if the latter, on whether he had taken transfer of the property. He would be acting *mala fide* not only where there was an element of deceit but also where knowledge of the right of first refusal was shown. Where the other purchaser acted *bona fide*, however, the lessee' right would be limited to an action for damages, unless the other purchaser acquired knowledge of the lessee's rights before taking transfer.

Held, further, that it is within the court's discretion as to whether to grant an order of specific performance in favour of the lessee. In this case, as the other purchaser had not taken occupation of the farm despite transfer to him, there could be no prejudice to him, and he would still have a claim for damages against the lessor.

Held, further, that where a price is fixed and determinable and the right of first refusal imposes an obligation on the seller to act in a certain way, the court can order specific performance at that price. The fact that the property might have appreciated in value since the time of the sale to the other purchaser did not affect this principle. The price was ascertainable, being the price offered by the other purchaser.

Cases Considered

Cases cited:

Bellairs v *Hodnett & Anor* 1978 (1) SA 1109 (A)

BP Southern Africa v *Desden Properties* 1964 RLR 7 (G); 1964 (2) SA 21 (R)

Farmers' Co-op Soc v *Berry* 1912 AD 343

Le Roux v *Odendaal & Ors* 1954 (4) SA 432 (N)

McGregor v *Jordaan & Anor* 1921 CPD 301

Owsianick v *African Consol Theatre* 1967 (3) SA 310 (A)

Case Information

J B Colegrave, for the applicant

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Miss *V Nyemba*, for the first respondent

No appearance for the second respondent

Judgment

Gwaunza J: In 1994, the applicant and the first respondent as lessee and lessor respectively, entered into an agreement of lease in respect of the property known as Rothbury Farm (Annexure "B"). It is common cause that clause 14 of the lease agreement gave the applicant the right of first refusal in the event of the first respondent intending to sell the farm.

It is also common cause that the first respondent sold the farm to the second respondent and that transfer of the property into the latter's name was effected on 15 July 1997 under Deed of Transfer No. 5234/97. The second respondent has never taken possession of the farm as it was encumbered by the existing lease agreement entered into between the applicant and the first respondent.

The applicant alleges that the first respondent breached clause 14 of the lease agreement by denying him the opportunity of exercising his right of first refusal. It is his contention that clause 14 of the lease agreement obliged the first respondent, once the second respondent offered to buy the farm for $2000000, to offer the farm to him (applicant) first before concluding any sale with the second respondent. He contends further that the second respondent was not only aware of the applicant's right of first refusal but had, at least, constructive knowledge that it had not been exercised.

The applicant accordingly seeks an order:

(a) setting aside the sale by the first respondent to the second respondent, of the farm known as the Great Riverside Estate in Mazowe (Rothbury Farm);

(b) authorising the Registrar of Deeds to cancel the registration of the property in the name of the second respondent, under Deed of Transfer 5234/94;

(c) directing that he be given the right of first refusal of an offer of $2000000 for the farm, account being had regarding improvements effected by the applicant and to be exercised within 14 days herein; and

(d) that the first and the second respondents pay the costs of the application.

The application was initially opposed by both respondents, it being the first respondent's contention that the applicant had been "availed" the opportunity to exercise his right of first refusal, and that he had chosen not to exercise it.

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The second respondent, in his turn, contended that he was an innocent third party and had been informed by the first respondent that the applicant had been given the opportunity to

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exercise his right and that he had done so by refusing to buy the farm at more than $1500000.

The parties' arguments are contained in lengthy founding, opposing and answering affidavits, which would have required the court to make a determination, among other issues, on whether the second respondent, being aware of the applicant's right of first refusal in terms of clause 14 of the lease agreement, had constructive knowledge of the fact that the applicant had not exercised this right before the sale of the property was concluded between him and the first respondent. The determination of the court on this matter would have largely influenced its decision on whether or not the sale should be set aside and registration under Deed of Transfer 5234/97 cancelled.

In the event, it was not necessary for the court to go into the merits of the second respondent's contentions on this matter.

This is because the second respondent, who on the papers strongly opposed the application, was in the end not only in default but automatically barred for failure to file his heads of argument, despite having filed notice of his intention to apply, at the trial, for the upliftment of the bar and condonation of the late filing of the heads of argument. The second respondent's default occurred despite proof on record that the notice of set down had been served on his legal practitioners.

A reading of the papers before me indicates that the failure by the second respondent to file his heads of argument timeously was due to the confusion and practicalities occasioned by the necessity for the two respondents, originally represented by one legal practitioner, to instruct different legal practitioners to carry the main application through. Such necessity arose out of certain developments in the relationship between the two respondents, explained more fully below. As a result of these developments, the first respondent filed a supplementary affidavit technically but not realistically withdrawing his opposition to the application. The court granted the application by the first respondent to file this supplementary affidavit even though the applicant had opposed it.

The first respondent's reasons for "withdrawing" his opposition appear from his supplementary affidavit:

> "The second respondent has failed to pay the balance of the purchase price in the sum of $1000000 which amount was due at the end of December 1997, but has not been paid ... I have decided to exercise my right in terms of clause 9 of the said agreement ...
>
> I am no longer opposing the application as I also pray that the sale between myself and the second respondent be set aside and that the Registrar of Deeds be and is hereby authorised to cancel the registration held under Deed of Transfer 5234/97 and reversed into

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> my name. In the event that I decide to sell the property, the applicant shall be given the right of first refusal as before based on the market value of the property and not on the sum of $2000000."

The first respondent adds in his heads of argument that he has renewed the applicant's lease for another two years, a fact confirmed by the applicant. The propriety of him doing so given the

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fact that the property is now registered in the name of the second respondent is, however, a matter not relevant to the determination of the dispute at hand.

The first respondent, although for a different reason, is thus technically no longer opposed to the relief sought by the applicant in terms of the setting aside of the sale and cancellation of the deed of transfer currently registered in favour of the second respondent. He still opposes the grounds upon which the applicant's prayer is based, as well as the value of the offer against which the applicant should exercise the right of first refusal now apparently restored to him in a new lease agreement.

The first respondent stresses that the "withdrawal" of his opposition to that part of the applicant's prayer which relates to the cancellation of the sale and registration of the property in the second respondent's name is in no way a concession by him that he had breached clause 14 of the lease agreement. The applicant, on the other hand, denies he was given the opportunity to exercise his right of first refusal in relation to the sale of the farm to the second respondent for $2000000. His prayer to have this right of first refusal restored to him accordingly amounts to a claim against the first respondent for specific performance of his obligation under clause 14 of the original lease agreement. This, in my view, makes it necessary to first establish whether the first respondent did indeed fail to perform. If it is found that he not only failed to perform but acted in breach of the clause setting out the obligation, the next issue to be considered would be the remedies available to the applicant under those circumstances.

It is not in dispute that, in terms of clause 14 of the lease agreement, the applicant had a right of first refusal in the event that the first respondent decided to sell the property to a third party. The relevant part of clause 14 reads as follows:

> "... and the Lessor agrees that the Lessee shall have the right of first refusal to purchase Rothbury at a price no greater than the seller would be prepared to accept from any other *bona fide* third party purchaser and in the event of his offering to sell Rothbury to the Lessee he undertakes to take into account the value of any improvements that may have been effected by the Lessee."

I consider it pertinent at this juncture to establish what is meant by a right of first refusal. In Cooper's *Landlord and Tenant* 1(39) the learned author states

that the right of first refusal is synonymous with the right of pre-emption. He explains that an agreement between the lessor and the lessee that the latter shall have the first right of purchase, should the grantor wish to sell, gives rise to an enforceable right. To be binding, such an agreement, being an agreement of pre-emption, must contain a price which is certain or ascertainable. He continues at p 141:

"A price is ascertainable where the grantee has the right to purchase at the price for which the grantor is prepared to sell to a third party. In effect, the price is then fixed by a third party ... An agreement of pre-emption does not compel the grantor to sell it only compels him to give the grantee the right to purchase if he (the grantor) proposes to sell."

Kerr *The Law of Sale and Lease* 2(40) adds the following:

"And consequently it too prevents him (the grantor) from selling to third persons during the existence of the right."

Cooper *Landlord and Tenant* at p 143 aptly summarises the grantor's obligations in relation to

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the exercise by the grantee of his right of pre-emption:

"An agreement of pre-emption contains both a negative and a positive element. The negative element is that the grantor is restrained from selling to a third party; the positive element is once he is prepared to sell he is under a 'positive obligation' to sell to the grantee."

In my view, the above captions describe the essential elements of the right of pre-emption (or first refusal) in terms that are both clear and unambiguous. My reading of these requirements is that the following steps must, in that sequence, be followed in the exercise of a right of pre-emption:

(a) an specific third party offers to buy the property at a given price;

(b) the grantor is prepared to sell at that price; but

(c) before accepting the buyer's offer, the grantor reverts to the grantee of the right of pre-emption, informs him of his decision to sell at the price offered by the particular buyer and asks him (grantee) to exercise his right of first refusal.

Thereafter, the outcome, in terms of who ends up buying the property, depends on the grantee's decision on whether to exercise his right. If he chooses to exercise it, the grantor is obliged to sell the property to the grantee. If the latter chooses not to exercise his right of first refusal, then the property is sold to the third party. The whole arrangement pre-supposes transparency and honest dealing between grantor and grantee.

[*Her Ladyship went on to consider the evidence as to whether these procedures were followed, and continued:*]

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In view of the foregoing, I am satisfied the "offer" of $3500000 referred to in the first respondent's affidavit did not constitute compliance with clause 14. It accordingly follows that the right of first refusal was still operational and in existence at the time the first respondent sold the property to the second respondent. Contrary to his contention that he was not obliged to go back to the applicant with "another offer", the first respondent was obliged to inform the applicant of the offer made by the second respondent to buy the farm at $2000000, thereby affording him the opportunity to exercise his right of first refusal. I am satisfied that, by failing to do so and then proceeding to sell the farm to the second respondent, the first respondent acted in breach of clause 14 of the lease agreement. He thus failed to perform.

As the question of whether, after a lessee refuses to purchase the property in terms of his right of first refusal, the lessor is obliged to keep on offering the property to him was raised in this case, it might be appropriate to address this issue at this point. Norman's *Purchase and Sale in South Africa* 4 ed at p 98 contains the following instructive passage:

"A point which does not seem to have arisen for decision is whether the grantor is bound to keep on offering the property to the grantee during the period of the right, if he refuses to purchase on each previous occasion. This, of course, pre-supposes that in such event the grantor does not sell to a third party. On the particular construction of a contract of pre-emption, it was held in the case of *Crossroads Properties (Pvt) Ltd* v *A1 Taxi Service Co (Pvt) Ltd*

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1954 (4) SA 516 (SR), that the grantor was not so bound, but this must be so in any case because, on refusal by the grantee, the grantor could immediately sell and even if he does not do so, the grantee's right must fall away."

It would thus appear that the right of first refusal, once its exercise has been properly requested by the grantor and refused by the grantee, immediately falls away. It is a "one-off" right. *In casu,* it has been determined that the applicant was not given the opportunity to exercise his right of first refusal.

What must now be considered is what remedies, if any, are available to the applicant under these circumstances. I have stated above that the applicant's claim against the first respondent is in effect one for specific performance. The question is whether this is an appropriate remedy given the circumstances of this cases.

In discussing a lessee's pre-emptive right *vis-à-vis* third parties, Cooper's *Landlord and Tenant* at p 147 has this to say:

"*Vis-à-vis* a third party who purchases the property in respect of which a lessee has a right of pre-emption the lessee has the same rights as a competing purchaser in the case of a double sale and, as in the case of a double sale, the rule *qui prior est tempore potior est jure* applies."

This position is confirmed in *Le Roux* v *Odendaal & Ors*: 3(41)

1999 (1) ZLR p209

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"The first question that arises is whether an the applicant's prior right of pre-emption places her in the same position in law as a prior purchaser. In my opinion, it does ...

The position then, is that the applicant is in the same position in law as if she had actually purchased the property prior to the date of the second respondent's purchase."

That the first purchaser's right is to be preferred is explained by Macdonald J (as he then was) in *BP Southern Africa* v *Desden Properties*: 4(42)

"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 this would be the invariable rule, but I agree with the view of Professor McKerron that save in special circumstances the first purchaser is to be preferred.

It is clear therefore that in our law an option holder who has exercised his option after a sale to a third purchaser of which he is ignorant is deemed in law to be a prior purchaser." 5 (43)

It is clear, therefore, on the authorities cited above that *in casu*, the applicant's right of first refusal takes precedence over the second respondent's rights in relation to his purchase of the property in question. However, when it comes to the possible remedies available to the applicant, Cooper's *Landlord and Tenant supra* says at p 93:

"In resolving conflicts arising from double sales a distinction is made between:

(a) a *mala fide* purchaser, ie one who has knowledge of the earlier sale at the time he purchased, and a *bona fide* purchaser, ieone who was ignorant of the earlier sale at the time he purchased the property; and

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(b) a second purchaser who has received transfer and one who has not."

Applying the same principle to the case in point, the applicant's remedy would have to depend on:

(a) whether or not the second respondent was a *mala fide* purchaser and

(b) whether he has taken transfer of the property.

It is not in dispute that the second respondent has taken transfer of the property. What is, or was, in dispute is whether or not he was a *bona fide* purchaser of the property. My consideration of this matter was complicated by the fact that the second respondent was in default. In these circumstances, I am compelled under the rules of this court to consider the second respondent as not having formally disputed the allegation that he was not an innocent purchaser of the property.

Despite the second respondent's default, I nevertheless consider it apposite to consider what the authorities say in respect of *bona fide* and *mala fide* second purchasers. See *McGregor* v *Jordan & Anor,* 6(44) where the court held that the holder of a prior right of pre-emption was entitled to an order

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declaring the sale of a half share in the farm in question null and void, and interdicting the grantor from giving, and the third party from receiving, transfer of the said half share. Kotzé JP then said:

"The object of the law is at all times to discourage and prevent fraud; and conduct such as that of which the second defendant has been guilty, amounts to fraud. The second defendant is, therefore, in the same position as he would have been, had the plaintiff been a prior purchaser, for he knowingly acted in breach of the plaintiff's prior right of pre-emption; and so likewise has the defendant, Jordan, who sold half the farm to the second defendant in breach of such pre-emptive right."

In that case, the plaintiff's case was founded on an alleged breach of a right of pre-emption given by the first defendant to the plaintiff as contained in a clause in a certain mortgage bond passed in favour of the plaintiff. The first defendant had then entered into a written agrement of sale in respect of a half share of the property with the second defendant, who was fully aware of the plaintiff's right of pre-emption.

In contrast to *mala fide* second purchasers, the authorities make it clear that a *bona fide* second purchaser enjoys some measure of, but not total, protection. In *Owsianick* v *African Consolidated Theatre* 1967 (3) SA 310 (A), Ogilvie Thompson JA said: 7(45)

"... In the case where, in breach of the right of pre-emption, the grantor has sold and delivered the subject of the right to a *bona fide* purchaser ... all the authorities are agreed that the personal right of the holder of a right of pre-emption is limited to an action for damages."

An earlier case, 8(46) however, is cited as authority for the proposition that the grantee of the option would still be entitled to specific performance where the purchaser, even though ignorant

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of the right at the time of the sale, subsequently acquired the knowledge. It was also held in the same case that the applicant (grantee) had a right to specific performance unless there were special circumstances affecting the balance of equities. Further, that even if there was a small balance of equity in the second respondent's favour, that it was not sufficient to defeat the applicant's *prima facie* right of specific performance. In the *Odendaal* case, the court found the balance of equity small even though the second respondent had taken occupation of the farm and started farming operations. The court held that any prejudice the second respondent suffered could be adequately compensated by a damages claim against the first respondent.

In casu, as already mentioned, the second respondent was in default and accordingly missed the chance to argue his case which would have enabled the court to make an informed determination on whether or not he was a *mala*

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fide purchaser. The applicant's relief in the face of the unchallenged *mala fides* of the second applicant is clear as illustrated by the authorities cited above.

However, on the authority of *Odendaal supra,* even had the second respondent not had prior knowledge of the applicant's right of pre-emption, the balance of equity represented by the fact that he had never taken possession of the farm might possibly have weighed so heavily against him as to entitle the applicant to an order for specific performance.

It has already been mentioned that the second purchaser's *mala fides* notwithstanding, a further distinction is made where transfer of the property has, like in the present case, taken place. The distinction is highlighted in the article by GA Mulligan entitled "Double Sales and Frustrated Options", 9(47) as follows:

"The position [where the purchaser was *mala fide*] is fairly clear. At the instance of the option holder the sale will be cancelled if conveyance of the property has not yet taken place. If conveyance has taken place, then at the instance of the option holder if *he has exercised* his option, sale and conveyance will be set aside."

This view is echoed by A J Kerr *op cit* at p 410:

"If during the currency of a lease in which the provisions granting the right of pre-emption from an integral part of the contract and in breach of the lessee's right of pre-emption, the leased property is sold to a third person, and if it is transferred to that person, then, on the principle *huur gaat voor koop*, the purchaser, now the lessor, is not entitled to stand in the way of any advantage the lessee may have acquired under the provisions of the lease. After the lessee has converted his right of pre-emption into a completed sale he is entitled to claim transfer to himself in much the same way as an ordinary the first purchaser can claim after transfer to a *mala fide* second purchaser."

In a footnote, the steps to be followed in such a procedure are set out as follows:

"The steps by which this is done are (1) a claim against the original lessor for specific performance of the contract iethat an offer be made to him; and (2) once the first claim is granted (and there seems to be no reason why it should not be granted) acceptance of the offer."

The third step would be for the applicant to claim transfer of the property to himself.

On the same subject, Cooper's *Landlord and Tenant*, although putting it differently, stresses the

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pre-condition that the applicant must have been entitled to specific performance, at p 95:

"If at the time he contracted with the seller the second purchaser was *mala fide* but, nevertheless, took transfer, the first purchaser may recover the property from the second purchaser provided the former would have been entitled to a decree of specific performance against the seller if there had been no second sale."

GWAUNZA J

The sum effect of these authorities would seem to be that in a case as the one in point, the applicant's success in his claim depends on whether or not he would have been entitled to a decree of specific performance against the seller if the sale to the second respondent had not taken place, and also on whether or not clause 14 was an integral part of the lease agreement. I am satisfied, on the basis of the above authorities, and in light of my decision as to the first respondent's breach, that the applicant's right to claim specific performance has been established. Further it cannot be disputed that clause 14 was an integral part of the contract of lease and on that basis is protected by the rule "*huur gaat voor koop*". 10(48)

There is, however, a further spanner in the works, as it were. The question of whether or not to grant an order of specific performance is entirely in the court's discretion. 11(49)Innes J is quoted as saying the following in *Farmers' Co-op Soc* v *Berry* 1912 AD 343 at 350:

"*Prima facie*, every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract."

Cooper *supra* at p 87 adds:

"This rule is subject to the qualification that a court has a discretion whether to grant an order of specific performance. This discretion, which must be exercised judicially is not confined to specific types of cases nor is it circumscribed by rigid rules. These principles apply to a lessee who seeks an order of specific performance."

In considering whether or not to grant an order for specific performance in favour of the applicant, I am persuaded by the applicant's contention that there would be no prejudice to the second respondent, who never took occupation of the farm, if the applicant were to succeed on his claim. I am further persuaded that any loss that the second respondent may have suffered can be compensated for by a claim for damages against the first respondent. The first respondent, to my mind, will suffer no prejudice, given the fact that he to a large extent is the author of the problem forming the basis of this application. Lastly, I have considered the prejudice that would be suffered by the applicant and his employees, who he says depend on the farm for their livelihood. I would, for these and the other reasons outlined above, grant the applicant's prayer for specific performance by the first respondent, of his obligations under clause 14 of the contract.

Having determined in this case that the applicant is entitled to claim specific performance of clause 14 of the contract of lease, the next issue to be determined is the value of the offer against which the applicant must

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exercise his option. The applicant's prayer in this respect is for the right of first refusal of an offer of $2000000 for Rothbury Farm, account being had regarding improvements effected by the applicant, to be exercised within 14 days herein.

The first respondent opposes this prayer on two grounds:

(a) he disputes that $2 million should be the offer against which the applicant should exercise his right of first refusal, contending this should be based on the current market value of the property; and

(b) by stating that the applicant will only be granted the opportunity to exercise the right of first refusal "in the event that I decide to sell the farm" 12(50) the first respondent is disputing the part of the applicant's prayer for the said right to be exercised within 14 days of the judgment of this court.

Counsel for the first respondent, Miss *Nyemba*, argues that between the time the property was sold to the second respondent in December 1996 and now, January 1999, the property has appreciated significantly in value. Therefore, she contends, it would be unfair to value the property at $2000000. Rather, if and when the first respondent chooses to sell, the applicant should be invited to exercise his right of first refusal against offers that are consistent with the current market value of the property. She goes on to mention that the first respondent has made the undertaking to give the applicant the right of first refusal should he decide to sell in future.

Mr *Colegrave,* for the applicant, stresses the point that in terms of clause 14 of the lease agreement, the first respondent was required to offer the farm to the applicant at *that sum* before concluding any sale with the second respondent. He adds that the applicant's prayer is for specific performance on the terms agreed by the parties.

The question of the price against which a right of first refusal should be exercised, given the time lapse between the date the right was created and the time it falls to be exercised, is canvassed in *Bellairs* v *Hodnett & Anor*, 13 (51) The Full Bench made a distinction between cases where the pre-emptive price is specified or determinable and cases where it is not so fixed, saying, in relation to the right in that case:

"It will therefore become immediately apparent that the right of pre-emption in clause 21 differs radically from the usual kind in which the pre-emptive price is either specified (see the authorities mentioned in *Sher* v *Allan* 1929 OPD 137 at p 141) or which, because of its wording or effect, it is the same price as the owner is prepared to accept from the third person ... or in which the price is otherwise objectively determinable (see *Lyle & Scott Ltd* v *Scott's Trustees* [1959] AC 763). Such cases are therefore, clearly distinguishable from

the present one. For in each of them, the owner is obliged positively to offer the *merx* to the obligee at the specified or determinable price before selling it to the third party; indeed so much so that it was held in *Lyle*'s case and by two judges in *Owsianick*'s case that, in appropriate circumstances that obligation can be enforced by an order for specific performance."

In that case, the relevant clause did not impose a positive obligation on a member "desirous of

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selling his shares" to offer them to the other members at any specified or determinable price, but left him free to fix whatever price he pleased. The right of pre-emption in that case imposed a negative obligation on the member not to sell to a non-member at a price lower than that offered to and refused by the other member. It did not at the same time impose the positive, legal obligation on him to fix the same price in his offer to the other members as he would or expects to be offered by other members. The court could therefore not compel him to offer or accept such a price against his will.

On the authority of that case, therefore, the determining factors are:

(a) whether or not the price was ascertainable; and

(b) whether or not the right of pre-emption offers both a negative and a positive obligation on the grantor to act in a certain way.

Thus, where a price is fixed or determinable and the right of pre-emption imposes both a negative and positive obligation, the court can order specific performance *at that price*. The facts of the case at hand, as discussed at length above, establish these factors beyond any doubt.

I must accordingly order specific performance at the price determined by the second respondent and for which he bought the property, that is, $2000000. In doing so, I should stress that the relief sought by the applicant accrues from obligations arising out of the old lease agreement between the parties, not the new one that the parties say they have entered into. That agreement has no relevance to the dispute at hand. It follows, therefore, that specific performance can only be ordered on the terms set out in the first lease agreement and the ascertainable price of $2000000 against which the applicant was denied the chance to exercise his right of pre-emption. The applicant's remedy is set out in the authorities cited above. By way of emphasis, the following words of the Macdonald JP in *BP Southern Africa* v *Desden Properties supra* are cited with approval:

"Where transfer has actually taken place to a *mala fide* third purchaser, the option holder, on exercising the option, is entitled to have the transfer set aside and the property transferred to him."

I consider the applicant to have, by virtue of this application, indicated his willingness to exercise his option to purchase the farm at the price offered by the second respondent, that is $2000000.

GWAUNZA J

Given the conduct of both the first and the second respondents, and in light of my decision in this case, I would concur with the applicant's counsel that the two respondents should bear the costs of this application. I shall so order.

In the premises, it is ordered as follows:

(a) that the first respondent be and is hereby ordered to give to the applicant the right of first refusal of an offer of $2000000 for Rothbury Farm, account being had regarding

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improvements effected by the applicant, to be exercised within 14 days of this judgement.

(b) that the sale of certain piece of land situated in the District of Mazowe measuring 5 335.935 hectares, called the Remaining Extent of Lot DA the Great Riverside Estate, also known as "Rothbury Farm" between Agson Mafuta Chioza and Neville Mujikwa held under Deed of Transfer No. 5234/97, be and is hereby set aside.

(c) that the Registrar of Deeds be and is hereby ordered to cancel the registration held under Deed of Transfer No. 5234/97.

(d) that within 30 days of the registration held under Deed of Transfer No. 5234/97 being cancelled in terms of (c) above, the first respondent be and is hereby ordered, upon payment to him by the applicant of the amount specified in (a) above, to effect transfer of the said property into the name of the applicant.

(e) that should the first applicant fail to comply with (d) above the Deputy Sheriff is authorised to take all necessary steps and to sign all documents as would be necessary to effect such transfer.

(f) that first and the second respondents pay the costs of this application, jointly and severally, the one paying the other to be absolved.

Surgey, Pittman & Kerswell, applicant's legal practitioners

V Nyemba & Associates, first respondents' legal practitioners

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S *v* JIRI 1999 (1) ZLR 216 (HC)

Citation	1999 (1) ZLR 216 (HC)
Case No	Judgment No. HH-61-99
Court	High Court, Harare
Judge	Bartlett J
Heard	March 31, 1999
Judgment	March 31, 1999
Annotations	None

Criminal review

Flynote

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Criminal procedure (sentence) - general principles - factors affecting sentence - previous convictions - accused convicted of trivial offence but having many previous convictions - subsequent conviction for trivial offence - approach to be taken by court

Headnote

The nature of the offence is an important factor in assessing sentence. Where the accused person has committed a trivial offence the court must not impose a severe sentence merely on the ground that the offender has many previous convictions. The accused is being sentenced for his present offence and is not being punished for his past misdeeds. Although his past criminal record disentitles him to leniency, the punishment for the present offence must be kept within the bounds of the offence committed. The courts will punish persistent offenders more severely than a first offender but must not end up imposing a completely disproportionate sentence when the offence committed by the accused person is of a trifling nature.

In the case being reviewed, the accused had stolen an item from a supermarket worth $52. He had an atrocious record of committing crimes involving dishonesty. In recent years, however, he had spent only eight weeks in prison; he seemed to have been making some effort to mend his ways. It did not appear that the reason for improvement was that he had been committing offences which had not been detected. There is no rule that shoplifting must be punished more severely than other forms of theft. The court reduced a sentence of two years' imprisonment to one of six months' imprisonment.

Cases Considered

Cases cited:

R v *Adamu* 1946 SR 103

S v *Bouchet* S-13-85

S v *Chakanetsa* 1980 ZLR 457 (A); 1981 (1) SA 876 (A)

S v *Gross* 1982 (1) SA 593 (A)

R v *McDermott* GB-72-64

S v *Macheka* HH-405-85

S v *Mandoro* 1977 (2) RLR 245 (A)

S v *Moyo* S-153-86

S v *Mpande* S-94-83

S v *Pasipanyodya* 1982 (2) ZLR 69 (H)

R v *Petersen* 1944 EDL 165

Judgment

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Bartlett J: John Jiri stole a bottle of brake fluid valued at $52 from a

BARTLETT J

supermarket in Murambinda. With what things cost today it must have been rather a small bottle of brake fluid. John Jiri denied the charge but was convicted and sentenced to 2 years' imprisonment. The sentence is so severe because John Jiri is by no means a stranger to the courts and has a large number of previous convictions.

The question which accordingly arises for decision in this matter is what weight should be given to an accused person's previous convictions when the present offence is of a minor nature. This is a question which has been considered many times by this court over the years, with clear principles and a clear approach being laid down. But from the review records crossing my desk it is not unusual to find magistrates adopting the wrong approach in dealing with this particular problem in the sentencing process. Accordingly, it is perhaps appropriate to restate the principles and then try to apply them to the facts of this case in the hope of providing some guidance and assistance to magistrates.

In *R* v *Petersen* 1944 EDL 165, Lewis AJ (as he then was) emphasised that a severe sentence for a trivial offence is not justified merely on the ground that the offender has many previous convictions.

Tredgold J (as he then was) was concerned in *R* v *Adamu* 1946 SR 103 with a theft of goods worth $2 - at least $52 in 1999 values - which led to a sentence of 2 months' imprisonment (and six strokes with a cane!). The learned judge stated that the sentence was excessive having regard to the small nature of the goods, adding that, even where previous convictions exist, the first consideration must be the circumstances of the offence actually before the court.

These sentiments have been echoed over the years - see *R* v *McDermott* GB-72-64; *S* v *Chakanetsa* 1980 ZLR 457 (A); 1981 (1) SA 876 (A); *S* v *Nyabira* AD-87-81; *S* v *Mpande* S-94-83; *S* v *Bouchet* S-13-85; *S* v *Macheka* HH-405-85 and *S* v *Moyo* S-153-86. The principle was perhaps stated with particular clarity by Dumbutshena J (as he then was) (with McNally J (as he then was) concurring) in *S* v *Pasipanodya* 1982 (2) ZLR 69 (H) at p 70F-H:

"While it is true that the accused has a bad record of relevant previous convictions, courts must not lose sight of the nature of the offence for which an accused is being punished. In the instant case, the trivial nature of the offence is an important factor to be considered when assessing sentence because the accused is not being punished for his past misdeeds but for the present one. The relevance of his previous convictions disentitles him to leniency but the punishment must, in my view, be within the confines and bounds of the offence committed."

A case of particular relevance is *S* v *Mpala* HH-301-86, where an accused with a bad previous record and suspended sentences hanging over his head was sentenced to 2 years' imprisonment for stealing property worth $47 -

BARTLETT J

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and in addition the suspended sentences were brought into effect. Sansole J had this to say:

"In my view, the cumulative sentence is so severe as to induce a sense of shock.

It seems to me that the trial magistrate was influenced by the accused's previous convictions. This is not right. Meting out a severe sentence for what is, in all the circumstances, a trifling offence, can be a grave injustice. Though it is, generally, the practice of criminal courts to punish persistent offenders more severely than first offenders 'it is not right to be guided merely by previous convictions' as a justification for imposing a severe sentence for what is in itself a trifling offence ...

Undoubtedly, this is a trifling offence which would not, normally, attract such a severe sentence but for the previous convictions.

It seems to me that where previous convictions need to be taken into account, and in particular where a suspended sentence is required to be brought into force, it is incumbent upon the court to determine a condign sentence for the instant case as a separate issue first and then take into account previous convictions or suspended sentence but always being mindful that the overall result should not be unfair and harsh to such extent as to cause a sense of shock on account of its severity."

The learned judge reduced the sentence to 3 months' imprisonment with labour - while leaving the order bringing the suspended sentences (which totalled 15 months) into effect intact.

I turn now to the facts of this case.

John Jiri has an atrocious record. Between 1980 and 1990, he was convicted on a total of twelve separate occasions for dishonesty. A variety of sentencing options were all unsuccessfully imposed - with the most severe prison sentence for any single conviction being a period of 18 months. There is then a distinct reduction in the number of convictions with only three convictions in the period 1991-99 prior to the commission of the instant offence on 20 February 1999. Two of these convictions resulted in the imposition of a fine and the third in a short period of 8 weeks imprisonment. The change in the pattern of criminal convictions means that, prior to the imposition of the two year sentence in this matter, John Jiri had been in prison for only 8 weeks in the last 8 years and seems to have been endeavouring to make at least some effort to mend his ways.

The accused in *S* v *Pasipanodya supra* seemed to follow a similar pattern of conduct which caused Dumbutshena J to observe as follows at 71H-72A:

"There is no doubt that the accused has a very bad record of previous convictions involving crimes of dishonesty. His record reveals that he was first sentenced to 6 cuts with a cane on 11 November 1958. From then onwards he frequently appeared in court. His last conviction on the record was on 21 May 1976. On that occasion, he was sentenced to a fine of $50 or, in default of payment, 50 days' imprisonment with labour. That sentence seems to have had sufficient deterrent effect because the accused seemed to have kept away from crime for a good 6 years."

See also the similar comments of Gubbay JA (as he then was) in *S* v *Moyo supra*.

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One could be less charitable and say as was stated by Davies JA in *S* v *Mandoro* 1977 (2) RLR

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245 (A) at 249B-C that "one cannot be blind to the fact that not all crimes are detected and that it is not improbable that during a relatively crime free period a particular accused has, in fact, merely been lucky in escaping detection".

But John Jiri, apart from committing numerous offences between 1980 and 1990, seems also to have been particularly adept at being caught committing them - hence his 12 court appearances in just under a decade. Accordingly, unless his ability to avoid detection showed a dramatic improvement after 1990 (deriving from his considerable relevant experience) it would seem that he was making an effort to diversify his income earning pursuits. Certainly, the facts of the instant case where he was comprehensively caught stealing the brake fluid in an inept fashion hardly indicate that his two decades of criminal experience had made him any more successful at avoiding detection.

The instant offence was also undoubtedly a minor offence. The magistrate said as much stating in his reasons for sentence - "This is a minor offence where the accused would have gotten [*sic*] away with a fine". The magistrate was correct and did not fall into the error made by the magistrate in *Pasipanodya*'s case *supra* of stating that "although the value involved is small shoplifting is a serious offence". In this regard, I would respectfully agree with Dumbutshena J's citing in *Pasipanodya*'s case *supra* of *S* v *Gross* 1982 (1) SA 593 (A) where Joubert JA held (as quoted in the headnote):

"that there was no rule that shoplifting ought to be punished more severely than theft in another form; the seriousness with which the magistrate approached shoplifting and the high incidence thereof in the district had weighed too heavily with him and had overshadowed the particular circumstances of the appellant as an individual."

See also the comments of Greenland J in *S* v *Mushonga* HH-606-87 at p 2.

The magistrate in this matter (as in *Pasipanodya*) fell into the error of imposing a severe sentence on the accused for a minor offence because of his serious previous convictions.

In all the circumstances, giving what I consider to be appropriate weight to John Jiri's previous convictions and the facts of the instant offence, the sentence of 2 years' imprisonment is set aside and a sentence of 6 months' imprisonment is substituted. The proceedings are otherwise confirmed.

Omerjee J agrees.

DALNY MINE *v* BANDA 1999 (1) ZLR 220 (SC)

Citation	1999 (1) ZLR 220 (SC)
Case No	Judgment No. S-39-99
Court	Supreme Court, Harare
Judge	McNally JA, Ebrahim JA, Muchechetere JA

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Heard March 23, 1999
Judgment April 12, 1999
Annotations None

Civil appeal

Flynote

Employment - appeals under labour legislation - appeal to Labour Relations Tribunal - appeal based on procedural irregularities - approach to be taken by Tribunal to rectify irregularities - should either remit or re-hear matter itself

Headnote

Where the Labour Relations Tribunal hears an appeal, it should not determine the matter on the basis of technical irregularities in the previous proceedings. This does not mean that the irregularities should be ignored; they should be put right. The Tribunal's choice is either -

(1) to remit the matter so that the irregularities might be cured in a re-hearing; or

(2) to hear the evidence itself, thus rendering the irregularities irrelevant.

Cases Considered

Cases cited:

Air Zimbabwe Corp v *Mlambo* 1997 (1) ZLR 220 (S)

Sirdar's Mfrs (Pvt) Ltd v *Chinya* 1995 (1) ZLR 368 (S)

Statutes Considered

Legislation referred to:

Labour Relations Act [*Chapter 28:01*], ss 90(6) and 101(8)

Case Information

Miss *W T Miles*, for the appellant

M V Chirodza, for the respondent

Judgment

McNally JA: This is a labour relations case. I will refer to the parties as "the mine" and "Banda". The facts, are briefly, that Banda was suspended from his job as a cardex clerk at the mine on 16 December 1992. At a hearing the previous day he had been found guilty of "failure to follow established procedures". He appealed, in terms of the relevant code of conduct (SI 165 of

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1992), to the Mine Manager. The Mine Manager dismissed him on 30 December 1992, having offered an alternative of demotion which was refused.

Banda then appealed, in terms of Part D, s 3(e) of the code, to the labour relations authorities, and his appeal was heard and dismissed by a senior labour relations officer on 1 February 1993. He then appealed to the Labour

McNALLY JA

Relations Tribunal (the Tribunal). His hearing in that forum extended from 30 November 1995 to 5 November 1996, 20 February 1997 and 7 May 1997.

The decision of the Tribunal was based on three procedural points taken by the Tribunal *mero motu* and *in limine*. Because it found fatal procedural defects in the procedure, the Tribunal "considered it proper to uphold the appellant's (Banda's) appeal without going into the merits". Accordingly, it ordered his reinstatement with an alternative of damages.

As a general rule it seems to me undesirable that labour relations matters should be decided on the basis of procedural irregularities. By this, I do not mean that such irregularities should be ignored. I mean that the procedural irregularities should be put right. This can be done in one of two ways:

(a) by remitting the matter for hearing *de novo* and in a procedurally correct manner;

(b) by the Tribunal hearing the evidence *de novo*.

In regard to the first of these alternatives, this court has previously said that:

"The Tribunal is not given a discretion whether to remit or not. Once it decides that the proceedings were fatally irregular, and that it cannot come to a conclusion on the merits, it has no choice but to remit."

See *Air Zimbabwe Corp* v *Mlambo* 1997 (1) ZLR 220 (S) at 223F, and s 101(8) of the Act.

In regard to the second alternative, I draw attention to the words in the above extract: "and that it cannot come to a conclusion on the merits". There used to be many cases in which the record of evidence was so scanty that it was virtually impossible to come to a conclusion on the record. I commented on this in *Sirdar's Manufacturers (Pvt) Ltd* v *Chinya* 1995 (1) ZLR 368 (S) at 370F *et seq*. I noted there that the Tribunal has the power to hear evidence in terms of s 106(6) of the Act as amended (now s 90(6) of *Chapter 28:01*). See also s 18(1) of SI 30 of 1993. It may also be pointed out that in terms of s 97(4)(a) and (b) of the Act, the Tribunal has a choice (to be exercised, of course, judicially) either to "proceed with the appeal by way of a hearing" or to "decide the appeal on the record".

In recent years, as in this case, the Tribunal has responded to our suggestion by calling for evidence when the record is wanting. When it has heard the evidence, then it is in a position to come to a conclusion on the merits. That, after all, is the purpose of hearing the evidence. And the hearing of the evidence will usually overcome, override and make irrelevant, the questions about procedural irregularities. Once the Tribunal has heard all the evidence, then what does it

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matter that someone who heard the evidence previously may have done so unprocedurally?

For this reason, I would think it often superfluous for the Tribunal to hear evidence relating to the irregularities. I say "often" because there may be

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cases in which this is not so. It may be that the existence of irregularities will affect the date from which the termination of employment takes effect. It may sometimes take effect from the date on which the irregularity is cured.

The point I am making is that when the Tribunal decides, as it did in this case, to exercise its powers under s 97(4)(a) of the Act, and to "proceed with the appeal by way of a hearing", then it is starting afresh, starting as it were, on a clean page. The errors of the past are no longer relevant.

Finally on this point, I draw attention to the provisions of ss 4(1) and (2) of the Labour Relations (Settlement of Disputes) Regulations (SI 30 of 1993), which read:

"(1) Subject to these regulations, the Tribunal shall conduct any hearing in such manner as it considers most suitable to the clarification of the issues before it and generally to the just handling of the proceedings.

(2) The Tribunal shall, so far as it appears to be appropriate, avoid formality in its proceedings, and it shall not be bound by any enactment or rule of law relating to the admissibility of evidence in proceedings before the courts of law."

It does not seem to me, with respect, to be a compliance with s 4(1) if the Tribunal, for technical procedural reasons, compels an employer to reinstate (or pay damages to) a person who has been clearly shown to have committed a dismissable offence.

I conclude, therefore, that the Tribunal should not have decided the matter on the basis of procedural irregularities. Its choice was either to remit the matter so that the irregularities might be cured in a re-hearing, or to hear the evidence itself, thus rendering the procedural irregularities irrelevant, and to come to a conclusion on these merits.

The Tribunal chose, I think, with respect, quite rightly, particularly in view of the long time lapse, to hear the evidence. I am satisfied that it should have come to a conclusion on the merits. I would propose therefore that we should remit the case to the Tribunal for that purpose, unless we can decide the matter finally ourselves.

I think it necessary to comment on the so-called "procedural irregularities".

[*The learned Judge of Appeal then did so, and concluded that there were no irregularities. He continued:*]

The Tribunal had all the necessary evidence before it. I propose to examine that evidence. If it appears to this court, after considering the merits, that the decision to order reinstatement/damages was clearly right, albeit for the wrong reasons, or clearly wrong, there would be no point in remitting the matter. The provisions of s 22(1)(b)(ix) of the Supreme Court

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Act [*Chapter*

McNALLY JA

7:13] could be applied. This was the relief sought at the hearing by Miss *Miles*, despite the prayer for remittal in the notice of appeal. It is nearly seven years since this case began.

[*His Lordship considered the evidence and concluded:*]

In summary, therefore, I find that the Tribunal should have dealt with the merits, and should then have concluded that Banda was properly discharged. This was a clear misdirection in law.

Accordingly, the appeal is allowed. The order of the Tribunal is altered to read:

"The appeal is allowed with costs. The dismissal of the appellant by the respondent is confirmed."

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Jarvis Palframan, appellant's legal practitioners

Jakachira, Gahadzikwa & Co, respondent's legal practitioners

KEY KABIN (PVT) LTD *v* MEGAMILLION INVESTMENTS (PVT) LTD 1999 (1) ZLR 224 (HC)

Citation	1999 (1) ZLR 224 (HC)
Case No	Judgment No. HH-64-99
Court	High Court, Harare
Judge	Bartlett J
Heard	April 14, 1999
Judgment	April 14, 1999
Annotations	None

Chamber application for default judgment

Flynote

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Practice and procedure - service - fees charged by Deputy Sheriff for service - Deputy Sheriff required to act honestly and reasonably to reduce costs to litigants - steps Deputy Sheriff must take in order to satisfy this requirement

Headnote

Paragraph 11 of the Third Schedule the High Court (Fees and Allowances) Rules (SI 164B/94) allows the Deputy Sheriff to charge a prescribed rate per kilometre when travelling to serve court process. Note 2 to para 11 provides that where process for more than one case may be effected one the same journey, the charges must be fairly apportioned between the various cases. This provision must be properly applied, otherwise litigants can be charged unnecessarily high amounts for service of process and Deputy Sheriffs will then profit unlawfully from serving process. Provided that the Deputy Sheriff acts honestly and reasonably, there will be no great difficulty in arriving at a fair and equitable apportionment between the various cases.

Critical factors to a proper application of Note 2 to para 11 are that the actual distances travelled in serving process are accurately recorded and that as many items of relevant process as possible are included in each journey so that the cost of serving each item is kept as low as possible. All that is required in this regard is that the Deputy Sheriff is that he acts in an honest and reasonable manner. He cannot wait an unreasonably long time for process for a particular area to build up before travelling to carry out service in that area, but it would be improper for him to travel many kilometres to serve one or two items of process, when he knows from experience that within a few days a substantial number of documents requiring service in that area will have built up. If the legal practitioner or person requiring the document to be served is not prepared to wait a reasonable time for other items for service in the area concerned to accumulate, he can always specifically instruct the Deputy Sheriff to serve the particular item of process individually as a matter of urgency and accept responsibility for the greater cost involved.

In practice, Note 2 to para 11 of the Third Schedule to the Rules does not seem to have been generally applied in the manner required. The distance travelled is not precisely recorded and the number of items of process served for each journey is not maximised. If the Rules are properly complied with the result should be a very substantial reduction in the costs to litigants of the service of the process. Deputy Sheriffs must ensure that the Assistant Deputy Sheriffs under his control properly comply with these provisions. It would also be appropriate for Ministry of Justice officials to carry out periodical checks by

arrangement with Deputy Sheriffs to satisfy themselves that the Rules are being properly complied with.

Statutes Considered

Legislation considered:

High Court (Fees and Allowances) Rules 1994 (SI 164B/1994), Third Schedule

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Judgment

Bartlett J: This is a chamber application for default judgment - which application has been granted. Nothing turns on the application itself.

What this judgment concerns is the application of the High Court (Fees and Allowances) Rules 1994, (SI 164B/94) (the Rules). In particular, it concerns the application in practice of note 2 to para 11 of the Third Schedule to the Rules.

The Third Schedule sets out the Tariff of Deputy Sheriffs' Fees and Charges. Paragraph 11 sets out the amount a Deputy Sheriff is allowed to charge per kilometre when travelling to serve court process. That amount, after the most recent amendment to the rules (SI 17/99), is now $6 per kilometre on tarmac roads. Note 2 to para 11 provides that:

"Where more services than one may be effected on the same journey, the charge for travelling expenses shall be fairly and equitably apportioned among the several cases."

Judges face a flood of applications for default judgment pouring across their desks each week. In considering these applications, judges are generally concerned with whether a cause of action has been properly established, whether service of the summons has been adequately effected and whether interest is being claimed at the correct rate from the correct date. But each and every one of these applications also involves the proper putting into practice of note 2 to para 11 of the Third Schedule to the Rules. It is important that these provisions are properly applied - as otherwise litigants can be charged unnecessarily high amounts for the service of process and Deputy Sheriffs profit unlawfully.

How then should note 2 to para 11 be applied in practice by a Deputy Sheriff? The answer in my view emerges simply from the clear wording of the note. A Deputy Sheriff serving process in the same general area should serve all available process for that area on the same journey and share the total number of kilometres covered on the journey fairly and equitably between the cases represented by the various items of process. For example, a Deputy Sheriff embarking on a journey to serve process in the Mabelreign area of Harare would make sure that he had all available process for that area before commencing his journey. He would then carefully measure the number of kilometres travelled on the journey and apportion the total between the individual cases. There might be variations. If, for example, one address for service were at a particularly far flung extremity of the area, the extra

kilometres to get there might be specifically allocated to that case to ensure a fair and equitable distribution. Or, if the journey covered two adjacent areas (for example, Zengesa and Chitungwiza), the basic journey from the office to the start of the first area and back could be shared between all process served and the additional distances within each individual area shared between the process served in that area. It is not possible to guess at all possible permutations, but in my view, a Deputy Sheriff acting honestly and reasonably would suffer no great difficulty in arriving at a fair and equitable distribution. And a judge, as long as he was satisfied that the Deputy Sheriff was acting *bona fide* and reasonably, would be slow to criticise

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any actual apportionment.

Critical factors to a proper application of note 2 to para 11 of the Third Schedule to the rules are that the actual distance travelled in serving process is accurately recorded and that as many items of relevant process as possible are included in each journey so that the cost of serving each item is kept as low as possible. Once again, all that is required of a Deputy Sheriff in this regard is that he acts in an honest and reasonable manner. He cannot wait an unreasonably long time for process for a particular area to build up before travelling to carry out service in that area, but it would be improper to travel many kilometres to serve one or two items of process when he knows, from experience, that within a few days a substantial number of documents requiring service in that area would have built up. If the legal practitioner or person requiring the document to be served is not prepared to wait a reasonable time for other items for service in the area concerned to accumulate, he or she can always specifically instruct the Deputy Sheriff to serve the particular item of process individually as a matter of urgency and accept responsibility for the greater cost involved.

It is apparent, from the multitude of proofs of service of process that a judge sees in the files that cross his desk, that individual Assistant Deputy Sheriffs service specific areas so the mode of operation I have outlined is obviously practicable. Once again, there may be exceptions and, once again, all that is expected is that a Deputy Sheriff or Assistant Deputy Sheriff acts honestly and reasonably.

Is note 2 to para 11 of the Third Schedule to the Rules applied in practice in the manner I have indicated it should? Unfortunately, the answer would appear to be in the negative. There is a sameness and uniformity to the service returns that pass across a judge's desk which clearly indicates that the kilometre distance travelled is not precisely recorded and that the number of items of process served on each journey is not maximised. For example, the returns of the Assistant Deputy Sheriff who covers Chitungwiza almost always refer to one of four combinations - 2 or 4 items of process served on

a journey of 64 kilometres or 6 or 8 items served on a journey of 96 kilometres. Never 5, 7, 9, 11, or 13 or 15 or any other number - and hardly ever any kilometres travelled other than 64 or 96. I need hardly add that it is most unlikely that every journey around Chitungwiza is either 64 or 96 kilometres and that on every trip there are only 2, 4, 6 or 8 items of process to serve. The returns, to be charitable, seem to be prepared with an eye on arithmetical convenience as opposed to the requirements of the Rules. Another example is the Assistant Deputy Sheriff who serves process in the area of, and adjacent to, the Harare city centre. Almost invariably each item of process is allocated a figure of 1 kilometre whether 1 item of process is served or 20. The instant application involved service of process in the Harare city centre and specified a l kilometre charge as the share for the service of 27 items of process. I would simply say that it is difficult to imagine travelling 27 kilometres around the centre of Harare in order to serve 27 items of process efficiently. Once again, the impression created is one of arithmetical convenience as opposed to accuracy.

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The approach of all the other Assistant Deputy Sheriffs serving the Harare area is similar to the examples I have given - taking account, of course, of the variation of distances depending on the areas they cover. The only Deputy Sheriff whose returns consistently indicate a precise calculation of distance travelled and an effort to maximize the items of process served on each journey is the Deputy Sheriff, Mutare. If the Deputy Sheriff, Mutare is able to be seen to comply with the Rules, I don't see any reason why those in Harare cannot do the same.

If the Rules were properly complied with, the result should be a very substantial reduction in the cost to litigants of the service of process. For example, if the Deputy Sheriff, Chitungwiza were able to serve 20 items of process on a single journey instead of 6, and efficiently planned his route, the number of kilometres would probably not be much greater than those travelled to serve the 6. Say, notionally, he covered 96 kilometres to serve the 6 items and 120 kilometres to serve the 20 items the travelling charge for each service would be reduced from $96 to $36 - a reduction of well over 100%. And the Deputy Sheriff would have suffered no prejudice to his pocket because he would be paid in terms of the rules for each kilometre he actually travelled. I reiterate that all that is expected is that a Deputy Sheriff acts honestly and reasonably in compliance with the Rules.

It is important that the Deputy Sheriff in charge of a particular area ensures that the Assistant Deputy Sheriffs under his control properly comply with the provisions of note 2 to s 11 of the Third Schedule to the Rules. It is the Deputy Sheriff in charge who allocates areas to his Assistants and who is aware of the volume of process requiring service and in each particular area. It is

accordingly part of the responsibility of the Deputy Sheriff to ensure that the rules under which he operates and charges fees are properly complied with. He cannot abrogate that responsibility by suggesting that it attaches to the individual Assistant Deputy Sheriff or the Ministry of Justice or the legal practitioner requiring service of process. He is the man in charge on the ground and he is in the best position to ensure necessary compliance. It would, of course, also be appropriate for Ministry of Justice officials to carry out periodical checks by arrangement with Deputy Sheriffs to satisfy themselves that the rules were being complied with.

The copies of this judgment will be sent to each Deputy Sheriff and to the Secretary for Justice, Legal and Parliamentary Affairs.

The Judge President has authorised me to say that he has read, and is in agreement with, this judgment.

S *v* DHLIWAYO 1999 (1) ZLR 229 (HC)

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Citation	1999 (1) ZLR 229 (HC)
Case No	Judgment No. HH-63-99
Court	High Court, Harare
Judge	Bartlett J
Heard	April 14, 1999
Judgment	April 14, 1999
Annotations	None

Criminal review

Flynote

Criminal procedure (sentence) - common law offences - rape - plea of guilty - mitigating effect on sentence - aggravating factors - transmission of disease and long term psychological harm to complainant - matters in respect of which evidence must be led

Headnote

A plea of guilty must always be given proper weight. The failure to give sufficient weight to a plea of guilty is commonplace in the magistrates court. A plea of guilty is particularly mitigating in a case of rape, since the complainant is not required to relive the trauma.

The court is allowed to take into general account aggravating factors such as possibility of the transmission of a venereal disease and the long-term traumatic effects on the complainant. But where a court proposes to give such factors specific aggravating effect, evidence needs to be led in that regard. Where a 53 year old man pleaded guilty to raping a girl of around 11 years, and expressed contrition which the court considered to be genuine, an effective sentence of $4\frac{1}{2}$ years' imprisonment was imposed on review.

Cases Considered

Cases cited:

S v *Buka* 1995 (2) ZLR 130 (S)

S v *Chiwambo* HH-391-86

S v *Kasaira* S-119-94

S v *Katsaura* 1997 (2) ZLR 102 (H)

S v *Matanga* S-242-91

S v *Munechawo* 1998 (1) ZLR 129 (H)

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S v *Mupfudze* S-134-95

S v *Mutongi* S-7-97

S v *Ndhlovu* S-54-97

S v *Nyathi* S-43-98

S v *Sidat* 1997 (1) ZLR 487 (S)

Judgment

Bartlett J: The accused was convicted of rape and sentenced to 9 years' imprisonment, of which l year's imprisonment was conditionally suspended.

The accused is a 53 year old first offender and pleaded guilty.

The circumstances of the offence were outlined in the agreed facts as follows:

"The accused is aged 53 years and resides at Oasis Farm, Featherstone where he is

employed as a general hand. The complainant is aged between 10 and 11 years and is a grade one pupil at Riversdale School. She resides at Oasis Farm. The age of the complainant was estimated by a radiologist since she does not have a birth certificate.

On 24 October 1998, the complainant proceeded to the accused's house at about 1900 hours. The accused gave the complainant some food.

After the meal, accused dragged the complainant into his bedroom hut. Accused removed the complainant's pants, undid his trouser's zip produced his penis which he inserted into the complainant's vagina. The accused then had sexual intercourse once with the complainant.

After the incident, complainant proceeded home where she made a report of the rape to her mother Margret Chikukwa. The matter was reported to the Police and as a result the accused was arrested."

In her reasons for sentence, the regional magistrate said the following:

"The accused is a 53-year-old first offender. He is a married man who has been on the right side of the law for all his life and as indicated this is his first brush with the law. He has pleaded guilty and is truly contrite. He has quoted moving portions of the Bible in urging the court to exercise leniency. Until this brush with the law, the accused was gainfully employed and he is obviously going to lose employment as a result of this conviction and his family will suffer.

In considering sentence, the court has truly considered the accused being a first offender and the undesirability of sending first offenders to prison and it has also considered his age of 53 and it is not the best of times to send the accused to jail at that kind of age".

She then outlined the aggravating factors inherent in the serious nature of the offence, emphasising the breach of trust and the fact that the accused was old enough to be the complainant's grandfather. She then emphasised the danger of rape resulting in infection with a

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sexually transmitted disease and, before passing sentence, added:

"Further, long after the accused has served his term of punishment, the complainant will still suffer the traumatic effects of this unlawful violation upon her privacy ..."

Although it goes without saying that rape is an extremely serious offence which requires exemplary, deterrent sentences, I am of the view that the regional magistrate did not take sufficient account of the substantial mitigatory factors inherent in the plea of guilty and the genuine expression of contrition.

Ebrahim JA stated in *S* v *Buka* 1995 (2) ZLR 130 (S) at 134G-135A:

'"... judicial officers do not always give sufficient weight to where an accused person tenders a plea of guilty to a charge levelled against him. It is important not merely to pay lip service by repeating what one is expected to say when a plea of guilty has been tendered.'

One often reads in a judgment the following:

'I have taken into account that you have pleaded guilty, that you are a first offender and that you have expressed contrition.'

It is not enough to repeat these phrases without giving due weight to the plea proffered. They are factors of mitigation and judicial officers should take proper account of them'."

McNally JA underlined this approach when he stated in *S* v *Sidat* 1997 (1) ZLR 487 (S) at 493B:

BARTLETT J

"A plea of guilty must be recognised for what it is - a valuable contribution towards the effective and efficient administration of justice. It must be made clear to offenders that a plea of guilty, while not absolving them, is something which will be rewarded. Otherwise, again, why plead guilty?"

As I stated in *S* v *Katsaura* 1997 (2) ZLR 102 (H) at 105E, the failure to give sufficient weight to a plea of guilty is commonplace in the magistrates court.

A plea of guilty is furthermore of particular mitigatory relevance on a rape allegation. Korsah JA stated in *S* v *Matanga* S 242-91 at p 17 of the cyclostyled judgment that:

"Perhaps more so than any other cases, a plea of guilty to rape would normally result in a reduction in the sentence that would otherwise have been appropriate; for the victim is then spared the extra stress of reliving her harrowing experience by narrating it in public."

These observations of Korsah JA were quoted with approval by Muchechetere JA in *S* v *Kasaira* S-119-94 at p 8 of the cyclostyled judgment.

See also the point emphasised by Devittie J in *S* v *Munechawo* 1998 (1) ZLR 129 (H) at 133D that "young offenders in sexual cases are relieved of the burden of giving evidence and reliving their trauma", in consequence of a plea of guilty.

The sentence imposed by the learned regional magistrate is, however, not dissimilar from sentences imposed where accused persons have pleaded not guilty and expressed no contrition at all for their actions - let alone the genuine heartfelt contrition expressed by the

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accused in this matter.

In fact, the sentence imposed is more severe than that imposed by the Supreme Court in a number of recent cases where the accused persons pleaded not guilty and expressed no contrition. See *S* v *Mupfudze* S-134-95, where a sentence of 10 years' imprisonment with $2^{1}{}_{-2}$ years' imprisonment suspended was imposed in respect of a rape by a policeman of a woman who had come to the police station to make a complaint; *S* v *Mutongi* S-7-97, where a sentence of 7 years' imprisonment with 2 years' imprisonment suspended was imposed in respect of the rape of a 15 year old by an adult in a position of *in loco* parentis in relation to the complainant; *S* v *Ndhlovu* S-54-97, where the sentence was 7 years' imprisonment with 2 years' imprisonment suspended in respect of a Roman Catholic priest who raped a 15 year old pregnant parishioner; and *S* v *Nyathi* S-43-98, where the sentence imposed was 10 years' imprisonment with 3 years' imprisonment suspended in respect of the rape of a woman tourist.

I emphasise that in each of the above cases, the plea was one of not guilty and that, although the factual circumstances were all different from the instant matter, they all contain clear aggravating factors - albeit different aggravating factors from those present in this matter.

BARTLETT J

I also consider that the regional magistrate, on the facts before her, overstated the effect of the two final aggravating factors on which she appeared to place particular weight. It is true that rape can result in infection with a sexually transmitted disease and that that is a serious aggravating factor. But there was nothing in the medical report to suggest that the complainant had been infected by a sexually transmitted disease. And furthermore, since the court proceedings took place over four months after the offence was committed, if the complainant had been infected with any sexually transmitted disease it would surely - if the prosecutor was operating with any efficiency at all - have been specified in the agreed facts.

The second factor was the regional magistrate's statement that "long after the accused has served his term of punishment the complainant will still suffer from the traumatic effects of this unlawful violation upon her privacy". It is undoubtedly appropriate to take into account, as a general aggravating factor, that rape causes serious and long term psychological harm to the complainant. But, in the absence of specific actual evidence of the actual effect on the individual complainant, it is not appropriate, in my view, to state the position as categorically as the regional magistrate did. There was no evidence as to the degree of the traumatic effect on the complainant. It was accordingly appropriate to emphasise, as a general aggravating factor, the adverse traumatic long term psychological effects of the rape on the complainant. It was not appropriate to use the extravagant language chosen by the regional magistrate and to say that, long after the accused had been released after serving an 8 year term of imprisonment, the complainant would still be suffering from the traumatic effect of the unlawful invasion of her privacy.

In order to assess an appropriate sentence, it is necessary to endeavour to give proper weight to, and properly balance, the aggravating and mitigatory factors as referred to by the regional

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magistrate.

Critical mitigatory factors are the plea of guilty and the magistrate's finding that the contrition felt was clearly genuine. The accused, as a 53 year old first offender, had until the offence lead a blameless life and, while not in the afternoon of his years, was certainly nowhere near the first flush of youth - although age in offences of this nature is a factor which has both mitigatory and aggravating factors: see *S* v *Chiwambo* HH-391-86. An aggravating factor, apart from those mentioned by the regional magistrate, is the very depressing and disturbing prevalence of the offence of rape - particularly involving complainants as young and younger than the complainant in this matter.

Balancing all the mitigating and aggravating factors as best as I am able, the sentence imposed by the regional magistrate is set aside and replaced as

BARTLETT J

follows: 7 years' imprisonment, of which $2^{1}/_{2}$ years' imprisonment is suspended for 5 years on the conditions imposed by the regional magistrate.

The regional magistrate is to ensure that an amended prison warrant is made out.

Smith J agrees.

S *v* HWEMBA 1999 (1) ZLR 234 (HC)

Citation	1999 (1) ZLR 234 (HC)
Case No	Judgment No. HH-65-99
Court	High Court, Harare
Judge	Bartlett J
Heard	April 14, 1999
Judgment	April 14, 1999
Annotations	None

Criminal review

Flynote

Criminal procedure (sentence) - imprisonment - when should be imposed - when imprisonment appropriate,

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court must impose minimum effective sentence - six months' imprisonment is substantial punishment

Headnote

A sentence of imprisonment is a rigorous and severe form of punishment. It should only be imposed as a last resort. Where imprisonment is the only appropriate sentence a court must impose the minimum effective period to do justice to both the offender and the interests of justice. Overlong imprisonment is counter-productive. It brutalises and contaminates the offender and may cause him to redefine himself as a criminal and behave accordingly. This is particularly the case with the first offender who is contrite.

It seems that most magistrates think that twelve to eighteen months is by no means a substantial period of imprisonment and that six months is a very short period of imprisonment. But six months for a first offender must seem interminable. Such a period is a substantial punishment and not the short, sharp period that magistrates seem to think it is. This is particularly so with prisons being crowded and conditions in prisons being adversely affected by restrictive budgets and spiralling inflation.

Cases Considered

Cases cited:

S v *Hope* HB-18-93

S v *Katsaura* 1997 (2) ZLR 102 (H)

S v *Mangena* HH-28-99

S v *Matanhire* 1982 (1) ZLR 139 (H)

S v *Matiya* HH-180-97

S v *Mikuduku* HH-84-87

S v *Mudzimba* HH-150-87

S v *Muratu* HH-383-86

S v *Ngombe* HH-504-87

S v *Sithole* HH-67-95

S v *Teburo* HH-517-87

S v *Wood* 1973 (2) RLR 11

Judgment

Bartlett J: A sentence of imprisonment is a rigorous and severe form of punishment. It should only be imposed as a last resort.

These basic tenets have been stated and restated almost times without number - see for

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example *S* v *Muratu* HH-383-86; *S* v *Mikuduku*

BARTLETT J

HH-84-87; *S* v *Mudzimba* HH-150-87; *S* v *Ngombe* HH-504-87; *S* v *Sithole* HH-50-95 and *S* v *Dube* HH-67-95.

Where imprisonment is the only appropriate sentence a court must impose the minimum effective period to do justice to both the offender and the interests of society.

This basic tenet has also echoed down the years. The rationale behind it was eloquently described by Greenland J in *S* v *Teburo* HH-517-87 (at p 2):

"Given the limited avenues available to a judicial officer, he can attempt to achieve this by tempering the sentence with mercy and compassion, especially here when the accused is a contrite first offender. Such an approach is more likely to induce a positive response from the accused than a sentence which will simply brutalise him and lead ultimately to the man redefining himself as a criminal and behaving accordingly,

Moreover, overlong incarceration is counter-productive. It destroys and contaminates. See *S* v *Khumalo & Anor* 1984 (3) SA 327 (A) at 331. The court therefore, ends up contributing to the criminalisation of society.

For the above reasons, it is a better approach for a judicial officer to appeal to the good sense of responsibility residual in the contrite first offender and impose the least punishment which will still achieve the objectives of punishment."

The most recent expressions of support for this principle have been in *S* v *Katsaura* 1997 (2) ZLR 102; *S* v *Matiya* HH-180-97 and *S* v *Mangena* HH-28-99.

Magistrates have, however, faced seemingly insuperable difficulty in understanding and giving effect to this basic requirement - see my comments with the concurrence of Mungwira J in *S* v *Katsaura supra* at 109H.

Things have not improved since the decision in *Katsaura*'s case almost two years ago. I still find myself issuing an almost endless series of review minutes reducing sentences because magistrates have not applied their minds to imposing the minimum necessary effective sentence to do justice to both the interests of the offender and the interests of society. This judgment is issued in the hope that yet another reminder resonating through the magistrates courts might have some effect. I am still sufficiently an optimist to at least hope so.

Part of the problem is perhaps a magistrate's perception of what the minimum necessary effective sentence should be in a particular case. The impression I get from the myriad of review cases that have tumbled through my in tray over the years is that most magistrates think that 12-18 months is by no means a substantial period of imprisonment and that 6 months is a very short period of imprisonment indeed. Blackie J in *S* v *Hope* HB-18-93 quoted the words of Macdonald JP (as he then was) in *S* v *Wood* 1973 (2) RLR at 14B-C as follows:

"In this connection, I should make the point that it should not be thought that to deprive a first offender of his liberty, even for a short period of six months, is not to impose a

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BARTLETT J

substantial term of imprisonment. To the first offender, accustomed to liberty and deprived of it for the first time, even such a period would, I would think, seem to be interminable. It is, of course, of the utmost importance that a person should not be kept in prison for longer than is necessary in the interests of the offender, of society, or both. The reasons for this need hardly be stressed, nor is it necessary to stress that in a civilised society, the retributive effect of punishment should not receive great weight."

I fully agree with those sentiments. Six months' imprisonment to a first offender must well seem interminable. Such a period is a substantial punishment and not a short, sharp period to use the phrase favoured by so many magistrates. This is particularly so with prisons being crowded and conditions in prisons being adversely affected by restrictive budgets and spiralling inflation.

So when magistrates apply their minds to what is the minimum effective period of imprisonment necessary, they must realise that a period of six months is a substantial period of imprisonment and not a trifling period. If they disagree perhaps they might like to spend six months in prison and then see if they think it is a short period!

As McNally J (as he then was) said in *S* v *Matanhire* 1982 (1) ZLR 139 (H), magistrates get used to sentencing people to prison and the fine edge of the agony in making the decision becomes blunted with use. In my view, the same applies in respect to the periods of imprisonment imposed. Magistrates get so used to sentencing people to prison for periods of 6 months, 9 months or 12 months, that perhaps after a while those periods seem inconsequential - when in fact they are not.

I turn now to deal with the facts of the review matter before me.

The accused broke and entered the complainant's room at night and stole clothing worth $5790 - of which $4895 worth has been recovered. He pleaded guilty and is an l8 year old first offender. The magistrate imposed a sentence of 30 months' imprisonment of which 15 months' imprisonment was suspended on condition of the accused's good behaviour for a period of 5 years.

The mitigatory factors the magistrate needed to take proper account of were the accused's young age, his status as a first offender, his plea of guilty and the fact that most of the property stolen was recovered. The aggravating factors to be considered were the serious and prevalent nature of the offence.

The magistrate, balancing those factors, decided that an effective term of imprisonment was appropriate. I do not consider that he can be faulted on that decision - it is certainly within his discretion. He then needed to appreciate that imprisonment is a rigorous punishment and impose the minimum effective period necessary. The accused's age, plea of guilty and status as a first offender would all be significant factors in assessing the appropriate period of imprisonment to be imposed.

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BARTLETT J

It is in assessing the minimum effective period necessary that the magistrate fell into the trap. I have outlined above in regard to periods of imprisonment. He obviously regarded an effective 15 months as the minimum period appropriate. But, 15 months is a decidedly substantial period - and particularly so for an 18 year old first offender who has pleaded guilty and where almost all the property stolen has been recovered.

In my view, an effective period of 6 months' imprisonment would be a substantial punishment and would meet the criterion of the minimum effective sentence appropriate for the overall blameworthiness of the accused. A similar suspended period would also be appropriate.

Accordingly, the sentence imposed by the magistrate is set aside and replaced as follows - 12 months' imprisonment of which 6 months' imprisonment is suspended for 5 years on condition the accused is not convicted of having committed within that period any offence of which dishonesty is an element and for which he is sentenced to imprisonment without the option of a fine.

The magistrate is to ensure that an amended prison warrant is made out.

Smith J agrees.

S *v* KUZAMBA 1999 (1) ZLR 238 (HC)

Citation	1999 (1) ZLR 238 (HC)
Case No	Judgment No. HH-62-99
Court	High Court, Harare
Judge	Adam J
Heard	April 14, 1999
Judgment	April 14, 1999
Annotations	None

Criminal review

Flynote

Criminal procedure - plea - not guilty - statement by accused outlining defence - admission contained in that statement - extent to which court can rely on admission in deciding whether to convict

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Headnote

The accused had been charged with housebreaking with intent to steal and theft. He pleaded not guilty to these charges but in his defence statement he said he had admitted the theft to the police because his father had influenced him to make this admission as his father had found a job for him. He also admitted in his defence statement that he had given the police the name of a person to whom he said he had sold the stolen property but he said he simply invented this name. The State led no evidence at all about the manner in which the housebreaking had been committed.

Held, that although in terms of s 189(1) of the Criminal Procedure and Evidence Act the court has a discretion to take into account the accused's defence statement in deciding whether he is guilty, if the statement contains an admission the court must consider whether the admission is genuine.

Held, further, that the onus is on the State to prove the essential elements of the offences with which the accused is charged. The State had not done this in relation to the charge of housebreaking. In deciding whether the accused's admission to the theft charge was genuine, the court should have taken into account that the accused said that he had been influenced by his father to admit to the charge. The onus was on the State to show that he had not been so influenced and the State had not discharged this onus.

Held, therefore, that the conviction should be set aside.

Cases Considered

Cases cited:

A-G v *Tarwirei* 1997 (1) ZLR 575 (S)

S v *Hartlebury & Anor* 1985 (1) ZLR 1 (H)

S v *Kachipare* 1998 (2) ZLR 271 (S)

Statutes Considered

Legislation considered:

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 188, 189 and 198

Judgment

Adam J: The accused was charged with housebreaking with intent to steal and theft of a video cassette recorder. He pleaded not guilty but was convicted and sentenced to 12 months' imprisonment with labour of which 6 months' imprisonment was suspended for 5 years on condition he did not, during that

ADAM J

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period, commit any offence involving dishonesty for which he was sentenced to imprisonment without the option of a fine and a further 6 months' imprisonment was suspended on condition he completed 180 hours of community service at Mabelreign Satellite Clinic.

The matter went before a regional magistrate for scrutiny who raised certain queries with the provincial magistrate. He pointed out that, at the close of the State case, the only evidence led was that the complainant had left his house, where he lived alone, closed and it was later discovered on the complainant's return on the same day that a burglary had been committed; that the complainant's brother had earlier on visited him on the same day and that the matter had been reported to the police. The accused, in his defence statement recorded by the magistrate in terms of s 88(b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], after the prosecution outline had been produced and read, stated as follows:

"I had admitted that I stole the property because my father had influenced me to admit as he had got a job for me.

My father took me to the police and I personally admitted to the police that I had sold the property to Chimenes. The police went to Chimenes' residence in Glen View 4. Chimenes denied that he knew anything about the video recorder. He was arrested by the police.

I do not know if the complainant's relatives have spare keys - because I have seen his brother who stays in Chitungwiza.

I just thought of Chimenes as the person to whom I had sold the property to.

That is all I have to say."

The regional magistrate pointed out to the provincial magistrate that the accused had denied the charge and even questioned in his defence statement whether the complainant's brother did not have a duplicate key.

The only witness called by the prosecution at the trial was the complainant who testified that he knew the accused as his landlord's son, that on that day he went to work from his home where he stayed alone, leaving his video cassette recorder, and that his brother was at home; that he received a report from his brother after which he reported the matter to the police concerning the video cassette recorder and that on the day in question his brother had visited him. The police officer who investigated the case was not called as a witness, nor was the complainant's brother and nor was Chimenes (or Chemwi). The property was not found.

In his reasons for judgment, the provincial magistrate recorded as follows. The complainant reported the case to the police who, acting on information, arrested the accused and the accused indicated where he had sold the property. The police made a frantic effort to recover the property but all this was in vain. In his defence, the accused indicated that he had confessed to the police as he had been influenced to do so by his father. He went on to indicate

that the name Chimenes came to his mind but he never sold the property to him. The prosecution called the complainant as its witness who stated that he had secured his house and left the property intact and that his brother did not have any spare keys to his room. The

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trial magistrate went on to say that it was clear to him that the accused stole the property. "To believe that he admitted before the police, created Chimenes lying but now he is telling the truth is to run away from the dictates of common sense". The trial magistrate clearly accepted the version of the prosecution and rejected that of the accused.

The regional magistrate observed that, from the evidence led, it appeared that there was no *prima facie* case; that in his reasons for judgment the provincial magistrate had even made reference to some evidence which did not appear in the record of proceedings in his own handwriting; and that the accused should not have been put on his defence to bolster the case for the prosecution.

In his reply to the regional magistrate, the provincial magistrate referred to the defence statement and stated that "even if the prosecution had closed their case after the defence statement", in terms of s 189(1)(a) the accused could have been convicted. He stated that "to accept that he lied to the Police, when he was not threatened, that he stole was a lie and now his denial is the truth is not to look at things seriously ... and this court was of the opinion that the accused's denial was a mere covering of his face".

In the prosecution outline, it was indicated that on the day in question the complainant secured his cottage by closing all the windows and locking all the doors before he went to work. All his property which was in his home was intact and in order. Whilst he was away the accused went to the complainant's home and forced open a partially opened window and jumped into the house and stole a video cassette recorder. The complainant came back home on the same day and discovered that his window was open and when he got into his home found that his video cassette recorder was missing. He reported the matter to the police. Three days later the accused was arrested who indicated where he sold the property to Samuel Chemwi in Glen View Four who also had resold the video cassette recorder. The property stolen was valued at $6200 and nothing was recovered. The accused was admitting to the charge.

This prosecution outline did not mention that after his arrest the accused had made admissions to the police that he had broken into and entered the complainant's home and had stolen the video cassette recorder. Further, the evidence given by the complainant was at variance with the above prosecution outline.

The relevant provisions of the Criminal Procedure and Evidence Act provide as follows:

ADAM J

"188. In a trial before a magistrate, if the accused pleads not guilty ... -

(a) the prosecutor shall make a statement outlining the nature of his case and the material facts on which he relies; and

(b) the accused shall be requested by the magistrate to make a statement outlining the nature of his defence and the material facts on which he relies and, if he is not represented by a legal practitioner, the provisions of subsection (2) of section *one hundred and eighty-nine* shall be explained to him.

189. (1) Any statement referred to in paragraph (b) of section *one hundred and eighty-eight* may -

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(a) be taken into account in deciding whether the accused is guilty of the offence charged or any other offence of which he may be found guilty on that charge; and

(b) except in so far as it amounts to an admission of any allegation made by the State, not be taken into account for the purpose of deciding whether the accused should be found not guilty in terms of subsection (3) of section *one hundred and ninety-eight*.

(2) If an accused, when so requested in terms of paragraph (b) of section *one hundred and eighty-eight*, has failed to mention any fact relevant to his defence, being a fact which in the circumstances existing at the time, he could reasonably have been expected to have mentioned, the court, in determining whether there is any evidence that the accused committed or whether the accused is guilty of the offence charged or any other offence of which he may be convicted on that charge, may draw such inferences from the failure as appear proper and the failure may, on the basis of such inferences, be treated as evidence corroborating any other evidence given against the accused.

...

198. (1) The prosecution may, at any trial before any evidence is given, address the court for the purpose of explaining the charge and opening the evidence intended to be adduced for the prosecution, but without comment thereon.

(2) The prosecutor -

(a) shall examine the witnesses for the prosecution; and

(b) may put in and read any documentary evidence which is admissible:

Provided that the prosecutor may, if the accused consents, put in the documentary evidence without reading it.

(3) If at the close of the case of 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."

In *S* v *Hartlebury & Anor* 1985 (1) ZLR 1 (H), this court considered s 198(3) and held that "no evidence that the accused committed the offence" has been taken to mean: (a) where there is no evidence to prove the essential element in the charge; or (b) where there is no evidence upon which a reasonable man might convict; or (c) where the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable court could safely convict upon it. See also *Attorney-General* v *Bvuma & Anor* 1987 (2) ZLR 96 (S) at 102-103;

ADAM J

Attorney-General v *Mzizi* 1991(2) ZLR 321(S) at 323; *Attorney-General* v *Tarwirei* 1997 (1) ZLR 575 (S) at 576 and *S* v *Kachipare* 1998 (2) ZLR 271 (S).

It is not disputed that the trial magistrate, in terms of s 189(1), has a discretion to take into account the accused's statement in deciding whether the accused is guilty of the offence charged. But in so doing the trial magistrate must be mindful, if the statement constitutes an admission, that, just as in the case of a confession, the admission is genuine.

The accused was alleged to have committed housebreaking with intent to steal and theft of a

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video cassette recorder. The onus was on the prosecution to prove the essential elements of housebreaking with intent to steal and theft. There was no evidence at all as to the manner of the housebreaking led by the prosecution. As for the theft, the accused in his defence statement stated clearly that he had admitted theft of the property because his father had influenced him to admit as his father had found a job for him. It follows from the foregoing that that was the total evidence led by the prosecution. The trial magistrate could not ignore the accused's defence outline when he asserted that his father had influenced him to admit that he stole the property because his father had found a job for him. The onus was on the prosecution to show that the accused had not been influenced by his father before the trial magistrate could have come to the conclusion that his admission that he stole the property was genuine.

The regional magistrate was correct in his observation that the prosecution had not established a *prima facie* case of housebreaking with intent to steal and theft at the end of the prosecution's case.

Accordingly, the conviction and sentence are set aside.

Smith J agrees.

GIRJAC SERVICES (PVT) LTD *v* MUDZINGWA 1999 (1) ZLR 243 (SC)

Citation	1999 (1) ZLR 243 (SC)
Case No	Judgment No. S-41-99
Court	Supreme Court, Bulawayo
Judge	Gubbay CJ, McNally JA, Ebrahim JA
Heard	March 29, 1999
Judgment	April 16, 1999
Annotations	None

Civil appeal

Flynote

Employment - contract - termination - grounds for - wilful absence - employee accused by employer of theft - while awaiting trial, employee not tendering his services - common law grounds for termination proved - termination under labour legislation - requirement for employer to follow statutory procedures - failure to do so, even though grounds for termination shown, making termination unlawful - application by employee to High Court for relief - remedies under labour legislation not exhausted - High Court not entitled to grant relief

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Headnote

An employee was arrested on charges of theft at the instance of his employer. He was released on bail but did not come back to work. Seventeen days later, he asked to be allowed to resume work; the employer refused the request. Some months later, the employee was acquitted of the charges of theft, although the circumstances of his acquittal did not establish his innocence. The employee sought to resume work. Payment of wages from the date of arrest until the date of resumption of duty was also demanded. The employer said that the contract had been repudiated by the employee's absence. After fruitless negotiations, the employee brought an action in the High Court seeking reinstatement. The application was successful; the High Court ordered reinstatement and back pay. On appeal by the employer:

Held, that the employee was not entitled to absent himself from work because he had been arrested. He was not incapacitated from working and should have tendered his services. He could not blame his absence on his employer for having wrongfully caused his arrest, there having been reasonable suspicion that he had committed an offence.

Held, further, that although under the common law the employer would have been justified in terminating the contract, he could not do so under the labour legislation and should have followed the required procedures if he wished to terminate the employee's contract. A collective bargaining agreement, which included a disciplinary code, was in effect and the procedures provided for in that agreement should have been followed. The employer's failure to do so made the termination unlawful.

Held, further, that although the termination was unlawful because of the employer's failure to comply with the disciplinary code, the employee should have exhausted the remedies available under the grievance procedure laid down in the code before approaching the High Court for relief. The code afforded effective redress, the unlawfulness of the termination

had not been undermined by the domestic remedies, and no special reasons were shown for approaching the High Court.

Held, further, that in the circumstances, this would not have been a case where reinstatement should have been ordered. The employer genuinely believed that the employee had committed a theft and there was no prospect of restoring a normal employer-employee relationship.

Cases Considered

Cases cited:

Beretta v *Rhodesia Rlys* 1947 SR 48; 1947 (2) SA 1075 (SR)

Brown v *Sessell* 1908 TS 1137

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

Commercial Careers College (1980) (Pvt) Ltd v *Jarvis* 1989 (1) ZLR 344 (S)

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Kanonhowa v *Cotton Co of Zimbabwe* 1998 (1) ZLR 68 (H)

London Tpt Executive v *Clarke* [1981] IRLR 166 (CA)

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

Musandu v *Chairperson, Cresta Lodge Disciplinary & Grievance Cttee* HH-115-94

Norris v *Southampton City Council* [1982] IRLR 141 (EAT)

Pelunsky v *Pastoll* 1920 WLD 32

Schneier & London Ltd v *Bennett* 1927 TPD 346

Stewart Wrightson (Pty) Ltd v *Thorpe* 1977 (2) SA 943 (A)

Thompson v *Raworth* 1910 TPD 782

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

Weyl v *United Restaurants Ltd* 1903 TH 161

Winterton Holmes & Hill v *Paterson* 1995 (2) ZLR 68 (S)

Zimbabwe Sun Hotels (Pvt) Ltd v *Lawn* 1988 (1) ZLR 143 (S)

Case Information

T A Cherry, for the appellant

G Tizirai-Chapwanya, for the respondent

Judgment

Gubbay CJ: The appellant carries on the business of a building contractor at premises located in the light industrial sites of Gweru. On 1 August 1995, it entered into a written contract with the respondent pursuant to which he was appointed a supervisor electrician, with the right to terminate such employment upon three months' notice.

The respondent performed what was required of him, apparently satisfactorily, until 5 October 1995. In the early evening of that day, a security guard at the premises reported to the appellant's managing director that he had recovered certain items of property belonging to the appellant hidden under the seat of the respondent's motor vehicle at the time the latter was about to drive away. The police were summoned and the respondent was arrested.

Two days later the respondent appeared before the Gweru magistrate's court charged with the theft of the property in question. He was remanded out of custody on his own recognisance. No conditions were attached to his release.

Although at liberty, the respondent did not report for duty at the workplace

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either on the seventh or any subsequent day of October 1995. He consulted a legal practitioner who, on 23 October 1995, addressed the following letter to the appellant:

"RE: STATE vs MUNYARADZI MUDZINGWA

We refer to the above matter wherein we have been instructed by Mr Mudzingwa to represent him in which he is alleged to have stolen certain electrical items from your company.

Please note that this matter has been set down for trial on 28 day of December 1995. We have further been instructed by our client to kindly request you to allow him to continue with his employment pending the finalisation of this matter ..."

The content of the letter underscored that no restriction had been placed by the magistrate upon the respondent returning to his workplace. Otherwise, how could he tender his services pending the finalisation of the criminal trial? That this was the position was later confirmed by an examination made of the criminal record pertaining to the respondent's case by the appellant's legal practitioner.

The appellant responded to this letter almost immediately. It declined the request made of it. Thereafter, nothing was heard from the respondent until the receipt of another letter, dated 23 July 1996, from his legal practitioner. This advised that on 18 July 1996, the respondent had been acquitted of the charge of theft. It enquired when the respondent could resume his duties with the appellant, and demanded payment of the respondent's wages from the date of arrest (wrongly termed "suspension") to resumption of duty.

It seems clear that the respondent was found not guilty as a result of the State withdrawing the charge of theft after plea. No evidence in respect of the charge was led. It is not known why the testimony of the security guard, obviously vital to a successful prosecution, was not placed before the trial court. In the event, the fact of the respondent's discharge cannot be regarded as establishing his innocence of the crime.

In replying to the letter of 23 July 1996, the appellant pointed out that it had been justified in terminating the respondent's employment by reason of absence from the workplace.

Negotiations to settle the dispute having broken down, on 5 February 1997 the respondent brought an application before the High Court in which was claimed reinstatement in employment and the payment of salary with effect from 31 October 1995. These proceedings, although opposed, were determined in favour of the respondent. Hence the appeal to this court.

The first argument advanced on behalf of the appellant was that the respondent's failure to present himself at the workplace from 7 October 1995 to the date when permission was sought for him to do so - a period of seventeen days - amounted to a fundamental breach of the contract of employment. It served, so said counsel, to vest the appellant with an election

whether to stand by the contract and enforce its rights, or to accept the repudiation and

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terminate the contract. See *Stewart Wrightson (Pty) Ltd* v *Thorpe* 1977 (2) SA 943 (A) at 952A; and *Zimbabwe Sun Hotels (Pvt) Ltd* v *Lawn* 1988 (1) ZLR 143 (S) at 151E. And the appellant chose the second option.

If indeed, the aforementioned period of absenteeism amounted to a breach by the respondent of the contract of employment, then it is to be accepted that under the common law the appellant was afforded the remedy of termination.

A distinction must be drawn between absenteeism due to illness or some other form of incapacity, and wilful abscondment. In the former situation, the employer cannot *ex eo* cancel the contract. Incapacity is not a breach of contract. Nonetheless, the fact that the employee is incapacitated by a cause beyond his control - by an act of God, if you like - does not deprive the employer of the right to terminate the contract where the absence was unreasonable. Non-performance by the employee of his duties for an unreasonable time justifies the employer in refusing to perform his part of the contract and in considering his obligations at an end. The crucial question of what is reasonable in such cases depends on the surrounding circumstances. What has to be considered is the nature of the business and whether the employee's absence may cause irreparable damage to the employer. See *Weyl* v *United Restaurants Ltd* 1903 TH 161 at 164; *Brown* v *Sessell* 1908 TS 1137 at 1139; *Pelunsky* v *Pastoll* 1920 WLD 32 at 34; *Schneier & London Ltd* v *Bennett* 1927 TPD 346 at 349; *Beretta* v *Rhodesia Railways* 1947 SR 48 at 50; 1947 (2) SA 1075 (SR) at 1079; and Riekert's *Basic Employment Law* 2 ed at 35.

Thomson v *Raworth* 1910 TPD 782 is a case where the employee, a chemist's assistant, wilfully absented himself from his work. He had been granted one week's leave of absence, expiring on 12 July, to enable him to proceed to the seaside in charge of a group of children. On 13 July, the employer telegraphed to the employee, who had not returned, dispensing with his services. The employee did not return to tender his services until 21 July, but the offer was not accepted. The employer tendered salary to 12 July. A Full Court of the Transvaal Provincial Division held that the employer was justified in dismissing the employee since the latter, knowing that he had no right to absent himself from his work, had wilfully done so thereby putting his employer to serious inconvenience. In the words of Smith J at 785:

"The question in this case depends entirely upon whether the defendant was justified in dismissing the plaintiff. The magistrate has found that the latter wilfully absented himself from his work, and there is evidence supporting that finding. If he did, it seems to me the defendant was justified in dismissing him."

The English case of *London Transport Executive* v *Clarke* [1981] IRLR

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166 (CA) is to much the same effect. The facts were that Clarke wanted to go to Jamaica on an extended unpaid leave, but permission was refused by his employer, London Transport, as he had already exhausted his entitlement. When he asked what would happen if he went without permission, he was told that his name would be removed from the books. Notwithstanding, he just "took off". He remained in the sun for seven weeks. On returning, he submitted a medical note to cover the exact period of his absence. He was met by the announcement that he was

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no longer employed by London Transport. Clarke claimed he had been unfairly dismissed. For London Transport it was argued that he had resigned. This view was rejected. Dunn and Templeman LJJ, for the majority, sought to lay at rest the heresy of automatic termination, seeing it as "contrary to principle, unsupported by authority binding on this court, and undesirable in practice". They held that it was manifestly unjust to allow a wrongdoer to determine a contract if the innocent party wished to affirm the contract for good reason. Thus, if an employee walked out of his job (and did not thereafter claim to be entitled to resume work, as did Clarke), it was still the employer who terminated by accepting the repudiation. An acceptance was required to convert the repudiation into a termination. Therefore, Clarke had been dismissed justifiably by London Transport - the concept of self-dismissal being firmly rejected. See also *Norris* v *Southampton City Council* [1982] IRLR 141 (EAT).

Considering the present matter in the light of these authorities, it seems to me that, once remanded out of custody, the respondent, who claimed innocence of the theft, ought not to have stayed away from the workplace. He should have tendered his services immediately he was able to do so. This he failed to do. And since he had been apprehended upon reasonable suspicion of having committed an offence, he was not justified in excusing his absence by blaming the appellant for having wrongfully caused his arrest. True, it is probable that had he returned to the workplace on 7 October 1995, or shortly thereafter, the appellant would not have accepted him back. But that is immaterial. The respondent had *not* been suspended, and so had no right to absent himself from his work. He did so wilfully. The offer, made after seventeen days, came too late. The respondent repudiated the contract of employment. And his repudiation was accepted by the appellant in the letter of 27 October 1995.

If the issue were whether the respondent's contract of employment had been lawfully terminated by the appellant in accordance with common law principles alone, the answer would be in the affirmative. To be considered, however, is what impact and effect relevant labour relations legislation had upon the appellant's right of termination under the common law.

Collective Bargaining Agreement: Construction Industry, published in

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SI 82 of 1994, is binding upon the parties as an employer and employee engaged in that industry. Section 27(1) expresses that the disciplinary code of conduct and grievance procedure contained in Annexure II, the "code of conduct", shall be observed by all employers and employees. Schedule C thereto specifies a list of offences ranging from minor to serious. Classified as serious are, amongst other offences, theft (No. 17) and absent from work for five or more consecutive working days without permission or reasonable excuse (No. 29). Section 5 of the code of conduct prescribes the procedure that has to be applied where it appears to the disciplinary grievance committee that an employee has committed an offence.

Of course, this procedure was not followed by the appellant in terminating the respondent's employment. Essentially, it relied upon the respondent's absence from the workplace for a period of five or more consecutive working days as a repudiation of his contract; yet did not seek to deal with this dismissable offence in terms of the Collective Bargaining Agreement by

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which it was bound. It should have done so. The common law right to accept the respondent's repudiation and notify him that his employment has been terminated was no longer open to it. The Collective Bargaining Agreement affords employees in the construction industry greater protection than does the common law. Their employment may only be terminated by strict adherence to the set down procedures. A contrary interpretation would mean that an employer in the construction industry could avoid recourse to the disciplinary code of conduct by deeming an employee's wilful absence from work as a repudiation, accepting it and terminating his employment. Such action would run counter to the letter and spirit of the disciplinary code.

For these reasons, I am forced to conclude that the termination of the respondent's contract of employment, notified on 27 October 1995, was unlawful.

The next point taken was on the basis of it being held by this court that the appellant's failure to comply with the provisions of the disciplinary code rendered the termination of the respondent's employment unlawful. It was that the respondent ought to have exhausted the domestic remedies under the grievance procedure laid down in the code of conduct. In so submitting, counsel acknowledged that the principle had been established that an aggrieved party nonetheless may have *locus standi* to approach the High Court for relief, provided special circumstances for so doing exist. See *Cargo Carriers (Pvt) Ltd* v *Zambezi & Ors* 1996 (1) ZLR 613 (S) at 617H-618A; *Kanonhowa* v *Cotton Co of Zimbabwe* 1998 (1) ZLR 68 (H) at 76C-D.

The grievance procedure to be observed by an employee in the construction industry is detailed in s 6 of the code of conduct. It provides that an employee wishing to raise as a grievance in terms of Part III of the Labour Relations Act

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[*Chapter 28:01*] (see, in particular, s 8(e)(i) - failure to comply with or to implement a collective bargaining agreement by an unfair labour practice), must do so with his immediate superior and with the workers' committee or works council. Thereafter, an investigation is carried out and ultimately the employee has the right to appeal to the National Employment Council. A further appeal lies to the Labour Relations Tribunal under s 101(7) of the Act.

In its opposing affidavit, the appellant specifically raised the complaint that the respondent had adopted the wrong procedure in applying to the High Court for relief rather than following the domestic procedure outlined in the code of conduct. In his answering affidavit, the respondent significantly proffered no explanation for taking the route he did. He appears to have been of the view that both options were open; the choice being uninhibited.

The learned judge *a quo* did not deal with this issue although it was argued and the relevant authorities referred to him. He ought to have done so.

In *Tutani* v *Minister of Labour & Ors* 1987 (2) ZLR 88 (H) at 95D, Mtambanengwe J observed that where domestic remedies are capable of providing effective redress in respect of the complaint and, secondly, where the unlawfulness alleged has not been undermined by the domestic remedies themselves, a litigant should exhaust his domestic remedies before approaching the courts unless there are good reasons for not doing so. The same approach

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was applied by Smith J in *Musandu* v *Chairperson Cresta Lodge Disciplinary and Grievance Committee* HH-115-94 (not reported); and was referred to with approval by Malaba J in *Moyo* v *Forestry Commission* 1996 (1) ZLR 173 (H) at 191D-192B. I respectfully endorse it.

In this matter, the procedure under s 6 of the code of conduct, and the availability of an appeal to the Labour Relations Tribunal, was capable of affording the respondent effective redress against the unlawful termination of his employment. Furthermore, the unlawfulness had not been undermined by such domestic remedies, for the grievance procedure had not been resorted to. Finally, no special circumstances or good reasons were advanced by the respondent for approaching the High Court. He maintained silence.

It follows that I can find no warrant for not enforcing the requirement that the respondent ought to have exhausted the remedies available to him under the domestic legislation. It is on this ground that the appeal succeeds.

For the sake of completeness and clarity, let me indicate that, in any event, the nature of the relief sought by the respondent - namely, reinstatement and back pay - ought not to have been granted by the learned judge.

The appellant genuinely believed that save for the alertness and intervention of the security guard the respondent would have succeeded in making away with its property. The respondent's acquittal of the crime of theft, even if it had been obtained on evidence adduced and not by virtue of a withdrawal of

the charge after plea, would hardly have satisfied the appellant of the respondent's innocence.

The respondent was a fairly senior employee. He was a person in whom the appellant reposed trust. He held a position which imported a close association with its manager. It cannot be doubted that from the appellant's viewpoint the personal relationship between it and the respondent had broken down to the extent that confidence in the respondent's honesty had been lost; there was no prospect of restoring a normal employer-employee relationship. Therefore, to have ordered the respondent's reinstatement - to have thrust him back upon the appellant, a relatively small organisation, against its will - was to create for it an intolerable situation. See *Commercial Careers College (1980) (Pvt) Ltd* v *Jarvis* 1989 (1) ZLR 344 (S) at 349F-G; and *Winterton, Holmes & Hill* v *Paterson* 1995 (2) ZLR 68 (S) at 74F-75E.

Since the issue of damages had not been argued, let alone raised in the papers, the learned judge (deciding, as he must have, that the court's intervention was properly sought) ought to have dismissed the application on the ground that the nature of the relief claimed was misconceived; leaving it to the respondent, if so advised, to pursue a claim for damages by way of fresh proceedings.

The appeal is allowed with costs. The wasted costs of the postponement on 30 November 1998, occasioned by the default of appearance of the appellant's legal practitioner, Mr *Cherry*, are, on his properly made concession, to be borne by him. The order of the court *a quo* is set aside and

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replaced by the following:

"The application is dismissed with costs."

McNALLY JA: I agree.

EBRAHIM JA: I agree.

Danziger & Partners, appellant's legal practitioners

Tizirai-Chapwanya & Partners, respondent's legal practitionerS

S *v* ROVAYI 1999 (1) ZLR 251 (SC)

Citation	1999 (1) ZLR 251 (SC)
Case No	Judgment No. S-42-99
Court	Supreme Court, Bulawayo
Judge	Muchechetere JA, Sandura JA
Heard	March 29, 1999
Judgment	April 16, 1999
Annotations	None

Criminal appeal

Flynote

Evidence - motor accident - credible police evidence of how accident occurred - greater weight to be given to such evidence than to reconstruction - point of impact - whether exact point of impact can be established or only area of impact

Headnote

The appellant had been convicted of culpable homicide, the allegation being that he had driven a Nissan truck negligently and had collided with a Bedford truck, thereby killing a passenger in the Bedford truck. The driver of the Bedford truck maintained that on approaching a culvert he had seen the oncoming Nissan truck coming at high speed and zig-zagging, so he had pulled his truck over to the extreme left hand side of the road and stopped. He said that the Nissan truck had come onto his side of the road and had hit his stationary truck. The appellant maintained that the accident had occurred as a result of the Bedford truck coming onto the wrong side of the road. The investigating police officer who had attended the accident scene soon after the accident testified that he and the appellant observed some glass debris and mud

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on the road and they agreed that this was the point of the impact. This point was on the Bedford truck's side of the road and not on the appellant's side. The insurer of the Nissan truck had employed a private investigator to carry out an investigation to determine which of the two drivers had caused the accident. This investigation had been carried out several weeks after the accident. The investigator had carried out a reconstruction of the accident and had concluded that the accident had occurred on the appellant's side of the road.

In finding the appellant guilty, the magistrate had accepted the police evidence and had rejected the evidence of the private investigator. Dismissing an appeal against conviction:

Held, that the critical question was on which side of the road the collision had occurred. In most instances it is not possible to identify the precise point on the road where the collision occurred. What is usually identifiable is an area on the road where the collision took place.

Held, further, that where there is credible evidence of the manner in which the collision occurred, such evidence generally carries greater weight than a reconstruction by an expert. In the present case, the evidence of the police officer who had attended the scene soon after the accident was credible as he was an independent and impartial witness. On the other hand, the private investigator was not an impartial witness and had carried out his reconstruction several weeks after the accident.

Cases Considered

Cases cited:

Bester v *Silva's Fishing Corp (Pty) Ltd* 1952 (1) SA 589 (C)

Motor Vehicle Assurance Fund v *Kenny* 1984 (4) SA 432 (E)

1999 (1) ZLR p252

Case Information

R Moyo, for the appellant

N M Wamambo, for the respondent

Judgment

Sandura JA: The appellant was charged with culpable homicide, the allegation being that on 20 April 1994 and at or near the 26 km peg on the Bulawayo/Nkayi Road he negligently drove a Nissan truck and collided with a Bedford truck, thereby killing Brighton Moyo, a passenger on the Bedford truck. Alternatively, he was charged with contravening s 43(1)(a) of the Road Traffic Act 48 of 1976, now s 52(2)(a) of the Road Traffic Act [*Chapter 13:11*], the allegation being that he drove the truck in question negligently. He pleaded not guilty to both charges but was convicted on the main count and sentenced to a fine of $1800 or, in default of payment, 6 months' imprisonment with labour. In addition, he was prohibited from driving all classes of motor vehicles for six months. He has now appealed against both conviction and sentence.

The state relied upon the evidence of two witnesses, Dhlamini, the driver of the Bedford truck,

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and Constable Kanhukamwe, the investigating officer.

Dhlamini's evidence was as follows. On the day in question, he was driving the Bedford truck northwards along the Bulawayo/Nkayi Road. The truck was pulling a trailer which was carrying a compressor and a drilling machine which were to be delivered to Nkayi.

As he approached the culvert at the 26 km peg, he saw the appellant's truck, which was pulling two trailers, approaching the culvert from the opposite direction and being driven at a high speed in a zig-zag manner. On the trailers were forty head of cattle. Sensing imminent danger, he pulled his truck to the extreme left side of the road and stopped. That was at about 11 am.

Shortly thereafter, the appellant's truck collided with Dhlamini's truck. Dhlamini and his assistant, Brighton Moyo, who had been in the front passenger seat, were badly injured and lost consciousness. They were taken to Mpilo Hospital where Brighton Moyo later died. Dhlamini was adamant that the point of impact was on his side of the road and not on the appellant's side.

That evidence was corroborated by Constable Kanhukamwe, the investigating officer, whose evidence was as follows. He arrived at the scene of the accident about an hour after the accident and found the appellant there. He observed that Dhlamini's truck was on the left side of the road for northbound traffic. The wheels of the trailer were off the tarmac and the badly damaged horse was then facing the Bulawayo direction. The appellant's truck was off the road in the bush on the left side of the road for southbound traffic. He briefly questioned the appellant who made indications on what had happened. He and the appellant observed a point on Dhlamini's side of the road which had some glass debris and mud and agreed that that was the point of impact. That point was

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definitely not on the appellant's side of the road. He subsequently drew a sketch plan indicating what he had observed at the scene.

The appellant gave evidence and called one witness, a Mr Laing ("Laing"). The appellant's version of how the accident occurred was different from Dhlamini's. It was as follows. As he was approaching the culvert he saw Dhlamini's truck approaching it from the opposite direction. He moved his truck to the left side of the road and Dhlamini did the same, intending to avoid a collision. However, when he was near the culvert he observed Dhlamini's truck changing its course and coming to his side of the road. He crossed the culvert, moved further to his left intending to avoid the imminent collision but did not succeed.

It was the appellant's evidence that the collision occurred on his side of the road and that after the collision his truck veered off the road into the bushy area on the left side. He denied seeing any debris on Dhlamini's side of the road as alleged by the investigating officer.

The appellant's witness, Laing, gave the following evidence. He was employed as a private investigator by a company called Loss Control Services (Pvt) Ltd. After the accident he was hired by the company which had provided the insurance cover for the appellant's truck. He was

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required to determine which of the two drivers had caused the accident. He visited the scene of the accident on two or three occasions about six weeks after the accident. On at least two of those occasions, he visited the scene with the appellant. He made various observations and prepared a plan of the scene.

On one of his visits to the scene, he found part of a concrete bollard. It was lying just off the road in the ditch of the culvert on the eastern side of the road. It had been painted white but had black marks which appeared to be rubber marks.

He took the bollard to the premises where the appellant's truck was parked and compared the black marks on the bollard with the marks which he had observed on the wall of the left front wheel of the truck. He then arranged the removal of the wheel from the truck and took the wheel and the bollard to the Forensic Scientist in Harare without allowing the two items to come into contact with each other. He asked the Forensic Scientist to investigate whether the marks on the tyre matched the marks of the bollard. In other words, he asked the Forensic Scientist to find out whether the marks had been caused by the two objects coming into contact with each other.

After examining the two objects, the Forensic Scientist concluded that the marks on the tyre had been caused by the bollard coming into contact with the tyre.

Relying upon that conclusion as well as the several observations which he made and the measurements which he took at the scene of the accident, Laing reconstructed the collision and concluded that it had occurred on the appellant's side of the road and not on Dhlamini's side.

SANDURA JA

The most important question to determine in this appeal is on whose side of the road was the point of collision or the point of impact. The answer to that question would determine whether it was Dhlamini or the appellant who caused the accident.

Before answering that question, I wish to point out that, insofar as the term "point of collision" or "point of impact" implies an exact spot, it is misleading. In most instances, it is not possible to identify the precise point on the road where the collision took place. What is usually identifiable is an area on the road where the collision took place.

That principle was stated by Herbstein J in *Bester* v *Silva Fishing Corp (Pty) Ltd* 1952 (1) SA 589 (C) at 594A-B as follows:

"In describing mishaps of this kind, the phrase 'point of impact' is generally used in an endeavour to fix the spot of the actual impact; the phrase is convenient but it is, in most cases, impossible to fix on a point with exactitude and the attempt to do so often leads to difficulties. What can, however, be done with greater hope of certainty is to determine the larger 'area of impact' which carried with it the implied admission that the actual impact was within the area but not at a determinable spot."

With that in mind, I proceed to determine the main question. In my view, the evidence of Constable Kanhukamwe, the investigating officer, established beyond doubt that the collision took place on Dhlamini's side of the road. The constable arrived at the scene of the accident

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about an hour after it had occurred. Although Dhlamini and the deceased had already been taken to hospital, the appellant was still there and the trucks had not been moved. Both the constable and the appellant observed an area on Dhlamini's side of the road which had some glass debris and mud, and agreed that that was where the collision had occurred.

Constable Kanhukamwe was clearly an independent and impartial witness who had no motive for implicating the appellant instead of Dhlamini in the commission of the offence. In my view, the location of the glass debris and mud must have compelled the appellant to agree with the constable's observation that the collision had occurred on Dhlamini's side of the road. The location of the glass debris provided convincing evidence of the area where the collision occurred.

As far as Laing's evidence was concerned, it seems to me that the learned trial magistrate correctly ignored it. To begin with, he was not an impartial witness. He was acting on the instructions of the insurance company which had a financial interest in the matter, and it was in the company's interest that the appellant was absolved of all responsibility for the accident.

Secondly, Laing visited the scene of the accident with the appellant on at least two occasions and drew a sketch plan of the scene on the basis of the indications made by the appellant as well as his own observations.

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Thirdly, Laing visited the scene long after the accident at a time when all the debris which might have been on the road had disappeared.

Fourthly, there was no independent evidence to corroborate Laing's assertion that he found the concrete bollard at the scene and that when he took the wheel and the bollard to the Forensic Scientist he did not allow the two objects to be in contact with each other.

Finally, Laing's version of the collision was a reconstruction carried out about two months after the event. Most of the vital evidence had disappeared from the scene.

In any event, where there is credible evidence of the manner in which a collision occurred, such evidence generally carries greater weight than a reconstruction of the collision by an expert. That point was made by Eksteen J in *Motor Vehicle Assurance Fund* v *Kenny* 1984 (4) SA 432 (E) at 436H-437A where the learned judge said the following:

"Direct or credible evidence of what happened in a collision, must, to my mind, generally carry greater weight than the opinion of an expert, however experienced he may be, seeking to reconstruct the events from his experience and scientific training. Strange things often happen in a collision and, where two vehicles approaching each other from opposite directions collide, it is practically impossible for anyone involved in the collision to give a minute and detailed description of the combined speed of the vehicles at the moment of impact, the angle of contact or of the subsequent lateral or forward movements of the vehicles. Tompkins' concession, therefore, that there are too many unknown factors in any collision to warrant a dogmatic assertion by an expert as to what must have happened seems to me to have been a very proper one. An expert's view of what might probably have occurred in a collision must, in my view, give way to the assertions of the direct and credible evidence of an eye witness. It is only where such direct evidence is so improbable that its very credibility is impugned, that an expert's opinion as to what may or may not

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have occurred can persuade the court to his view ..."

In the present case, the evidence of the investigating officer was crucial. His evidence that he and the appellant observed glass debris and mud on Dhlamini's side of the road and agreed that that was the area where the collision had occurred established the appellant's guilt beyond reasonable doubt.

With regard to the sentence, I am satisfied that it was entirely appropriate. In any event, counsel for the appellant made no submissions in this regard.

In the circumstances, the appeal is dismissed in its entirety.

MUCHECHETERE JA: I agree.

Coghlan & Welsh, appellant's legal practitioners

S *v* P & ORS 1999 (1) ZLR 256 (HC)

Citation	1999 (1) ZLR 256 (HC)
Case No	Judgment No. HH-67-99
Court	High Court, Harare
Judge	Bartlett J
Heard	April 21, 1999
Judgment	April 21, 1999
Annotations	None

Criminal review

Flynote

Criminal law - common law offences - criminal injuria - act constituting another offence - whether should be charged as criminal injuria or as that other offence - effect of charging as criminal injuria

Criminal procedure (sentence) - common law offences - criminal injuria in circumstances amounting to indecent assault - juveniles assaulting another juvenile and forcing him to copulate with a dog - corporal punishment up to the maximum limit appropriate

Headnote

The accused, male juveniles aged 16 and 17, assaulted with branches another male juvenile aged 14, whom they suspected of stealing from them. After the assault they forced him to

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copulate with a female dog. The complainant was then ordered to go home and was warned not to tell anyone what had happened to him or else he would be killed. The accused were convicted of assault and criminal *injuria* and were sentenced to two strokes with a cane. The review court addressed two issues, namely, the correctness or the appropriateness of the charge of criminal *injuria* and the adequacy of the sentence imposed.

Held, that criminal *injuria* should not normally be charged where the conduct concerned constitutes another specific criminal offence such as indecent assault. Where a person forces another to have sexual intercourse with an animal this constitutes indecent assault. However, in the present case the element of indecent physical assault was only incidental to the main purpose of causing injury to the complainant's dignity; the dominant purpose was to humiliate the complainant and injure him in his dignity by forcing him to have sexual intercourse with the dog and therefore on the facts the conviction for criminal *injuria* should stand.

Held, further, that the accused could on the facts also have been charged as accomplices to the offence of bestiality or of contravening the Prevention of Cruelty to Animals Act.

Held, further, that the punishment imposed of two strokes was too lenient. A sentence of corporal punishment of five or six strokes should have been imposed.

Cases Considered

Cases cited:

S v *A* 1993 (1) SACR 600 (A)

R v *Bourne* (1952) 36 Cr App Rep 125

S v *Brereton* 1970 (2) RLR 272 (A); 1971 (1) SA 489 (RA)

S v *Butau* 1994 (1) ZLR 240 (H)

R v *Chipo & Ors* 1953 SR 53; 1953 (3) SA 802 (SR)

S v *Dziva* 1971 (1) RLR 202 (G); 1971 (4) SA 185 (R)

S v *Juhwiridza* 1975 (2) RLR 53 (G); 1975 (4) SA 698 (R)

S v *Muzoriwa* HH-179-97

Judgment

Bartlett J: The three accused have been convicted of assault and *crimen injuria*. They are Nyau dancers. They also pleaded guilty and are young first offenders. Apart from that, there is nothing pleasant that I can find to say about them.

The facts establishing the *crimen injuria,* as the regional magistrate who has referred the matter to the High Court states, are disgusting to say the least. Overall, the facts display a disturbing streak of sadism within the three young accused which unless eradicated is indicative of a very

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unhappy future for them - and regrettably for any persons unfortunate enough to incur their ire.

What happened is this. The accused suspected that the 14 year old complainant had taken their Nyau dancing kit which they had hidden in the bush. They used a subterfuge to lure him from his grandmother's home and asked him what he had done with their property. He denied having taken it. They then assaulted him by striking him on the back with green tree branches. Whilst they were assaulting the complainant the first accused whistled for his female dog. The first accused held the dog by the head, the second by the hind legs and the third by the body, while at the same time forcing the complainant to have sexual intercourse with the animal. The complainant was then ordered to return to his home and told never to tell anyone what had happened or he would be killed.

The offence did, however, come to light and the accused, as I have indicated, pleaded guilty to assault and *crimen injuria*. The magistrate accepted without investigation their statement that they were aged 17, 16 and 16 respectively - though the charge sheet had given ages of 17, 18 and 19. No medical report was produced to detail the injuries suffered by the complainant from the assault with the branches or the forced intercourse with the dog. The agreed facts, however, stated that the complainant suffered some injuries on his back from the assault with the branches and a swollen penis as a result of his penetration of the animal. A medical report should have been obtained.

The magistrate imposed a fine of $300 or 30 days' imprisonment wholly suspended in respect of the assault and corporal punishment of two strokes with a light cane in respect of the *crimen injuria*.

The matter went on scrutiny to the regional court - though since corporal punishment was imposed it should have come directly to the High Court on perusal - see *S* v *Muzoriwa* HH-179-97 at p 3. The scrutinising regional magistrate was shocked at the leniency of the sentence and wrote to the trial

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magistrate asking for his comment. The trial magistrate agreed that the sentence he imposed was lenient. The regional magistrate, finding himself unable to certify the proceedings as being in accordance with real and substantial justice, referred the matter to the High Court. He suggested that, accepting that all the accused were juveniles, corporal punishment of six strokes would have been appropriate for the *crimen injuria*.

Whilst I agree with the sentiments of Gillespie J expressed in *S* v *Muzoriwa supra* that corporal punishment should be used sparingly and reserved for only serious offences committed by juveniles, I consider that the sentiments of the regional magistrate on this particular matter are correct. In my view, corporal punishment of 5 or 6 strokes would have been appropriate. I would add that, in addition to imposing a sentence which was manifestly lenient, the trial magistrate worded the sentence incorrectly. Corporal punishment is administered with a rattan cane, not a light cane - for the appropriate wording for corporal punishment sentences see S v *Butau* 1994 (1) ZLR 240 (H).

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Another point of concern is whether *crimen injuria* was the appropriate charge to prefer in consequence of the wrongful acts committed in respect of the complainant. This question is important because, as stated by Beadle CJ in S v *Brereton* 1971 (1) SA 489 (RA) 489 at 490H:

"It must now be accepted that the crime of criminal *injuria* does not include those injuries which are now known and can be charged as offences under distinct and appropriate names, and that when an injury can more appropriately be charged under its own distinctive name, it is not competent to charge that injury as criminal *injuria*."

Similar sentiments were expressed by Beadle CJ in *S* v *Dziva* 1971 (4) SA 185 (R) at 188B-C when he said:

"Whatever may be the law elsewhere (subject to what I shall say later about over-lapping offences), there is no doubt that in Rhodesia it is not competent to charge the accused with criminal *injuria* when the same criminal conduct constitutes another well recognised criminal offence which can be charged *eo nomine*."

See also *R* v *Chipo & Ors* 1953 SR 53; 1953 (3) SA 802 (SR) and *S* v *Juhwiridza* 1975 (2) RLR 53 (G); 1975 (4) SA 698 R.

I accordingly need to assess whether the accuseds' actions against the complainant constitute another well recognised criminal offence which can be charged *eo nomine*. If they do, then on the basis of the above quoted authorities - subject to a consideration of overlapping offences - the conviction for *crimen injuria* would need to be set aside.

A possible well recognised criminal offence constituted by the accused's actions in respect of the complainant is the offence of indecent assault. Indecent assault consists of an unlawful and intentional assault which is or is intended to be indecent. *Crimen injuria* consists in unlawfully, intentionally and

seriously impairing the *dignitas* of another. Do the accuseds' actions against the complainant more appropriately constitute an indecent assault?

An assault is normally committed in a direct manner but may be committed in an indirect or constructive manner: See for example the cases referred to by J R L Milton in *SA Criminal Law and Procedure* Vol 2 3 ed at p 420-1, where it is emphasised that setting a dog on a person or causing a person to rush into an obstruction constitute unlawful assaults. Similarly, as also emphasised by Milton *op cit* at p 471, for an indecent assault to be committed the accused does not actually have to touch the complainant. It is enough that he exerts indecent pressure through some object - see Sv *A* 1993 (1) SACR 600 (A) where the accused administered an electric shock to the complainant's penis. The indecent assault may also be constructive as where the accused compels the complainant to perform an act of indecency on himself - see again *S* v *A supra* where the accused also forced the complainant to masturbate himself.

Based on these authorities, I have no doubt that by parity of reasoning an accused forcing a person to have sexual intercourse with a dog constitutes an indecent assault on that person.

So should the accuseds have been charged with indecent assault in respect of their actions against the complainant and should the conviction of *crimen injuria* be set aside? Not

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necessarily so. As stated by Beadle CJ in *S* v *Dziva supra* at p 186F:

"In many cases, however, the same set of facts may constitute both criminal *injuria* and another well known offence."

Milton *op cit* underlines this at p 494 when he states that it does not follow that an act which constitutes an assault cannot be charged as *crimen injuria* for an act may impair both *dignitas* and bodily security.

Beadle CJ in *S* v *Brereton supra* lays down the approach a court should adopt in deciding whether the charge preferred should be one of assault or *crimen injuria*. At p 491G-492A he states:

"The dividing line between acts which should be charged as assault and those which may be charged as criminal *injuria* may often, however, be a very difficult one to draw and I think can only properly be drawn by deciding which charge is the more appropriate one in the circumstances. Where, for example, by long practice particular acts have come to be charged as assaults, the charge of assault would obviously be the more appropriate charge. The converse is equally true. Another rough rule of thumb test as to which of the two offences would be the more appropriate one to charge, is to determine what is the real gravamen of the accused's unlawful acts. If the element of physical assault is only incidental to the main purpose of causing injury to the complainant's dignity, then I think the offence may be properly charged as criminal *injuria."*

The learned Chief Justice added at p 492G-H:

"Where an accused in the course of one transaction commits more than one offence in

BARTLETT J

circumstances which do not permit him being charged for those offences separately, then the proper offence with which to charge him is the most serious one. If it is not possible to determine which is the most serious, then the accused's intention should be looked at. In most such cases, where it is not possible to determine which of the two offences is the more serious, the accused will have a dominant intention in doing what he did. In such cases where the accused, in pursuance of the dominant intention, commits a number of offences, the proper thing to do is to charge him only with that offence which was his dominant purpose."

and at p 493C-D:

"If, on the facts as a whole, the charge of crimina*l injuria* is an appropriate one, the accused may be properly charged with criminal *injuria*, notwithstanding the fact that in the course of committing this offence he also committed other offences."

(see also Beadle CJ's summary of the approach in *S* v *Dziva supra* at 187A-C)

As Beadle CJ said, the dividing line may often be a very difficult one to draw. But applying the approach laid down by the learned Chief Justice, as best as I am able, to the facts of the matter at hand, it seems to me that the element of the indecent physical assault was only incidental to the main purpose of causing injury to the complainant's dignity. Or that the dominant purpose or intention of the accuseds was to humiliate the complainant and injure him in his dignity by forcing him to have intercourse with the dog. I also do not consider that it can be categorically stated that the offence of indecent assault is more serious than the offence of *crimen injuria*. Depending on the facts, some examples of *crimen injuria* may be more serious than examples of indecent assault, and the converse is obviously equally true. As I have stated, my view is that the main purpose of the accused was to seriously humiliate and cause injury to the complainant's dignity. So I do not consider that on the particular facts of this matter the element

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of indecent assault constituted the more serious offence.

Accordingly, applying all the individual constituents of the approach laid down by Beadle CJ, I am satisfied "that on the facts as a whole", the charge of *crimen injuria* was the appropriate one and that the accused were properly charged with *crimen injuria*.

There are, however, other charges with which the accused could and should have been charged - and indeed possibly could still be charged. I would emphasise, however, that such charges do not relate to offences committed in respect of the complainant - that is, they do not involve any attack on the complainant's dignity or bodily security. Accordingly, since they involve different complainants, they fall outside the ambit of the question I have just considered as to whether *crimen injuria* was the appropriate charge. That argument, I reiterate, related only to the question of the appropriate charge in respect of the wrongs committed against the fourteen year old complainant forced to have sexual intercourse with the dog.

The other possible charges are as an accomplice to the offence of bestiality

and contravention of either s 3(1)(a) or s 3(1)(e) of the Prevention of Cruelty to Animals Act [*Chapter 19:09*].

In *R* v *Bourne* (1952) 36 Cr App Rep 125 the accused forced his wife to submit to sexual intercourse with a dog. The facts are exactly analogous to the present matter. The accused was convicted of aiding and abetting his wife to commit buggery (bestiality) with a dog. Hilbery CJ said at p 129:

"If he caused his wife to have connection with a dog he is guilty, whether you call him an aider and abettor or an accessory, as a principal in the second degree."

Since the complainant in the instant matter was being forced he could not be charged with bestiality. The wrong against him was either, as I have indicated, *crimen injuria* or indecent assault. But with the different complainant, namely the State, the offence of bestiality as an accomplice was capable of being charged. See Milton *supra* at p 231 where he indicates that on the facts of *Bourne*'s case the charge to be preferred in this jurisdiction would be one of bestiality as an accomplice.

The accuseds' conduct also constituted a contravention of either s 3(1)(a) or s 3(1)(e) of the Prevention of Cruelty to Animals Act [*Chapter 19:09*] - that is, ill-treating an animal or wantonly or unreasonably doing or procuring the commission of any act like to infuriate or terrify any animal.

The decision as to whether any of these charges should be preferred against the accuseds even at this late stage is one for the Attorney-General and this judgment will be referred to him for his consideration. I would not wish to interfere with the Attorney-General's discretion but would observe that assuming there were no splitting of charges, it would very probably have been appropriate, in the overall circumstances, to have taken the offence of *crimen injuria* and that of bestiality as an accomplice, together for the purposes of sentence. This would militate

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against any charge as an accomplice to bestiality being preferred at this stage. That, however, may not be so in respect of the possible offences under the Prevention of Cruelty to Animals Act. Such offences relate particularly to protecting the animal from ill treatment or from conduct likely to infuriate or terrify it. It may be that such charges are sufficiently divorced from the overall circumstances surrounding the *crimen injuria* to allow them to be preferred - albeit at this late stage. As I say the decision is one for the Attorney-General.

As far as the matter before me is concerned, I am only able to agree that the convictions are appropriate. The sentence in respect of the *crimen injuria* is manifestly too lenient and I am, accordingly, unable to certify the proceedings as being in accordance with real and substantial justice.

Gillespie J agrees.

STANBIC FINANCE ZIMBABWE LTD *v* CHIVHUNGWA 1999 (1) ZLR 262 (HC)

Citation	1999 (1) ZLR 262 (HC)
Case No	Judgment No. HB-19-99
Court	High Court, Bulawayo
Judge	Malaba J
Heard	February 19, 1999
Judgment	April 29, 1999
Annotations	None

Civil application

Flynote

Estoppel - negligent misrepresentation - when can be proved - finance company owner of vehicle under hire-purchase agreement - vehicle registered in name of hirer-purchaser - vehicle being sold to third party while hire-purchase agreement still in force - whether owner under any duty of care to third party

Property and real rights - ownership - movables - vindication - estoppel - negligent misrepresentation - when can be proved - when owner of vehicle can be estopped from vindicating vehicle from third party - exceptio doli generalis - when owner may be prevented from vindicating even where no culpa on his part shown - extremely limited circumstances where an owner will not be allowed to vindicate his own property

Headnote

The applicant, a financial institution, sold a car to a company under a hire-purchase agreement, which contained a clause reserving ownership for the applicant. The car was, however,

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registered in the company's name. For some two years the company paid the instalments, then stopped. When the applicant's agents investigated, they found that a director of the company had sold the car to the respondent. The applicant sought to recover the car. The respondent raised the defence of estoppel. He claimed that the applicant had been negligent in that it had failed to notify him that it, and not the company, was the owner of the car.

Held, that the applicant, as owner, was in principle entitled to recover the vehicle from any person who had possession of it. The respondent had the onus of establishing that the applicant was estopped from relying on its ownership of the car, and there had to be clear proof of estoppel.

Held, further, that for estoppel to exist there must have been a representation made by the owner that the person who disposed of the property was entitled to do so. The representation must have been made negligently, and it must have been relied on by the person raising the issue of estoppel. In this case, the applicant made no representation of any kind to the respondent. It had not delivered the car registration book to the company, which had made its own application for the car to be registered. The fact that the applicant entrusted the possession of the car to the company in terms of the hire-purchase agreement did not constitute a representation that the company was the owner of the car. Nor had the company made the representation to the respondent; the representation was made by the director, acting on his own behalf.

Held, further, that even though estoppel by negligence can be raised where the person, through his negligent inaction or silence, enabled another person to make a false representation, there was in this case no duty of care owed by the applicant to the respondent. There would have to have been a duty to speak.

Held, further, that a reasonable man would not be entitled to rely on the registration book as proof that the person holding it was entitled to dispose of the car.

Held, further, that although it has been held that the *exceptio doli generalis* is no longer part of the Roman-Dutch law, it is still possible to use the principle of compelling considerations of fairness to estop an owner from vindicating his property where *culpa* has not been proved. However, the principle is applicable only in very exceptional circumstances, which must be clearly and overwhelmingly in favour of the defendant retaining the property, to the extent that it would be grossly unfair and would offend any reasonable man's sense of justice. This did not apply in the present case.

Per curiam: it would be desirable for the legislature to amend the existing legislation to ensure that a vehicle's registration book shows whether the vehicle is encumbered in any way.

Cases Considered

Cases cited:

Akojee v *Sibanyoni & Anor* 1976 (3) SA 440 (W)

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Aris Entrprs (Finance) (Pty) Ltd v *Waterberg Koelkamers (Pty) Ltd* 1977 (2) SA 435 (T)

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

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

Electrolux (Pty) Ltd v *Khota & Anor* 1961 (4) SA 244 (W)

Farquharson Bros & Co v *King & Co* [1902] AC 325

Grosvenor Motors (Potchefstroom) Ltd v *Douglas* 1956 (3) SA 420 (A)

Johaadien v *Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A)

Jolly v *Shannon & Anor* 1998 (1) ZLR 78 (H)

Lickbarrow & Anor v *Mason & Ors* (1787) 2 TR 63; [1775-1802] All ER Rep 1

Makumboreka v *Marini* S-130-95

Mashave v *Standard Bank of SA Ltd* 1998 (1) ZLR 436 (S)

Mercantile Bank of India Ltd v *Central Bank of India Ltd* [1938] AC 387

Moorgate Mercantile Co v *Twitchings* [1976] 2 All ER 641 (HL)

Oakland Nominees Ltd v *Gelria Mining & Invtm Co Ltd* 1976 (1) SA 441 (A)

Saflec Security Systems (Pty) Ltd v *Group Fire Bldg (East Cape) (Pty) Ltd* 1990 (4) SA 626 (E)

Union Govt v *National Bank of SA Ltd* 1921 AD 121

Case Information

R Moyo, for the applicant

T Matatu, for the respondent

Judgment

Malaba J: This is an application for an order directing the respondent (to whom I shall refer as "Mr Chivhungwa" or "respondent" as contextual clarity may require) to return to the applicant (to whom I shall refer as "Stanbic Finance") a Nissan Sunny motor vehicle registration number 649-425W ("the motor vehicle") which is in his possession, failing which the Deputy Sheriff or his lawful assistant be authorised and directed to remove the said motor vehicle from the possession of the respondent and hand it over to the applicant.

MALABA J

In the founding affidavit deposed to by its Bulawayo Manager, Stanbic Finance states that it is a financial institution incorporated according to the laws of Zimbabwe and carrying on the

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business of providing finance for the lease and hire-purchase of motor vehicles. It averred that it is the legal owner of the motor vehicle which is in the unlawful possession of the respondent.

The respondent admits in the opposing affidavit that he is in the possession of the motor vehicle. He said he acquired ownership of the car by a sale in which he purchased it for $85000 in cash from Gunn Auto Electrical (Pvt) Ltd ("Gunn Electrical"). He denied that Stanbic Finance has the right of ownership in the motor vehicle. He said Stanbic Finance is estopped from asserting such a right by its negligence, in that it delivered the motor vehicle to a lessee in circumstances in which it represented the latter as the true owner of the motor vehicle and that it had the right to dispose of the car leading him to believe the representation as true and acting on it to his prejudice.

The facts are not in dispute. On 30 July 1996, Stanbic Finance bought the motor vehicle from a car dealer. It was a new car. Stanbic Finance did not have the motor vehicle registered in its name. On the same day, it entered into a lease agreement with Gunn Electrical, represented by its director Andrew Gundu. In terms of the lease agreement, Stanbic Finance let the motor vehicle to Gunn Electrical for $226077.83, payable in thirty-six monthly instalments of $6279.93 per month.

In terms of clause 4.1 of the lease agreement, ownership of the motor vehicle remained with Stanbic Finance at all material times when its possession and use was enjoyed by Gunn Electrical. Gunn Electrical undertook in terms of clause 6.4 not to sell the motor vehicle, or cede, assign or delegate its rights or obligations in the lease agreement relating to the motor vehicle without Stanbic Finance's written consent.

Gunn Electrical took delivery of the motor vehicle directly from the car dealer pursuant to the lease agreement. It completed the application form for registration of the motor vehicle and had it registered with the Central Vehicle Registry in its name. The car registration book was issued in Gunn Electrical's name.

Gunn Electrical failed to discharge all its obligations under the lease agreement, in that it paid twenty-four monthly installments and stopped making any further payments. When Gunn Electrical's account fell into arrears, Stanbic Finance instituted an investigation into the matter. The employees who conducted the investigation discovered that the motor vehicle was in the possession of the respondent at his residence in Zvishavane.

Andrew Gundu had in fact offered the motor vehicle for sale and the respondent had bought it for $85000 in cash. It transpired that he had represented to Mr Chivhungwa that Gunn Electrical was the true owner of the

motor vehicle and that it had the right to dispose of it. He had produced the car registration book in Gunn Electrical's name.

The respondent contacted the Central Vehicle Registry to verify the contents of the car registration book. He was told that the records there reflected Gunn Electrical as the "registered

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owner" of the motor vehicle. He, together with Andrew Gundu, took the motor vehicle to the Criminal Investigation Department, Bulawayo. The police checked the engine and chassis numbers against the contents of the car registration book. They confirmed that according to their records the motor vehicle was not a stolen car. Believing that Gunn Electrical had good title to the motor vehicle, the respondent paid $85000 in cash to Andrew Gundu and took delivery of it.

When they found the motor vehicle in Mr Chivhungwa's possession Stanbic Finance's employees told him that the car belonged to their employer. They expressed an intention to recover the motor vehicle, but the respondent refused to hand it over, saying he had acquired ownership of the motor vehicle through a cash sale.

The particulars of the defence of estoppel raised in the application by the respondent are contained in paras 12 and 13 of the opposing affidavit. He states the defence therein in these words:

> "12. I contend that the applicant was negligent in its dealings in that it delivered the motor vehicle under a lease agreement to the lessee together with an open registration book, thereby misrepresenting to the world at large that the lessee was the rightful owner and therefore capable of passing ownership to any third party who may buy the said motor vehicle. In the premises, ownership passed to me by a sale, taking into account that sale of most motor vehicles is done in a free market.
>
> 13. I also contend that while the applicant may have the right to vindicate the said motor vehicle from me, yet he is estopped from vindication since he entrusted his property to the lessee under circumstances which fairly and reasonably induced me to believing that the lessee (ostensible owner) was the true owner or had the authority to dispose of the motor vehicle."

The respondent does not deny that the lease agreement contained a term reserving ownership of the motor vehicle for Stanbic Finance. Gunn Electrical did not in reality have title to the motor vehicle. On the principle that no-one can give to another a better title than he himself possesses, the respondent, without the intervention of law through the recognised exceptions, could not acquire better rights in the motor vehicle than Gunn Electrical had. Gunn Electrical did not in fact become the owner of the motor vehicle and therefore could not transfer ownership to the respondent.

Stanbic Finance, as the true owner of the motor vehicle, is entitled on the principles of the *actio rei vindicatio* to recover it from any person, including the respondent, who has possession of it without its consent. The facts clearly show that it has established the two essential elements of the *actio rei*

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vindicatio, namely, that it is the owner of the car and that possession of it is with the respondent. The respondent contends that Stanbic Finance is nonetheless estopped from relying on its ownership of the motor vehicle in seeking to vindicate it. The onus is therefore on the respondent to prove the defence of estoppel which he has pleaded to justify retention of the motor vehicle: *Chetty* v *Naidoo* 1974 (3) SA 13 (A) at 20A-C; *Makumborenga* v *Marini* S-130-95 at p 2; *Jolly* v *Shannon & Anor* 1998 (1) ZLR 78 (H) at 88B.

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In *Mashave* v *Standard Bank of South Africa Ltd* 1998 (1) ZLR 436 (S) McNally JA observed at p 438C-D that the Roman Dutch Law protects the right of an owner to vindicate his property and "as a matter of policy favours him as against an innocent purchaser".

In *Oakland Nominees Ltd* v *Gelria Mining & Investment Co Ltd* 1976 (1) SA 441 (A) at 452A Holmes JA said:

"Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course the possessor has some enforceable right against the owner."

In 1956, Steyn JA (as he then was) in *Grosvenor Motors (Potchefstroom) Ltd* v *Douglas* 1956 (3) SA 420 (A) emphasised the importance our law attaches to the protection of property when at p 427C-D he said:

"It is only necessary to add that according to Matthaeus *Paroemia* 7. 7. i.f. enactments derogating from an owner's vindicatory rights are to be very strictly (*strictissime*) construed, a view with which Voet *Commentarius* 6.1.12. agrees.

This serves to emphasise the importance which, notwithstanding recognised exceptions, our law attaches to the owner's right to vindicate his property and suggests that, where estoppel is pleaded, he is not debarred from asserting that right *unless there is clear proof of estoppel*" (the emphasis is mine).

Estoppel depends upon an allegation that a representation was made by the owner (*Mashave*'s case *supra* at p 438D). In *Oakland Nominees supra* at p 452A-G Holmes JA said:

"(i) There must be a representation by the owner, by conduct or otherwise, that the person who disposed of his property was the owner of it or was entitled to dispose of it. A helpful decision in this regard is *Electrolux (Pty) Ltd* v *Khota & Anor* 1961 (4) SA 244 (W) with its reference at p 247 to the entrusting of possession of property with *indicia* of *dominium* or *jus disponendi*.

(ii) The representation must have been made negligently in the circumstances.

(iii) The representation must have been relied upon by the person raising the estoppel.

(iv) Such person's reliance upon the representation must be the cause of his acting to his detriment."

I take the question of representation first. The representation alleged to have been made to the respondent by Stanbic Finance is that Gunn Electrical was the owner of the motor vehicle and that it had the right to dispose of the car.

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The representation is said to have been made by the delivery by Stanbic Finance to Gunn Electrical of the motor vehicle "together with an open registration book".

The facts show that Stanbic Finance did not make the representation complained of to the respondent. It did not deliver the car registration book, let alone an open one, to Gunn Electrical. An open registration book has no particulars to produce the representation of ownership to a motor vehicle. The issuing of Gunn Electrical with the car registration book in its name by the registering authority was not a direct result of Stanbic Finance's action. Gunn Electrical made application for the registration of the motor vehicle on its own. The car

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registration book was then issued to it in terms of the provisions of the Vehicle Registration and Licensing Act [*Chapter 13:14*] (the Act) by the registering officer, after satisfying himself that the application was in order.

It is true that Stanbic Finance entrusted the possession of the motor vehicle with Gunn Electrical in terms of the lease agreement. That conduct could not beget a representation that Gunn Electrical was the owner of the motor vehicle and that it had the right to dispose of it. In *Electrolux (Pty) Ltd* v *Khota & Anor* 1961 (4) SA 244 (T) at p 246G-H Trollip J said:

"It is clear from the authorities in our law, as well as in English law, that the owner's mere entrusting a person (not being a factor, broker or agent for selling) with the possession of its articles is not sufficient to produce the representation that the *dominium* or *jus disponendi* was vested in the possessor.

The respondent would not be entitled to assume from such mere possession that the possessor was authorised to dispose of the articles. If he made such an assumption he would only have himself to blame for his gullibility."

Not only did Stanbic Finance not make to the respondent the representation upon which he seeks to estop it from vindicating the motor vehicle, Gunn Electrical, into whose possession the motor vehicle was delivered and which had the car registration book, did not make the alleged representation either. The intervening fraudulent misrepresentation that Gunn Electrical was the true owner of the motor vehicle with the right to dispose of it was made to the respondent by Andrew Gundu. The facts show that Andrew Gundu was acting in his personal capacity for his own benefit. There is no allegation in the respondent's affidavit that Andrew Gundu had authority from Gunn Electrical to sell or dispose of its asset. He did not ask for the production of proof of such authorisation and none was produced. The respondent gave credit to Andrew Gundu in his personal capacity by paying the $85000 to him. He was not entitled to assume from the mere possession of the motor vehicle and the car registration book in Gunn Electrical's name that Andrew Gundu had authority from Gunn Electrical to dispose of its asset. Even if Andrew Gundu misrepresented to the respondent that Gunn Electrical owned

the motor vehicle and had the right to dispose of it, that did not mean that Gunn Electrical was in fact selling the car.

It is clear from the manner the respondent pleaded the defence of estoppel in this case that he and his legal representatives took a very simplistic approach to a difficult problem. Notwithstanding the fact that the opposing affidavit alleged direct representation to the respondent of ownership of the motor vehicle vesting in Gunn Electrical as the basis of the estoppel, Mr *Matutu* argued the case on the basis of estoppel by negligence. He failed to appreciate the fact that for the defence of estoppel by negligence to be advanced at all there had to be an allegation and proof in the opposing affidavit of the fact that Stanbic Finance became silent or inactive when the circumstances imposed on it a duty to speak or act to protect the respondent against the loss or damage he suffered and that by that *culpable* breach of duty it enabled or assisted Andrew Gundu to make the fraudulent misrepresentation, leading to his belief that Gunn Electrical was the true owner of the motor vehicle with the right to

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dispose of it and acting on the mistaken belief to his prejudice.

P J Rabie *The Law of Estoppel in South Africa* states at p 91 that:

"The expression 'estoppel by negligence' is not infrequently encountered in cases of estoppel ... It seems that ... the expression is commonly used in those cases where an estoppel is raised against a person, not on the ground of representation which he himself made to the person raising the estoppel, but on the ground of a representation which he, through negligent conduct on his part, enabled another person, acting fraudulently, to make to the person claiming the estoppel. Ewart, as shown above, refers to a representation made in this fashion as 'assisted misrepresentation'.

In such a case, he says, the person against whom the estoppel is raised is estopped, not because of any misrepresentation made by himself, but because he 'furnished an opportunity for fraud' and 'made the representation of another person credible'."

Even if one proceeded on the assumption that the facts proved that Stanbic Finance did not make the representation on which the estoppel is based to the respondent but that it did not take the car registration book from Gunn Electrical (inaction) and failed to warn him of the lease agreement (silence) and that Andrew Gundu made the fraudulent misrepresentation to him that Gunn Electrical was the true owner of the motor vehicle and that it had the right to dispose of it, the element of the existence of a legal duty of care owed by Stanbic Finance to the respondent in the circumstances would be missing.

In *Moorgate Mercantile Co* v *Twitchings* [1976] 2 All ER 641 (HL) Lord Wilberforce said:

"A man who owns property is not estopped from asserting his title by mere inaction or silence, because inaction or silence by contrast with positive conduct or statement, is colourless. It cannot influence a person to act to his detriment unless it acquires a positive content such that the person is entitled to rely on it. In order that silence or inaction may acquire a positive content, it is usually said that there must be a duty to speak or to act in

a particular way owed to the person prejudiced or to the public or to a class of the public of which he in the event turns out to be one."

In this case, Stanbic Finance would be under a legal duty to retain the car registration book or warn the respondent about the lease agreement in order to protect his property against the fraudulent misrepresentantion of Andrew Gundu, if it were found that a reasonable man in its position would have reasonably foreseen or anticipated that his failure to act or speak in the manner described would enable or assist Andrew Gundu to commit the fraud on the respondent.

The above test was clearly stated by Innes CJ in *Union Government* v *National Bank of South Africa Ltd* 1921 AD 121 at 129 when he said:

"The test as to the existence of the duty is, by our law, the judgment of a reasonable man. Could the infliction of injury to others have been reasonably foreseen? If so, the person whose conduct is in question must be regarded as having owed a duty to such others - whoever they might be - to take due and reasonable care to avoid such injury."

It is clear from the authorities that the question whether a legal duty of care exists is a question of fact, dependent upon the circumstances of the case. The onus was on the respondent to

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marshal facts that showed the existence of a legal duty of care owed him by Stanbic Finance. The facts contained in the opposing affidavit do not suggest the respondent's mind was ever directed at the question of the existence or otherwise of a legal duty of care owed by Stanbic Finance to him in the manner described by the court. In argument Mr *Matutu* glossed over the problem.

I am able, however, to say from the facts that Stanbic Finance did not contract with Andrew Gundu. It leased its motor vehicle to Gunn Electrical and the car registration book was taken in that company's name. On what basis would Stanbic Finance be expected to reasonably anticipate financial loss to the respondent incurred as a result of a fraudulent misrepresentation of the car registration book by a person in whose name the book was not issued and in whose possession it had not placed its motor vehicle?

There was nothing in the conduct of Gunn Electrical during the period of twenty-four months when it paid the monthly instalments that could have given Stanbic Finance any reasonable ground to suspect Andrew Gundu or any of its employees of fraudulently misrepresenting ownership of the vehicle as vesting in Gunn Electrical and disposing of it to an innocent purchaser like the respondent. The fact that Stanbic Finance had entrusted possession of its motor vehicle with a company not involved in the business of selling motor vehicles gave it no reason for contemplating a situation where its motor vehicle could be sold by Gunn Electrical. Gunn Electrical did not in fact sell or dispose of the motor vehicle. Stanbic Finance could not have failed to reasonably foresee what in fact did not occur. The respondent

believed a representation of ownership which was made by a person who clearly did not even purport to own the motor vehicle or allege that he had authority to dispose of it.

The car registration book which is the document Stanbic Finance omitted to take from Gunn Electrical and retain did not contain mercantile qualities on the basis of which a reasonable man could be expected to reasonably anticipate a misrepresentation of title or right of disposition to the motor vehicle by any person putting it forward. In *Electrolux (Pty) Ltd supra* at 247B-C, Trollip J said that:

"To give rise to the representation of *dominium* or *jus disponendi* the owner's conduct must be not only the entrusting of possession to the possessor but also the entrusting of it with the *indicia* of the *dominium* or *jus disponendi*. Such *indicia* may be the documents of title and/or the authority to dispose of the articles, as for example, the share certificate with a blank transfer form annexed, as in *West* v *de Villiers* 1938 CPD 96, and the cases referred to therein, or such *indicia* may be the actual manner or circumstances in which the owner allows the possessor to possess the articles, as for example, the owner/wholesaler allowing the retailer to exhibit the articles in question for sale with his other stock in trade."

Not only would Stanbic Finance not have given Andrew Gundu the possession of the motor vehicle, the car registration book, not being a document of title, would be understood by a reasonable man in its position to be devoid of the representation on which the respondent now seeks to estop it from vindicating the car. An examination of the provisions of the Act shows that the primary purpose for which a car registration book is issued is to indicate the person who is holding the motor vehicle and is liable to pay the road licence fee in respect of the car. A car

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registration book does not vest ownership of the motor vehicle in the person in whose name it is issued nor does it give that person any power to dispose of the car. It is for the reason that ownership of a motor vehicle or the right to dispose of it may lie with someone other than the person in whose name it is issued that the book contains a warning at p 8 in the words:

"This registration book is not proof of legal ownership."

See also *Akojee* v *Sibanyoni & Anor* 1976 (3) SA 440 (W).

Stanbic Finance would not, in my view, be expected to anticipate the consequences of putting forward a car registration book by a rogue as representing that ownership of its motor vehicle vested in the person in whose name it was issued when the registration book itself stated the precise opposite; proclaiming to the representee that it was not proof of what was being represented to him. This alone shows that the representation on which the respondent seeks to estop Stanbic Finance from vindicating its motor vehicle is not clear and unequivocal. In *Law of South Africa* vol 9 para 374 it is stated that:

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"... the statement or conduct which is relied upon as creating an estoppel must be precise and unambiguous. This seems to mean no more than that a representation cannot found an estopel if it is equivocal in the sense that it can reasonably be understood in a sense different from the one contended for by the person raising the estoppel."

The respondent failed to prove that Stanbic Finance was in the circumstances of this case under a legal duty to warn him that the motor vehicle fraudulently sold to him by Andrew Gundu was subject to a lease agreement or to take the car registration book from Gunn Electrical and keep it.

It is clear from the facts that the proximate or real cause of the belief in the respondent's mind that ownership of the motor vehicle vested in Gunn Electrical was not connected to anything that Stanbic Finance had done. The real and direct cause of that mistaken belief was the intervening and independent act of the wickedness of Andrew Gundu which Stanbic Finance could not be expected to anticipate. As the car registration book could not at law produce that representation, the misstatement had to be conceived by Andrew Gundu who sold it to the respondent. It was also the respondent's misconstruction of the representation of the car registration book and his failure to appreciate the fact that an individual had no right to dispose of company property without proof of authorisation by the company to do so that facilitated the fraud of Andrew Gundu on him.

Mr *Matutu* also sought to advance the respondent's case by invoking the principle laid down by Ashhurst J in *Lickbarrow & Anor* v *Mason & Anor* (1787) 2 TR 63; [1775-1802] All ER Rep 1 that "whenever one of two innocent persons must suffer by the acts of a third person then he who has enabled such third person to occasion the loss must sustain it".

It is clear that this principle underlies the defence of estoppel by negligence. It has been pointed out in many cases that the rule was too widely stated for general application. In *Farquharson Bros & Co* v *King & Co* [1902] AC 325 Lord Lindley at p 347 of his speech said the *dictum* by

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Ashhurst J could not be relied on without considerable qualifications.

The qualifications that were made in subsequent cases are summarised by Lord Wright in *Mercantile Bank of India Ltd* v *Central Bank of India Ltd* [1938] AC 387 at p 299. These requirements are that the neglect must be in the transaction itself and be the proximate cause of the loss or damage. The neglect must also be the neglect of some duty that is owing to the person led into incurring the loss. It must not merely be the neglect of what would be prudent in respect to the party himself. The qualifications clearly bring the principle within the ambit of principles underlying the defence of estoppel by negligence. That defence has already been considered in detail. There is no need for repetition.

Mr *Matutu* based his next submission on the *dictum* by Holmes JA in

Oakland Nominees (Pty) Ltd v *Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) where the learned Judge of Appeal suggested that the owner of property may be estopped from recovering it despite the absence of *culpa* where he "is precluded from asserting his rights by compelling considerations of fairness within the broad concept of the *exceptio doli*". Mr *Matutu* argued that even if the respondent failed to prove negligence on the part of Stanbic Finance, the latter was estopped from recovering the motor vehicle by "compelling considerations of fairness within the broad concept of *exceptio doli*". He said the "compelling considerations of fairness" arose from these facts: that the respondent is a *bona fide* purchaser, that he bought the motor vehicle with $85000 in cash from personal savings, that the "lessee has since disappeared and prospects of locating him are remote", and that Stanbic Finance had received about $150000 of the total rental due to it by the lessee.

In *Aris Enterprises (Finance) (Pty) Ltd* v *Waterberg Koelkamers (Pty) Ltd* 1977 (2) SA 436 (T) at 437 *in fine*- 438B, Coetzee J said the *exceptio doli generalis* was not part of Roman-Dutch law.*(52) He pointed out that by the time of Justinian it had already served its purpose and Roman law had no longer any need for it thereafter. In *Bank of Lisbon and South Africa Ltd* v *de Ornelas & Anor* 1988 (3) SA 580 at 581D, the Appellate Division of South Africa, by a majority of four to one (Jansen JA being the dissenting member of the court), held that:

"the *exceptio doli generalis* has never formed part of Roman-Dutch law, and, despite the fact that in a number of judgments this court accepted the *exceptio* as part of our law, the time has now arrived once and for all to bury the *exceptio* as a superfluous, defunct anachronism. This conclusion holds equally for the *replicatio doli generalis.*"

Does it necessarily follow from the above statement that the burial of the *exceptio doli* means that in every case of *rei vindicatio* in which the defence of estoppel is raised, *culpa* is a requisite element that must be alleged and proved and that, in the absence of *culpa,* the principle of fairness cannot be relied upon to defeat the right of the owner to vindicate his property? In *Saflec Security Systems (Pty) Ltd* v *Group Five Building (East Cape) (Pty) Ltd* 1990 (4) SA 626 (E) at 635F, Kannemeyer JP, relying on the decision in the *Bank of Lisbon supra* for authority, said the *dicta* of Holmes JA in *Oakland Nominees supra* and Steyn CJ in *Johaadien* v *Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A) at 441C-D to that same effect, "would appear no longer applicable".

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MALABA J

Holding that the general rule was that it was necessary to prove *culpa* (negligence) on the part of the person whom it is sought to estop from vindicating his property, Steyn CJ indicated in *Johaadien's* case *supra,* that cases might conceivably arise in which it would be justified to allow the defence of estoppel to succeed without fault on overwhelming grounds of fairness. The learned authors of Silberberg and Schoeman *The Law of Property* 3 ed state at p 286 that:

"It would be unrealistic to discard fixed contemporary principles and perceptions relating to fairness merely because the *exceptio doli* may not be considered as part of (our) law."

I agree. Part of Holmes JA's formulation in *Oakland Nominees supra* relating to the use of the principle of "compelling considerations of fairness" to estop an owner from vindicating his property where *culpa* has not been proved by the defendant may still be applied within the broad concept of "equitable estoppel": *Mashave* v *Standard Bank of South Africa Ltd* 1998 (1) ZLR 436 (S) at 441H-442A.

It is clear that the principle contained in Holmes JA's *dictum* in *Oakland Nominees supra* is applicable in very exceptional circumstances. The learned Judge of Appeal said at p 452D of the judgment that the occasion had not yet arisen for the further development of the formulation. It appears to me that the circumstances must be clearly and overwhelmingly in favour of the defendant retaining the property sought to be vindicated by the owner and that to grant the owner the right to recover it would be grossly unfair and offending any reasonable man's sense of justice. The facts outlined by Mr *Matutu* as giving rise to "compelling considerations of fairness" do not, in my view, constitute the special circumstances that would give rise to the application of the principle.

Lastly, Mr *Matutu* argued that Stanbic Finance had not complied with the terms of clauses 12.2 and 12.2.2 of the lease agreement requiring it, in the event of a breach of the agreement by Gunn Electrical, to either demand payment of all outstanding rentals or failing which and after demand, cancel the agreement and obtain possession of the motor vehicle. He said Stanbic Finance could not recover the motor vehicle before it cancelled the agreement with the lessee or demanded the payment of the outstanding rentals.

The answer to this argument is that the requirements in the conditions of lease refer to the relationship between Stanbic Finance and Gunn Electrical. They are not relevant when the former makes a vindicatory application against a third party who did not acquire possession of the property claimed in terms of the lease agreement.

The applicant is entitled to the order applied for. Before I make the order, I would like to comment on the unsatisfactory state of the legal system under which the medium of leasing/hire-purchasing of motor vehicles is operated.

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The legal system seems to me to lend itself almost ideally to fraudulent abuse. This is because

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it permits of the divorcing of ownership (vested in the lessor or a finance company) from possession (held by the lessee/hire-purchaser). It also permits the lessee to retain the car registration book in his name without any endorsement of the interests of others. It does not require the registration of the agreement in an accessible register.

There is no doubt that the lease agreement or hire purchase agreement is an ingenious invention which has proved itself as a very convenient and economically stimulating method of financing sales of goods, particularly motor vehicles (*per* Lord Wilberforce in *Moorgate Mercantile Co* v *Twitchings* [1976] 2 All ER 641 at p 644). It has, however, occasioned much hardship to innocent purchasers of motor vehicles under lease agreements or hire purchase agreements fraudulently sold by the lessees or hire purchasers without the consent or knowledge of the true owners who are usually finance companies and without disclosing that the motor cars are subject to lease agreements or hire-purchase agreements.

In *Mashave's* case *supra* at p 441B McNally JA observed that:

"The weakness in the system seems to lie in the legislation which permits the registration of a vehicle in the name of a lessee or hire-purchaser without any caveat on the registration book to show that the vehicle is the subject of an agreement of lease or hire-purchase."

It appears to me that the loopholes in the legal system that are frequently exploited by the fraudsters at the expense of the innocent purchases who part with their money on the mistaken belief that they are buying unencumbered motor vehicles, only to be approached shortly after the sale transactions by the true owners claiming ownership of the cars, were created by the legislature when the Hire-Purchase Act and the Vehicle Registration and Licensing Act [*Chapter 13:14*] were enacted.

It is for this reason that the solution to the problem lies in legislative intervention as opposed to judicial practice. Enactment of the amending legislation would not seem to present any particular difficulty. The need for legislative intervention also arises from the fact that, notwithstanding the true representation of a car registration book and the warning on it to the effect that it is not proof of legal ownership, the public continues in general to treat a car registration book as a document of title proving legal ownership of the motor vehicle by the person in whose name it is issued.

The legislature may therefore consider amending the Vehicle Registration and Licensing Act [*Chapter 13:14*] to make it compulsory for car registration books to record the fact that the vehicle is the subject of a lease agreement or a hire-purchase agreement.

The Hire-Purchase Act [*Chapter 14:09*] may be amended to provide that the registration book of a motor vehicle let under a lease agreement or a hire-

purchase agreement should be retained by the owner of the motor vehicle and that the lessee/hire purchaser should be given, say, a licensing card which would enable him to obtain the road licence.

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In my judgment, it would not be proper for this court to embark on a course, the end result of which would be to force all lessors/finance companies to retain car registration books or to register lease agreements or hire-purchase agreements in accessible registers or to record them on the car registration books on pain of possible findings of negligence against them on the principles of equitable estoppel.

Having come to the end of the digression, I now make the order applied for by Stanbic Finance. It is ordered that the respondent should deliver the Nissan Sunny motor vehicle registration No. 649-625W to the manager of Stanbic Finance Main Street/8th Avenue, Bulawayo within twenty-four hours of this order, failing which the Deputy Sheriff or his lawful assistant be and is hereby authorised and directed to remove the said motor vehicle from the respondent or from who ever is in possession of the car and hand it over to the applicant at the address mentioned herein.

The respondent is to pay the costs of this application.

Coghlan & Welsh, applicant's legal practitioners

Takafuma & Partners, respondent's legal practitioners

MHLANGA *v* SHERIFF OF THE HIGH COURT 1999 (1) ZLR 276 (HC)

Citation	1999 (1) ZLR 276 (HC)
Case No	Judgment No. HH-70-99
Court	High Court, Harare
Judge	Gwaunza J
Heard	January 20, 1999
Judgment	May, 5 1999
Annotations	None

Stated case

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 16 - protection against deprivation of property - exception in respect of execution of court judgments - whether requires price realised at sale in execution to be sufficient to satisfy debt

Court - officials - Sheriff - duties - sale in execution - duties in connection with sale

Practice and procedure - execution - sale - purpose of - Sheriff's duties - setting aside of sale for failure to

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obtain fair and reasonable price - what is - no requirement that sale should realise a price that satisfies the judgment debt

Headnote

The applicant's immovable property was sold by private treaty at the instance of a creditor, a purported sale by auction not having realised an adequate price. The price realised, $1 million, was about three times the highest bid made at the auction. There was, however, a mortgage bond over the property, under which the applicant owed some $2 million. The sale price was thus not enough to cover the amount owing on the mortgage, let alone what was owing to the judgment creditor. The Sheriff was aware of what was owing on the mortgage bond.

In a stated case, several questions arose, among them:

(1) was the Sheriff wrong in selling the property for less than a fair and reasonable price, so as to result in loss to the applicant?

(2) was the Sheriff obliged to realise an amount at least equal to the amount owing on the mortgage bond?

(3) where the sale price did not cover secured creditors and the execution creditor received nothing, could the price ever be regarded as fair and reasonable?

(4) Should the Sheriff have ensured that the sale price was such that the judgment creditor received something?

The applicant argued that execution which does not result in the satisfaction of at least some portion of the judgment debt is *ipso facto* flawed. It was also argued that implicit in s 16 of the Constitution, which protects the rights of ownership save in certain circumstances (including execution of the judgment of a court), is the requirement that the deprivation of property be effective in satisfying, at least to some extent, the right or obligation determined by the judgment of the court.

1999 (1) ZLR p277

Held, that the purpose of a sale in execution is, firstly, to satisfy a judgment debt, but there was a multidimensional character to the purpose of execution. There may be more than one judgment creditor. The judgment creditors have to take second place to any existing hypothecs. If there are excess proceeds after the satisfaction of existing hypothecs, they are distributed to judgment creditors on a *pro rata* basis.

Held, further, that under the High Court Rules the Sheriff is only entitled to attach immovable property after being satisfied that there is no or insufficient movable property to satisfy the debt. He does not have to satisfy himself that the property is unencumbered by mortgages.

Held, further, that the task of investigating and ascertaining how good are the chances of settling the debt from the proceeds of the sale lies on the judgment creditor. Writs of execution are sued out at the risk of the judgment creditor. More than one writ may be sued out in respect of the same property, which weakens any link between any particular judgment debt and the

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means chosen to satisfy it.

Held, further, that the requirement for the Sheriff to ascertain the existence of mortgages and other burdens is to enable him to inform the holders of the mortgages of the impending sale. Even if he realised that the proceeds of the sale were not likely to satisfy the existing debts, including the judgment debt, the Sheriff would have no authority to stop the sale.

Held, further, that it was open to the judgment debtor to apply to have the sale set aside if he could show that the price realised was not fair and reasonable. The onus was on him to do so, and to lead evidence to show that the fair market price was higher. The evidence would have to include properly supported valuations which reflect the lower and upper limits of the market value.

Held, further, that the judgment debtor would also have to show that the Sheriff acted unreasonably or negligently. In this case, such a finding could not be made. There was no onus on the Sheriff to show that the price realised was reasonable.

Held, further, that before a sale which had been confirmed by the Sheriff could be set aside, the judgment debtor would have to show that very special grounds existed for setting aside the sale. The court would have to be satisfied that the price was unreasonably low, but the fact that the sale proceeds are insufficient to cover a debt would not be a special ground.

Held, further, that it might have been advantageous for the Sheriff to have exercised the discretion given by r 351, which allows the Sheriff to obtain an independent valuation of the property. Using this procedure would likely lead to a reduction in applications for the settling aside of sales in execution. It would put the judgment debtor and creditor in a better position to judge whether or not it would be in their interests to let the sale proceed. In this case, though, the Sheriff's failure to use this procedure did not make her liable for any losses suffered by the applicant.

Held, further, that there is nothing in s 16(7) of the Constitution which implies that the proceeds of a sale in execution have to satisfy the judgment debtor's obligations. To read into the subsection the manner in which execution is to take place, what must be taken into account before confirming the sale, or how the proceeds are to be distributed, would stretch the provision well beyond what was intended.

Cases Considered

Cases cited:

Gore & Ors v *Deputy Sheriff, Kwekwe & Ors* HH-100-97

Lalla v *Bhura* 1973 (2) RLR 280 (G)

Mapedzamombe v *Commercial Bank & Anor* 1996 (1) ZLR 257 (S)

Morfopoulos v *Zimbank & Anor* 1996 (1) ZLR 626 (H)

Naran v *Midlands Chemical Industries (Pvt) Ltd* S-220-91

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1999 (1) ZLR p278

Smith & Anor v *Acting Sheriff & Anor* 1995 (1) ZLR 158 (S)

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

Young v *Young* (1919) 39 NLR 460

Zvirawa v *Makoni & Anor* 1988 (2) ZLR 15 (S)

Statutes Considered

Legislation considered:

Constitution of Zimbabwe 1980, s 16(7)

High Court Rules 1971 (RGN 1047/1971), rr 323, 326, 327, 348 and 356

Case Information

E W W Morris, for the applicant

J Musimbe, for the respondent

Judgment

GWAUNZA J: This matter was set down for argument on a special plea, the facts having been agreed and set out in a stated case. The applicant's counsel, Mr *Morris*, submits that if the matter is disposed of favourably to the applicant, the issue of *quantum* of damages would still remain to be determined. Further, that by the same token, if the matter is determined adversely to the applicant, there would be other claims to be determined, based on evidence that would be led.

The court was accordingly called upon to make a ruling only on the stated case.

The agreed facts are as follows;

1. Pursuant to a judgment against applicant (then defendant) in Case No. 5021/91, applicant's immovable property known as 60 Gamble Close (the property) was attached in execution at the instance of a creditor, Scotfin Ltd.

2. On 20 May 1994, the property was put on auction and a bid of $370000 was the highest made. This was considered by the respondent to be inadequate and relying on, *inter alia*, the auctioneer's report, the respondent declined to confirm the sale.

3. Thereafter, the respondent sold the property by private treaty in terms of r 358(2) of the High Court Rules for the sum of $1 million.

4. At all materials times, the respondent knew that there existed a mortgage bond over the

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property on which the applicant owed some $2 million.

5. In the result, insufficient was raised from the sale to even cover the amount owing on the mortgage bond as well, and the judgment creditor, Scotfin, received nothing whatsoever.

6. The building society in whose favour the mortgage bond was granted surrendered the title deeds to the property to the respondent and agreed to the registration of title into the name of the purchaser.

The case for determination, then, is stated as:

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1. Was it wrongful of the respondent to sell the property for less than a fair and reasonable price so as to result in loss to the applicant?

2. Was the respondent obliged to realise from the sale an amount equal or in excess of $2 million reflected on the bond over the property?

3. Ought the reasonable person in the position of the respondent to have foreseen that in a sale in execution, a price that did not cover secured creditors and resulted in the execution creditor receiving nothing at all from the sale could never be a fair and reasonable price?

4. Is the respondent obliged to realise an amount which would have ensured that the judgment creditor received something?

5. Was the property sold at a fair and reasonable price?

6. In the result, is respondent liable to applicant for any loss that he may be able to establish?

In his heads ofargument, the applicant contends that to sell property under a writ of execution which fetches a price that does not satisfy "one cent" of that writ is to sell the property for an unreasonably low price. The applicant's counsel, Mr *Morris*, submits that there is no case in point and the problem must be approached from first principles and from a common sense point of view. He submits that as execution is the process whereby satisfaction of a judgment debt may be enforced, it follows that where the execution does not result in the satisfaction of a judgment debt at all then the process is *ipso facto* flawed. He confirms that r 356 of order 40 requires the Sheriff to satisfy himself that the highest price offered at an auction is reasonable, having regard to time, place and the state of the property market. Also that if the Sheriff does not confirm the sale he may sell the property at a private treaty in terms of r 358(2) for a price greater than the highest offer made at the auction. It is Mr *Morris*' submission, however, that these provisions do not exempt the Sheriff from requiring that the basic precept of execution be compiled with, namely, that the judgment debt or some portion thereof be satisfied. He submits further that s 11 of the Constitution offers protection for the privacy of a person's home and other property and from the compulsory acquisition of property without compensation, subject to respect for the rights and freedoms of others and for the public interest. *(53) Consequently, it is Mr *Morris*'s submission, these rights are not served where a person is deprived of his property in execution of a debt which is not satisfied "in the least" and circumstances where another

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debt, secured by the mortgage bond, which had hitherto been payable by instalments, then becomes payable in a lump sum of around one million dollars. He refers to 16 of the Constitution,

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which protects the rights of ownership save in certain exceptions, one of them being, as *per* subs (7)(e), execution of the judgment or order of a court in proceedings for the determination of civil rights or obligations. Mr *Morris* submits that implicit in the requirement of a determination of civil rights or obligations is the requirement that the deprivation of property be effective in satisfying, to some extent at least, the right or obligation so determined. He refers further to s 24(5) of the Constitution, saying that any deprivation of property in the circumstances of this case cannot be reasonably justified in a democratic society, saying there is simply no justification at all, reasonable or otherwise, for depriving a man of his property when the deprivation has not the slightest effect upon his indebtedness to the judgment creditor.

Lastly, Mr *Morris* argues that, as a matter of first principle, one cannot in ordinary circumstances harm another although some harm is justified on the basis that it benefits another person. In this case, he argues, there is no benefit to anyone and hence there is no justification for the doing of the harm. He submits that para 5 of the stated case is not relevant as it does not affect the issue at hand. This is the paragraph relating to the surrender of the title deeds to the property, to the purchaser, by the building society in whose favour the mortgage bond was registered.

The espondent's counsel, Mr *Musimbe*, argues in response that s 16(7)(e) of the Constitution allows a sale in execution without implying that the proceeds thereof have to satisfy the judgment debtor's obligation. He cites a number of authorities to support his submission that even a price substantially less than the market price can be reasonable under the circumstances. He refers to rr 362 to 366 and submits the plan of distribution was properly laid in the respondent's office in terms of r 363 for inspection and properly advertised in the *Gazette* and that no objections were raised by the applicant. Mr *Musimbe* submits that in selling property in execution of a judgment debt the Sheriff is not obliged to sell the property at a price which satisfies the full debt. Arguing that r 356 of the High Court Rules requires the Sheriff to sell the property at the highest price which should be reasonable taking into account the circumstances of time, place and state of the property market, he submits in the present case the respondent considered the following, among other things, before selling the property by private treaty:

(a) the advertisement of the property for sale;

(b) the fact that at the initial sale on 20 May 1994 the property had fetched the highest price of $370000 which was considered unreasonable; and

(c) the report dated 23 May 1994 by the auctioneer, namely Mitchell Real Estate, who had advised that $900000 was the reasonable price for the property.

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Mr *Musimbe* further cites *Smith & Anor* v *Acting Sheriff & Anor* 1(54) as authority for the importance to be attached to the auctioneer's report in relation to the reasonableness of the highest price offered for the sale of a property in execution. He concludes by submitting that there was no obligation on the Sheriff to sell the property at a price which could have satisfied all of the applicant's debts.

In my view, the determination of this matter rests on the following issues:

(a) the meaning and purpose of a sale of property in execution;

(b) the procedures to be followed in a such sale, with special reference to the role of the Sheriff, and the responsibilities and entitlements of the judgment debtor and creditor, and most importantly;

(c) the link between these issues.

THE MEANING AND PURPOSE OF EXECUTION

Claassen's *Dictionary of Legal Words and Phrases* 2(55) defines execution as follows:

"Execution, in its widest sense, means carrying out of or giving effect to a judgment in the manner provided by the law; and in a narrower sense it is the process by which the Sheriff or messenger procures for a judgment creditor the fruits of his judgment."

Implicit in this definition is the purpose of execution, which is more clearly explained in the following introductory remarks in Chapter 37 of *Herbstein and van Winsen's Civil Practice of the Supreme Court of South Africa*: 3(56)

"Having obtained a judgment in his favour, the judgment creditor will want to obtain satisfaction of it from the debtor. The process which enables him to enforce a judgment is known as execution ... the appropriate manner of execution in a particular case depends upon the type of judgment and the nature of the debtor's available assets."

While it is thus clear, as submitted by Mr *Morris*, that the primary purpose of a sale in execution is to satisfy a judgment debt, it should be mentioned from the outset, however, that the prescribed manner of conducting such sale indicates a multidimensional character to the purpose of execution. Reference to a *judgment debt* is not to be taken literally. As r 323 suggests, it is possible for the same property to be attached for more that one debt. Where this happens the first person to obtain a writ of execution against the property of any debtor does not have a monopoly over or right of first satisfaction from, the proceeds from the sale of the property. In the absence of other writs, the judgment creditor would still have to take second place to any hypothecs, if any, existing over the property before its attachment. Thus, while there will

be one sale of the property, there may be more than one debt or judgment creditor to satisfy. First to be considered are any hypothecs existing prior to attachment of the property (r 331)

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which must be satisfied ahead of any writs of execution, including the first to be sued out, lodged with the Sheriff. Thereafter excess proceeds,if any, are distributed to the holders of the writs lodged with the Sheriff, on a *pro rata basis.*

It is evident from the foregoing that the purpose of a sale of property in execution is by no means as simple and straightforward as the explanation given above might suggest. A more realistic explanation is that *regardless of who may have issued out the first writ of execution against the property in question, the purpose of the consequent sale in execution is to satisfy, firstly any existing hypothecs and secondly (and should there be excess proceeds thereof), to satisfy, on a* pro rata *basis, any judgment creditors - including the one who sued out the first writ - who may have lodged their writs with the Sheriff.*

It is against this background and within this context that the procedures for execution and the role therein of the Sheriff as well as the responsibilities and expectations of the various stakeholders like the judgment debtor and creditor, are to be understood.

Applying the expanded purpose of execution to the case before me, it is evident that Scotfin, as the judgment creditor who sued out what appears to have been the only writ of execution against the property in question, could only have ranked second after the mortgage bond of $20000000 registered against the title deeds of the property. The mere attachment of the property at its instance was not *per se* a guarantee that sufficient funds would remain after the mortgage bond was paid to satisfy Scotfin's judgment debt. As discussed below, this is one of the risks a judgment creditor takes when he chooses to enforce a judgment in his favour through the process of execution against the debtor's property. For not only may there be no excess proceeds after the preferred claim is settled, whatever excess may remain may have to be shared among other creditors in a manner that may result in the judgment creditor not receiving the full measure, or for that matter, anything, of what is owed to him. The link between the purpose of execution and the satisfaction of any one judgment debt is thus, by no means always certain or direct.

PROCEDURES, ROLES AND RESPONSIBILITIES OF THE VARIOUS PLAYERS

As discussed below, the process of execution involves many players, each of whose rôle or rôles are significant in determining the particular course and outcome of any given case.

1999 (1) ZLR p283

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Having established what the purpose of execution is, I will now consider the processes involved, the rôle of the Sheriff and her officials as well as the obligations and entitlements of the various stakeholders like the judgment debtor and creditor. Given the issues to be determined in this case, the primary object of this logical analysis is to ascertain the extent, if any, to which the Sheriff, by any action or omission, contributed to (and is therefore liable for) the loss suffered by the applicant. A secondary object is to determine, given the responsibilities of a judgment debtor and creditor in the process of execution, the extent, if any, to which the applicant and/or Scotfin, by any act or omission may have contributed to the loss suffered by both of them.

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WRIT OF EXECUTION AND PRE-SALE PROCEDURES

In as much as the Deputy Sheriff cannot attach property in execution unless there is a judgment that has to be satisfied, he cannot attach the property in question without a writ of execution. In this respect, r 322 of the High Court Rules provides:

"*Process for execution of judgment: Writ of execution*

> The process for the execution of any judgment for the payment of money, for the delivery up of goods or premises, or for ejectment, shall be by writ of execution signed by the registrar and addressed to the Sheriff or his deputy, in accordance with one or other of forms No. 34 to 41."

In terms of attachment of immovable property, it is a requirement under r 326 that the Deputy Sheriff shall not attach in execution

"the immovable property of the judgment debtor unless and until he has by due inquiry and diligent search satisfied himself that there is no or insufficient movable property belonging to the judgment debtor to satisfy the amount due under writ."

This is usually demonstrated by a *nulla bona* return. Having decided to attach the judgment creditor's immovable property, the deputy Sheriff is not required, at that material stage, to carry out any further investigations to ascertain, for instance, the existence, if any, and the nature of, any other interests like mortgage bonds, that may encumber the property and frustrate the realisation of the primary goal of execution, which is the raising of sufficient funds to satisfy the judgment debt. Form 36 of the High Court Rules, which provides the format for the writ of execution against immovable property, provides, *inter alia*:

"Now, therefore, you are required and directed to attach and take into execution the immovable property of the said ... being ... (description of the property) and to cause to be realised therefrom the sum of $... together with costs hereof and of the prior writ amounting to $... and your charges in and about the same, and thereafter to dispose of the proceeds thereof in accordance with Part C of Order 40 ..."

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The Deputy Sheriff's obligations under this writ are clear. He has to attach immovable property (previously identified by the judgment creditor or someone else) and thereafter, by public auction, cause to be raised the required sum and other charges.

It is assumed that the proceeds from the sale of the property would be enough to satisfy the judgment debt and other costs.

To my mind, this is the stage at which the link between the purpose of execution in the case of any given writ and the means of achieving that purpose starts to weaken. It would appear that at the stage of attachment of the property or before, the task of investigating and ascertaining how good the chances are of settling the debt from the proceeds of the sale, lies on the judgment creditor. This is a significant precaution, which in this case it appears the judgment creditor did not take. It is possible that had Scotfin carried out such investigation, they might have decided not to authorise the Deputy Sheriff to attach the particular property in question, which, as it turned out, was heavily encumbered to the tune of some $2000000. By not doing

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so, the judgment creditor took a risk that is stressed in r 323:

"One or more writs of execution may be sued out, *at his own risk*, by any person in whose favour any such judgment has been pronounced if such judgment is not then satisfied, stayed or suspended" (my emphasis).

The link between the purpose of execution at the instance of any one judgment creditor and the means for satisfaction of the judgment debt becomes even weaker. To the extent that Scotfin as the judgment creditor elected to enforce the judgment in their favour through the attachment in execution of the property in question, which was identified by them, I would consider them to have contributed in some measure to the eventual loss to themselves. At this stage of the proceedings, I find nothing negligent in the conduct of the Deputy Sheriff (and by extension the Sheriff), who did no more nor less than is prescribed in the rules of court.

Once the property has been attached, a process well laid out in the rules of court is then followed. This is not to say, however, that the sale by public auction that is the usual consequence of attachment cannot be averted. Rule 327(1) provides for the withdrawal or suspension of a writ of execution at any time by notice to the Sheriff or his deputy "on payment of the fees incurred" by the party who has sued out such writ. This usually follows settlement, by the judgment debtor, of the amount owed. However, suspension or withdrawal of any one writ may not result in the cancellation of the sale, should there be more than one writ on the property. A judgment debtor would have to settle all the amounts outstanding on the other writs before the sale of the property can be cancelled. The provision allowing for more than one writ to be sued out in respect of any one property, in my view, further weakens

the link between any particular judgment debt and the means chosen to satisfy it.

In casu, there is no indication that other writs than that of Scotfin were in existence. Had the judgment debtor been so minded, he could have halted the process of execution by satisfying the judgment debt and relevant costs before the property was sold, in terms of r 327(1). In my view, the fact that the sale of the property can be stopped in this manner by notice, not at the discretion of, the Sheriff, serves to underline the facilitative, as opposed to deciding, role of the Sheriff in determining the course of the execution process.

SALE OF THE PROPERTY

Rule 348 sets out the responsibilities of the Sheriff after the immovable property has been attached and a copy of the process and return filed with the Sheriff's office:

"... subject to rule 348A, the Sheriff shall thereupon enquire of and ascertain the extent and particulars of all bonds, hypothecations, and mortgages and other burdens which relate to the property."

It is only at this, in my view, late stage that the Sheriff is required to conduct such an inquiry. The purpose of such enquiry is to enable the Sheriff to inform the holders of any mortgage bonds or other burdens, of the impending sale of the property over which they have an interest (see r 352) and give them the opportunity to take such steps as they can to protect such interests. There is no suggestion that r 348 serves any other purpose than that. Thus, even

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were the Sheriff to realise, from this enquiry, that strong likelihood exists for the proceeds from the sale of the property not being sufficient to satisfy all the existing debts, including the judgment debt in question, she would, for that reason alone, have no authority to stop the sale. The power to stop the sale would still lie with the judgment debtor.

If this does not happen, the sale proceeds, with the Sheriff being required, in terms of r 353 to prepare conditions of sale. The execution debtor has the chance to influence both the conduct of the sale and its confirmation, as the same rule empowers the execution debtor or any other person having interest in the sale of the property to apply to a judge in chambers for amendment to the conditions of sale.

In a situation where the execution debtor, creditor or any other interested party has not suggested any amendment to the conditions of sale, there is, in my view, no authority for the Sheriff to conduct the sale in any other way except in terms of the unchallenged conditions drawn up by her.

In the present case, it is common cause that when the property was put

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under the auctioneer's block on the second of May 1994, the highest bid stood at $370000. Not being satisfied the price was reasonable, having regard to -

(a) the circumstances of time and place and the state of the property market (r 356); and

(b) the auctioneers report which estimated the fair value to be $900000;

the Sheriff declined to declare the purchaser.

It has not been suggested that the Sheriff acted unreasonably in this instance. Thereafter, the property was sold by private treaty at a price of $1000000,

" ... subject to the conditions of sale for such price, being greater than the highest offer made at the public auction, as he deems fair and reasonable." (r 358(2))

The price of $1000000 was not only greater than $370000 previously offered, being almost treble that amount, it also exceeded the estimate of $900000 given by the auctioneer, Mitchell Real Estate.

That great weight must be attached to the auctioneer's report is stressed in the case of *Smith & Anor* v *Acting Sheriff & Anor* 4(57) where Bartlett J said of such report:

"... It is in effect the report of the expert in regard to the sale. It is the report of the auctioneer estate agency which carried out the sale and which would be expected to provide a proper report especially in view of the fact that the auctioneer was working for a commission on the matter."

Mr *Morris*, for the applicant, submits that rr 356 and 358(2) do not exempt that Sheriff from requiring that the basic precept of execution be complied with, namely, that the judgment debt or some portion thereof be satisfied. While it is true that the primary purpose of execution is to

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satisfy the judgment debt, and that this fact must be borne in mind throughout the whole process of execution, it is equally true that there are other, equally important considerations that must be taken into account. The Sheriff is equally obliged to ensure that the sale is conducted according to (a) conditions set down by her, and into which the execution creditor and any other person with an interest may input, and (b) the other relevant rules of court, for instance, rr 356 and 358(2). Nowhere in the rules is it suggested that the Sheriff must stop the sale of the property in question, or cancel it if the proceeds raised therefrom are not sufficient to satisfy all that has to be paid from them. The only authority the Sheriff has not to declare the purchaser is if she is not satisfied that the highest price offered at a public sale is reasonable in terms of r 356. Where the property is thereafter sold by private treaty, r 358(2) suggests that provided the price is greater than the highest offered at the

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public sale and provided the Sheriff deems it fair and reasonable, she should accept it. Only if she is not able to sell the property at such price will it be offered again for sale by public auction. After the sale has gone through, the power to set it aside rests with the court, on application to it by anyone having an interest in the matter including and, in my view, particularly the judgment debtor and creditor (r 359). Where no such application is made, successfully that is, the Sheriff confirms the sale in terms of r 360.

The Sheriff deemed the price of $1 million to be fair and reasonable and it is this assessment by the Sheriff which is now in issue. It must be noted that the acceptance by the Sheriff of this price did not amount to a finalisation of the sale. The rules provide, even at that stage, that the sale can be set aside at the instance of any interested party, including the judgment debtor, as follows:

"359 *Setting aside sale*

Any person having an interest in the sale may make a court application to have it set aside on the ground that the sale was improperly conducted or the property was sold for an unreasonably low sum or any other good ground. Any such person shall give due notice to the Sheriff of the application stating the grounds of his objections to confirmation of the sale. On hearing of the application, the court may make such order as it deems fit."

In my view, this is the crucial stage at which objections relating to the price at which the property is sold must be made. Failure to register any such objections gives the green light to the Sheriff to confirm the sale. It is an accepted principle of the law 5(58) that the onus of proving the price was unreasonably low lies on the person making such a claim. In *Morfopoulos* v *Zimbank & Anor*, 6(59) Gillespie J explained the requirements for discharging such burden:

"A litigant who wishes to discharge this burden must be fully prepared with properly supported valuations of the property under considerations. These valuations must reflect the upper and lower limits of the suggested market price that the court might make a proper determination whether the price achieved is unreasonable, that is to say, that it is substantially lower than would reasonably be anticipated, given the expected range of prices ... The awe and finality with which the law seeks to invest the process of execution cannot be disturbed by such ill-refined and non-specific averments such as these."

In that case, the applicant applied for the setting aside of the sale of his immovable property, which had realised $220000 when the judgment debt was $482528. He had by personal "*ipse*

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dixit" valued the property at $500000 and went on to aver as a ground for his application:

"Already we have got a buyer of the property for the sum of $350000."

Even though upon this basis, he claimed the price of $200000 was

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unreasonably low, he could, as in the present case, very well have justified his assertion on the basis that the price raised was less than half his indebtedness and would still leave him will a debt of over $200000. The court dismissed the application with costs.

Even though the relief sought *in casu* is not the setting aside of the sale, but damages against the Sheriff for having accepted and confirmed a price considered by the applicant to be unreasonably low, in my view exactly the same principles and requirements apply in determining whether the Sheriff is liable to the applicant for any loss he may be able to establish.

The applicant assesses the value of the property in question to have been somewhere in the region of $3.2 million. No professional basis has been provided by him for this assessment. He has not provided any documents, preferably in the form of an estate agent's evaluation report, showing the "upper and lower limits" of the suggested market price, to support his contention that the fair market value of the property was $3.2 million. Even had he done so, there is authority to the effect that such evaluation on its own might not be decisive in the determination of the fair market value of the property. As Manyarara JA commented in *Zvirawa* v *Makoni & Anor* 7(60) such report could have been "caught" by the *dictum* expressed by Davies J in *Lalla* v *Bhura* 8(61) at 285 A and 287C-D as follows:

"It seems to me that in general one must hesitate before one accepts the theoretical evidence of a valuator against the specific evidence of a price offered in open competition at an auction sale, properly advertised and property conducted."

In *Zvirawa* v *Makoni & Anor*, the applicant had sought to have the sale of his property sold in execution set aside on the basis that the price was unreasonably low. The Supreme Court dismissed the applicant's appeal and commented in respect of the market price of the property at 17D:

"It is settled that the market price of property lies between the highest and lowest prices which the property can reasonably be expected to fetch in the open market. It is also settled that what is meant by unreasonably low price is a price which is substantially less than the market price."

Unlike the respondent, while the applicant asserts $1 million was unreasonably low, he has not provided substantiated evidence indicating a fair market value against which this amount could have been measured. The amount of the judgment debt, taken together with the value of other encumbrances on the property, are not of themselves indicative of the fair market value of the property. Nor, for that matter, is the argument that the building society in question was unlikely to have granted a mortgage whose value was not compatible with the market value of the property. In my view,

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a measure that ignores the fair market value of a property defeats the basic tenet of the law of purchase and sale. The price at which anything is sold, to my mind, cannot be regarded as unreasonably low unless it is also assessed against its fair market value, as ascertained by an expert. It is not inconceivable for the combination of a heavy mortgage and the judgment debt in any particular case to surpass in value the fair market value of the property.

Beyond contending that the price of $1 million was unreasonably low and that the Sheriff should not have accepted it, the applicant has not suggested what other course of action the Sheriff could have adopted to secure a higher bid than that. According to r 358(2), the Sheriff can only again offer the property for sale by public auction if she is unable to sell the property by private treaty at a price she considers reasonable

"having regard to the circumstances of time and place and to the state of the property market" (r 356).

Should she be able to sell the property, she can then only confirm if no objections are raised (r 360), or if the court, on hearing the objection, orders that the sale should be confirmed (r 359). While it is contended for the applicant that the court can and should relax the rules of court where circumstances call for it, no specific suggestion has been made as to how this could have been done in this case in order to accommodate the applicant's specific concern. The earlier sale of the property by public auction had attracted only $370000 as the highest bid. In my view, there would have been little, if any, justification for the Sheriff to reject the price of $1 million and refer the property back for sale by public auction when there was every likelihood that it might not attract more than the offer made by the private buyer.

Even had he managed to justify the basis of his estimation of the value of the property at $3.2 million, the applicant would still have had to satisfy the court that the Sheriff had acted unreasonably or negligently in SSSSSSSaccepting the price of $1 million for the property. His contention that, because the amount realised was not sufficient to satisfy the judgment debt, it was by that token unreasonably low, cannot in my view be said to be indicative of any impropriety in the conduct of the whole sale by the Sheriff.

In this connection, I found the following *dictum* in *Union Government* v *Union Steel Corporation (SA) Ltd* 1928 AD 220 at 236 (cited in *Thirwell* v *Johannesburg Building Society* 1961 (4) SA 665) to be particularly instructive:

"There is no authority that I know of, and none has been cited, for the proposition that a court of law will interfere with the exercise of a discretion on the mere ground of its unreasonableness. It is true the word is often used in the cases on the subject, but nowhere has it been held that unreasonableness is sufficient ground for interference. Emphasis is

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always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is inexplicable except on the assumption of *mala fides* or ulterior motive, see *African Realty Trust* v *Johannesburg Municipality* 1906 TH 179, or that it amounts to proof that the person on whom discretion is conferred

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has not applied his mind to the matter, see *Grown Mines Ltd* v *Commissioner For Inland Revenue* 1922 AD 91."

In relation to the Deputy Sheriff's acceptance of a bid judged by him to be reasonable, the learned judge goes on:

"It is, I think, obvious that the mere fact that the deputy sheriff accepted a bid which did not represent a fair value of the property would not justify any interference with his decision ... the Deputy Sheriff says he was satisfied that the highest bid which he received reflected a fair value of the property and he submits his discretion in this regard was exercised reasonably and properly. He states that the sale was well attended and that there were several interested bidders. It is in the light of the sworn evidence of the deputy sheriff that the court has to consider whether, in dispute of such evidence, the applicant has shown, on a substantial balance of probability, that the Deputy Sheriff did not exercise his discretion properly and could not have been satisfied about the sufficiency of the bid which he accepted."

In that case, the price realised for the property exceeded the total of all bonds and there remained a surplus for distribution to concurrent creditors. One of the conditions of sale in that case read:

"There shall be no sale unless the auctioneer is satisfied that the highest bid reflects a fair value of property."

The applicant claimed that this condition had not been complied with because the auctioneer could not have been satisfied that the highest bid reflected a fair value of the property, or if he was so satisfied, he did not exercise his discretion reasonably or properly. The court dismissed the application.

In casu, the Deputy Sheriff initially received the highest bid of $370000 at the auction, and later an evaluation from an expert of $900000. In the end, the Sheriff sold the property for $1000000. There would, to my mind, be no basis for the suggestion that the Sheriff failed to apply her mind to the matter which she had to decide. Nor can she be said to have acted unreasonably. Rule 358(2) does no more than require the Sheriff to accept that price if it meets the requirements of r 356. On her own prerogative, the Sheriff can only again offer the property for sale by private auction if she is unable to sell the property by private treaty. In this case, the Sheriff was able to sell the property by private treaty and her responsibilities in that respect were discharged, in my view reasonably.

It is pertinent to note that while the onus of proving the price offered and accepted by the Sheriff for any property sold in execution lies on the person making such allegation, conversely, no onus lies on the Sheriff to show the price at which the property was sold was reasonable. This point

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is stressed in *Young* v *Young & Ors* (1919) 39 NLR 460 where the learned judge said:

"I do not think the Deputy Sheriff is obliged to disclose precisely how he calculated what was the fair value of the property. I say this because the onus is upon applicant to prove his case and it is not for the Deputy Sheriff to justify the manner in which he exercised his discretion."

I would not interfere with or question the Sheriff's decision to accept the price of $1 million as fair and reasonable under the circumstances.

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It should be noted in this connection that generally courts are reluctant to interfere with a sale after confirmation, a point emphasised the following *dictum* by Gubbay CJ in *Madzamombe* v *Commercial Bank & Anor*: 9(62)

"Before a sale is confirmed in terms of r 360 it is a conditional sale and any interested party may apply to court for it to be set aside. At that stage, even though the court has a discretion to set aside the sale in certain circumstances, it will not readily do so. See *Lalla* v *Bhura supra* at 283A-B. That being so, a court would be even more reluctant to set aside the sale pursuant to an application in terms of r 359 for it to do so."

Thus, a judgment debtor who alleges, after the sale has been confirmed, that the price at which the property was sold was unreasonably low has an even greater burden to discharge. He must in addition satisfy the court that he had a good reason for not having objected to the sale in terms of r 359.

In *Morfopoulos*'s case cited above, Gillespie J 10(63) aptly, in my view, explains the importance to the judgment debtor of intervening in the process of a sale in execution. He also stresses the consequences to the debtor of not doing so despite the difficult position he finds himself in:

"The opportunity in particular of intervening for any good cause shown permits a court to extent relief where circumstances permit. All too frequently, however, the debtor finds himself in an invidious position relating to the loss of his home precisely because of his failure to address the problem efficiently at an early stage. Where his own tardiness or evasion has contributed to his problem, a debtor cannot hope to persuade a court that equitable relief is his due."

It seems to me that the effect of the above *dicta* is to cast serious doubt on the prospects of success for an applicant in a case in which he seeks, on the same set of facts, relief other than the setting aside of a sale after confirmation, like a claim for damages against the Sheriff.

After confirmation of the sale the judgment debtor, as an interested party, has the chance to influence the distribution of the purchase money (see r 364). If no objection is lodged and the distribution plan is confirmed, the Sheriff shall proceed in terms of r 366 to distribute the purchase money accordingly and pay over the surplus, if any, to the debtor. While the words

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"if any" suggest there may actually be no such surplus, it is accepted that in some cases there in fact is a deficit, entitling the judgment creditor, if he is so minded, to cause other property of the judgment debtor to be attached in an attempt to raise the balance. In addition to highlighting the risks the judgment creditor takes, this serves to underline the fact that there are no guarantees insofar as the settling of a debtor's obligations through execution is concerned. In that respect, a debtor who allows his property to be attached for purposes of sale in execution takes the certain risk that:

(a) the property will very likely fetch a price below its true worth;

(b) depending on other encumbrances on the property, such price might not be sufficient to satisfy both the judgment debt in question, and any others; and

(c) consequently more attempts, if not definite steps, may be taken thereafter to attach even

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more of his property until all his debts are settled.

In this case, if blame is to be apportioned for the outcome of the sale of the property by the Sheriff, a considerable amount, in my view, should be placed on the judgment debtor and the judgment creditor themselves. Had they availed themselves of the opportunities allowed them by the rules to intervene and influence both the conduct and the outcome of the sale in terms of proceeds therefrom, then both might have been spared loss and this action would not have been necessary. The Sheriff would, in my view and as explained below, be the least to blame, if at all.

The judgment debtor's dilemma is addressed, albeit with a sense of some sympathy for him, by Bartlett J in *Smith & Anor* v *Acting Sheriff & Anor supra* and by the Supreme Court:

"There is no reason why the courts should not take into account the fact that forced sales generally realise lower prices than ordinary < sales and that judgment debtors' interest rank low in the scale of priorities in these sales. Perhaps too low ..." 11(64)

"It would be commercially unacceptable for courts to have the power to set aside deals simply on the basis that in the absence of mistake or fraud or other legitimate ground, one party has made a bad bargain." 12(65)

By the same token, it would not be commercially acceptable for the court to hold the Sheriff liable to an applicant for damages following a properly conducted sale, devoid of mistake or fraud, simply because the applicant would have made a "bad bargain". To do so, would be to open a floodgate of claims for damages against the Sheriff by any judgment debtor who considers the price realised in the sale in execution of his immovable property to be low.

I feel compelled, however, to cite one case in which the court set aside a

sale in execution on the ground that the price realised was unreasonably low. The price in question was $80000. In that case, *Gore & Ors* v *Deputy Sheriff, Kwekwe & Ors* HH-100-97, the applicant gave as one of the factors to support his contention that the price was unreasonably low, that:

"even if the sale were to be allowed to stand, his indebtedness stood at over $400000 inclusive of interests and costs. The sale if confirmed would leave him still indebted to the fourth respondent to the tune of $320000."

In that case, Sibanda J relied more on the purchase price of the property, some three years earlier, in 1992, which was $16000, and the improvements effected thereto to the value of $100000 than the market value assessed by a single evaluator (of $450000) to reach the conclusion that the price of $80000 was unreasonably low under the circumstances.

The learned judge had this on to say:

"The issues for determination under r 359 are firstly whether the property was sold for an unreasonably low sum, and secondly, are there 'any other grounds' that would entitle the applicant to set aside the sale. In ... *Lalla* v *Bhura supra,* Davies J (as he then was) held that on hearing of the application the court may make such an order as it deems just. It seems to me these words clearly indicate that in considering what is meant by the rule and particularly what is

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meant by the phrase 'any other ground' the court can and should properly have regard to equitable considerations."

He continued at p 14:

"In this matter, it is not in dispute that applicant owed the fourth respondent the sum of $331156.12, that after the sale in execution of the property at the auction for $80000 applicant remains still indebted to fourth respondent in the sum of $251151.12 plus interest at the rate of 12% and related costs. The sale if left to stand will benefit neither the applicant or (*sic*) the fourth respondent."

Relying on the words of Ebrahim JA in *Naran*'s case *supra*, that "very special grounds" would have to exist for a court to decide that the sale should be set aside, the learned judge decided that "very special grounds" existed in that case to justify the setting aside of the sale and listed among those grounds the following:

(a) that the sale left the judgment debtor still indebted to the judgment creditor in the "large sum" of $251156.12;

(b) the sale did not realise for the judgment creditor the full amount owed by the judgment debtor; and

(c) that the reasonable market value (whether it was to be accepted as $450000 as per the evaluator's report, or to be based on the purchase price of the property plus the value of improvements) far exceeded the "forced" purchase price of $80000.

He accordingly set aside the sale. By extension, in my view, these same considerations can be applied to the case at hand to determine whether any liability attaches to the respondent, that is the Sheriff, towards the applicant.

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What *Gore*'s case indicates is that before the relief sought by a challenger can be granted the court must be satisfied that:

(a) the applicant has proved to it on the basis of substantiated evidence, that the price realised at the sale in execution was unreasonably low;

and

(b) "very special grounds" exist for granting the relied sought.

In my view, the two requirements must be considered together and not in the alternative.

The learned judge in the *Gore*'s case accepted as a "very special ground" the fact that the price realised at the sale in execution had not raised sufficient to satisfy the judgment debt, thereby leaving the judgment creditor still in debt.

If this ground is taken in isolation, I would respectfully disagree with this view, on the basis that there is nothing unusual or "very special" about the proceeds from a sale not being sufficient to cover the judgment debt. It is against just such an eventuality that the rules alert the judgment creditor as to the risk he takes in choosing to enforce a judgment in his favour through

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execution. That a creditor in respect of whom this risk becomes a reality can still have more of the judgment creditor's property attached in order to satisfy the same debt is further evidence of the reality of this eventually. Thus, in my view, this ground, standing on its own, would not constitute "a very special ground". Likewise and in the same vein, the ground that the amount realised at a sale in execution does not satisfy any existing preferred claim (like a mortgage bond) cannot, on its own constitute "a very special ground" justifying an interference, in one way or another, with the sale. For, as already stated, a price might be fair and reasonable and yet still fail to satisfy the judgment debt. In the present case, the applicant failed to discharge the onus of proving the price of $1000000 was unreasonably low, given the circumstances set out in r 356. He may have had a better chance of discharging the onus had the Sheriff accepted the price of $370000 which was the highest bid at the auction sale. Even had the applicant objected to the setting aside of this sale, his prospects of success, especially given the absence of an evaluator's report indicating the lowest and highest points in the range of a fair market value of the property, would not, in my view, have been bright. It follows that the relief that the applicant now seeks, that of damages against the Sheriff, after confirmation of the sale and transfer of the property into the name of the purchaser, is doomed, and doubly so, to failure. Not only has he not given good reasons for not objecting to the confirmation of the sale, he has failed to discharge the onus that the price fetched at the sale by private treaty was unreasonably low under the circumstances. And finally, while it might be considered a "very special ground" that the price realised

raised not "one cent" to meet the judgment debt, thereby benefiting neither side, this cannot on its own, stand as justification for holding the Sheriff liable for the loss suffered by the applicant.

It is clear from the above analysis of the roles, entitlements and obligations of the various stakeholders in a sale in execution that the Sheriff's role is hardly more than that of facilitator. This is particularly so, given the fact that the action leading to the execution is, after all, one between private individuals, with one seeking to recover from the other what is legitimately owed to him. This role is, in summary, underscored by the following factors:

(a) the choice as to which immovable property to attach lies with the judgment creditor;

(b) the writ of attachment does no more than require the Sheriff to attach the property in question and then sell it in order to raise the judgment debt and other costs. It does not impose an obligation on the Sheriff to first enquire whether she will be able, after selling the property, to raise the relevant amount;

(c) the Sheriff's responsibility to enquire into any other encumbrances is only to enable her to inform other creditors of the judgment debtor, who obviously have an interest in the property, as to what is about to happen. This would accordingly give them the opportunity to take whatever steps may be necessary to protect their interests. The object is not for the Sheriff to then use the information to stop the sale and pre-determine the price at which the property should be sold;

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(d) the Sheriff, at the sale, only has to use her discretion to determine whether or not the highest price offered is reasonable. If it is not, she can decline to confirm a buyer and put the price up for sale by private treaty, applying the same test as the one to be used for an ordinary sale by auction to determine whether or not the price is reasonable;

(e) even should the Sheriff deem a price offered to be reasonable, she can only confirm the sale after any interested party, including the judgment debtor, has been given a chance to raise any objections they may have, including the one that the price accepted by the Sheriff is unreasonably low;

(f) after confirmation of the sale, the distribution of the proceeds is carried out by the Sheriff on the basis of a distribution plan, confirmed only after no objections are received from any interested party, including the judgment debtor.

In my view, one criticism that could be levelled at the Sheriff in the conduct of the sale in question is the failure, before accepting the price of $1 million, to exercise the discretion provided for in r 351 which reads as follows:

"The Sheriff may, if he deems it expedient, appoint some fit person, not interested in the

immovable property, to value the same and to report on oath to him for his guidance such estimated value, and any party interested may, at his own expense, in like manner furnish the Sheriff with an independent valuation of the property."

In *Morfopoulos* v *Zimbank & Anor*, 13(66) Gillespie J commented thus on this clause:

"Starting with r 351, there is a sadly underutilised provision entitling the Sheriff to obtain a valuation of the property to be sold. It seems to me that were this rule to be followed in advance of a sale it might provide the Sheriff and the auctioneer with valuable assistance in the determination of an appropriate price and conduct of sale."

In addition to providing the Sheriff and auctioneer with valuable assistance in the determination of an appropriate price, the utilisation of the rule would likely lead to a reduction in applications for the setting aside of sales in execution on the basis that the price raised was too low. Both the judgment debtor and the judgment creditor would be better placed to judge whether or not it would be in their interests to let the sale take place. Another, yet more important, consequence of utilising the rule, and having a direct bearing on the case at hand, would be greater indemnity afforded to the Sheriff against claims for damages, as in the present case. Given the facts of this case, however, and the conduct of the Sheriff generally in the sale, particularly that an effort was indeed made to obtain a professional assessment of the market value of the property, I do not consider her failure to utilise the provisions of r 351 of itself to be so fundamental as to render her liable for any loss suffered by the applicant.

CONSTITUTIONAL ARGUMENTS

Mr *Morris* in his heads of argument submits as follows in paras 9 and 10:

"9. Section 16 of the Constitution protects the rights of ownership save in certain exceptions subs 7(e) states

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one of these exceptions as being: 'in execution of the judgment or order of court in proceedings for the determination of civil rights or obligations'.

10. It is submitted that implicit in the requirement of a determination of civil rights or obligations is the requirement that the deprivation of property be effective in satisfying, to some extent at least, the right or obligation so determined."

Mr *Morris* further makes reference to s 24(5) of the Constitution to support the contention that any deprivation of property in the circumstances of this case cannot be reasonably justified in a democratic society. I would concur with Mr *Musimbe*'s submission that there is "nowhere in the section that implies that the proceeds of the sale have to satisfy the judgment debtor's obligations". 14(67)

GWAUNZA J

In my view, subs (7)(e) of s 16 of the Constitution must not be read in isolation but is to be understood within the context of the intention behind the whole section.

Subsection (1) of s 16 reads:

"(1) No property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that:

(a) ...

(b) ...

(c) ...

(d) [etc, up to (f)]."

Subsection (7) reads:

"Nothing contained in or done under the authority of any law shall be said to be in contravention of subsection (1) to the extent that the law in question makes provisions for the acquisition of any property or any interest or right therein in any of the following cases:

(a) ...

(b) ...

(c) ...

(d) ...

(e) in execution of the judgment or order of a court in proceedings for the determination of civil rights or obligations;

(f) etc, up to (o) ...

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

The intention behind the whole of s 16, in my view, is not only to emphasise the protection guaranteed every individual against deprivation of his property, but also to specify the

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circumstances under which, that protection notwithstanding, such deprivation is permissible. I find subs (7)(e) to be clear in its wording. It simply allows that a person be deprived of his property in circumstances where a judgment in a civil matter has been obtained against him and if he has failed or neglected to comply with the judgment, for the judgment creditor to enforce the judgment through the process of execution. To read into this wording the specific manner in which the execution is to take place, what must be taken into account before confirming the sale, or how the proceeds are to be distributed would be, in my view, to stretch the provision to well beyond the intention behind it. These details are deliberately left to relevant legislative provisions and regulations in order not to unnecessarily encumber the Constitution or dilute its character of being the supreme law of the country and the source of other laws. In my view, para (e) of subs (7) can only be invoked where the deprivation of the property in question happened in circumstances other than those specified therein. The issue of how much is realised and to what extent it goes to satisfy the debt in question is a matter which should rightly remain beyond the scope of the provision. I should think also that a democratic society should endeavour, to

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the extent it is possible to do so, to put in place mechanisms that would allow a creditor to legitimately recover what he is owed by a debtor who, despite the existence of a judgment requiring him to pay, nevertheless fails or otherwise neglects to do so. That due to the judgment debtor's conduct (for instance, creating a situation where his debts, including the judgment debt, exceed the value of the property attached), the sale in execution fails to satisfy the debt in question or any part thereof, in no way undermines the "democratic" spirit behind the mechanisms in question. This is particularly so, given the fact that the execution was at the instance of the creditor and that both creditor and debtor are allowed the opportunity to interfere with the process as well as its outcome. In this connection, I found the following *dictum* in *Morfopoulos* v *Zimbabwe Banking Co-operation & Anor* 15(68) by Gillespie J to be particularly apposite:

"The rules (of court) that have evolved concerning the sale of properties in execution are designed to find a balance on the one hand between the need to protect a judgement debtor who is unfairly being hounded into insolvency and homelessness and on the other the imperative to ensure that the judgment creditor, forced to go to court to obtain satisfaction of his debts, is provided with his just relief."

I accordingly find no merit in the argument advanced by the applicant's counsel that s 16(7)(e) of the Constitution is, by implication, infringed where the proceeds from a sale in execution, properly conducted in terms of the law, fail to satisfy any part of the judgment debt.

In light of the foregoing, I would summarise my determination of each of the issues listed for determination as follows:

(a) *was it wrongful of the respondent to sell the property for less than a fair and reasonable price so as to result in loss to the plaintiff?*

On the authority of the cases cited on the question of what is a fair and reasonable price, I am satisfied that the price of $1000000 raised at the sale of the property by private treaty,

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and in the circumstances outlined, was fair and reasonable. Accordingly, no loss suffered by the defendant should be attributed to the respondent's action.

I am also satisfied on the evidence before me that the applicant has failed to discharge the onus upon him to prove that the price of $1 million was unreasonably low under the circumstances, nor that the Sheriff, in accepting that price, acted unreasonably.

(b) *was respondent obliged to realise from the sale an amount equal or in excess of $2 million reflected on the bond over the property?*

I am satisfied not. The $2 million was not the sole deciding factor as to the price at which to sell the property. In any case, the applicant could have applied to have the sale set aside in terms of r 359.

GWAUNZA J

(c) *ought the reasonable person in the position of defendant have foreseen that in a sale in execution, a price that did not cover secured creditors and resulted in the execution creditor receiving nothing at all from the sale could never be a fair and reasonable price?*

The respondent very likely realised the highest price she could realise on the house was not enough to cover both secured creditors and the judgment debt but was not obliged on that ground alone, to regard the price as not being fair or reasonable. I am satisfied that the price of $1 million that the property attracted in the sale by private treaty, being almost three times greater than the highest bid at the earlier sale by public auction, was fair and reasonable under the circumstances.

(d) *Is the respondent obliged to realise an amount which would have ensured that the judgment creditor received something?*

No. Rule 323 makes it clear that the judgment creditor, by suing out a writ of execution against the property of the judgment debtor takes the risk of the judgment debt not being satisfied. The fact that he has the option to take out further writs against any other property of the judgment debtor serves to underline this risk. In addition, the judgment creditor, as an interested party, could have applied to have the sale set aside, or provided a valuation report to give an indication of the fair market value of the property.

(e) *was the property sold at a fair and reasonable price?*

I am satisfied it was. In the absence of a valuator's report or reports, which could have been supplied by either of the parties or any other interested party in terms of r 351 to provide further indication of the fair market price of the property, the only indicator was the highest price offered at the auction sale, ie $370000. Compared to that price, $1000000 cannot be said to have been unreasonably low.

(F) *In the result, is the respondent liable to applicant for any loss that he may be able to establish?*

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I am satisfied that the respondent, who did everything that she is required to do in terms of the rules except commission an independent evaluation of the property, is not liable to the applicant for any loss related to the price at which the property was sold. It was in the applicant's power to have the sale set aside in terms of the rules. In the absence of a court order setting aside the sale, there was no reason for the respondent not to confirm the sale of the property at the price of $1000000.

Stumbles & Rowe, applicant's legal practitioners

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

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KANTOR & IMMERMAN *v* CHOMBO 1999 (1) ZLR 300 (HC)

Citation	1999 (1) ZLR 300 (HC)
Case No	Judgment No. HH-72-99
Court	High Court, Harare
Judge	Gillespie J
Heard	May 5, 1999
Judgment	May 5, 1999
Annotations	None

Civil application

Flynote

Practice and procedure - summons - from legal practitioners' firm for professional services rendered - client's right to demand that bill of costs be taxed - legal practitioner may nevertheless sue for fees without first having fees taxed - when default judgment may be granted in respect of claim for fees - averments to be included in summons claiming professional fees

Headnote

A legal practitioner is entitled to a fair and reasonable remuneration for professional services rendered. If a client is dissatisfied with the fees claimed by his legal practitioner, he is entitled to query these fees and to cause them to be subjected to the system of independent assessment known as taxation. This process of independent assessment is carried out by the Registrar of the High Court. The Registrar determines whether a fair and reasonable level of fees has been charged. Even if the lawyer and his client have entered an agreement as to fees, the dissatisfied client may nevertheless insist on taxation.

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If the client disputes the legal practitioner's fees, the legal practitioner may not claim summary judgment on the strength of the untaxed demand for costs. There is, however, no law that requires that a legal practitioner's bill of costs to his client must be taxed before the practitioner may issue a summons claiming payment of those costs. This does not necessarily mean that default judgment will inevitably be granted on such claim. The court has a discretion to order taxation of legal practitioner's professional fees in order to prevent the legal practitioner from taking unfair advantage of his client by charging an excessive fee for his services. Generally the court will order taxation where the client requests it and the legal practitioner does not or will not comply with the request.

Even if the client has not requested taxation, the court may of its own accord exercise this discretion. The client's right to have the costs taxed must not be overlooked. Often lay clients do not know of this right. The court can extend this protection by refusing judgment or by ordering taxation or giving some other appropriate direction when faced with an uncontested claim for judgment on a legal practitioner's untaxed fees. For example, a claim in a substantial amount by a law firm against an individual which simply recites that the claim is for fees for professional services rendered contains nothing to satisfy the court that the fees are reasonable and proper or agreed, nor to show that the lack of opposition is due to acceptance of the indebtedness rather than an ignorance of rights. Ideally, every claim for fees for professional services by a legal practitioner should aver:

- the existence and performance of a mandate;
- that the fees were agreed upon, or, if there was no such agreement, fees in sum claimed

> are fair and reasonable or usual and normal for the work done; that these fees have been taxed or if they have not that demand has been made; and that the client, having been informed of this right to have the fees taxed, has failed or declined to pay the amount claimed or to request taxation.

Where the court declines to award judgment by default in these circumstances, it will not normally order the bill of costs to be taxed in the absence of a request by the defendant that the bill of costs be taxed. It will not make such an order because taxation involves exposure to added costs that the defendant may not wish to incur. The court will, however, normally give directions to ensure that any defect in the claim is properly rectified or that an opportunity to demand taxation is given to the defendant.

Cases Considered

Cases cited:

Benson & Anor v *Walter & Anor* 1984 (1) SA 73 (A)

Charke v *Henning & Henning* 1923 EDL 315

Deeb v *Pinter; Shave & Stoler* v *Munro Scott* 1984 (2) SA 507 (W)

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de Wet v *Meyer* (1834) 1 Menz 59

Layton v *Oehley* 1909 EDC 101

Mheresi v *McNaught Wickwar* 1997 (2) ZLR 386 (S)

Mxumalo & Ors v *Guni* 1987 (2) ZLR 1 (S)

Roberts & Letts v *Williamson* 1911 SR 105

van Copenhagen v *Wiid* 1913 CPD 83

Walker v *Syfret, Godlonton & Low* (1906) 16 CTR 814

Judgment

GILLESPIE J: The plaintiff is a law firm which sues its client for payment of the sum of $41435 allegedly

"due and owing by the defendant to the plaintiff for work done in the period done (*sic*) 1997 to 4 June 1998."

The endorsed summons is, as can be seen from the quotation above, markedly scant in its averments. It does not particularise that the fees are for professional services; it does not aver them to be either agreed, or taxed, or fair and reasonable.

The registrar, in placing before me the application for judgment by default, thoughtfully made the following query:

"If the claim is for professional services rendered, ought the applicant (*sic*) not have a bill of costs taxed by the Taxing Master first?"

I therefore invited the plaintiff's submissions in response to the query.

In response, the plaintiff acknowledged that the fees claimed are in respect of professional services rendered. The point of substance in my query was not answered directly. It was submitted, however, that it would be difficult to tax a bill since

"a mechanism is yet to be developed identifying a forum for the taxation of bills in respect of labour matters before Labour Officers."

In addition, it was asserted that the defendant did not dispute the amount and would consent to it.

GILLESPIE J

For reasons that will emerge below, the first of these propositions is without any substance at all. The second, however, if proven, would settle the matter. I therefore gave the plaintiff an opportunity to file a consent to judgment. It has since reverted to me with the indication that it is unable to do more than disclose a previous undertaking from the defendant to pay the debt in instalments. I have therefore been asked to determine the point of substance which is whether an attorney suing his client for payment of fees for professional services rendered is obliged, or

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might properly be required by the court, to submit a bill of costs for taxation, in the absence of request to that effect from the defendant client. Arising from that is the question whether default judgment may be entered against the client where the bill of costs remains untaxed.

An attorney is entitled to fair and reasonable 1(69) remuneration for services rendered. Where these fees are in respect of professional services, that is work done in his capacity as a legal practitioner and not as an ordinary agent, then those fees and the manner of their charging is susceptible of the discipline governing the attorney's practice. In particular, the fees, in the absence of agreement to the contrary, are to be charged according to a tariff prescribed by the Law Society. 2(70) He is permitted to enter into an agreement with the client to charge a lump sum or agreed fee. 3(71)

This control over attorneys in the matter of their fees is imposed as a matter of public policy. 4(72) The policy arises from the attorney's status as an officer of the court playing an important role in, and bearing no little responsibility towards, the administration of justice. A balance is sought to be drawn between permitting the attorney fair reward for his expertise and preventing him from taking unfair advantage of his client and charging an excessive fee. This latter evil, overreaching his client, is unprofessional conduct in an attorney. 5(73)

It is, accordingly, the case that any client, dissatisfied with the fees claimed by his legal practitioner, is entitled to query these fees and cause them to be subjected to the system of independent assessment known as taxation. 6(74) A lawyer's fees charged to his own client are taxed by the Registrar of the High Court, or his assistant, who -

"may tax all bills of costs for services (other than conveyancing) actually rendered by a legal practitioner or by a notary public in his capacity as such." 7 (75)

GILLESPIE J

The taxing officer

"shall be guided as far as possible by any tariff prescribed by the Law Society ..." 8(76)

in determining the fair and reasonable level of fees. It is the lawyer's duty to satisfy the taxing officer as to the fee. 9(77) Even if the lawyer and his client have entered an agreement as to fees, the dissatisfied client may nevertheless insist upon taxation.10(78) Only fees relating to work not done in the legal practitioner's professional capacity are immune from taxation.11(79)

The client has a right to demand taxation. It has been held in our Supreme Court that

"The public should be aware, or should be made aware, that any client dissatisfied with his lawyer's charges may insist that the lawyer tax his bill." 12(80)

This right is such that if the client disputes the attorney's fees, the attorney may not, on the strength of the untaxed demand for costs, claim summary judgment. 13(81) Conversely, where a bill of costs has been taxed, it becomes a liquid document upon which provisional sentence may be obtained, provided due notice of taxation has been given to the opposite party. 14(82)

Granting this right in favour of the client leads irresistibly to the question of whether an attorney

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may sue out summons against his client for his fees without first having those fees taxed. This question was raised, but not resolved, by McNally JA in *Mheresi*'s case *supra*. 15(83) In the Cape Colony, from which we derive our law, even before the promulgation of rules of court authorising the taxation of an attorney and client bill of costs, it had been held that if an attorney refused to proceed to taxation and instituted action the court could order a bill for professional services in litigious matters to be taxed. 16(84) The introduction of a rule providing for such taxation even in non-litigious matters reinforced this practice and led to a number of decisions in which exception, taken by the client to the attorney's declaration claiming fees, was allowed on the grounds that the bill had not been taxed. 17(85) This culminated in a decision that an amount claimed in an untaxed bill of costs is not certain and ascertainable and cannot be set off against a debt due by the attorney to the client. 18(86)

In this jurisdiction, there is also early authority dealing with the question

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whether an attorney's declaration claiming payment on an untaxed bill of costs is bad in law.

In the old Southern Rhodesian case of *Roberts & Letts* v *Williamson,* a client raised a special plea to the plaintiff attorneys' declaration claiming fees. The attorneys excepted to the special plea. Watermeyer J acknowledged a right to insist upon taxation but nevertheless allowed the exception and quashed the special plea saying

"I agree that a man is entitled to demand that his costs should be taxed. But I hold that the demand should be made when the bill of costs is tendered to him. If not it is fair for the attorney to consider that taxation has been received. The plea now for the first time claims a taxation. This cannot disprove of the plaintiff's claim - the bill of costs is not necessarily bad because untaxed. The client can demand that the bill be taxed." 19(87)

There is accordingly a conflict between cited Cape cases permitting an exception to an untaxed bill of costs and a Rhodesian case not even allowing a special plea. It seems to me that the resolution to this conflict is indicated by the decision in *Benson & Anor* v *Walter & Anor.* 20(88) In this case, attorneys sued for fees from their client. The client took a point of prescription, claiming that prescription ran from termination of the mandate. The attorneys contended that prescription commenced to run only upon taxation of the bill of costs. After a thorough review of the cases, it was held that there was no rule of law that an attorney could not sue or obtain judgment on an untaxed bill; that accordingly a declaration for such relief is not bad in law and vulnerable to exception but is susceptible to a dilatory plea, raised by special plea claiming taxation prior to any further proceedings; but that the court has a discretion to order taxation. 21(89) (In the circumstances, prescription was held to run from the date of termination of the mandate.)

I respectfully share the views expressed above. It follows that the old Rhodesian decision should have permitted a special plea raising a dilatory defence of a stay of proceedings pending taxation. 22(90)

My conclusion, therefore, is that there is no law that a bill of costs as between an attorney and his client requires taxation before the attorney can issue summons claiming payment of those

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costs. This does not necessarily mean, however, that default judgment will inevitably be granted on such a claim.

It has appeared from the cases cited above that the court has assumed a discretion to order taxation of such a bill. This discretion has its origin in the

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court's inherent jurisdiction to control and supervise the conduct of its officers. 23(91) The protection of members of the public from overreaching by their attorneys is a matter of concern to the court, as is the preservation of openness in charging and the accessibility of the client to recourse in the case of complaint. Hence, the discretion I mentioned will generally, perhaps almost invariably, be exercised in favour of ordering taxation where the client requests it and the attorney does not or will not comply. I go further, however, and state that even if the client has not so requested, but allows process from his attorney to go uncontested, the court may of its own accord exercise that discretion.

In saying so, I am aware of the decision in *Deeb* v *Pinter; Shave & Stoler* v *Munro Scott t/a House of Bernardt*. 24(92) These were two uncontested applications for default judgment in respect of attorneys' fees which came before Kirk-Cohen J in the Witwatersrand Local Division of the Supreme Court of South Africa. The learned judge gave consideration to the question whether taxation of the fees was a legal prerequisite. He concluded it was not, holding -

"In my judgment, an attorney is entitled to sue for his fees and disbursement including those incurred in Supreme Court litigation. He may do so where he alleges that the fees have been agreed upon, or that they are fair and reasonable or they are usual or normal fees due for the work in question." 25(93)

The learned judge therefore granted default judgment on a summons bearing the uncontested averment that the fees were the normal or fair and reasonable charges for the work. On a second summons, he similarly gave judgment as prayed, despite the absence of any such averment, on the basis that it was an implied averment that the amount claimed was fair and reasonable. The learned judge did not consider the question whether he had, or should exercise, a discretion to refuse judgment or to order taxation. 26(94)

I am bound to express respectful disagreement with the result arrived at by Kirk-Cohen J. Although I agree with his conclusion, that taxation is not a legal requirement in such a claim, and that the essential averments of the claim were as the learned judge stated, I would have reached a different decision to his on at least the second of the two matters. To my mind, the relationship between attorney and client is not analogous, as the learned judge saw it, to the bond between tradesman and customer. On this analogy,

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the learned judge held it to be an implied term of the contract that fair and reasonable charges be levied, and an implied averment that the charges claimed were fair and reasonable.

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It seems to me that in the absence of express agreement between an attorney and client as to fees, the tacit term, implied by law, is that the fees will be the attorney's normal fees to the extent that they are fair and reasonable, subject to the client's right to demand taxation. 27 (95)

This last qualification is important. It is a necessary part of enjoying a right that one should know of the existence of that right. Just as the court has an interest in protecting the client's right to demand taxation, it has an interest in ensuring that the lay client knows of this right. 28(96) It is probable, however, that the majority of clients whom the average lawyer deals with do not know of this right. Unfortunately, it is precisely that sort of client, the one least able to afford the lawyer's fees and who most needs protection, who would be most likely to allow an attorney's claim for fees to go uncontested.

I have no doubt that the only way in which this protection can be extended, when needed, is by the appropriate exercise of a discretion to refuse judgment or to order taxation or to give some other appropriate direction when faced with an uncontested claim for judgment on an attorney's untaxed fees. For example, a claim in a substantial amount by a firm against an individual, which simply recites that the claim is for fees for professional services rendered, contains nothing to satisfy a court that the fees are reasonable and proper or agreed, nor to show that the lack of opposition is due to acceptance of the indebtedness rather than ignorance of rights.

Ideally, every claim for fees for professional services by an attorney should contain the averments:

(a) of the existence and performance of a mandate;

(b) that fees in the sum claimed are agreed; or, in the absence of agreement;

(c) that the fees in the sum claimed are fair and reasonable, or usual and normal, for the work done;

(d) have been taxed; or in the absence of taxation; and

(e) demand has been made and the client, having been informed of his right to have the fees taxed, failed or has declined either to pay the amount claimed or to request taxation.

I hold that in the absence of averment (a) no cause of action will be disclosed. Without either (b) or (c) the summons will want an essential averment. If averment (c) is made, then without (d) the claim will be

susceptible to special plea in abatement and, unless (e) is averred, judgment in default will generally be refused as a matter of discretion.

Where the court declines to award judgment by default in these circumstances it will not normally order the bill to be taxed in the absence of request by the defendant. Taxation involves an exposure to added costs that the defendant may choose not to incur. It will normally, however, give directions calculated to ensure that any defect in the claim is properly rectified or

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that an opportunity to demand taxation is given to the defendant.

I, therefore, make the following order:

1. Judgment in default be and is hereby refused.

2. The Registrar shall cause a copy of this judgment and order to be served upon the defendant.

3. The defendant may if so advised, within 10 days of service upon him of this judgment, make written request of the plaintiff copied to the Registrar to submit a bill of costs for taxation, failing which request the plaintiff may, without further notice to the defendant, set the matter down for judgment in default.

Since this judgment concerns matters of practice not expressed in the Rules of Court, I have shown it to the Judge President who authorises me to say he agrees with it. I would like to add that nothing in this judgment ought to be construed as criticism of the professional behaviour of the plaintiff or of its attorneys of record. There is no basis in this case for any supposition that they have knowingly acted improperly.

Dube, Manikai & Hwacha, plaintiff's legal practitioners

ZFC LTD *v* TAYLOR 1999 (1) ZLR 308 (HC)

Citation	1999 (1) ZLR 308 (HC)
Case No	Judgment No. HH-71-99
Court	High Court, Harare
Judge	Gillespie J
Heard	May 5, 1999
Judgment	May 5, 1999
Annotations	None

Application for default judgment

Practice and procedure - default judgment - application for - including documents of evidence in application - impropriety of attaching such documents - reduction of outstanding amounts - duty to advise court of reduction - manner of so advising court

Practice and procedure - process and pleadings - amendment of - how may be made after issue of summons

Practice and procedure - summons -stale - proper course

Headnote

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It is improper to attach documents of evidence to chamber applications for default judgment. If the appropriate averments have been made in the summons and are unanswered, no evidence is required. The extra costs of adducing such unnecessary evidence is properly visited on the party or attorney responsible.

There is a practice prevalent, born out indolence and ignorance of the rules, whereby parties attempt to amend process or pleadings by the unilateral issue of a "notice of amendment". There are only two ways of making amendments to process or pleadings after summons has been issued: one is by consent of the parties; the other is by order of court. Where the amendment is by consent, the documents should be amended, either by written alterations (where the amendments are of single names, words or figures) or by interleaved pages or substituted documents. Failing consent, an application must be made for amendment. The application must be served on the opposing party, supported by an affidavit showing good cause, and accompanied by a draft order. Only if the order is granted can the process or pleading be considered to have been amended.

Cases Considered

Cases cited:

Malala v *Min of Law & Order & Anor* 1993 (1) SA 673 (W)

Muvheya v *Matangeri & Ors* 1997 (2) ZLR 462 (H)

Statutes Considered

Legislation considered:

High Court Rules 1971 (RGN 1047/1971), rr 132, 133, 134 and 226

Judgment

GILLESPIE J: In January 1995, the plaintiff issued summons against the defendant. It claimed a sum of money as payment for goods sold and delivered together with interest on the sum claimed, to accrue at the rate of

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45% *per annum*. Costs were claimed on the higher scale. Application for default judgment was made in August 1996. This was said to be accompanied by a

"letter of agreement between the parties indicating that the defendant would be liable to pay interest at a higher scale."

In fact, the letter is no more than a letter of comfort promising payment of unspecified indebtedness once financing would have been provided by a bank.

The matter was placed before me, with an application for default judgment, on 19 August 1996.

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I caused a minute to be issued, from which the following is an extract:

"Judgment is refused. The photocopy document filed apart from the summons and not served on defendant is not acceptable proof of an agreement as regards interest at the rate, or costs on the scale, claimed ..."

Nothing more was heard of the matter until 8 April 1999 when the file returned to my table.

In substance, the plaintiff now seeks judgment solely for interest at the prescribed rate and costs. Its position is stated in this letter to the registrar, covering an amended draft order:

"Herewith our client's amended draft order. The defendant paid on 31 March 1995 the full capital sum and it is for this reason that the draft order has been amended accordingly.

We now look forward to receiving our client's court order."

That anticipation will prove inane.

The summons is stale. As I said in *Muvheya* v *Matangeri & Ors*, 1(97)

"Where a plaintiff issues summons and the defendant totally ignores it, the plaintiff is nevertheless obliged to proceed with his action within a reasonable time."

In this case, one is concerned about a delay, not between the service of summons and an application for judgment, but between refusal of default judgment and some species of fresh application for similar relief. The principle stated applies nonetheless. A litigant is expected to prosecute his action with reasonable expedition through all stages to its final resolution. 2 (98)

In this case, faced with the refusal of judgment, the plaintiff need not have commenced proceedings afresh since the claim was not dismissed. The order was a refusal of default judgment. It was open to the plaintiff to make fresh application for default judgment on papers that removed the cause for criticism. Since the criticism pertained to the absence of essential averments as to a part of the relief sought, and to the unacceptable attempt to remedy that by the informal addition of evidential matter as to an averment not made, it would have been necessary to cause the amendment of the summons.

It should be noted that the habit of attempting to attach documents of

evidence to chamber application for default judgment is by no means uncommon. This practice is improper. If the appropriate averments have been made in the summons and are unanswered, then no evidence is required - save in the case of claims for damages which themselves ought only to be made on court applications. The extra costs of adducing such unnecessary evidence is properly visited on the party or attorney responsible. If the required averment has not been made then, this defect cannot be cured by the submission of evidential matter, since that would breach the defendant's right to notice of the case alleged against him. Hence the need, in such a situation, for an amendment of the summons.

Although the point does not arise in this case, a few remarks concerning the amendment of a claim would not be out of place. There is a practice prevalent, born of indolence and ignorance

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of the rules, whereby parties purport to effect an amendment of process and pleadings by the unilateral issue of a so-called "notice of amendment". One frequently finds in applications for default judgments that such notices have been issued after the default or bar, as the case may be, and are not even served upon the defendant. This is entirely unprocedural.

There are only two possible methods of procuring an amendment to process or pleadings after the issue of summons. One is by consent of the parties and the other is by order of court. 3(99) Whenever it is desired to amend such a document, the first step, therefore, is to approach the other party for consent to the amendment. That given, then the documents delivered and filed may be amended, either by written alterations, by interleaved pages or by replacement with copies of the document as amende 4(100) whichever is more appropriate. Generally, speaking, written alterations will only be appropriate for alterations or deletions of a single name, word or figure. In all other cases, the choice between interleaved amendments or replacements of an entire pleading must depend upon the nature and extent of the amendment, with preference being extended, particularly in the age of word processor, to replacement of the document as amended. Manuscript alterations by consent should be initialled by both parties; written amendments should be filed under copy of a signed notice of consent.

Failing consent then it is necessary to make application for amendment, 5(101) either to court or a judge in chambers, depending upon the criteria set out in r 226. 6 (102)The application must be served upon the opposing party; be supported

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by affidavit showing good cause; and must be accompanied by a draft order. Only once an order has been given can process or a pleading be considered to be amended, and only after its amendment is the amended document susceptible of response by way of pleading or requests for particularity. A "notice of amendment" such as I have earlier described is not provided for in the rules and is an irregular proceeding.

In this case, therefore, the plaintiff should either have invoked the appropriate procedure for amendment within a reasonable time after the refusal of judgment, and on notice to the defendant, or should have abandoned any part of its claim which could not have been cured, making fresh application, without notice being necessary, for such lesser relief than that claimed in the summons for which a claim could properly be pressed. It did neither. On that ground alone, therefore, the summons is stale and the proceedings have, through the plaintiff's fault, been attended by unacceptable delay.

In addition, however, I must comment upon the fact that, as the plaintiff now reveals, the principal debt was paid within three months of the issue of summons and well before the application for default judgment had been made. The failure to disclose this circumstance in the application for default judgment is inexcusable. Supposing it to have been an oversight, it was a very serious oversight and could have led to grave injustice. But for my concern on other points, I might well have granted judgment. Even given my dissatisfaction with the claims for interest and costs, I might well have given judgment with interest at the prescribed rate and costs on the lower scale. This may well have led, at best, to an urgent application for stay of

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execution and wasted costs, and at worst to an unjust execution and considerable damages.

The original application should have been accompanied by a statement from the attorney for the plaintiff. This should properly have disclosed the fact of payment and the calculation of interest in consequence of the payment and expressing a reduced claim for interest and costs alone. The fact that this has now been done four years later does not cure the defect.

There is, further, an important consequence of the payment by the defendant of the principal debt. It is that prescription commenced to run on the ancillary claim for interest thereon. In terms of law, a judge is not entitled to take a point of prescription *mero motu*. In the circumstances, that would prevent me from giving judgment for the defendant on the existing claim for interest. It does not, however, force me to blind myself to the obvious possibility of prescription having run when exercising my discretion as to how otherwise to dispose of this unduly delayed summons.

It seems to me that since prescription may, barring any undisclosed circumstance of interruption, indeed have run on this part of the claim, and since the summons is now so stale, and since the defendant had no notice of

GILLESPIE J

the resurrection of this minor piece of history, I ought dismiss the claim. This will leave the plaintiff with the opportunity of commencing action afresh and affording the defendant the chance to contest it if so desired. I prefer this course to an order of re-service of the summons for a number of reasons.

First, the relief prayed is no longer that set out in the summons. Second, the plaintiff has already had and squandered its opportunity to press the existing summons. Third, the delay is such that finality on this summons is called for. Fourth, an appropriate and final order of costs is desirable and is given more expediently if the proceedings are disposed of completely.

The order of costs involves making an example of the attorneys involved. The various defects that offend: the inadequacy of the summons; the defects in the application for judgment; the failure of disclosure of material facts; the excessive delays; the hitherto unremarked discourtesy of not even mentioning the delay - far from attempting to justify it - all call for an exemplary order.

I therefore order the dismissal of the claim. The costs thereof are to be bone by Messrs Gill, Godlonton and Gerrans who shall charge no fees and recover no disbursements in respect thereof from, but not including, the service of summons, and also not including any commission in respect of the collection of the capital sum paid on 31 March 1995, and any such fees or disbursements already recovered shall be reimbursed to the plaintiff.

Gill, Godlonton & Gerrans, applicant's legal practitioners

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KODZWA *v* SECRETARY FOR HEALTH & ANOR 1999 (1) ZLR 313 (SC)

Citation	1999 (1) ZLR 313 (SC)
Case No	Judgment No. S-50-99
Court	Supreme Court, Harare
Judge	McNally JA, Ebrahim JA, Sandura JA
Heard	January 20, 1999
Judgment	May 6, 1999
Annotations	None

Civil appeal

Flynote

Flynote

Practice and procedure - condonation - late application for review - grounds on which condonation may be granted - relevance of prospects of success - form of application - oral application not in compliance with Rules

Headnote

Proceedings for review must, in terms of the High Court Rules, be brought within 8 weeks of the end of the proceedings to which the review relates. If the application is not filed in time, condonation must be sought. The grounds on which condonation may be granted are well-established: the court has a discretion to grant condonation when the principles of justice and fair play demand it, and when the reasons for non-compliance with the rules have been explained by the applicant to the satisfaction of the court. The same principles apply to an application to note an appeal timeously. The fact that there is a reasonable prospect of success is important but not necessarily decisive. In the case of a flagrant breach of the rules, particularly when there is no acceptable explanation for it, the indulgence of condonation may be refused, whatever the merits of the case may be.

An application for condonation for late noting of an appeal must be made in the proper form, which is by notice of motion, together with an affidavit explaining why the appeal was not noted in time. An oral application for condonation does not comply with the Rules.

Cases Considered

Cases cited:

Bosman (P E) Tpt Works Cttee & Ors v *Piet Bosman Tpt (Pty) Ltd* 1980 (4) SA 794 (A)

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

Rennie v *Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A)

Saloojee & Anor v *Min of Community Development* 1965 (2) SA 135 (A)

Statutes Considered

Legislation considered:

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

Supreme Court Rules 1964 (RGN 380/1964), r 31(1)

Case Information

E Matinenga, for the appellant

Mrs *J Zindi*, for the respondents

Judgment

SANDURA JA: This is an appeal against the judgment of the High Court which dismissed with costs the appellant's application for an order setting aside his dismissal from the public service.

SANDURA JA

The background facts are as follows. The appellant was employed by the first respondent as a senior stores assistant in the Government Medical Stores department ("Medical Stores"). On 25 March 1994, Mrs Muchemwa ("Muchemwa"), the Deputy Controller of Medical Stores, and Mrs Mebe ("Mebe"), the Chief Pharmacist, visited the Medical Stores. They found the appellant reading a newspaper during working hours.

Muchemwa told the appellant that he should not be reading a newspaper but should be compiling drug returns as she had previously instructed him to do. In reply, he said that he was waiting for certain documents to be brought to him from another section of the Medical Stores. Muchemwa then instructed him to go to that section and collect the documents. The appellant repeatedly refused to carry out that instruction and was rude to Mebe. This conduct was later reported to Mr Kaseke ("Kaseke"), the Controller of Medical Stores.

Subsequently, Mrs Musikavanhu ("Musikavanhu"), the Pharmacy Technician, saw the appellant on 13 January 1995 and asked him why he had not taken certain documents to the dispatch section of the Medical Stores. In reply, the appellant told her that she was not his supervisor. He added that she should not call Kaseke and Muchemwa because they, too, were not his immediate supervisors. He pointed a finger at her and told her to leave his office. This conduct was again reported to the Controller of Medical Stores.

As a result of what happened on 25 March 1994 and on 13 January 1995, the appellant was charged with two counts of misconduct in terms of the Public Service (Disciplinary) Regulations

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published in SI 65 of 1992 ("the Regulations"). The acts of misconduct alleged in each count were (a) failure to obey lawful instructions, and (b) insubordinate or discourteous behaviour.

On 7 March 1995, the first respondent found the appellant guilty on both counts and dismissed him from the public service with effect from that day. The appellant appealed to the Public Service Commission but that appeal was dismissed on 9 August 1995.

Thereafter, on 17 April 1996, the appellant filed an application in the High Court seeking an order setting aside his dismissal. The application was brought in terms of r 259 of the High Court Rules 1971. It was dismissed with costs mainly because the learned judge in the court *a quo* declined to condone the very long delay of over eight months in bringing the application. The judge also found that there were no prospects of success on the merits.

Rule 259 of the High Court Rules 1971 reads as follows:

"Any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceeding in which the irregularity or illegality complained of is alleged to have occurred:

Provided that the court may for good cause shown extend the time."

A party intending to institute review proceedings, therefore, has eight weeks

within which to file the application. If he does not do so within that period but wants to file the application after the period of eight weeks has expired, he must first of all make an application for the condonation of the late filing of the application. It is in fact an application for the extension of the time within which to institute the review proceedings.

The factors which the court should consider in determining an application for condonation are clearly set out in *Herbstein & van Winsen's The Civil Practice of the Supreme Court of South Africa* 4 ed by van Winsen, Cilliers and Loots at pp 897-898 as follows:

"Condonation of the non-observance of the rules is by no means a mere formality. It is for the applicant to satisfy the court that there is sufficient cause to excuse him from compliance ...

The court's power to grant relief should not be exercised arbitrarily and upon the mere asking, but with proper judicial discretion and upon sufficient and satisfactory grounds being shown by the applicant. In the determination whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides in which the court will endeavour to reach a conclusion that will be in the best interests of justice. The factors usually weighed by the court in considering applications for condonation ... include the degree of non-compliance, the explanation for it, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice."

It is, therefore, well established that the court has a discretion to grant condonation when the principles of justice and fair play demand it, and when the reasons for non-compliance with the rules have been explained by the applicant/appellant to the satisfaction of the court. The principles applicable are the same, whether one is dealing with an application for condonation of

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the failure to file an application for review timeously or to note an appeal timeously.

Whilst the presence of reasonable prospects of success on appeal is an important consideration which is relevant to the granting of condonation, it is not necessarily decisive. Thus in the case of a flagrant breach of the rules, particularly where there is no acceptable explanation for it, the indulgence of condonation may be refused, whatever the merits of the appeal may be. This was made clear by Muller JA in *P E Bosman Transport Works Committee & Ors* v *Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A) at 799D-E, where the learned Judge of Appeal said:

"In a case such as the present, where there has been a flagrant breach of the Rules of this court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should, in my opinion, not be granted whatever the prospects of success may be."

SANDURA JA

The same point was made by Hoexter JA in *Rennie* v *Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131G-J where the learned Judge of Appeal said:

"In applications of this sort, the prospects of success are in general an important, although not decisive, consideration. It has been pointed out (*Finbro Furnishers (Pty) Ltd* v *Registrar of Deeds, Bloemfontein & Ors* 1985 (4) SA 773 (A) at 789C) that the court is bound to make an assessment of the petitioner's prospects of success as one of the factors relevant to the exercise of the court's discretion unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. It seems to me that in the instant case the cumulative effect of the factors which I have summarised ... above is by itself sufficient to render the application unworthy of consideration; and that this is a case in which the court should refuse the application irrespective of the prospects of success."

More recently, in our own jurisdiction, my brother McNally said the following in *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S) 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 subveniunt* - roughly translated, the law will help the vigilant but not the sluggard."

With those principles in mind, I now wish to consider the appellant's application for condonation of his failure to note the appeal timeously.

On 19 January 1999, the day before the appeal was heard, Mr *Matinenga*, who appeared for the appellant, filed supplementary heads of argument, para 1 of which reads as follows:

"It is conceded that appellant is not properly before the court as he has not sought condonation to note an appeal out of time. Appellant, through counsel, will orally make application for condonation to appeal out of time."

The oral application was subsequently made by the appellant's counsel on 20 January 1999 and we reserved our decision on it.

I would like first of all to comment on the form of the application and the long delay which

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occurred before it was made.

The appellant's application was dismissed by the High Court on 20 November 1996. Thereafter, the appellant did nothing about the matter until about six months later, when he filed a notice of appeal on 13 May 1997 without applying for leave to appeal out of time. It appears from the notice of appeal that he was represented by a firm of legal practitioners at the time.

Nevertheless, the notice of appeal was hopelessly out of time and no application for condonation was made until 20 January 1999 when the appeal

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was heard. That was about twenty months after the noting of the appeal without leave. No reasonable explanation was given as to why the application was not made much earlier.

In addition, when the application for condonation was eventually made, it was not in proper form. It was made by counsel orally on the day of the hearing of the appeal, and no explanation was given as to why a proper application in written form had not been filed with the court, as required by r 31(1) of the Rules of the Supreme Court 1964 ("the Rules"). That rule reads as follows:

"An application ... for an extension of time in which to appeal shall be by notice of motion signed by the applicant or his legal representative and shall be accompanied by a copy of the judgment against which it is sought to appeal."

Furthermore, r 31(3), in relevant part, reads as follows:

"An application for extension of time in which to appeal shall have attached to it a notice of appeal ... and an affidavit setting out the reasons why the appeal was not entered in time or leave to appeal was not applied for in time."

Quite clearly, the appellant did not comply with the above provisions of the Rules and gave no satisfactory explanation for his failure to do so. In the result, the appellant gave no satisfactory explanation for his failure to note the appeal timeously.

In my view, whether the blame is that of the appellant or that of his legal practitioner is irrelevant in this case. As Steyn CJ said in *Saloojee & Anor* v *Minister of Community Development* 1965 (2) SA 135 (A) at 141C-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 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 ..."

As far as the merits of the appeal are concerned, the learned judge in the court *a quo* dismissed the appellant's application on two main grounds. The first ground was that the appellant had failed to give a satisfactory explanation for his failure to institute the review proceedings

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timeously; and the second ground was that, in any event, he had no prospects of success on the merits because he was clearly guilty of the acts of misconduct complained of. I am in complete agreement with the conclusions reached by the learned judge.

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As already stated, the appellant's appeal to the Public Service Commission was dismissed on 9 August 1995. Thereafter, he did nothing about the matter for more than eight months, and then on 17 April 1996 instituted the review proceedings in the High Court. In his application for condonation of the delay in instituting the proceedings, he alleged that he delayed for more than eight months because he could not raise the fees required by his lawyers. That reason was rejected by the learned judge in the court *a quo* because it was unsatisfactory and had not been substantiated. I entirely agree with that conclusion.

As far as the acts of misconduct were concerned, the learned judge in the court *a quo* found that the allegations in both counts had clearly been proved. In the course of delivering his judgment, he said:

"The papers filed by the respondents show that the applicant admitted that he was only prepared to take instructions from his immediate boss, Mr Msopero, and not from Mrs Musikavanhu.

In respect of the earlier incident, the finding was made that the applicant had refused to collect Kardex cards, saying that it was the duty of the clerks to bring the cards to him and not the other way round."

In my view, those observations are clearly correct. In fact, when the appellant appeared before the Board of Inquiry, he admitted most of the allegations against him. He stated that he had refused to go and collect the cards because he believed that that was not his duty. He also admitted that he told Musikavanhu, the Pharmacy Technician, that she was not his boss. He produced an organisational chart to support his contention.

The learned judge was, therefore, clearly correct in concluding that the acts of misconduct had been proved against the appellant.

I now wish to deal with the additional ground of appeal introduced by counsel for the appellant in his supplementary heads of argument. It reads as follows:

"The learned judge erred in not finding *mero motu* that the first respondent did not have jurisdiction in terms of law to decide on the allegation of misconduct against the appellant."

The procedure for determining the allegations of misconduct is set out in ss 4 to 7 of the Regulations which read as follows:

"4. (1) If a member is suspected of misconduct, the head of office, head of department, head of Ministry or the Commission, as the case may be, shall conduct or cause to be conducted such investigations as may be necessary and the member concerned shall answer all questions put to him and disclose all information required from him.

(2) ...

(3) If on completion of the investigation referred to in subsection (1), it is found that a charge of misconduct

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should be preferred against the member, the head of office, head of department, head of Ministry or the Commission, as the case may be, shall -

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(a) inform the member, in writing, of the nature of the allegations against him;

(b) ...

and call upon him to submit a written reply to the allegation within fourteen days.

(4) The head of office, head of department or the head of Ministry, as the case may be, shall:

(a) within fourteen days of receiving the member's reply; or

(b) ...

submit -

(c) in the case of the head of office, to his head of department;

(d) in the case of the head of department, to his head of Ministry;

(e) in the case of the head of Ministry, to the Commission;

a report in Form P.S.D. 1, together with the charge, the member's reply and all relevant papers.

5. Upon receiving the report of a head of office in terms of paragraph (c) of subsection (4) of section 4, a head of department shall -

(a) if appropriate, proceed in terms of section 7; or

(b) within seven days of receiving the report, forward the report, together with any comments he may wish to make on it, to the head of Ministry.

6. Upon receiving the report of a head of department in terms of paragraph (d) of subsection (4) of section 4 or in terms of section 5, the head of Ministry shall -

(a) if appropriate, proceed in terms of section 7; or

(b) within seven days of receiving the report forward the report, together with any comments he may wish to make on it, and all the relevant papers to the Commission.

Upon receipt of the report and all relevant papers forwarded in terms of section 4, 5 or 6, the head of department, head of Ministry or the Commission, as the case may be:

(a) may direct that further investigations be carried out and that, at the conclusion of such further investigations, proceed in terms of paragraph (b), (c) or (d) as may be appropriate ...

(b) may, in the case of the head of department after obtaining the approval of the head of Ministry, direct that an inquiry be held;

(c) may, in the case of the head of Ministry, direct that an inquiry be held;

(d) may proceed to determine whether or not the member is guilty of misconduct."

The Regulations define "member" as a person who is employed in the public service as an

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officer or employee. The term "head of office" means the senior member of the office concerned or such other member as may be designated by the Commission. Similarly, the rules provide that the term "head of department" means -

" (a) where a ministry is divided into provinces, the provincial officer; or

(b) the principal establishment officer; or

(c) the establishment officer in an autonomous department;"

It was common cause at the hearing of the appellant's application in the court *a quo* that Kaseke, the Controller of Government Medical Stores, was the head of the department, and that the appellant was an employee and not an officer.

SANDURA JA

I now wish to determine the validity or otherwise of the new ground of appeal introduced by counsel for the appellant, ie that the first respondent did not have the jurisdiction, in terms of the Regulations, to determine the allegations of misconduct levelled against the appellant. However, a close examination of the provisions of ss 4 to 7 of the Regulations indicates that the first respondent did have the necessary jurisdiction. In fact, both the head of the department and the head of the Ministry followed the procedure for the determination of misconduct allegations as laid down by ss 4 to 7 of the Regulations.

In the first place, the Controller, acting in terms of s 4(1) of the Regulations, investigated the allegations of misconduct levelled against the appellant. He set up a board of inquiry ("the board") which he chaired. Both the appellant and the complainants appeared before the board, gave their evidence and were questioned. That was on 26 May 1994.

Upon completion of the investigations, the Controller was satisfied that the acts of misconduct had been proved. Accordingly, on 9 December 1994 and acting in terms of s 4(3)(a) of the Regulations, he preferred charges of misconduct against the appellant and called upon him to submit a written reply to the charges within 14 days. The written reply was later submitted.

Thereafter, and acting in terms of s 4(4)(d) of the Regulations, the Controller sent to the first respondent a report setting out the charges preferred against the appellant, together with the appellant's reply and all relevant papers.

The first respondent, as head of the Ministry and acting in terms of s 7(d) of the Regulations, then determined, on the basis of the papers submitted to him by the Controller, that the appellant was guilty as charged.

In the circumstances, I am satisfied that s 7(d) of the Regulations gave the first respondent the power to determine whether or not the appellant was guilty of misconduct. There is, therefore, no validity in the new ground of appeal advanced by counsel for the appellant.

However, even if I had found that the new ground of appeal is valid, I think that this is a case in which the application for condonation of the late noting of the appeal should be refused

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whatever the prospects of success on the merits may be. There were flagrant breaches of the Rules of this court in more than one respect, and no acceptable explanations were given by the appellant.

In the first place, the appellant took more than eight months to institute the review proceedings in the High Court, and gave no acceptable explanation for such a long delay.

Secondly, about six months after the judgment of the High Court had been handed down, he purported to note an appeal against that judgment. I use the word "purported" because the notice of appeal was hopelessly out of time.

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In addition, no attempt was made at that time to apply for an extension of the time within which to appeal, and no explanation was given by the appellant for his failure to do so. Indeed, no acceptable explanation was given by the appellant for waiting for six months before "noting the appeal".

Finally, about 20 months after the appellant had purported to note the appeal, his counsel made a verbal application for condonation of the late noting of the appeal. The application was made on the day set for the hearing of the appeal. No acceptable explanation was given by the appellant for his failure to file a written application as required by the Rules.

In my view, the appellant has treated the Rules of this court with disdain and does not deserve the court's indulgence.

In the circumstances, the application for condonation of the late noting of the appeal is refused, and the appeal is dismissed with costs.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

Mushonga & Associates, appellant's legal practitioners

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

BENMA ENTERPRISES (PVT) LTD & ORS *v* SCOTFIN LTD 1999 (1) ZLR 322 (SC)

Citation	1999 (1) ZLR 322 (SC)
Case No	Judgment No. S-49-99
Court	Supreme Court, Harare

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Judge	Gubbay CJ, McNally JA, Sandura JA
Heard	February 16, 1999
Judgment	May, 6 1999
Annotations	None

Civil Appeal

Flynote

Practice and procedure - execution - sale - application to set aside sale on ground that the price realised was unreasonably low - onus on person seeking to set aside sale on this basis

Headnote

The onus is on the party seeking to set aside a sale by public auction on the ground that the property in question was sold for an unreasonably low price. The task of discharging this onus is a formidable one. The general rule is that the price received at a properly advertised and properly conducted public auction is a reliable indicator of the market value of the property in question, bearing in mind that in a forced sale the price tends to be lower than a sale by private treaty.

In the present case, an application for the setting aside of the sale by public auction on the ground that the sale price was unreasonably low was dismissed. The sale had been properly conducted. The applicants had relied solely on an allegation that, prior to the sale by auction, a company had offered to purchase the property for a much higher price than that which had been realised at the public auction. This allegation was disbelieved by the court and the court found that the onus resting on the applicants had not been discharged because the applicants had failed to lead any evidence establishing that the property had been sold at an unreasonably low price.

Cases Considered

Cases cited:

Lalla v *Bhura* 1973 (2) RLR 280 (G)

Morfoupoulos v *Zimbank & Ors* 1996 (1) ZLR 626 (H)

Thirlwell v *Johannesburg Building Society & Ors* 1962 (4) SA 581 (N)

Zvirawa v *Makoni & Anor* 1988 (2) ZLR 15 (S)

Case Information

W Ncube, for the appellant

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A P de Bourbon SC, for the respondent

Judgment

SANDURA JA: This is an appeal against the judgment of the High Court in terms of which the three appellants were ordered to pay to the respondent, jointly and severally, the one paying the others to be absolved, the sum of $99493.24 with interest thereon at the rate of 25% *per annum* from 28 September 1995 to the date of payment, and costs of suit.

The background facts are as follows. On 24 June 1991, the first appellant

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("Benma") purchased an 8-ton Bedford truck ("the truck") from Zimbabwe Motor Distributors (Pvt) Ltd ("the seller"). In order to finance the purchase, it entered into a hire purchase agreement with the seller. The cash price of the truck was $247000 and the hire purchase charges were $159788.60, making the total purchase price of $406788.60.

After the sale, the seller ceded the hire purchase agreement to the respondent ("Scotfin").

Thereafter, on 10 May 1993, Benma concluded a loan agreement with Scotfin in terms of which it borrowed the sum of $88129.60 from Scotfin.

In respect of both the hire purchase agreement and the loan agreement, the second appellant ("Benjamin") and the third appellant ("Idah") bound themselves as sureties and co-principal debtors with Benma for the payment of all the amounts owed by Benma under the two agreements.

Subsequently, Benma defaulted in the payment of the instalments due in terms of both agreements. Scotfin therefore repossessed the truck and sold it by public auction on 27 October 1994 for $55000. After the various charges associated with the auction sale were deducted, the net sum credited to Benma's account with Scotfin was $49039.21.

That sum was much less than the amount which Benma still owed Scotfin under the hire purchase agreement. Scotfin therefore issued a summons against the three appellants claiming the amounts due under the hire purchase agreement and the loan agreement. The appellants opposed the claims.

In respect of the claim brought in terms of the hire purchase agreement, the appellants alleged that the truck had been sold for an unreasonably low price. They claimed that if the sale had been properly advertised the truck could have fetched more than $200000.

As far as the claim under the loan agreement was concerned, the appellants conceded at the pre-trial conference that the amount claimed by Scotfin was indeed due and payable. Accordingly, judgment was granted by consent in favour of Scotfin in respect of that claim, but the claim under the hire purchase agreement was referred to trial. It was agreed that the main issue for determination by the trial court was whether the truck had been sold for an

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unreasonably low price.

When the matter subsequently came up for trial, Scotfin called its assistant loss control manager as the sole witness. His evidence was not contentious. It established that the truck was repossessed in September 1994 and was sold by public auction in October 1994 for $55000. It also established that after the net amount had been credited to Benma's account with Scotfin there remained a balance of $99493.24 still owing. That was the amount claimed by Scotfin from the appellants.

The appellants called Benjamin as their sole witness. His evidence was as

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follows. At the relevant time he was Benma's managing director. The truck was repossessed in 1994 when it was in a good condition and was sold about a year later. Its condition must have deteriorated during the period it was kept by Scotfin before it was sold. However, before it was sold he found a buyer who made a firm offer to purchase the truck for $280000.

To support that allegation, he produced a letter from a company called CN Consultants (Pvt) Ltd ("CN Consultants"). The letter is dated 22 August 1994 and was written in order to convey to Benma the offer by CN Consultants to buy the truck for $280000 and thereafter take over Benma's liability under the hire purchase agreement.

It was Benjamin's evidence that after he received the letter he sent a copy to Scotfin requesting Scotfin to release the truck so that he could sell it for $280000, but Scotfin refused to do so.

The authenticity of the letter was put in issue and it was put to Benjamin that the letter was not genuine. Although he disagreed and maintained that it was genuine, I am not impressed.

In the first place, on 15 October 1994, he wrote a letter to Scotfin requesting Scotfin to release the truck so that he could enter into contracts for the transportation of chrome ore to a company called ZIMASCO and another called Zim Alloys. In that letter, he did not mention the earlier offer allegedly made by CN Consultants to purchase the truck for $280000, nor did he refer to his alleged earlier request that the truck be released for sale to CN Consultants. If the letter contained a genuine offer to purchase the truck for $280000, Benjamin's behaviour was strange, bearing in mind the fact that he knew that the truck had been repossessed and that it could be sold by public auction at any time.

Secondly, in their summary of evidence which was prepared before the trial, the appellants stated that before the truck was sold Benma had found a buyer who was prepared to purchase it for $180000. There is no mention of the sum of $280000.

Thirdly, Scotfin did not receive a copy of the letter from CN Consultants allegedly sent to it by Benma. In addition, a copy of the covering letter which would have been sent to Scotfin together with a copy of the letter from CN Consultants was not produced.

Fourthly, the writer of the letter from CN Consultants was not called to give evidence. During cross-examination, it was made clear to Benjamin that the authenticity of the letter was put in

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issue. In fact, it was put to him that the letter was a fabrication. In the circumstances, if the letter was genuine, the writer would have been called.

Finally, if the offer by CN Consultants was genuine and it was communicated to Scotfin, it would have been in Scotfin's best interests to sell

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the truck to CN Consultants for $280000. There would have been no reason for Scotfin, to reject such an offer as alleged by Benjamin.

Although initially there was some confusion on the date when the truck was repossessed, it was eventually accepted by the parties that it had been repossessed in September 1994 and sold on 27 October 1994. The issue of the deterioration of the truck whilst it was in Scotfin's possession thus fell away.

Having said that, I now wish to deal with the issue of the burden of proof in a case such as this.

Where a party seeks an order setting aside a sale by public auction on the ground that the property in question was sold for an unreasonably low price, that party bears the onus to establish that. In my view, such a task is a formidable one. As Henning J said in *Thirlwell* v *Johannesburg Building Society & Ors* 1962 (4) SA 581 (N) at 586F-H:

"In the light of the circumstances which I have outlined, it is clear, I think, that the applicant faces a fairly formidable task to show that the price realised at the auction was not a fair market value of the property. His case as to value is mainly based upon two recent valuations of the property. Before I deal with those valuations I would refer to the case of *Estate Hemraj Mooljee* v *Seedat* 1945 NPD 22 at p 24, where Selke J, after saying that a price realised in open competition is properly to be regarded as indicating the market price of the property, proceeded to say at p 25, when dealing with evidence of a sworn valuation:

> 'But however that may be, the opinion of Mr Mallinson, though possibly entitled to some weight, is, after all, merely the opinion of a valuator and must, it seems to me, be of considerably less value than definite information about the price actually offered for the property in bona fide competition at auction, after due and proper advertisement.'

... The acid test is what the property concerned will fetch in the market."

This passage was quoted with approval by Davis J, as he then was, in *Lalla* v *Bhura* 1973 (2) RLR 280 (G) at 284E-H. The learned judge commented as follows at 285A:

"It seems to me that in general one must hesitate before one accepts the theoretical evidence of a valuator against the specific evidence of a price offered in open competition at an auction sale, properly advertised and properly conducted."

See also *Zvirawa* v *Makoni & Anor* 1988 (2) ZLR 15 (S); and *Morfopoulos* v *Zimbabwe Banking Corp Ltd & Ors* 1996 (1) ZLR 626 (H).

In the present case, it is clear that the sale by public auction was properly conducted. The appellants did not lead any evidence to the contrary.

In determining whether or not the price was unreasonably low, one ought to bear in mind that as a general rule, the price received at a public auction is a reliable indicator of the market value of

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the property in question. One should also bear in mind that in a forced sale the price tends to be lower than in a sale by private treaty. As Manyarara JA said in *Zvirawa supra* at 18B:

"I do not think that authority is required for the proposition that the price realised at a forced

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sale like the present will tend to be lower than that realised in a sale by private treaty. The trite reason is that the bidders at an auction sale will be competing for as low a price as they can possibly pay."

Finally, I wish to determine whether the appellants established that the truck was sold for an unreasonably low price. As already stated, the appellants did not lead any evidence to show that the sale was not properly conducted. They made no attempt to challenge the basis upon which the public auction was held. They relied exclusively on the allegation that CN Consultants had offered to purchase the truck for $280000. They did not even rely upon the evidence of an independent valuator.

However, as already indicated, it appears to me that the letter allegedly sent by CN Consultants to Benma, in which CN Consultants allegedly offered to purchase the truck for $280000, is not genuine. I am therefore not prepared to place any reliance on it. In my view, the learned trial judge properly rejected it.

That being the case, I am satisfied that the appellants did not lead any evidence which established that the truck was sold for a price which was unreasonably low. They, therefore, failed to discharge the onus resting upon them.

In the circumstances, the appeal is dismissed with costs.

GUBBAY CJ: I agree.

McNALLY JA: I agree.

Scanlen & Holderness, appellants' legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

KAREMBERA *v* MVURWI RURAL COUNCIL 1999 (1) ZLR 327 (SC)

Citation	1999 (1) ZLR 327 (SC)
Case No	Judgment No. S-51-99
Court	Supreme Court, Harare
Judge	Muchechetere JA, Sandura JA
Heard	January 26, 1999

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Judgment May 6, 1999
Annotations None

Civil appeal

Flynote

Employment - contract - termination - termination under labour legislation - employee suspended but application to labour relations officer to dismiss not made forthwith and therefore suspension invalid and a nullity - whether employer entitled to rely on ground different from that forming the basis of the suspension

Headnote

A rural council had suspended an employee without pay pending police investigations into his conduct. About four months later it had applied to the Ministry of Labour seeking permission to dismiss him. A few months later a hearing was held and the labour relations officer granted permission for the dismissal. The employee then appealed first to a senior labour relations officer and then to the Labour Relations Tribunal. Both these appeals were unsuccessful. However, the Labour Relations Tribunal criticised the senior labour relations officer for relying on a ground for dismissal which had been discovered only after the employee had been suspended. The employee then appealed to the Supreme Court against the decision of the Labour Relations Tribunal. In dismissing the appeal:

Held, that s 3(1) of the Labour Relations (General Conditions of Employment) Termination of Employment Regulations 1985 ("the Regulations") lays down that after suspending an employee an application must be made forthwith to a labour relations officer for authority to dismiss the employee.

Held, further, that where an employer suspends the employee and makes an application forthwith for authority to dismiss the employee, the application must be based on the same ground as that used for suspending the employee.

Held, further, that if the employer suspends an employee but fails to make such an application to dismiss forthwith, the original suspension of the employee is rendered inoperative and is a nullity. Where the original suspension is invalid on this basis, the employer has two options. The first is to suspend the employee again, either on the same ground as before, or on another ground specified in s 3(1) of the Regulations, and apply forthwith on that ground to a labour relations officer for authority to dismiss him. The second option is to apply to the labour relations officer on any of the grounds specified in s 3(1).

Held, further, that in the present case the original suspension had been rendered inoperative because the employer had failed to apply forthwith to a labour relations officer for authority to dismiss the suspended employee. There was no further suspension of the employee. The employer was therefore entitled in his application to rely, as it did, on any of the grounds specified in s 3(1) of the Regulations, even though it was not a ground which had prompted the invalid suspension of the employee and had only been discovered after the original suspension.

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The Labour Relations Tribunal therefore had been incorrect in criticising the

senior labour relations officer for relying on a ground which had only been discovered after the employee had been suspended.

Cases Considered

Cases cited:

Standard Chartered Bank Ltd v *Masika* 1996 (1) ZLR 123 (S)

Statutes Considered

Legislation considered:

Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985), s 3(1)

Case Information

Appellant in person

W Ncube, for the respondent

Judgment

Sandura JA: This is an appeal against the judgment of the Labour Relations Tribunal which dismissed with costs the appellant's appeal against the decision of the senior labour relations officer. The senior labour relations officer had dismissed the appellant's appeal against the decision of the labour relations officer in terms of which the respondent was granted the authority to dismiss the appellant from his employment.

The background facts are as follows. The appellant was employed by the respondent as its treasurer. On 2 December 1992, the respondent's chairman wrote the following letter to him:

"This letter serves notice of suspension without pay pending police investigations. The suspension is with effect from 2 December 1992.

In the interim, you will not be permitted to enter Council premises but will be allowed to use your Council residence until the matter is finalised.

Telephone and electricity charges in respect of the house will be to your account.

The suspension is in terms of s 62, para 4 of the Rural Councils Act [*Chapter 211*]."

Subsequently, on 9 March 1993 the respondent's executive officer wrote the following letter to the Ministry of Labour:

"'I am writing to inform you that Mr Karembera was suspended from duty on 2 December 1992.

The reason behind the suspension is that Mr Karembera was engaged in the building industry whilst being employed by Council. Council was against his engagement in private business since it affected his performance at work. He

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ordered materials for his private business on Council requisitions and the issue came to light when he could not pay DST an amount of $22905.89 for materials ordered in July, PG an amount of $2781.01 and Tregers an amount of $6890.31. The above mentioned suppliers were about to take legal action to recover the amounts. Since he had no authority to purchase materials for his use, Council suspended him from duty.

Following this suspension, we then discovered that Mr Karembera was cashing his personal cheques at Council outlets. Most of the cheques were not honoured and the amounts and accounts involved are:

Mvurwi Beerhall $37 267.42

Mvurwi Housing $12 720.00

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Gatu Housing $2 122.00

Gatu Beerhall $2 140.00

In terms of SI 371 of 1985, Council is seeking permission to terminate the employment of Mr Karembera. It is believed that he is guilty of paras (a), (b) and (d) of s 3 of SI 371 of 1985."

Thereafter, on 28 May 1993, the respondent's application for the authority to dismiss the appellant was heard by the labour relations officer at Mvurwi. The respondent relied upon the following grounds: (a) that the appellant had used its requisitions in ordering building materials for his private business; (b) that the appellant had cashed his personal cheques at its outlets, knowing that the cheques would not be met as he did not have any money in his bank accounts; and (c) that the appellant benefited from the Aided Self Help programme by taking some building materials from the programme when he was not a beneficiary of the programme.

The hearing was concluded on 8 June 1993, and on 24 June 1993 the labour relations officer issued the following determination:

"Permission to dismiss H Karembera is hereby granted as per SI 371 s 3(a). Mr H Karembera used his employment with the council to benefit his private business, which was in conflict with the fulfilment of the express or implied conditions of his contract of employment. Mvurwi Rural Council to pay Mr H Karembera all his terminal benefits due to him if he is due any. Termination of employment is with effect from the day of suspension."

Aggrieved by that determination, the appellant appealed to the senior labour relations officer. The appeal was heard on 10 September 1993, and on 23 September 1993 the senior labour relations officer issued the following determination:

"From the fore-going observations it is concluded that Mr Karembera's financial dealings (with) respect to both himself and his company had a negative effect on the council in question. He conducted himself improperly with respect to aspects relating to cashing personal cheques. The whole scenario did not augur well with his position as the treasurer. Therefore, the ... decision of the labour relations officer that he be dismissed from the council's employ is hereby confirmed."

It is pertinent to note that the senior labour relations officer confirmed the decision of the labour relations officer on the basis of grounds different from those relied upon by the labour relations officer who authorised the respondent to terminate the appellant's contract of employment.

Subsequently, the appellant appealed to the Labour Relations Tribunal ("the Tribunal"), which

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dismissed the appeal with costs.

In dismissing the appeal, the Chairman of the Tribunal based his decision on two grounds which were: (a) that the appellant disregarded the respondent's resolution barring the use of its requisitions in ordering goods for private business; and (b) that the appellant defied the respondent's directive that if

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he wanted to continue working for the respondent he had to abandon his private business.

The learned Chairman ignored the ground relied upon by the senior labour relations officer because he was of the view that by basing his decision on the cashing of personal cheques, the senior labour relations officer misdirected himself. He came to that conclusion because the cashing of cheques by the appellant was only discovered after the appellant's suspension. In his judgment he said:

"It will be noted that the fact that Karembera cashed personal cheques at Council outlets (which is not denied by Karembera) was discovered by the respondent subsequent to Karembera's suspension. It is now a settled question of law that the reason for which a suspended employee may be dismissed must be a fact which was/reasons which were known to the employee (*sic*) at the time of the suspension of such employee and actually motivated the employer to suspend the employee and not something which happened or came to be known to the employer after the suspension. See *Standard Chartered Bank Zimbabwe Ltd* v *Matsika* S-23-96."

In my view, the respondent was perfectly entitled to rely upon the cashing of the cheque by the appellant, and the learned Chairman was mistaken in that respect.

Section 3(1) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985, published in SI 371 of 1985 ("the Regulations") reads as follows:

"Where an employer has good cause to believe that an employee is guilty of -

(a) any act, conduct or omission inconsistent with the fulfilment of the express or implied conditions of his contract;

(b) wilful disobedience to a lawful order given by the employer;

(c) ... ;

(d) theft or fraud;

(e) - (i) ... ;

the employer may suspend such employee without pay and other benefits and shall forthwith apply to a labour relations officer for an order or determination terminating the contract of employment."

As I intend determining this appeal on the basis of the fact that the appellant cashed his personal cheques at the respondent's outlets, a fact which was admitted by the appellant at the hearing before the labour relations officer, I would like to show why, in my view, the learned Chairman wrongly criticised the senior labour relations officer when he said that the latter, by basing his decision on the cashing of cheques, had misdirected himself because that event

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was discovered after the appellant's suspension.

In reaching the conclusion which he reached, the Chairman misinterpreted what Gubbay CJ said in *Standard Chartered Bank Zimbabwe Ltd* v *Matsika* 1996 (1) ZLR 123 (S). At 130C-D, the learned Chief Justice said:

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"In my view, it would be incompetent for a labour relations officer to order the termination of a contract of employment on a ground that was only relied upon or arose after the date of the application; and was different from either that which had motivated the suspension of the employee, together with the application made forthwith, or that upon which the application alone was based, where the employee had not been suspended."

The learned Chief Justice continued at 131D-G as follows:

"It seems to me beyond question that having suspended Matsika without pay and other benefits on 3 August 1992 the Bank, either by design or oversight, failed to apply *forthwith* to a labour relations officer. The word 'forthwith', though not as peremptory as 'immediately', means 'as soon as is reasonably possible in the circumstances'... The delay of six weeks between the suspension and the application rendered the suspension inoperative. It was a nullity, with the consequence that the Bank was left with two options: it could suspend Matsika again either on the same or another ground specified in s 3(1) and apply forthwith on that ground to a labour relations officer for his dismissal; or it could apply to a labour relations officer on any of the specified grounds without re-suspending him. In either event, the Bank was liable to pay Matsika his salary and other benefits with effect from the date of the invalid suspension; and if it did not re-suspend him, to reinstate him in employment. Yet, was the Bank compelled under the Regulations to do so before it applied to the labour relations officer on 11 September 1992? In other words, is it a prerequisite for an employer, who suspends an employee without pay but does not apply forthwith, to formally withdraw the suspension and make good to the employee - to wipe the slate clean as it were - before being permitted to utilise the procedure under s 3(1)?"

Later in the judgment, the learned Chief Justice answered that question in the negative.

Finally, at 132D-133A the learned Chief Justice said:

"I have no difficulty in accepting that where an application for an order terminating a contract of employment is made forthwith after the suspension of the employee, the ground must not be different. I do not, however, understand why the ground should be the same where the suspension is rendered invalid by a failure to make the requisite application forthwith. It seems to me that once the application is not proceeded with forthwith, there is no longer any necessity for the ground on which the employee was suspended to identify with the ground on which the application is subsequently made. With effect from the date of re-suspension or of the employer's application, the employee may be faced legitimately with the same ground that prompted the invalid suspension or an entirely new ground, or indeed both ... In sum, then, if the suspension of an employee is nullified by the omission of the employer to apply forthwith to a labour relations officer for an order of termination, the employer is not precluded from re-suspending the employee and applying forthwith on the same ground as before, or on a different ground, or from simply applying to the labour relations officer, without re-suspending the employee, on any of the grounds specified in s 3(1) of the Regulations."

I entirely agree with the learned Chief Justice.

In the present case, the appellant was suspended on 2 December 1992. The application to the labour relations officer for the authority to dismiss him was not made until 9 March 1993. It was, therefore, not made "forthwith" as required by s 3(1) of the Regulations. The duration of the delay between the

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suspension and the application was 96 days, and this rendered the suspension inoperative. The appellant's suspension was, therefore, a nullity.

That being the case, it follows that the respondent had two options. The first option was to suspend the appellant again either on the same ground as before, or on another ground specified in s 3(1) of the Regulations, and apply forthwith on that ground to the labour relations officer for the authority to dismiss him. The second option was to apply to the labour relations officer on any of the grounds specified in s 3(1) of the Regulations without re-suspending the appellant.

The respondent adopted the second option and relied upon the ground that the appellant had fraudulently cashed his personal cheques at the respondent's outlets well knowing that the cheques would not be met as he did not have any money in his bank account. In other words, the respondent relied upon the allegation of theft or fraud, which is one of the grounds specified in s 3(1) of the Regulations. The respondent was quite entitled to rely upon that ground even though it was not a ground which prompted the appellant's invalid suspension.

As already stated, the appellant admitted cashing his personal cheques at the respondent's outlets, but alleged that it was not illegal. The beerhall manager who gave evidence at the hearing before the labour relations officer stated that the appellant had cashed his personal cheques at the beerhall, and had instructed him to hold on to the cheques until he (the appellant) advised him to deposit them into the respondent's bank account. Although the appellant initially denied giving that instruction, he later admitted it when cross-examined.

In my view, bearing in mind the fact that the appellant was the respondent's treasurer, his conduct in cashing the cheques was highly reprehensible. It was ridiculous for him to allege that it was not illegal. There can be no doubt that his conduct was criminal and that he deserved dismissal.

Having come to that conclusion, I do not consider it necessary to determine the validity or otherwise of the grounds relied upon by the learned Chairman in dismissing the appellant's appeal against the decision of the senior labour relations officer. I have, however, come to the same conclusion as the learned Chairman did, but via a different route.

In the circumstances, the appeal is dismissed with costs.

MUCHECHERERE JA: I agree.

Kantor & Immerman, respondent's legal practitioners

O'SHEA *v* CHIUNDA 1999 (1) ZLR 333 (SC)

Citation 1999 (1) ZLR 333 (SC)

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Case No	Judgment No. S-52-99
Court	Supreme Court, Harare
Judge	Ebrahim JA, Muchechetere JA, Sandura JA
Heard	February 23, 1999
Judgment	May 6, 1999
Annotations	None

Civil appeal

Flynote

Agency - agent - duties - duty to account - accounting for profits - agent charged with selling on behalf of principal - duty to account for all proceeds

Employment - employee - suspension of employee accused of making profit at employer's expense - when employer can claim such profits

Practice and procedure - res judicata - principles - determination by labour relations officer - whether had dealt with issues which were now the subject of claims in High Court

Headnote

The appellant suspected that the respondent, an employee of hers, was engaged in fraudulent activities which consisted of overcharging customers who purchased goods at her shop and taking for himself the extra profits. She reported this to the police and the employee was arrested. He was later tried on a charge of fraud but he was acquitted. The employee then applied to a labour relations officer to be reinstated. He also claimed certain sums of money. The labour relations officer made a determination in which he ordered the appellant to pay the employee various sums of money. The officer, however, ordered that the contract of employment be terminated because the relations between the parties were now severely strained.

Following that determination, the employee issued summons against the appellant claiming, amongst other things, an amount for unpaid salary during the time he was on suspension. At the trial of this matter the appellant relied mainly on the plea of *res judicata*, arguing that the matter relating to unpaid salary during suspension had already been raised before the labour relations officer and had already been determined. This argument was rejected by the trial judge. The employee had also claimed for overtime pay, but this claim was dismissed by the trial judge on the basis that *res judicata* applied as this matter had already been determined by the labour relations officer. The appellant had also counterclaimed for money which she alleged was owed to her by the employee on the basis of an acknowledgement of a debt signed by the employee. She averred that the amount specified in this document represented the amount the employee had appropriated for himself by overcharging the customers. This counterclaim was dismissed by the trial judge.

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The appellant appealed against the rejection by the trial court of her argument that the matter of pay during suspension was *res judicata* and the employee cross-appealed against the finding by the trial judge that the employee's claim for overtime payment was *res judicata*. She also appealed against the dismissal of her counterclaim.

Held, that *res judicata* applies where the two actions are between the same parties, or their successors in title, concerning the same subject matter and founded on the same cause of action In the present case the trial court had been wrong in rejecting the argument by the appellant that *res judicata* applied. Although the labour relations officer did not refer to the matter of pay during suspension, it was reasonably clear from the record that the officer had considered the employee's claim for payment whilst he was on suspension and had rejected it because she did not consider that the arrest of the employee by the police had been due to the employer's fault. Thus this matter was *res judicata*. Instead of instituting court proceedings, the employee should have appealed to the regional hearing officer against the labour relations officer's decision.

Held, further, that the trial judge was correct in finding the matter of overtime pay was *res judicata*.

Held, further, that the trial judge had correctly dismissed the appellant's counterclaim. This was not, however, because the appellant had obtained the signature of the employee to the acknowledgement of debt by trickery or duress. Instead, the correct reason why the counterclaim had to be dismissed was that it was unlikely that the employee understood the contents of the document and therefore the genuineness of the counterclaim was in doubt. Additionally, the appellant had failed to establish any basis on which the figure given in the document had been arrived at.

Held, further, that if the genuineness of the acknowledgement of debt had been established and the amount therein had been established to be the actual amount of surplus profit realised by the employee at the appellant's expense, the appellant would have succeeded in her counterclaim. An agent has a duty of good faith towards his principal. Any profit realised by the agent by virtue of his position as agent, without the knowledge and consent of his principal, he acquires for the principal. The principal is entitled to claim whatever profits made by the agent in the course of execution of his agency, including those made by transactions entered into in violation of his duty towards his principal.

Cases Considered

Cases cited:

Branch v *Vic Diamond & Sons (Pvt) Ltd* 1957 R & N 11; 1957 (1) SA 331 (SR)

S v *A* 1979 RLR 69 (G); 1979 (4) SA 1 (R)

Case Information

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Mrs *J B Wood*, for the appellant

A M Gijima, for the respondent

Judgment

Sandura JA: This is an appeal against the judgment of the High Court in terms of which the appellant was ordered to pay to the respondent the sum of $9200 together with interest and costs of suit. There is also a cross appeal by the respondent.

The background facts are as follows. The respondent was employed by the appellant as the manager of her business called A1 Seeds at Mutoko. The appellant's husband was in control of the business, and both the appellant and her husband lived in Harare, whilst the respondent was in charge of the day-to-day running of the business and lived at Mutoko.

During the second half 1985, the appellant's husband suspected that the

respondent was overcharging customers who purchased goods from the shop and was taking the extra profits. Consequently, on 21 December 1985 he caused his arrest by the police and suspended him from duty without pay.

The respondent was subsequently tried in the magistrates court in October 1987 on one count of fraud, but was acquitted at the end of the State case on the basis that he had no case to answer.

Subsequently, he filed a complaint with the labour relations officer in Harare in October 1987 claiming reinstatement and payment of certain sums of money. Thereafter, the matter was heard by the officer on 7 December 1987, and on 8 December 1987 the officer issued the following determination:

"Employer to pay the employee a total of $1 270 to Chiunda being moneys owing to him as wages due for the 21 days worked in December 1985, cash in lieu of leave, and the $400 belonging to the employee. Termination of contract of employment is agreed by both parties as relations are severely strained. Payment of the money is to be made at the Department of Labour Relations."

Following that determination, the respondent issued a summons against the appellant in July 1988 claiming payment of the following: (a) the sum of $9200, being unpaid salary for the period during which he was on suspension; (b) the sum of $2252.95 being overtime pay; (c) interest at the rate of 10% *per annum* on the total sum of $11452.95; and (d) costs of suit.

The matter was later heard by an acting judge of the High Court in July 1992. However, no judgment in the matter was prepared by the acting judge before his appointment expired. Thereafter, both the file and the judge's notebook could not be located, and no judgment could be prepared. A re-trial was, therefore, conducted in October 1996, and the appellant was ordered to pay to the respondent the sum of $9200 together with interest and costs of suit.

I shall refer to the trial presided over by the acting judge as the first trial, and the re-trial as the

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second trial.

At the second trial, the appellant relied mainly on the plea of *res judicata*, alleging that the issues raised by the respondent had already been raised and determined by the labour relations officer. That argument was rejected by the learned trial judge in the court *a quo*. In my view, the learned trial judge was wrong.

The requisites of a plea of *res judicata* are set out in *Herbstein & Van Winsen: The Civil Practice of the Supreme Court of South Africa* 4 ed by Van Winsen, Cilliers and Loots at p 249 as follows:

"The requisites of a plea of *lis pendens* are the same with regard to the person, cause of action and subject matter as those of a plea of *res judicata*, which, in turn, are that the two actions must have been between the same parties or their successors in title, concerning the same subject matter and founded upon the same cause of complaint."

The issue in the court *a quo* was whether the question of payment of the

respondent's salary during the period when he was on suspension had been considered and determined by the labour relations officer. The learned judge in the court *a quo* came to the conclusion that the issue had not been considered and determined. He therefore rejected the appellant's argument.

In reaching that conclusion, the learned trial judge relied upon the fact that the determination issued by the labour relations officer did not mention that the issue of payment of the respondent's salary whilst he was on suspension had been considered. Whilst it is correct that the determination did not mention that fact, it is, in my view, quite clear from the record of the proceedings in the court *a quo* that the issue was considered and determined. The labour relations officer who presided over the hearing made that clear in her evidence in the court *a quo*.

This is evidenced by a number of passages in the record of the proceedings in the court *a quo*. For example:

1. "Q. So did you call them both?

   A. And I called them both to come for the hearing.

   Q. I understand you were just the three of you present?

   A. Yes.

   Q. And how did you understand the plaintiff's complaint, that is Mr Chiunda?

   A. He had been arrested by the police and he was asking the employer to pay him for all that time that he was under arrest by the police.

   Q. Do you know what he meant my under arrest?

   A. I would have thought then it is under police custody, that time between the time he left his employment and the time I think the case was cleared by the courts. That is the time he was asking for."

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2. "Q. Did you grant him?

   A. We discussed the issue of payment for the period that he had raised the allegations over cash in lieu of (the) period under arrest, and according to the laws, the labour laws, I could not determine that he be paid because it wasn't the employer's fault (nor) his fault that he was under (arrest)."

3. "Q. So you are saying that you discussed the question of whether he should be paid for the period when he was being tried, in other words when he was suspended?

   A. Yes.

   Q. How long was that period?

   A. It was about two years, I think about two years, about that."

In my view, it is fairly clear from the labour relations officer's answers, both in evidence-in-chief and cross-examination, that she considered the respondent's claim for payment whilst he was under suspension, and rejected it because she believed that the arrest was not due to the appellant's fault. The fact that the determination did not state that fact is clearly irrelevant. It simply stated what claims had been granted and did not mention the claims which had been rejected.

I am, therefore, satisfied that the issue of the payment of the respondent's

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salary whilst he was on suspension was *res judicata* and ought not to have been considered and determined by the learned trial judge.

Instead of instituting proceedings in the High Court, the respondent should have appealed to the Regional Hearing Officer against the labour relations officer's determination.

The next issue which I would like to consider is the appellant's counterclaim. In this regard, the appellant claimed from the respondent payment of the sum of $3500 on the basis of an acknowledgement of debt signed by the respondent. The claim was dismissed by the learned trial judge.

The respondent's case on the pleadings and throughout the trial was that he was tricked by the appellant's husband into signing the acknowledgment of debt. He also alleged duress.

In the acknowledgement of debt, the respondent acknowledged the indebtedness as:

"monies fraudulently accumulated by me through overcharging of items of trade entrusted to me ... as manager of A1 Seeds Mutoko."

Although the appellant's husband stated that the contents of the acknowledgment of debt were explained to the respondent, my main concern is that it is unlikely that the respondent, a man with a standard two education, would have fully understood the contents of the document.

I say so because the appellant's husband stated that he himself did not understand some of the expressions in the document. He said he had prepared the document by merely copying the

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contents of a blank acknowledgment of debt form.

In the circumstances, I think that the learned trial judge was correct when he dismissed the counterclaim, although he did so for a different reason. It is also pertinent to note that the appellant's husband did not establish any basis on which he arrived at the sum of $3500.

I now wish to deal with the respondent's cross appeal. In this regard, counsel for the respondent submitted that the learned trial judge erred in holding that the respondent's claim for overtime payment was *res judicata*. I disagree.

When the labour relations officer was asked by the trial judge what issues she had dealt with at the hearing she said:

"We considered the issue of (him) not being paid for the 21 days he had worked in December. We considered the cash, issues of cash in lieu of leave. We considered the issue of him (being) paid overtime. We considered the issues of him being paid cash in lieu of time under arrest ... What I wrote on the determination was what he was to be paid."

I am, therefore, satisfied that the claim for overtime payment was considered and rejected by the labour relations officer. The fact that it was not mentioned in the determination is, in my view, irrelevant. Indeed, the labour relations

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officer stated that what she wrote in the determination was what the respondent had been granted. In other words, she did not mention what had been rejected.

Finally, before concluding this judgment, I wish to comment on a matter which was raised by the respondent in his plea to the appellant's claim in reconvention. He averred that in any event the appellant could not claim the sum of $3500, the alleged secret profit realised by the respondent by overcharging customers for the goods they purchased, because the appellant was not entitled to the money. It is clear from previous cases that that averment is incorrect.

Dealing with a similar submission Young J had this to say in *Branch* v *Vic Diamond & Son (Pvt) Ltd* 1957 R&N 11 (SR) at 13F; 1957 (1) SA 331 (SR) at 335C-D:

"Now, I am quite unable to see how, where there is merely an authority to sell at a certain figure nett, that by itself entitles the agent to retain any surplus, whatever the amount. The agent might with equal lack of justification argue that where there is authority to sell at a certain figure gross he is entitled to any surplus. His duty as an agent is to get the best price he can for his client and to account for the whole of the proceeds."

About twenty-two years later, Gubbay J (as he then was) dealing with a similar submission, had this to say in *S* v *A* 1979 RLR 69 (G) at 82H-83G; 1979 (4) SA 51 (R) at 59G-60D:

"The common law relating to the obtaining of a secret consideration by an agent is correctly set out in De Villiers and Macintosh *The Law of Agency in South Africa* 2 ed at 149, where it is said:

> 'The rule that an agent is liable to account for profits is based not on the prevention of the principal from earning profits, but on the duty of good faith which requires every benefit, directly or indirectly connected with the agency, save for the remuneration agreed upon, to be handed over to the principal. Hence, any profit which the agent acquires by virtue of his position as agent, without the knowledge and consent of his principal, he acquires for the

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> principal, whether or not the earning of it actually prejudiced the principal.'

... Of course, where a profit is made by the agent on a transaction completely outside the agency relationship, then the agent is not accountable to his principal ...

The criterion is whether the profit was directly or indirectly connected with the agency. It is immaterial that the profit did not arise out of the transaction directly within the mandate of the agent, provided it was acquired by means of the agency. In the words of Mason J in *Tranvsaal Cold Storage Co Ltd* v *Palmer* 1904 TS 4 at 33:

> '... the principal is entitled to claim whatever profits have been made by the agent in the course of execution of or in connection with the agency, including those made by any transaction entered into in violation of his duty to his principal if directly or indirectly connected with the matter of agency.'

The relationship between a principal and his agent was lucidly defined by Innes CJ in *Robinson* v *Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 178 in the following terms:

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> 'If employed to buy, he cannot sell his own property; if employed to sell, he cannot buy his own property; nor can he make any profit from his agency save the agreed remuneration; all such profit belongs not to him, but to his principal. There is only one way by which such transactions can be validated, and that is by the free consent of the principal following upon a full disclosure by the agent. In such a case, the special relationship *quoad* that transaction falls away and the parties deal at arm's length with one another'."

The principle is, therefore, well established. It follows that in the present case if the genuineness of the acknowledgment of debt had not been successfully challenged, and it had been established that the sum of $3 500 represented the actual surplus profit realised by the respondent, the appellant would have succeeded in her counterclaim. The respondent would not have been permitted to keep the secret profit. However, that was not the case. In addition, the appellant's husband did not establish any basis on which he arrived at the sum of $3500.

As already indicated at the beginning of this judgment, a re-trial had to be conducted due to circumstances beyond the control of the parties. The relevant case file as well as the acting judge's notebook could not be located. Consequently, it was impossible for the former acting judge to prepare his judgment.

In the circumstances, a special order of costs is called for to ensure that the parties are not financially prejudiced.

I therefore make the following order:

1. The appeal is allowed with costs. The order of the court *a quo* is set aside and the following is substituted:

   "(a) The plaintiff's claim is dismissed, with the costs of the first trial being borne by the plaintiff.

   (b) The defendant's claim in reconvention is dismissed, with the costs of the claim in reconvention in the first trial being borne by the defendant.

   (c) The costs of the second trial in respect of both parties shall be borne by the Registrar of the High Court on the legal practitioner and client scale."

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2. The cross appeal is dismissed with costs.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

Sawyer & Mkushi, respondent's legal practitioners

BANDA & ORS *v* ZISCO 1999 (1) ZLR 340 (SC)

Citation	1999 (1) ZLR 340 (SC)
Case No	Judgment No. S-54-99
Court	Supreme Court, Harare
Judge	McNally JA, Ebrahim JA, Sandura JA
Heard	March 18, 1999
Judgment	May 6, 1999
Annotations	None

Civil appeal

Practice and procedure - res judicata - principles - previous judgment - when to be regarded as res judicata - whether present claim actually affected by previous judgment

Headnote

The appellants had been employed by the respondent corporation. They had engaged in an unlawful strike. Disciplinary proceedings were instituted against them by their employer and they were dismissed. The appellants appealed to a labour relations officer, who ordered that they be reinstated. The corporation appealed unsuccessfully to a senior labour relations officer and then to the Labour Relations Tribunal. On appeal to the Supreme Court, however, the dismissals were confirmed. Subsequently, an action was brought by the appellants to seek a review of the disciplinary proceedings on the grounds of irregularities and bias. The High Court held that the matter was *res judicata*. On appeal:

Held, that the requirements for a plea of *res judicata* were well established. They are that (1) the action must be between the same parties, (2) concerning the same subject matter and (3) founded on the same cause of complaint as the action in which the defence is raised. The previous judgment of the Supreme Court was to the effect that the dismissals were lawful and

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the present claim effectively sought a reversal of that judgment. As a court had already issued a final and definitive judgment regarding the issue raised in the review proceedings, the matter was *res judicata*.

Cases Considered

Cases cited:

Mitford's Exor v *Ebden's Exors & Ors* 1917 AD 682

Pretorius v *Barkly East Divisional Council* 1914 AD 407

Wolfenden v *Jackson* 1985 (2) ZLR 313 (S)

ZISCO v *Dube & Ors* 1997 (2) ZLR 172 (S)

Case Information

W Ncube, for the appellants

J C Andersen SC, for the respondent

Judgment

SANDURA JA: This is an appeal against the judgment of the High Court which dismissed with costs the application by the appellants for an order directing the respondent to reinstate them in their former positions without loss of salary and benefits.

The background facts are as follows. The appellants were employed by the respondent ("ZISCO"). Following a strike, they were dismissed from their

employment in April 1995. They appealed to a labour relations officer, seeking an order setting aside their dismissal on the ground that the disposal order issued on 26 March 1995, precluded ZISCO from bringing disciplinary proceedings against them. The disposal order, which had been issued by a labour relations officer, directed that the unlawful strike be terminated and that the issues in dispute be discussed in terms of the relevant Collective Bargaining Agreement.

The contention by the appellants was upheld by the labour relations officer, who ordered that the appellants be reinstated in their former positions without loss of salary and benefits.

ZISCO then appealed to the senior labour relations officer who dismissed the appeal. It then appealed to the Labour Relations Tribunal, which dismissed the appeal on the ground that the disposal order of 26 March 1995 was invalid because it had been issued by a labour relations officer and not by the responsible Minister. The Tribunal, therefore, ordered ZISCO to reinstate the appellants in their former positions without loss of salary and benefits.

Finally, ZISCO appealed to this court which allowed the appeal in July 1997 and confirmed the

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dismissals of the appellants from their employment. See *Zimbabwe Iron and Steel Co Ltd* v *Dube & Ors* 1997 (2) ZLR 172 (S).

Subsequently, on 6 January 1998, the appellants filed a court application in the High Court seeking a review of the proceedings of the respondent's disciplinary committee which had recommended their dismissal from employment. They sought an order setting aside the proceedings on the ground that the proceedings were vitiated by procedural improprieties and bias.

As the application for review was not brought timeously, the appellants made an application for the condonation of the delay in filing the application. The learned judge in the court *a quo* refused to grant the condonation sought by the appellants on the ground that they had failed to advance any acceptable explanation for the failure to institute the review proceedings timeously. The learned judge also determined that, as the issue which he was supposed to determine had already been determined by this court, the matter was *res judicata*.

Aggrieved by that decision, the appellants have now brought the matter on appeal to this court.

The requisites of the plea of *res judicata* have been set out in a number of previous cases. In *Pretorius* v *Barkly East Divisional Council* 1914 AD 407 at 409, Searle J set them out as follows:

"As to the first point, the requisites for a plea of *res judicata* have several times been laid down in this court.

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The three requisites of a plea of *res judicata*, said the Chief Justice in *Hiddingh* v *Denyssen & Ors* (1885) 3 Menz 424, quoting Voet (44.2.3), are that the action in respect of which judgment has been given must have been between the same parties or their privies, concerning the same subject matter and founded upon the same cause of complaint as the action in which the defence is raised ...

In order to determine the cause of complaint, the pleadings and not the evidence in the case must be looked at."

Subsequently, in *Mitford's Executor* v *Ebden's Executors & Ors* 1917 AD 682 at 686, Maasdorp JA said the following:

"The question now arises whether that decision was given under circumstances which preclude the plaintiff from bringing his present action. Are the first defendants entitled to set up that decision as *res judicata* in the present action? To determine that question it will be necessary to enquire whether that judgment was given in an action (1) with respect to the same subject matter, (2) based on the same ground, and (3) between the same parties."

More recently, Gubbay JA (as he then was) commented on the plea of *res judicata* in *Wolfenden* v *Jackson* 1985 (2) ZLR 313 (S) at 316B-C as follows:

"The *exceptio rei judicatae* is based principally upon the public interest that there must be an end to litigation and that the authority vested in judicial decisions be given effect to, even if erroneous. See *Le Roux en 'n Ander* v *Le Roux* 1967 (1) SA 446 (A) at 461H. It is a form of estoppel and means that where a final and definitive judgment is delivered by a competent court, the parties to that judgment or their privies (or, in the case of a judgment *in rem*, any other person) are not permitted to dispute its correctness."

Finally, in *Beck's Theory and Principles of Pleading in Civil Actions* 5 ed by Isaacs, the learned author specifies in what respects a previous judgment may be *res judicata*. At p 171, he states

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as follows:

"The previous judgment is only *res judicata* as regards matters between the parties which the judgment actually affects and when the plea is raised, it therefore becomes essential to determine whether the present claim is actually affected by the previous judgment."

These are the principles which I shall apply to the facts of the present appeal in order to determine whether the matter raised by the appellant is *res judicata*.

The question for consideration is whether the judgment of this court which was handed down in July 1997 actually affects the present claim by the appellants. In this regard, it is clear that, in terms of the previous decision of this court, it was determined that the appellants had been lawfully dismissed from their employment and that they were not to be reinstated. That is why this court, set aside the order of the Labour Relations Tribunal directing the respondent to reinstate the appellants in their previous positions.

It is also clear that the order sought by the appellants in the review proceedings was in effect a reversal of the judgment handed down by this court in July 1997. I say so because in those proceedings the appellants sought an order directing the respondent to reinstate them in their previous positions.

SANDURA JA

In the circumstances, as this court has already issued a final and definitive judgment regarding the issue raised in the review proceedings, the matter is *res judicata*, and the learned judge in the court *a quo* was correct in declining to determine it.

Having come to that conclusion, I do not consider it necessary to deal with the other argument advanced by Mr *Ncube*, who appeared for the appellants, that the appellants had proffered an acceptable explanation for their failure to institute the review proceedings timeously and should have been granted condonation. However, it suffices to say that, in my view, the appellants did not advance any acceptable explanation for the long delay. The disciplinary proceedings took place in March 1995 and the review proceedings were instituted on 6 January 1998, a delay of about three years.

In the circumstances, the appeal is dismissed with costs.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

Honey & Blanckenberg, appellants' legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

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MUNYORO *v* FOUNDERS BUILDING SOCIETY & ORS 1999 (1) ZLR 344 (HC)

Citation	1999 (1) ZLR 344 (HC)
Case No	Judgment No. HH-54-99
Court	High Court, Harare
Judge	Smith J
Heard	April 14, 1999
Judgment	May 12, 1999
Annotations	None

Civil application

Flynote

Flynote

Practice and procedure - execution - sale - immovable property - setting aside of "on good grounds" - debtor retaining possession of house after sale in execution - debt fully paid and buyer making no effort to obtain transfer - sale set aside on basis of equities

Headnote

A house had been sold in execution because the debtor had defaulted in his obligations to make payments to a building society. The buyer purchased the house at the sale in execution. After the sale in execution, but just before the sale was confirmed, the debtor managed to settle his debt to the building society. The building society advised the Sheriff that the outstanding debt had been settled and requested the Sheriff to set aside the sale in execution. The Sheriff responded to the building society that he could not cancel the sale as he had already accepted the applicant's bid for the property. He advised the debtor to apply to court to have the sale cancelled.

The debtor then applied for a provisional order setting aside the sale. This order was granted and the Sheriff was ordered not to confirm the sale in execution pending the court hearing. However, the same day, and before the provisional order was served on him - if indeed it was served on him at all - the Sheriff confirmed the sale. In confirming the sale, the Sheriff acted in terms of r 360 of the High Court Rules, which lays down that the Sheriff must confirm the sale if he does not receive any objection by an interested party within seven days of the sale. No objection had been received by him from the debtor within that period. For a long time after the provisional order was issued, the debtor did not apply for set down for hearing the matter of the confirmation of the provisional order. Eventually, after some two years and nine months had elapsed from the date of the sale in execution, the buyer of the house applied for the matter to be set down for hearing. During this time, the debtor had continued to live in the house. The

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buyer, who had paid the full price for the house, had not made any meaningful attempt to obtain transfer of the property and to obtain occupation of the property. This indicated that he must have obtained the property as an investment.

At the hearing, the debtor applied in terms of r 359 of the Rules of the High Court for the court to cancel the sale in execution. Rule 359 provides that the court may set aside on the sale where the sale was improperly conducted, the property was sold for an unreasonably low sum or on any other good grounds.

Held, that in the present case there was no irregularity in the sale in execution and the house had not been sold for an unreasonably low amount.

Held, further, that a judicial sale must not be lightly set aside and a judicial sale cannot be set

aside simply on the ground that the judgment debtor has made a "bad bargain" and a judgment debtor cannot rely on his own default to defeat the sale. On the other hand, bargain hunters seeking to buy property at judicial sales will not be deterred from attending judicial sales merely because the sale to them might be set aside at a later date, as long as the procedure is not too long drawn out.

Held, further, that r 359 gives the court a wide discretion as to what constitutes any other good grounds for setting aside a judicial sale. In deciding this the court will have regard to the equities of the case.

Held, further, that in the present case although the debtor had been tardy in settling his debt to the building society, he managed to do this after the sale in execution but before the sale was confirmed, and the building society had advised the Sheriff accordingly. On the other hand, the buyer had not made any attempt during the preceding two and a half years to press his claim to have the property transferred and to secure occupation of the house. During that time the debtor had been allowed to carry on living in the house together with his family. On the basis of equity, the judicial sale should be cancelled. However, as the debtor was largely to blame for the position in which he found himself it would be unjust to order the buyer to pay his costs.

Held, further, that, under the current law, if the Sheriff receives an objection to a sale in execution within seven days of the sale, the matter must be dealt with by the High Court. There would be merit in changing this to allow the Sheriff himself to deal in the first instance with any objection. He would be able to handle the matter much more expeditiously and at less cost to the parties. The High Court should only come into the picture if any interested party wishes to appeal against the decision of the Sheriff.

Cases Considered

Cases cited:

Lalla v *Bhura* 1973 (2) ZLR 280 (G)

Mapedzamombe v *Commercial Bank of Zimbabwe* 1996 (1) ZLR 257 (S)

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Morfopolous v *Zimbank Ltd & Ors* 1996 (1) ZLR 626 (H)

Naran v *Midlands Chemical Industries* S-220-91

Smith & Anor v *Acting Sheriff of Zimbabwe & Anor* 1995 (1) ZLR 158 (S)

Statutes Considered

Legislation considered:

High Court Rules 1971 (RGN 1047/1971), rr 359 & 360

Case Information

A M Gijima, for the applicant

L T Biti, for the second respondent

Judgment

SMITH J: The applicant (hereinafter referred to as "Munyoro") is the registered owner of house No. 1345 in Ardbennie Township, Houghton Park. He defaulted in his obligations to make payments to the first respondent (hereinafter referred to "Founders") and so Founders issued summons against him and eventually the property was sold in execution to the second respondent (hereinafter referred to as "Kaseke") on 24 May 1996. Munyoro made an urgent application on 11 June 1996 for a provisional order cancelling the sale in execution. The order was granted on that same date. The provisional order ordered, as interim relief, that the third respondent (hereinafter referred to as "the Sheriff") shall not confirm the sale in

execution, pending the confirmation or discharge of the provisional order. In a letter dated 31 May 1996, Founders advised the Sheriff that Munyoro had settled his arrears on 30 May and asked that the sale in execution be set aside. The reply by the Sheriff to Founders, in a letter dated 4 June, was that he could not cancel the sale as he had already accepted a bid from Kaseke of $215000 for the property. He advised that Munyoro should apply to court to have the sale cancelled. He said that there was extreme urgency in the matter as the sale was due for confirmation on 11 June 1996. That advice no doubt led to the urgent application by Munyoro for the provisional order.

Kaseke opposes the confirmation of the provisional order. The basis of his opposition is that the property was sold to him; his offer was accepted by the Sheriff, no objections were received by the Sheriff and accordingly the sale was duly confirmed. He has paid the purchase price to the estate agent and is therefore entitled to due performance.

Although the provisional order was issued on 11 June 1996, Munyoro did not apply for the matter to be set down for hearing for the confirmation of the provisional order. It was Kaseke who did so, but he only did so in 1998. On 30 October 1998, Munyoro applied for leave to file a

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supplementary affidavit. The judge before whom the chamber application was placed ordered that it should be dealt with at the hearing of the confirmation proceedings. Kaseke, on 6 January 1999, also filed a supplementary affidavit and begged leave that it be admitted if Munyoro's supplementary affidavit was admitted. In view of the lengthy period that has elapsed since the provisional order was issued, and since Mr *Biti* did not oppose the application, I am prepared to admit the two supplementary affidavits. Accordingly, the application for leave to file the supplementary affidavit made by Munyoro is granted and the supplementary affidavit from Mr Kaseke is also admitted. It is only right that Munyoro pay the costs of this application, including the costs of Kaseke's supplementary affidavit.

The provisional order, as stated above, ordered that the Sheriff should not confirm the sale in execution pending this hearing. However, he did confirm the sale. That was on 11 June 1996, the same day that the provisional order was granted. Obviously, he confirmed the sale before the provisional order was served on him, if in fact it was so served. However, in terms of r 360 of the High Court Rules, the Sheriff must confirm a sale in the absence of any objection by an interested party within 7 days of the sale. Since Munyoro had not objected within the 7 day period, the Sheriff had no discretion in the matter.

The third respondent filed his report. In the report he said that he did not oppose the relief being sought by the applicant and would therefore abide by the court's decision.

SMITH J

Rule 359 of the High Court Rules provides that an application may be made for a sale to be set aside on the ground that it was improperly concluded, that the property was sold for an unreasonably low sum or on any other good ground. This application is being heard some 2 years and 9 months after the sale in execution. In that period, Munyoro and his family have continued living on the property. Admittedly Munyoro has been dilatory in not having the matter set down. However, Kaseke was entitled to have the matter set down. He could have done so two and a half years ago. Why did he not act then? He did apply for the matter to be set down in July and October 1998 but apparently the matter was postponed and Munyoro was ordered to pay the costs.

Mr *Gijima* argued that the sale should be set aside on three grounds. Firstly, it was not properly confirmed or conducted, in that the third respondent failed to take into account the objection by Munyoro in the form of his urgent application. Hence the confirmation of the sale was improper. Secondly, the property was sold for an unreasonably low amount. Thirdly, it would be unjust and unequitable for the sale not to be set aside. Mr *Biti* argued that sales in execution are not lightly set aside - *Lalla* v *Bhura* 1973 (2) RLR 280 (G) and *Naran* v *Midlands Chemical Industries* S-220-91 - and that, in considering the equities, the court should take into account the conduct of the debtor: *Mapedzamombe* v *Commercial Bank of Zimbabwe* 1996 (1) ZLR 257 (S). He further submitted that there were no irregularities in the sale and that the property was not sold for an unreasonably low amount. Accordingly, the application should be dismissed.

As I have said, the provisional order was granted on 11 June 1996, but there is no evidence as to when the provisional order was served on the Sheriff or, indeed, that it was so served.

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However, as I pointed out earlier, the application was made more than 7 days after the sale, it was out of time. I find, therefore, that there is no evidence of any irregularity in the sale. Also, I find that there is no evidence that the property was sold for an unreasonably low amount.

In *Lalla supra* at p 283A Davies J said:

"Again I agree with the observation that if the courts were over ready to set aside sales in execution under r 359, this might have a profound effect upon the efficacy of this type of sale. Would-be purchasers might well be deterred from attending and bidding if they considered their efforts might easily be frustrated by an application under r 359, and as a general principle I think it should be accepted that a court will not readily interfere in these matters."

However, he then went on to add:

"On the other hand, in this connexion the court must take into account the clear provisions of the rules, that is that the sale is essentially at all times a conditional sale until there is confirmation in terms of r 360; and a seller would be unwise if he were to proceed on the basis that until that stage is reached he has any firm rights in connexion with the property."

SMITH J

In dealing with the submission that had been made by counsel to the effect that before the Sheriff's decision was set aside the court had to be satisfied that the price offered was grossly unreasonable and that something approaching *mala fides* had to be shown, the learned judge said at p 283E-F:

"In my view, one cannot go as far as this. The wording of the rule itself is all-important. The concluding portion of the rule provides that 'On the hearing of the application the court may make such order as it deems just' and it seems to me these words clearly indicate that in considering what is meant by the rule, and particularly what is meant by the phrase 'any other good ground', the court can and should properly have regard to equitable considerations'."

In that case, Davies J found that whilst there may well have some element of a bargain in the price, the offered price was not unreasonably low. However, the learned judge then went on to consider whether there was some "other good ground" on which the sale should be set aside. After giving consideration to the equities of the case, he came to the conclusion that the circumstances of that case did constitute good grounds in terms of r 359, and that the interests of justice in that case would best be served by setting aside the sale rather than by confirming it.

In *Naran supra*, the Supreme Court considered an appeal from the decision of a judge of the High Court that a judicial sale be set aside. Naran had bought a stand which belonged to Midlands Chemical Industries (Pvt) Ltd (hereinafter referred to as "MCI") at a sale in execution. MCI then applied for cancellation of the sale, seeking *restitutio in integrum*, which was granted. Naran then appealed to the Supreme Court. At p 6-7 of the cyclostyled judgment Ebrahim JA said:

"A bad bargain for the judgment creditor (if that be the case and I make no finding on that point) would not constitute a ground for setting aside. It would be commercially unacceptable for courts to have the power to set aside deals simply on the basis that, in the absence of mistake or fraud or other legitimate ground, one party made a bad bargain. Midlands was the author of its failure to prevent the sale, or to procure or arrange for their backer to attend effectively the properly advertised sale to bid for the property. The inchoate sale to the appellant Naran (yet to be perfected by delivery) should and cannot be lightly impugned. See *Sookdeyi & Ors* v *Sahadeo & Ors* 1952 (4) SA 568 at 571H. I consider the facts adduced at the hearing and on which the trial judge relied to set aside judgment are wholly

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inadequate to justify the relief that Midlands seeks. The appellant purchaser has acted in good faith and performed his part of the contract. Midlands cannot rely on their own fault to defeat the sale."

I would point out that the application in *Naran*'s case was not brought in terms of r 359. It was brought under the common law. I accept, as indeed I am bound to do, that a judicial sale cannot be set aside simply on the grounds that the judgment debtor had made a "bad bargain", and that the judgment debtor cannot rely on his or her own default to defeat the sale. Where, however, the application is brought in terms of r 359, the court is obliged,

SMITH J

by virtue of the provisions of that rule, to have regard to the equities of the case.

McNally JA, in *Smith & Anor* v *Acting Sheriff of Zimbabwe & Anor* 1995 (1) ZLR 158 (S), sounded a warning that, in dealing with cases for the setting aside of a judicial sale, the court should not fall for hard-luck stories. At p 161F-G he said:

"The evolution of the Roman-Dutch law in the spirit of our customary law is an on-going process - a process of indigenisation. Current public concern over the fate of people who lose their houses because of economic misfortune is a good example of the clash between the stricter Western legal mentality and the gentler, more compromising, customary-law outlook. We must be careful not to drift into maudlin sentimentality and excessive sympathy for the hard-luck stories. If we do, we undermine the very efficient and effective mechanisms by which housing is funded. But there is no reason why the courts should not take account of the fact that forced sales generally realise a lower price than ordinary sales, and that the judgment debtors' interests rank low in the scale of priorities in these sales. Perhaps too low."

The principle that a judicial sale which has been confirmed will not readily be set aside was reaffirmed in *Mapedzamombe* v *Commercial Bank of Zimbabwe & Anor* 1996 (1) ZLR 257 (S) at 260D-E, where Gubbay CJ said:

"Before a sale is confirmed in terms of r 360, it is a conditional sale and any interested party may apply to court for it to be set aside. At that stage, even though the court has a discretion to set aside the sale in certain circumstances, it will not readily do so. See *Lalla* v *Bhura supra* at 283A-B. Once confirmed by the Sheriff in compliance with r 360, the sale of the property is no longer conditional. That being so, a court would be even more reluctant to set aside the sale pursuant to an application in terms of r 359 for it to do so. See *Naran* v *Midlands Chemical Industries (Pvt) Ltd* S-220-91 (not reported) at pp 6-7. When the sale of the property not only has been properly confirmed by the Sheriff but transfer effected by him to the purchaser against payment of the price, any application to set aside the transfer falls outside r 359 and must conform strictly with the principles of the common law.

This is the insurmountable difficulty which now besets the application. The features urged on his behalf, such as the unreasonably low price obtained at the public auction and his prospects of being able to settle the judgment debt without there being the necessity to deprive him of his home, even if they could be accepted as cogent, are of no relevance."

It was clear from this remark that the court felt that, if the judgment debtor was able to settle the judgment debt without there being the necessity to drive him from his home, that might well constitute good grounds for setting aside the sale in execution.

As Gillespie J said in *Morfopolous* v *Zimbabwe Banking Corporation Ltd & Ors* 1996 (1) ZLR 626 (H) at 631F, r 351 expands, rather than curtails, the common law, which justifies the proposition that the court has a wide discretion as to what constitutes a good ground for setting

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aside a judicial sale in terms of that rule. He pointed out that the enlargement of the common law was achieved, not only by widening the grounds upon which relief may be

SMITH J

given, but also by the provision of an intermediate stage between the conclusion of the sale and the confirmation thereof by the Sheriff, in which period the sale is to be seen as a conditional one.

After referring to the comment made by McNally JA in *Smith*'s case *supra*, about the current public concern over the fate of people who lose their houses because of economic misfortune, which I have cited above, the learned judge went on to say at p 634:

"I am not of the view that the dichotomy of principle is, as these authorities have shown, well known to the settled law and our own rules of court given an indication of a desire to allow somewhat more latitude to the judgment debtor. The opportunity in particular of intervening for any good cause shown permits a court to extend relief where circumstances permit. All too frequently, however, the debtor finds himself in an invidious position relating to the loss of his home precisely because of his own failure to address the problem efficiently at an early stage. Where his own tardiness or evasion has contributed to his problems, a debtor cannot hope to persuade a court that equitable relief is his due."

In applying the law to the circumstances of this case, it is accepted that Munyoro was tardy in settling his debt to Founders. However, he did manage to do so before the sale in execution was confirmed but admittedly after the actual sale in execution. Furthermore, by letter dated 31 May 1996, Founders advised the Sheriff that Munyoro had settled his arrears and requested that the sale be set aside. Had Kaseke made any attempt during the last $2^{1}/_{2}$ years to press his claim and have the property transferred, I am sure the court would have been more sympathetic to his claim. However, he has done little to enforce his rights. He did apply, more than once, in 1998 for the matter to be set down for hearing but his efforts came to nought. The matter was not set down until 1999. Munyoro, in the meanwhile, has been allowed to carry on living in his home with his family.

I accept that a judicial sale must not be lightly set aside. On the other hand, the decision to turn a family out of its home must also not be taken lightly. Hopeful purchasers who attend judicial sales are usually looking for bargains. They want to buy property as cheaply as possible. I do not think that bargain hunters would be deterred from attending judicial sales merely because the sale to them might be set aside at a later date, as long as the procedure is not too long drawn out. In this case, Kaseke paid for the property in 1996 but does not appear to have made any meaningful attempt to obtain transfer. Clearly, this is an investment on his part. If he was wanting a home, he would have made greater efforts to get occupation. On the other hand, Munyoro has paid the judgment creditor, the first respondent, what he owed it in 1996. In the circumstances, it seems to me that Munyoro has shown good cause for the sale to be cancelled. In coming to that conclusion I do not consider that I am drifting into "maudlin sentimentality and excessive sympathy".

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SMITH J

However, even though Munyoro has been successful, he is largely to blame for the position in which he is now and has been for some four years. He is seeking condonation for his inaction or dilatory action. In the circumstances, it would be unjust to order that Kaseke pay his costs.

As mentioned above, once a sale has been concluded in terms of r 356 or 358, the Sheriff is obliged to confirm it if no objection is lodged within 7 days. If an objection is lodged, it is dealt with by the High Court. If an objection is not lodged within the 7 days, then the Sheriff must confirm the sale even if there has been a procedural defect or there is other good cause why the sale should not be confirmed. It seems to me that there would be merit in permitting the Sheriff, in the first instance, to deal with any objection. He would be able to handle the matter much more expeditiously and at less cost to the parties. The High Court should only come into the picture if any interested party wishes to appeal from the decision of the Sheriff. I strongly recommend that consideration be given to amending the rules of court so as to confer the necessary powers on the Sheriff to deal with such objections.

The provisional order cancelling the sale of house No. 1345 Ardbennie Township 16 of Subdivision A of Ardbennie, Harare is confirmed. Each party shall bear its own costs, save that the applicant shall pay the second respondent's costs relating to the supplementary affidavit.

Sawyer & Mkushi, applicant's legal practitioners

Honey & Blanckenberg, second respondent's legal practitioners

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S *v* MASENDEKE 1999 (1) ZLR 352 (HC)

Citation	1999 (1) ZLR 352 (HC)
Case No	Judgment No. HH-80-99
Court	High Court, Harare
Judge	Chinhengo J
Heard	May 12, 1999
Judgment	May 12, 1999
Annotations	None

Criminal review

Flynote

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Appeal - noting of - effect on operation of sentence passed - prohibition from driving and cancellation of licence - operation of prohibition and cancellation suspended pending outcome of appeal

Headnote

The accused had been convicted of negligent driving and had been sentenced to a fine of $1 000 or, in default of payment, to 5 months' imprisonment. He had also been prohibited from driving all types of motor vehicles for a period of six months and his driver's licence had been cancelled. He noted an appeal against sentence and after this he continued to drive his vehicle as he had been advised by his lawyer that he was entitled to continue to drive his vehicle until the appeal against sentence was determined. He was then charged with and convicted of driving a motor vehicle while under prohibition in contravention of s 49(2)(b) of the Road Traffic Act [*Chapter 13:11*]. On review:

Held, that, in terms of s 63 of the Magistrates Court Act [*Chapter 13:11*] a sentence of a fine or imprisonment is not suspended by the noting of an appeal.

Held, further, that the purpose of prohibiting a person from driving and cancelling his licence is both to punish the convicted person and to protect the public from his undesirable manner of driving and the prohibition from driving and cancellation of the licence is part of the sentence.

Held, further, that although the prohibition from driving and cancellation of the licence is part of the sentence, it is not a sentence of a fine or imprisonment as provided by s 63 of the Magistrates Court Act. The legislature has laid down that only a sentence of a fine or imprisonment is not suspended upon the noting of an appeal. Thus an order prohibiting a person from driving or cancelling his licence is suspended when an appeal is noted.

Held, further, therefore, that the conviction of the accused for driving while he was prohibited from driving must therefore be set aside.

Per curiam: It was strongly recommended that the legislature should change the law so that the noting of an appeal will not suspend the order prohibiting a person from driving pending the determination of the appeal. The time has come for the law to be more protective of the public instead of protecting the accused from possible unjust punishment. The carnage on our roads has increased and many people are killed or maimed due to negligent driving. The law should be changed to provide that the suspension of a licence or its cancellation consequent upon the prohibition from driving takes immediate effect despite the noting of an appeal against sentence. If this is not done the inevitable delay in the hearing and finalisation of appeals in the High Court, and even more so if there is a further appeal to the Supreme Court, would mean that dangerous drivers would be about on the roads and could again kill or maim other people.

1999 (1) ZLR p353

Cases Considered

Cases cited:

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Hatfield Ex p 1955 SR 86; 1956 (1) SA 38 (SR)

Mpanza v *Minister of Native Affairs & Ors* 1946 WLD 225

R v *Hickman* 1961 (4) SA 457 (SR)

S v *Chaita & Ors* 1998 (1) ZLR 213 (H)

R v *Graham* 1954 SR 8; 1954 (2) SA 272 (SR)

Statutes Considered

Legislation considered:

Magistrates Court Act [*Chapter 7:10*], s 63

Judgment

CHINHENGO J: On 14 July 1998, the accused was convicted of the crime of contravening s 52(1)(a) of the Road Traffic Act [*Chapter 13:11*] ("the Act"). The proper provision under which the accused should have been charged is s 52(2)(a) which makes it an offence to drive a motor vehicle negligently. He was sentenced to pay a fine of $1000 or, in default of payment, to serve 5 months' imprisonment. He was prohibited from driving all types of motor vehicles for a period of six months and his driver's licence was cancelled. He noted an appeal against sentence on 21 July 1998.

The conviction and sentence in the above mentioned matter is not the subject of the present review. The subject of this review is a further charge and conviction of the accused for contravening s 49(2)(b) of the same Act - the offence being that he drove a motor vehicle whilst under prohibition. He was sentenced to pay a fine of $350. It appears from the record of proceedings that, before committing this offence, the accused sought and obtained legal advice as to his rights in the matter. He was advised that he was entitled to drive a motor vehicle at least until his appeal against sentence was determined.

The reason for bringing this matter on review is summed up succinctly by the accused's legal practitioner in paras 10 and 13 of his statement submitted in terms of s 57(3) of the Magistrates' Court Act [*Chapter 7:10*]. Therein it is stated:

> "10. The only issue for determination by the Honourable Court now was therefore whether by virtue of having noted an appeal in respect of the earlier sentence given by the magistrate on 14 July 1998 the accused person is entitled to drive any classes of motor vehicle pending the determination of the appeal. Put differently, the court *a quo* was to decide whether or not the noting of the appeal by the accused person in respect of the sentence given on 14 July 1998 had the automatic effect of suspending the order given by the court in relation to the cancellation of the licence and the prohibition from driving for six months. It must be pointed out that the accused person, though having noted the appeal, had complied with the other aspect of paying the fine of $1000.
>
> 13. ... The contention (is) that the conviction and sentence in respect of contravening s 49(2)(b) of the Road Traffic Act [*Chapter 13:11*] and the subsequent sentence of $350 is manifestly wrong in law and as such it is not in accordance with real and substantial justice. The contention by the accused person [is] that by noting an

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CHINHENGO J

appeal against sentence given in respect of contravening s 52(1)(a) of the Road Traffic Act [*Chapter 13:11*] the appeal had the automatic effect of suspending the order pertaining to the prohibition from driving and the cancellation of the driver's licence. In other words, it is the accused's contention that he is entitled in law to drive pending the determination of the appeal which he noted in respect of the judgment given on 14 July 1998."

Gwaunza J, who was initially seized with this matter, sought the opinion of the Attorney-General. Upon receipt of the Attorney-General's opinion, the matter came before me during her absence. The Attorney-General's written opinion was that the orders prohibiting the accused from driving and cancelling his licence were suspended by the noting of the appeal against sentence in the earlier matter and, as such, the conviction and sentence should be set aside. Part of the Attorney-General's letter reads as follows:

"The trial magistrate is correct when he observes an element of absurdity in that *noting of an appeal does not suspend* the operation of a prison term or a fine, and, yet, *suspends* the operation of an order (part of a sentence thereof). Unfortunately, or is it fortunately, that is the law obtaining, going by s 63 of the Magistrates' Court Act [*Chapter 7:10*]. The feeling that a dangerous driver might be risking innocent persons' lives by driving pending the determination of the appeal, is only morally invoked. The rule of law is, as per s 63 of Magistrates' Court Act, the noting of an appeal suspends the operation of an order of prohibition, other than, the order of a prison term or a fine. It seems to me, crystal clear [*sic*].

It does not occur to me as if there is a conflict between s 63 of the Magistrates Court Act and s 65(9) of the Road Traffic Act [*Chapter 13:11*]. Section 65(9) of the Road Traffic Act provides that:

> 'A prohibition from driving and any consequent cancellation of a licence imposed in respect of an offence shall be deemed to be part of the sentence passed on the person convicted.'
>
> That is true; but then, s 63 of the Magistrates Court Act is more than specific when it provides that:
>
> 'The *execution* of any sentence of imprisonment or a fine shall not be suspended by:
>
> (a) ...
>
> (b) the noting of an appeal referred to in section 60 ..." (my own emphasis).

So, yes, the order of prohibition or cancellation is part of the overall sentence, but then *the effect of noting an appeal suspends the operation of the order and not, the operation of a prison term or a fine*."

Section 63 of the Magistrates' Courts Act thus makes it clear that a sentence of a fine or imprisonment is not suspended by the fact that an appeal has been noted against that sentence (see John Reid-Rowland - *Criminal Procedure in Zimbabwe* at p 27-31).

A similar question arose in Ex p *Hatfield* 1955 SR 86; reported *sub nom R* v *Hatfield* 1956 (1) SA 38 (SR), where the petitioner applied for directions as to whether or not the order suspending his driver's licence is operative pending the hearing of an appeal which he had noted. Beadle J (as he then was) reached the conclusion that the order was suspended. His reasoning appears at 88 (SR); 39 (SALR), where he said:

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"... where the legislature considers that the noting of an appeal shall not suspend the operation of a sentence it says so clearly, and it may be argued from the fact that, as no reference is made in any relevant statute as to what happens in the case of sentence of the suspension of a driver's licence, in the absence of a clear indication that such a sentence shall not be suspended it is suspended, pending the noting of an appeal."

The learned judge preferred to base his decision on the common law and, after referring to Voet 49.1.7 and to *Mpanza* v *Minister of Native Affairs & Ors* 1946 WLD 225, he concluded that under the common law the noting of an appeal suspends the operation of any sentence of the court. In further support of his reasoning, he distinguished the case before him from the earlier case of *R* v *Graham* 1954 SR 8; 1954 (2) SA 272 (SR) and stated at 89 (SR); 40A-C (SALR) as follows:

"In my view, however, the considerations which apply to this case are very different from those which applied in *R* v *Graham supra*. There are, in effect, two conflicting principles which have to be considered. If the sentence of the suspension of the driver's licence were suspended, and the appeal of the accused was unsuccessful the public would have been exposed to the danger of his dangerous driving during this period. If, on the other hand, this sentence were not suspended, and the accused's appeal were ultimately successful, then the accused would have been unjustly punished. It seems to me that in the face of these two conflicting principles the greater hardship would be that suffered by the accused if he were unjustly punished, rather than the possible hardship which might be suffered by the public if the accused were allowed to drive a car during the period of the suspension of his licence if that sentence were confirmed on appeal."

The learned judge ruled that unless there is a clear legislative direction on the noting of an appeal a sentence of this sort is automatically suspended.

It is noteworthy that Beadle J used the phrase "sentence of suspension of the driver's licence" in reference to the order of prohibition from driving and the cancellation of the driver's licence. That he referred to the order of suspension of the driver's licence as a sentence is instructive. It is consistent with s 65(9), which deems the prohibition from driving and the consequent cancellation of the licence to be part of the sentence passed on the person convicted.

It is also noteworthy that, in the passage which I have quoted above, Beadle J implies, if not expressly states, that the prohibition from driving and the consequent cancellation of the licence are part of the punishment imposed on the accused hence his reference to the accused being "unjustly punished". If the prohibition and cancellation are part of the punishment they are *ipso facto* part of the sentence imposed on the accused person. The purpose of a prohibition from driving and a cancellation of the licence is both to punish the convicted person and to protect the public from his undesirable manner of driving (see *R* v *Hickman* 1961 (4) SA 457 (SR)). The fact that an order of prohibition from driving or cancellation of the licence is part of the sentence does not mean that such order, whilst it is a sentence, is a sentence

of imprisonment or a fine. It is a sentence alright but not one of imprisonment or of a fine. Thus, s 63 of the Magistrates Court Act does not apply to such sentence or order. The section is quite specific that only a sentence of imprisonment or a fine may not be suspended by the noting of an appeal in terms of s 60 of the same Act. That section grants to the convicted person the right

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of appeal to the High Court against both sentence and conviction. I therefore agree that an order of prohibition from driving and the consequent order of cancellation of the driver's licence are sentences which are automatically suspended upon the noting of an appeal by a convicted person. This conclusion finds support in s 65 of the Act. Subsection (6) thereof provides that if the court for any reason does not prohibit a convicted person from driving a motor vehicle or prohibits him from driving a motor vehicle for a shorter period than that required in terms of the Act or does not cancel a licence when it should; that is to say, it commits an error being a failure to prohibit a person from driving (or for an appropriate period) or a failure to cancel the licence, the court shall cause a notice to be served on the convicted person directing him to appear before it and show cause why the prohibition or cancellation should not be imposed or the order corrected as the case may be - see *S* v *Chaita & Ors* 1998 (1) ZLR 213 (H) at 222D-E. That notice may not be given more than six months from the date of conviction. However, subs (8), which provides for the six months' limitation, recognises in its proviso that if an appeal has been noted against the conviction, the notice may be given within six months after the date the appeal lapses for want of prosecution or is determined, withdrawn or abandoned. This, to my mind, is an implicit recognition that even if the order of prohibition or cancellation was made before the appeal was determined, that order would have no practical effect as it would be suspended until the appeal is finalised.

With all due respect, I do not agree with the rationale advanced by Beadle J in *R* v *Hatfield* *supra* that of the two conflicting principles, the law must lean in favour of the accused who may, in the result, be unjustly punished. The situation in 1956 when *Hatfield*'s case *supra* was decided is not the same today. The carnage on our roads has probably multiplied tenfold. The number of vehicles on the road has increased, so has the number of drivers and dangerous drivers for that matter. In the last few years, we have read of horrendous stories where bus drivers have killed or maimed people because of negligent driving. If the law is not changed to provide that the suspension of a licence, or its cancellation consequent upon a prohibition from driving shall take immediate effect despite the noting of an appeal, then due to the inevitable delay in the hearing and finalisation of appeals in the High Court, and even more so where there is a further appeal to the Supreme Court, drivers dangerous to the public will be out on our roads for periods exceeding

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a year at the very least and may again kill or maim other people. I think that the legislature must step in and amend the law, so that the noting of an appeal does not suspend the orders or sentences of prohibition and cancellation pending the determination of any appeal. I would commend this change in the law to the Attorney-General and the responsible Ministry. The time has come, in my opinion, when the law must be more protective of the public than the convicted person who may be "unjustly punished". The individual interest must be subordinated to the interest of the majority in these circumstances.

The magistrate's determination in the present case was wrong. The accused should not have been charged with the offence of contravening s 49(2)(b) of the Act in the first place. He should not have been convicted and sentenced on that charge. The noting of an appeal by the

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accused had suspended the orders or sentences relating to prohibition and cancellation. The conviction must be set aside and the sentence quashed.

I need, however, to draw the magistrate's attention to the fact that the accused's defence in this case was in fact a defence of claim of right. The accused had sought and obtained legal advice as to his rights in the matter. The defence of claim of right, had the magistrate recognised it for what it was, would also have resulted in the accused's acquittal.

I agree that the law is as stated by accused's legal representative in his statement in terms of s 59 of the Magistrates' Court Act and as stated by the Attorney-General in his helpful comments. I do not necessarily agree that the law should remain as it is. It should, in my view be amended to provide that orders of prohibition from driving or the cancellation of driving licences should take effect immediately after they have been made and not suspended pending the determination of any appeal noted against them. I accept that this is a moot point, but I think that such an amendment of the law will ensure that the public is protected against reckless drivers.

The conviction and sentence of the accused are set aside. He should be refunded the sum of $350 which he paid as a fine.

Gwaunza J agrees.

S *v* TIVAFIRE 1999 (1) ZLR 358 (HC)

Citation	1999 (1) ZLR 358 (HC)
Case No	Judgment No. HH-52-99
Court	High Court, Harare
Judge	Garwe J, Chinhengo J
Heard	May 12, 1999
Judgment	May 12, 1999
Annotations	None

Criminal review

Flynote

Criminal procedure - compensation - for personal injury suffered - may not be made a condition of suspension of portion of sentence - may only be subject of order for compensation under Part XIX of the Criminal Procedure and Evidence Act [Chapter 9:07]

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Criminal procedure (sentence) - suspension - condition of suspension - compensation for damage or injury - personal injury - compensation may not be made condition of portion of suspension of sentence

Headnote

The accused was convicted of assault with intent to do grievous bodily harm. He was fined and, in addition, sentenced to a term of imprisonment, which was suspended on condition that he paid a specific sum of money to the complainant as compensation for the injuries she had suffered. No application for compensation had been made by the complainant. The question arose on review whether it was competent, in a case where personal injury is involved, to make an order for compensation or restitution a condition of suspension of portion of a sentence.

Held, that compensation or restitution may be granted in two ways. The first is where the complainant requests it in terms of Part XIX of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. Where the court orders compensation to be paid under this Part, the order is effectively a civil judgment which may be enforced as such. A person to whom an award has been so made has no further civil remedy. The second is where, in terms of s 358(3)(b) of the Act, payment of compensation is made a condition of suspension of sentence. The section allows a sentence to be suspended on condition of payment for "damage or pecuniary loss caused by the offence". The second course should only be followed where loss or damage is readily ascertainable, in such cases as theft or damage to property, as long as there has been evidence establishing the amount of compensation due. The amount of compensation for personal injuries is not readily ascertainable, being "damages" as opposed to "damage".

Held, further, that the order made by the magistrate should be set aside. It was arbitrary in respect of *quantum*. It was potentially prejudicial to the convicted person and to the victim of the offence.

S v *Banana* 1999 (1) ZLR 50 (H) not followed.

Cases Considered

Cases cited:

S v *Banana* 1999 (1) ZLR 50 (H)

S v *Charlie* 1976 (2) SA 596 (A)

S v *Donga & Anor* HB-37-95

S v *Chiwoko & Anor* 1989 (2) ZLR 364 (H)

S v *Edward* 1978 (1) SA 317 (C)

S v *Majecha* HH-64-84

S v *Moyo & Anor* 1996 (1) ZLR 5 (H)

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S v *Mpofu (2)* 1985 (1) ZLR 285 (H)

S v *Mupuka* HH-232-98

R v *O'Brian* 1927 TPD 274

S v *Svondo* 1984 (1) ZLR 140 (H)

S v *Tami & Ors* 1983 (1) ZLR 246 (H)

Smith v *Brown* (1871) LR 6 QB 729; 40 LJ QB 218

Statutes Considered

Legislation considered:

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 266(1)(b), 272, 358(2), 358(3), 362 & 363

Judgment

CHINHENGO J: The accused was charged with the crime of assault with intent to do grievous bodily harm. He pleaded not guilty to the charge. He was convicted and sentenced to a fine of $1000 or in default of payment 3 months' imprisonment. In addition, 3 months' imprisonment was suspended on condition that he paid, on or before 31 December 1998, $1000 to the complainant, Zola Makwena, as compensation for the injuries she sustained.

The facts, in brief, are that the accused and the complainant, Zola Makwena, were lovers. The complainant became pregnant and on 7 September 1998 at about 8.00 o'clock in the evening the complainant's sister took the complainant to accused's residence with the intention of leaving her with, in fact abandoning her to, the accused because of the pregnancy. The accused was unwilling to live with the complainant. He was angered by this move and assaulted the complainant twices that evening, first with a wooden plank and booted feet and then with a plastic tube. On examination by a doctor, the complainant was certified as having sustained certain injuries: a "scar of the left cheek, right knee and right leg". However, her evidence in court, which was not disputed by the accused, showed that she was assaulted all over her body. The doctor stated that moderate force was used by the accused; that the injuries were not serious and that there was no likelihood of a permanent injury. At the time of the assault, the complainant was two months pregnant. She later miscarried but the miscarriage could not, medically, be attributed to the assault.

I have no difficulty with the conviction of the accused and the part of the sentence concerning the fine imposed. The conviction was based on a virtual plea of guilty as the accused admitted all the essential elements of the offence.

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The fine fitted the offence and it was within accused's means. However, a part of the sentence

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imposed on the accused, ie the suspension of 3 months' imprisonment on condition that the accused paid compensation to the complainant in the sum of $1000 on or before 31 December 1998, raises some concern. It is this part of the order that drew the scrutinising magistrate's attention to the misdirection made by the trial magistrate. He wrote to the trial magistrate as follows:

"The learned trial magistrate noted in his reasons for sentence that this was a fitting case for complainant to get compensation for the pain and suffering as well as the humiliation. He went on to make an award of $1 000. However, this award was made as a condition of suspending 3 months' imprisonment with labour.

There is no mention of the provision relied on in making the award. The Criminal Procedure and Evidence Act provides for such compensation in s 363. This award is subject to subpara (i) of para (b) of subsection (1) of s 366 and also ss 368 and 274 of the same Act.

Now, did the learned trial magistrate make an award of compensation or merely suspended a portion of the sentence on condition accused pays $1 000 to complainant? If it is an award, did he follow the procedure? If it is a portion of a sentence suspended as a condition of compensation how was the level of compensation determined? Further, would that debar complainant in terms of s 374 of the Act? In other words, what is the effect of the sentence to complainant's civil claim if any at all?"

The trial magistrate conceded that he had misdirected himself in the circumstances. He did however mention that:

"I was, however, satisfied that the convicted person would suffer no prejudice as a result of the claim for compensation. In fact, the compensation has already been paid. I believe that in seeking compensation through the prosecutor the complainant was also advised that she would be debarred from further civil remedy. However for clarity I should have sought clarification from the public prosecutor before making the order."

After receiving the trial magistrate's response, the scrutinising magistrate despatched the following letter to the Registrar of the High Court on 16 February 1999:

"Could you please place this record before a reviewing judge with the following comments:

The trial magistrate suspended a portion of the sentence on condition of compensation in an assault case. He did not indicate whether he was doing so in terms of s 363 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. From the record, the complainant has not made an application for compensation. No other inquiry was held to determine the level of compensation. When asked to explain his award the trial magistrate conceded that it was improper for him to have suspended a portion of the sentence on condition of compensation.

The record is referred for his Lordship's views."

The scrutinising magistrate was correct to note that there is no indication on the record that an application for compensation was made or that an inquiry was held to determine the level of compensation. The only reference

in the record to compensation is a statement by the trial magistrate in his reasons for sentence where he said:

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"Accused is able to pay a fine. He is able even to pay compensation to complainant. I believe this is a fitting case for complainant to get compensation for the pain and suffering as well as the humiliation."

The trial magistrate was therefore not correct to state, in response to the query, that an application for compensation had been made. If it had, that is not indicated on the record. If it had, that also would mean that the record is not complete and that it, in fact, omits a material part of the proceedings. I will proceed on the basis, as did the scrutinising magistrate, and correctly so, that no application for compensation was made because what the trial magistrate states in his response is not borne out by the record. At best it is a belated attempt by him to minimise the seriousness of his misdirection.

In terms of s 358(2)(c) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the Act"), a court may:

"pass sentence, but order the operation of the whole or any part of the sentence to be suspended for a period not exceeding five years on such conditions as the court may specify in the order."

The several conditions on which the whole sentence or part thereof may be suspended are specified in s 358(3). Paragraph (b) of subs (3) relates to:

"compensation for damage or pecuniary loss caused by the offence:

Provided that no such condition shall require compensation to be paid in respect of damage or loss that is the subject of an award of compensation in terms of Part XIX ([of the Act])."

Part XIX deals with compensation for loss of or damage to property in s 362 and compensation for personal injury in s 363. The latter section provides that:

"Subject to this Part, a court which has convicted a person of an offence may forthwith award compensation to any person who has suffered personal injury as a result of the offence."

The provisions of the Act relating to compensation for loss or damage to property and for personal injury in Part XIX are designed to give the injured party the opportunity to obtain compensation or restitution in an inexpensive way and expeditiously.

What is in issue in this case is whether it is competent for a court to order compensation or restitution and make it a condition of suspension of a portion of a sentence under s 358; *in fine* subs (3)(b) where personal injury is involved. The words "compensation" and "restitution" can be used interchangeably. Reid Rowland in *Criminal Procedure in Zimbabwe* at p 25-48 uses these words interchangeably. He however, makes a statement which is liable to create confusion as to the circumstances in which an order

of restitution is appropriate under s 358 and when it is appropriate under Part XIX. He says:

"It is desirable, where the accused is convicted of an offence which has resulted in loss to another, to seek to compensate the complainant. This can be achieved by suspending portion of a sentence on condition of restitution."

As authority for this statement he cites *S* v *Mpofu (2)* 1985 (1) ZLR 285 (H) in which Reynolds J

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stated (at 293E-D):

"... it is in the interests of society as well if restitution takes place in that the complainant is content, the accused is making an effort to redeem himself and part of the affront against the social order has been repaired. As I see it, it is proper for the court itself, if the matter is not raised by the defence, to investigate the prospects of restitution and to give due weight, depending upon the circumstances, if this form of reparation is made. It is, in my view, desirable for the courts to encourage any person convicted of having committed an offence against property, such as theft or arson, to restore to the victim of the crime the value of the property in question."

I note that the learned judge qualified his rather generalised statement at the beginning of this passage, by making specific reference to offences "against property, such as theft or arson," thereby limiting the scope of his statement to offences against property. He goes on to say that there is no problem if the accused person volunteers to restore the property concerned or its value and is able to do so. The difficulty, he says, arises where the accused declines to make restitution although he may be in a position to do so. The learned judge asks the question at 293H-294A:

"The point arises as to whether he can and should be induced to do so by means of a suspended sentence or some other form of persuasion."

The question couched in these terms again seems to me to widen the scope of his statement quoted above, where otherwise one would have thought he intended to limit it to offences by which property has been damaged or stolen. He proceeds to deal with the general desirability of suspending a sentence or a portion of a sentence on condition of restitution. But he does not specifically address the question, which obviously did not arise in the case before him but arises in this case, as to the circumstances in which the presiding judicial officer should proceed in terms of s 358 or should proceed in terms of Part XIX of the Act. This problem was extensively addressed in *S* v *Banana* HH-11-99 *(103) where Chidyausiku JP awarded compensation to the complainant in a case of sodomy and to the "secondary victim" of the offence, ie the family of the deceased killed by the complainant for having called him "Banana's wife". Of a total of 8 years' imprisonment imposed on the accused, 3 years were suspended on condition of good behaviour and 4 years were suspended on condition that the accused paid $500 000 to the complainant Jefta Dube

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and the deceased's estate for distribution to the deceased's dependants - this amount to be divided equally between the complainant, on the one hand, and the deceased's dependants on the other. In suspending a portion of the sentence on condition that the accused paid compensation, the learned Judge President stated (at pp 8-10 of the cyclostyled judgment +(104)) the following:

"I now wish to turn to the question of whether it is competent for this court to suspend a portion of the sentence on condition of payment of compensation.

Section 365 of the Criminal Procedure and Evidence Act empowers a court to award compensation to any person who has suffered personal injury as a direct result of the offence. An award made in terms of this section is subject to certain limitations. The amount of damages, the extent of the accused's liability should be easily ascertainable, and the convicted person must not suffer prejudice. See s 366 of the Code. The award in terms of s 363 has to be applied

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for and cannot be granted by the court *mero motu*. An award made in terms of the above provisions is virtually a civil judgment and can be enforced as such after compliance with certain requirements.

Section 375 provides that an award made in terms of Part XIX of the Code, namely, the above provisions, shall not derogate from any other law relating to compensation or restitution. Compensation to the complainant in this case cannot be awarded in terms of the above provisions for a number of reasons, ie it is not easily ascertainable and it has not been applied for.

However, in my view, it would be quite proper to suspend a portion of the term of imprisonment I intend to impose on the accused on condition the accused pays compensation for the damage caused to the complainant Dube and any other person in terms of the provisions of s 358 of the Code.

In terms of s 358, where a person is convicted of any offence other than a Seventh Schedule offence a court may pass sentence but suspend the whole or part of it for up to five years on any such conditions as the court may specify. The conditions that the court may impose are set out in subs (3) of s 358 of the Criminal Procedure and Evidence Act ...

It would appear to me that this section confers on the court a very wide discretion regarding the conditions of suspension of sentence. In particular the restrictions imposed on a court making an award do not apply to the granting of compensation for damages as alternative to a custodial sentence. While I accept that most of the orders for compensation that have been made by the courts in terms of s 358 have related to proprietary loss I see no basis for a restricted interpretation of the words 'compensation for damage' as to mean damage to property only. In my view, Jefta Dube has suffered damage at the hands of the accused. Jefta Dube's condition, brought about by the accused's actions caused Dube to kill the deceased, Patrick Masawi. This in my view, is sufficient to bring Dube's victim within the ambit of s 358(3)(h). In my view it is also in the interests of the accused that he be given the option of paying compensation in exchange for a lengthy period of incarceration. This is particularly so if one takes into account the accused's health. The accused is also not prejudiced by the order for compensation because the period of effective imprisonment I intend to impose remains the same. It is not affected by the option of compensation. An effective 5 years' imprisonment with labour is an appropriate sentence for counts 2 and 3. So should the accused fail to pay compensation for whatever reason he will not be prejudiced in anyway because the court is satisfied that 8 years' imprisonment

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with labour with 3 years suspended on condition of good behaviour for counts 2 and 3 is an appropriate sentence, with or without the option to pay compensation."

It will be apparent that the Judge President considered that it was competent for the court to order compensation in terms of s 358 of the Act and that he more specifically relied on s 358(3)(h) in making the order. I have, with due respect, some difficulty with the approach taken in this case. Although I cannot say that approach is wrong on any reading of the relevant provisions of the Act, as I shall show later, I think it is not to be encouraged for adoption by judicial officers.

The suspension of a portion of a sentence on condition of compensation or restitution is a part of the criminal sanction imposed by the court. Whilst such an order enures to the advantage of the victim of the offence it is not essentially concerned with him. Its objective is to ensure that the accused does not undergo a longer and more rigorous form of punishment if he pays back or restores to the complainant the loss occasioned by the offence. If he does not comply with the order he then must serve the back-up punishment, which invariably is a prison term. In the words of Squires J in *S* v *Majecha* HH-64-84 (not reported) and referred to with approval by

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Chatikobo J in *S* v *Moyo & Anor* 1996 (1) ZLR 5 (H) at 8A-D:

"Ordering an accused to make restitution to complainant is another way of repairing the financial or patrimonial loss caused to a victim which can be achieved without an application by the complainant for compensation under [s 362]. Such restitution can be achieved in appropriate circumstances - such as a desire or a capacity to do so on the part of the accused - by ordering part of the sentence to be suspended under the court's general powers to suspend all or portion of the sentence it imposes on suitable conditions. This power is given under [s 358(2)(b)] and is on a different basis entirely from compensation awarded under [s 362]. In the case of restitution the criminal sanction is being used to achieve performance of the condition, because it is part of the sentence the court imposes. In this case, the court does have a discretion, to order compensation in suitable circumstances; and the decision to resort to such a course or not is part of the wider question of imposing a suitable sentence."

In *Banana*'s case *supra*, the court can be said to have used its discretion and made the order "as part of the wider question of imposing a suitable sentence". But this is precisely what McNally J (as he then was) in *S* v *Svondo* 1984 (1) ZLR 140 (H) found to be objectionable. He stated at 141H-142 that:

"These two orders are quite different from each other. The courts have often stressed that they should not be cojoined, that is to say the court should not order compensation under [s 362] and make it a condition of suspension that the money be paid. This is effectively to grant a civil judgement with a criminal sanction, as was pointed out in *S* v *Gombarume* 1975 (1) ZLR 300 at 301E-G."

In *Moyo*'s case *supra*, Chatikobo J in reference to his earlier decision in *S* v *Donga & Anor* HB-37-95 (not reported) stated that Part XIX was

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specifically enacted for compensation to be ordered in respect of loss occasioned by the accused's actions and that the order in terms of Part XIX is not dependant upon a suspension of sentence. "It is an order of a civil remedy", he said.

The distinction between the restitutionary or compensatory orders which can be made under s 358 and those which can be made under Part XIX is important to bear in mind. In my view, s 358(3)(b) was intended to deal with compensation for damage or loss which is not of a personal injury kind but loss or damage to property which is readily ascertainable. This is why an order under Part XIX can only be made upon an application by the victim of the offence and the court cannot act *mero motu*. The evidence must, in appropriate cases (which in practice means all cases), be adduced to determine the victim's entitlement to compensation, the liability of the convicted person to pay the compensation and the amount of the compensation. The purpose of s 358(3)(b) was not that it should be applied to decide issues separate from those raised in the criminal trial. It was designed to apply in cases where the proof of the commission of the crime itself virtually proves the liability for damages (see *R* v *Kurayi* 1958 R&N 863). It is otherwise, with Part XIX of the Act, the procedure of which calls for an inquiry into the application for compensation and the determination of the various issues that necessarily arise from such application.

The case which comes nearest to my own thinking on this question is *S* v *Mupuka* HH-232-98, a decision by Garwe J. In this case, the learned judge stated at p 2 of the cyclostyled judgment

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that:

"One further matter is of concern and that is the portion of the sentence suspended on condition accused pays the sum of $800 to the complainant for the injuries sustained. That order cannot stand and must be set aside. Compensation for personal injury is made pursuant to s 363 of the Criminal Code ...

... It is also apparent from the wording of s 358 of the Criminal Code that a portion of a sentence can be suspended on condition that accused pays compensation for damage or pecuniary loss caused by the offence. In my view, this relates to damage or pecuniary loss that is readily ascertainable. Compensation for personal injury does not fall into this category."

I am persuaded in my thinking that the decision in *Mapuka*'s case *supra* is the correct interpretation of s 358 and Part XIX of the Act. It is, in my view, supported by the decision in *S* v *Chiwoko & Anor* 1989 (2) ZLR 364 (H). Unless a judicial officer is in a position to ascertain readily the liability of the convicted person to pay compensation and unless the quantum of the compensation is readily ascertainable, it would not be proper to proceed under s 358(3)(b) or s 358(3)(h) in any case in which compensation which must properly be quantified would be payable. The latter provision was designed to give to the court the discretion to deal with the matter in any other

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way not specifically stated in paras (a) to (g) of this subsection. Section 363 of the Act is, in my view, quite unambiguous that compensation for personal injuries is claimable only in terms of Part XIX of the Act. To proceed in terms of s 358(3)(b) in such a situation opens the judicial officer to many imponderables - he would not be in a position to assess the liability of the convicted person to pay the amount of compensation involved or to assess the victim's entitlement to that amount. The court must always give the correct amount of the judgment in any civil judgment (*S* v *Tami & Ors* 1983 (1) ZLR 246 at 247H). If the correct amount cannot be ascertained or assessed, as would be the case if the court acted in terms of s 358(3)(b) of the Act where personal injuries are involved, prejudice is likely to be caused to both the convicted person and to the victim of his offence. In respect of the convicted person, prejudice may arise, for instance, from ordering him to pay a high amount as compensation which may not be justified. This, in my view, is the prejudice which the court must have regard to, not the prejudice, as stated in *Banana*'s case *supra*, which is relative to the severity or otherwise of the alternative punishment. In respect of the victim of the offence, prejudice may arise in that the order may stipulate a lesser amount than that which is justified ie the correct amount in the circumstances. It is to avoid all these pitfalls that the legislature enacted Part XIX of the Act whose provisions, in my view, should be followed in every case in which the amount of compensation and the convicted person's liability to pay that specific amount are not "virtually proved by the commission of the crime itself". This is why, in practice, compensation should, and will, be ordered as a condition of suspension of a sentence only in those cases in which the damage (and amount of compensation thereof) is readily ascertainable or the loss is purely pecuniary.

Part XIX does not define personal injury at all. It may be necessary, in order to avoid any confusion, that the term "personal injury" be suitably defined in amending legislation. Such

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amendment would, in my view, have to include injury of the nature as in *Banana*'s case *supra* because such injury is personal, not readily quantifiable, and not purely patrimonial damage.

The use of the word "damage" in s 358(3)(b) is liable to be understood to mean a sum of money awarded in compensation for loss or injury, which is its legal meaning, with the result that it may be argued that a compensation order such as was made in *Banana*'s case *supra* cannot be said to be clearly wrong. In South Africa, the court there upheld a suspension of a portion of a sentence on condition of compensation in an assault case. See *S* v *Edward* 1978 (1) SA 317 (C). It has also upheld the suspension of a portion of a sentence on condition of payment of compensation (*S* v *Charlie* 1976 (2) SA 596 (A)) in a situation similar to that contemplated by s 262 of our Act. The distinguishing feature of these two South African cases is that the accused

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persons made offers to pay compensation and the offers were accepted by the victims.

The scrutinising magistrate in this case was, no doubt, correct in the objections he raised against the order made by the presiding magistrate. That order cannot be allowed to stand. It is arbitrary in respect of quantum. It is potentially prejudicial to the convicted person and to the victim of the offence. It can only properly be made if Part XIX is complied with. It is, in my view, incompetent. Accordingly, the sentence is set aside and the following is substituted:

"The accused is sentenced to a fine of $1000 or in default of payment 3 months' imprisonment."

GARWE J: On the whole, I am in broad agreement with Chinhengo J's remarks in this review judgment and the sentence he has substituted. I am persuaded that the suspension of a sentence in terms of s 358 on condition that the accused pays compensation for damage or pecuniary loss caused by the offence would only apply in a situation where such damage or pecuniary loss refers to mischief done to property and is readily quantifiable or ascertainable. Personal injury can hardly amount to "damage" as envisaged in s 358(3)(b). Section 358(3)(b) specifically refers to "damage" and not "damages".

I am aware of some decisions in South Africa to the contrary. In addition to *S* v *Edward supra* cited by Chinhengo J, *R* v *O'Brian* 1927 TPD 274 at 278 is also authority for the proposition that:

"this condition attached to the suspension of the sentence is not only in accordance with substantial justice but is in accordance with strict law ... It is not necessary for the magistrate to have a claim for compensation before him or to have any evidence to the damage suffered."

I do not, with respect, subscribe to the above remarks. I am fortified in the view I take of the matter by a number of English authorities. In *Smith* v *Brown* (1871) LR 6 QB 729; 40 LJ QB 218 for example, Cockburn CJ said of the term "damage":

"Neither in common parlance, nor in legal phraseology, is the word 'damage' used as applicable to injuries done to the person; but solely as applicable to mischief done to property. We speak of 'damages' as compensation for injury done to the person; but the term 'damage' is not employed interchangeably with the term 'injury' with reference to mischief wrongfully occasioned to the person."

Whilst I accept that the interpretation of s 358(3)(b) is one that gives rise to some difference in

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opinion, I am of the considered view that the phrase "compensation for damage or pecuniary loss" in that section refers to compensation arising out of cases such as theft, arson, malicious injury to property, etc. In terms of Part XIX of the Criminal Code, before making an award, a court must undertake an inquiry and may receive further evidence.

CHINHENGO J

This is significant, as, in terms of s 274 of the Code, the person to whom an award has been granted has no further civil remedy. In terms of s 266(1)(b), a court shall not make an award where the amount is not readily quantifiable or where the full extent of the convicted person's liability to pay compensation is not readily ascertainable. All these provisions suggest to me that the intention was to ensure that before a court makes an award in personal injury cases it must be satisfied from all the circumstances that the award is an appropriate one. An award cannot be arbitrarily made. The award must, as in all civil cases, be properly considered and precedent taken into account. If this is the correct position, it seems even more unlikely that it could have been intended that under s 358(3)(b) a court can, without conducting any inquiry at all, take any figure and suspend a portion of the sentence on condition the accused pays that sum.

I am of the view that all awards for personal injury must be dealt with under Part XIX and not s 358(3)(b) of the Criminal Code. In summary, therefore, whilst compensation ordered under s 358(3)(b) could also be the subject of a civil award at the instance of the complainant under Part XIX of the Code and in particular in terms of s 362, compensation for personal injury cannot properly be made a condition of suspension under s 58(3)(b).

I acknowledge that this whole matter is a moot one and that it is necessary that the legislature steps in and makes its intention clear. The issue has arisen on many occasions before and needs to be resolved as soon as possible.

For the avoidance of doubt, I confirm that I concur with the sentence substituted by Chinhengo J.

S *v* M (a juvenile) 1999 (1) ZLR 369 (HC)

Citation	1999 (1) ZLR 369 (HC)
Case No	Judgment No. HH-91-99
Court	High Court, Harare
Judge	Gillespie J
Heard	May 12, 1999; May 13, 1999
Judgment	May 14, 1999
Annotations	None

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Bail application

Flynote

Child - child in need of care - sixteen year old girl arrested on charges of car theft - how such case should be dealt with - whether case should be diverted from the system of criminal prosecution

Criminal procedure - juvenile accused - pre-trial incarceration of - need for careful inquiry before ordering pre-trial incarceration

Headnote

A sixteen year-old girl had been enticed away from her family in Mutare by a prominent politician, who set her up in a flat in Harare. The politician then made sexual demands of her and she reluctantly submitted to these demands. During the time that she was not entertaining the politician, she used to stand flirtatiously on the side of road and she accepted lifts when drivers stopped. On two occasions after being picked up, the drivers stopped and she was left alone with the cars. She then drove the cars away illegally. Both cars were recovered, one abandoned in town and one when she was still driving it. She was arrested on two counts of car theft. She was held in prison on remand for several months. The Social Welfare Department had declined to investigate and report on the girl on the grounds that she was over 16. She then applied to the High Court for bail.

Held, that there is a need to give conscientious consideration to the possibility of diversion of juveniles from criminal justice proceedings. This case shows a serious failure on the part of all concerned at the initial stages of this investigation. The investigating officer had done nothing to inquire into the circumstances of the young girl. The prosecutor in the remand court had not shown proper sensitivity to the question of incarceration of this girl. The magistrates who had dealt with this case had failed to show the sensitivity they should have in relation to the detention of a juvenile in prison. If it was indeed the practice of the Social Welfare Department not to intervene and report on juveniles over 16 who were subject to criminal proceedings, this was a most pernicious practice.

Held, further, from the facts which emerged from the bail application and from the judge's own inquiries, this girl was at least as much victim as offender. She was a child in need of care in terms of s 2 of the Children's Protection and Adoption Act [*Chapter 5:06*]. The law requires that a child in need of care be installed in a place of safety and, once this is done, that the matter be referred promptly to the juvenile court.

Held, further, that she be removed from prison immediately and be placed in care for a period of not more than two weeks at the Musasa Project, which provides a shelter for girls and women. A probation officer of the Department of Social Welfare should forthwith prepare a report on the circumstances of the girl. The girl should be taken within two weeks before

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a juvenile court at which hearing the Social Welfare probation officer and an officer of the Musasa Project should make recommendations as to the future care and placement of the applicant.

Held, further, that subject to what further reports on the girl's circumstances might show, it seemed that the interests of justice may well be served by diverting the girl from criminal prosecution altogether. Various informal methods of diversion are suggested in the various cases. An appropriate method of formal diversion would be a court order staying prosecution on appropriate conditions. There is no legislative machinery in place permitting the giving of such an order by a lower court. This court could no doubt make such an order on the Attorney-General's application subject to the consent of the accused, but it is scarcely practicable to put in place a scheme of diversion which requires an application in each case to the High Court. Consideration should be given to passing legislation permitting such formal orders of diversion in the magistrates court.

Held, further, that if the Attorney-General decided that a prosecution must follow, the better charge to bring might be the unlawful use of cars rather than theft. Moreover, on conviction the question would arise as to whether it is desirable to divert the case from the standard criminal sanction by referring the matter to a juvenile court for sentence.

Cases Considered

Cases cited:

R v *Mahwahwa & Anor* 1955 SR 297

S v *C* 1997 (2) ZLR 395 (H)

S v *Tendai & Anor* 1998 (2) ZLR 423 (H)

Case Information

Applicant in person

Miss *T Zimba*, for the State

Judgment

GILLESPIE J: Young M, who is sixteen years old, who came before me applying for bail. That simple statement ought to prompt the question "What on earth is a sixteen year old girl doing in gaol?" The answer to that question is that officers of the law have not been attentive to their duty.

I wrote in *S* v *C* (a juvenile) 1(105) of the need to give conscientious consideration to the possibility of diversion of juveniles from criminal justice proceedings. This case shows a serious failure on the part of all concerned at the initial stages of this investigation. The investigating officer has done nothing to inquire into the circumstances of the young girl. The prosecutor in the remand court has shown little or nothing in the way of sensitivity to the question of the

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pre-trial incarceration of a juvenile. The magistrate before whoever she first appeared, a Mr Musakwa, failed completely to give any protection at all, as did every other magistrate who kept this child in Chikurubi prison from November last year, when she first looked to a court for succour, to her appearance before me. Even the Department of Social Welfare, which at some stage was alerted to this girl's plight, declined to investigate and report on the grounds that she is over 16 years. If it is the practice of this department

GILLESPIE J

not to intervene and report on a juvenile subject to criminal proceedings, if that juvenile has attained the age of 16, then it is a most pernicious practice.

The true extent and effect of this lethargy becomes apparent from the facts of the case as they have, on my investigation, been revealed to me. The applicant lived at home with her parents until about August last year. She has attended senior school in Harare and Mutare and has reached the third form. The real turning point in her young life seems to have been when an influential politician, apparently a cabinet minister, interfered with her well-being.

She first came into his orbit, in about April or May 1998, at about the time of her sixteenth birthday. While using a telephone at a public booth, M was approached by the close security officer of a prominent politician - whose name the girl was rather too frightened to divulge - and summoned to the presence of the "chef". She went to him where he sat in his green Mercedes, received his professions of pseudo-avuncular interest in her well-being, accepted his offer of a lift to her destination; and left him with his protestations of selflessly proffered assistance ringing in her ears and his card with the number of his personal mobile telephone weighting her pocket.

Some months later, in about August last year the family was living in Mutare. She offended her father's notions of good conduct. He disciplined her - perhaps relatively cruelly, perhaps not. With the tantalizing promise of influential patronage ringing enticingly in her ears, M called the number on the card. Her immediate reward was a bus ticket to Harare and the key to a flat in Avondale, by kind favour of her new protector. It soon became clear that the sanctuary was not without its price. He wanted from her what one might expect the roué to want from the ingenue. And despite her original reluctance, she found herself with no option but to submit to his sexual demands.

Time hung heavily on her hands during her stay at 7 Simon Court. The way she found to pass the time, when not entertaining her powerful friend, was to stand flirtatiously at the side of the road, attracting the notice, and the attentions, of passing drivers. On at least two occasions, she accepted rides from motorists who, at some stage in the journey, left her alone in the car with the car keys. She took the opportunity on these two occasions to drive the cars away unlawfully. The cars were both recovered. The first was abandoned in town. On the recovery of the second car, she was still driving it. She was then arrested and placed on remand on two counts of car theft.

It seemed to me during the course of the application for bail, and my subsequent inquiries, that this girl is at least as much victim as offender. I

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GILLESPIE J

found her to be a child in need of care 2(106) and accordingly exerted myself to ascertain the proper way of dealing with her. I have ascertained that a place is available for her at the Musasa Project, a shelter for girls and women, for two weeks. An order placing the girl in care there would remove her from prison immediately and provide temporary sanctuary and the opportunity for proper investigation, report and recommendation. The law provides that when a young person is installed in a place of safety then a prompt referral to the juvenile court is required. 3 (107) It would therefore be convenient to direct the referral to the juvenile court within the period of two weeks.

Miss *Zimba,* of the Attorney-General's Office, to whom I am grateful for her assistance in ensuring that I had the opportunity to interview the girl and her parents, has agreed that M is a child in need of care and ought to be ordered to a place of safety. She has also undertaken to examine the docket, and the girl's circumstances, with a view to giving closer consideration to the question of diversion. It seems to me, subject to anything further reports on the girl's circumstances might show, that the interests of justice, and of this young person, may well be best served by diverting her from criminal prosecution altogether.

Various informal methods of diversion are suggested in decided cases. 4(108) An appropriate method of formal diversion would be a court order staying prosecution on appropriate conditions. There is no legislative machinery in place permitting the giving of such an order by a lower court. This court could no doubt make such an order on the Attorney-General's application and within the consent of the accused, but it is scarcely practicable to put in place a scheme of diversion which requires application in each case to the High Court. It is time therefore to recommend, as I do, the consideration of legislation permitting such formal orders of diversion in the magistrates' court.

Even if it is decided by the Attorney-General, in his discretion, that prosecution must follow, I would have thought (though the decision is not mine) that the better charge may well be the unlawful use of the cars 5(109) rather than theft. Upon conviction, moreover, there is raised yet again the desirability of diversion from standard criminal sanction to treatment more appropriate to a juvenile. 6(110) For instance, in this case it might well be thought appropriate to refer the matter to a juvenile court for sentence.

GILLESPIE J

I cannot conclude this object lesson of how not to treat a young girl without also recommending to the attention and investigation of the Attorney-General the complaint against the as yet unnamed politician. The predatory sexual behaviour of influential men towards impressionable youngsters is an issue that is no new scandal in this country. On what I have been told, there is cause for suspicion that an offence has been committed against this girl by her would-be protector - perhaps the offence of corruption of a minor, 7(111) perhaps worse. I trust that appropriate inquiries will be opened. To that end I direct that a copy of this judgment be

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delivered to the Attorney-General and also to the Director of the Musasa Project and to the senior officer in the Department of Social Welfare.

In the event, for the reasons given I have made the order -

1. that the applicant is liberated from custody subject to the following conditions :

2. that in terms of s 15(1) of the Children's Protection and Adoption Act [*Chapter 5:06*] the applicant shall be removed forthwith to a place of safety, namely the Musasa Project, and there held in care for a period of no more than two weeks pending a hearing in the juvenile court.

3. that a probation officer of the Department of Social Welfare shall forthwith prepare a report on the circumstances of the applicant.

4. that the applicant shall be taken before a juvenile court in terms of s 17 of *Chapter 5:06* within two weeks hereof, at which hearing the probation officer shall, and the Director or her Deputy or some other officer of the Musasa Project may, make recommendations as to the future care and placement of the applicant.

5. that this order shall be served on the Director or her Deputy of the Musasa Project and upon the Provincial Social Welfare Officer.

MADODA *v* TANGANDA TEA COMPANY LTD 1999 (1) ZLR 374 (SC)

Citation	1999 (1) ZLR 374 (SC)
Case No	Judgment No. S-48-99
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA, Sandura JA
Heard	February 15, 1999
Judgment	May 18, 1999
Annotations	None

Civil appeal

Flynote

Employment - contract - termination - under employment code of conduct - disciplinary hearing held in terms of code of conduct - requirement to adhere to provisions of code in regard to composition of committee

Employment - code of conduct - interpretation - golden rule - words to be given grammatical and ordinary

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meaning unless absurdity results

Headnote

The appellant, a managerial employee in the respondent company, was charged with misconduct in terms of the company's registered employment code of conduct. He was found guilty by a disciplinary committee and was dismissed. The code of conduct prescribed how the disciplinary committee was to be composed. It required that the personnel manager or his representative should be present, as should two members of the workers' committee. No workers' committee members were present, and the group human resources manager, a superior of the personnel manager, took part. The personnel manager did not take part because he was a friend of the appellant. Counsel for the appellant submitted that the disciplinary committee which had dealt with this case was improperly constituted and that the proceedings were accordingly a nullity.

Held, that the appellant's dismissal was invalid. The disciplinary committee had been improperly constituted because of the absence of the two workers' committee members. The golden rule of construction of documents had to be applied. The ordinary meaning of the words used was that the presence of the two workers' committee members was obligatory. Although the prospect of two members of the workers' committee sitting in judgment over a managerial employee might be inappropriate or undesirable, it could hardly be described as an absurdity which warranted modification of the grammatical and ordinary sense of the words used. In fact, the provisions of the employment code had been agreed upon by the parties concerned, including managerial employees. The absence of the two workers committee members from the disciplinary tribunal was a fatal irregularity which vitiated the proceedings.

Held, further, that the attendance of the group human resources manager in place of the personnel manager or his representative constituted an additional irregularity. It was appropriate to substitute someone for the personnel manager, because he was a friend of the employee whose case was before the disciplinary tribunal. However, it was not appropriate to substitute the group human resources manager. The employment code did not provide for the group human resources manager in place of the personnel manager. He

could not be sent as the representative of the personnel manager. It is usually a junior official who represents his senior, not the other way round. It would be strange and absurd for the group human resources manager, who was the supervisor of the personnel manager, to be the representative of the personnel manager. This could not have been the intention of the parties to the employment code. They must have intended that the representative of the personnel manager would be a person on the same level as him or someone subordinate to him.

Held, further, that the employee's dismissal should be set aside and the matter remitted for rehearing by a properly constituted disciplinary committee.

Cases Considered

Cases cited:

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Chegutu Municipality v *Manyora* 1996 (1) ZLR 262 (S)

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

Minerals Mktg Corp of Zimbabwe v *Mazvimavi* 1995 (2) ZLR 353 (S)

Case Information

P Nherere, for the appellant

E W W Morris, for the respondent

Judgment

SANDURA JA: This is an appeal against the judgment of the High Court which dismissed with costs the appellant's application for an order setting aside the termination of his employment by the respondent.

The background facts are as follows. The appellant was employed by the respondent as a mechanical workshop manager. On 15 January 1998, he was charged with misconduct in terms of the respondent's Employment code of conduct ("the code"). A hearing was convened on 17 January 1998. Present at that hearing were: (a) Mr Craig, the respondent's estate manager, who was the chairman and complainant; (b) Mr Shoniwa, the respondent's human resources manager; and (c) the appellant. After an argument between the appellant and the chairman, the hearing was postponed to 20 January 1998. The appellant was advised to bring his own representative to the hearing.

Subsequently, the hearing was resumed on 20 January 1998 and present were the following persons: (a) Mr Reid, the respondent's agricultural manager, who was the new chairman; (b) Mr Craig, the respondent's estates manager, who was the complainant; (c) Mr Shoniwa, the respondent's group human resources manager; (d) Mr Mvududu, the appellant's representative; and (e) the appellant. Mr Craig was replaced as chairman because the appellant had apparently objected to his chairmanship.

Shortly after the commencement of the hearing, an argument ensued between the chairman and the appellant who was supported by his representative. The appellant argued against the charge preferred against him and indicated that he had no case to answer. Thereafter, the appellant left the hearing and was followed by his representative.

Nevertheless, the hearing continued and the chairman found the appellant guilty as charged. He recommended that the appellant be dismissed, and the

appellant was subsequently dismissed by the respondent. The appellant then filed a court application seeking an order setting aside the dismissal but, as already indicated, the application was dismissed with costs.

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Counsel for the appellant submitted that the disciplinary proceedings which resulted in the appellant's dismissal were vitiated by procedural irregularity in that the disciplinary committee ("the committee") which heard the appellant's case was not properly constituted in terms of the code. He gave two reasons for that submission. The first reason was that the committee did not include two members of the workers committee as required by the code; and the second reason was that neither the respondent's personnel manager nor a representative of his was in attendance at the hearing.

In order to test the validity of counsel's submissions, it is necessary to look at the provisions of the code. Section 7 reads as follows:

"7. COMPOSITION OF DISCIPLINARY COMMITTEE

The disciplinary hearing will be conducted by the following:

i. The personnel manager/Officer or his representative who will attend in an advisory capacity, in addition to acting as secretary in the proceedings.

ii. The Chairman - who is a designated disciplinary officer who may be:

(a) The Line Supervisor; or

(b) The Line Manager; or

(c) Head of Department/Division/Estate Manager; or

(d) The General Manager.

iii. Two workers' committee members

iv. The worker concerned (alleged offender)."

In passing, I wish to point out that it is somewhat anomalous and absurd that the alleged offender is included as a member of the committee. It seems to me that the intention of the draftsman was to indicate that the alleged offender was one of the persons expected to be present at the hearing. In my view, the only sensible way of interpreting s 7 of the code is that the hearing should be conducted by the chairman and two workers' committee members with the advice of the personnel manager or his representative.

In dismissing the appellant's application, the learned judge in the court *a quo* took the view that at the hearing the absence of two members of the workers' committee had no significance and did not vitiate the proceedings. Having concluded that the code applied to the appellant (a managerial employee), as he was obliged to do because the code specifically provided that its provisions applied to all employees, including managerial employees, the learned judge in the court *a quo* said:

"It would be most inappropriate to have a mid-management employee judged for misconduct by workers' committee members ... It would therefore have been a mis-application, an inappropriate interpretation of the code of conduct to require the attendance at the disciplinary of a managerial employee of two workers' committee members."

SANDURA JA

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By adopting that approach to the interpretation of s 7 of the code the learned judge in the court *a quo* departed from the ordinary grammatical meaning of the section and, therefore, erred. As Joubert JA said in *Coopers & Lybrand & Ors* v *Bryant* 1995 (3) SA 761 (A) at 767D-F:

"The matter is essentially one of interpretation. I proceed to ascertain the common intention of the parties from the language used in the instrument. Various canons of Constitution are available to ascertain their common intention at the time of concluding the cession. 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 same view was subsequently expressed by my brother McNally in *Chegutu Municipality* v *Manyora* 1996 (1) ZLR 262 (S) at 264D-E where he said:

"There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as Lord Wensleydale said in *Grey* v *Pearson* (1857) 10 ER 1216 at 1234, 'unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further'."

In my view, the only absurdity in s 7 of the code is the one which I have already referred to, and that is the inclusion of the alleged offender in the composition of the disciplinary committee. It is, therefore, imperative to ascribe to the rest of the section the ordinary meaning of the words used.

Although the prospect of two members of the workers' committee sitting in judgment over a managerial employee might be inappropriate or undesirable, it could hardly be described as an absurdity which warranted modification of the grammatical and ordinary sense of the words used. In fact, the provisions of the code were agreed upon by the parties concerned, including managerial employees. In this regard, para 4 of the respondent's opposing affidavit reads as follows:

"I admit that the respondent has a registered code of conduct, but deny that at its inception managerial employees were not consulted. In fact managerial employees were represented on the works council formed for the registration of the code."

Furthermore, the preamble to the code makes it quite clear that the provisions of the code were negotiated and agreed upon by the parties concerned and that they applied to all employees, including managerial employees. It reads as follows:

"1.1 This employment code of conduct shall be known as the TANGANDA TEA COMPANY employment code of conduct. It has been negotiated, agreed and signed in terms of SI 379/1990, Labour Relations (Employment codes of Conduct) Regulations.

1.2 The code shall apply to all employees including managerial employees ..."

SANDURA JA

The learned judge in the court *a quo* was of the view that the absence of the members of the workers' committee was not a fatal irregularity because the appellant attended the disciplinary proceedings with a representative of his own choice. I disagree. There is no provision in the code which permits the substitution of a personal representative for the two members of the

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workers' committee. In any event, the two members of the workers' committee who are supposed to be on the disciplinary committee are there to represent the interest of the workers in general and not just those of the alleged offender as is the case with a personal representative.

In the circumstances, I am satisfied that the absence of two members of the workers' committee from the disciplinary hearing on 20 January 1998 was a fatal irregularity which vitiated the proceedings. That in fact is the end of the matter.

Nevertheless, I proceed to consider the attendance of the group human resources manager at the disciplinary hearing in place of the personnel manager.

In terms of s 7 of the code, the official who attends the disciplinary hearings in an advisory capacity and as the secretary of the disciplinary committee is the personnel manager/officer or his representative. It was alleged by the respondent that the group human resources manager attended the hearing as a representative of the personnel manager because the latter was a friend of the appellant. In this regard, the learned judge in the court *a quo* said the following in his judgment:

"In addition, it seems to me entirely appropriate that the group human resources manager should attend a disciplinary hearing involving a person at mid management level, rather than leaving it to somebody more or less at the same level or potentially more or less of the same level of the applicant. Someone such as the personnel manager at the station."

Whilst I agree that it was appropriate to substitute someone else for the personnel manager because the latter was a friend of the appellant, I respectfully disagree that the group human resources manager was an appropriate substitute. I say so because s 7 of the code does not provide for the attendance of the group human resources manager in place of the personnel manager. It provides that the personnel manager or his representative shall attend the disciplinary hearing.

A representative is a person chosen or appointed to take the place of another. Usually, it is the junior official who represents his senior, and not the other way round. For example, it would be strange and absurd for the President to represent the Vice President at a function. Similarly, it would be strange and absurd for the group human resources manager, who is the supervisor of the personnel manager, to be a representative of the personnel manager. In my view, that was not the intention of the parties concerned. The

intention must have been that the representative of the personnel manager would be a person on the same level as the personnel manager or someone subordinate to him.

It follows that the group human resources manager did not attend the disciplinary hearing as a representative of the personnel manager, and that his attendance thereat was not provided for by the code. He therefore attended and took part in the disciplinary hearing as a stranger.

In my view, where a disciplinary committee is established in terms of a registered code of

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conduct and the composition of the committee is not as provided for in the code, the deviation from the provisions of the code constitutes a procedural irregularity. In addition, the attendance and participation of a stranger at the disciplinary hearing is an irregularity which renders the proceedings at least voidable at the instance of the convicted employee. In this regard, it is for the party who seeks to have the proceedings upheld to show that the irregularity did not cause any prejudice.

Commenting on the attendance at a disciplinary hearing by Mr Sibanda, the human resources manager, whose attendance was not provided for by the code, Gubbay CJ said the following in *Minerals Marketing Corporation of Zimbabwe* v *Mazvimavi* 1995 (2) ZLR 353 at 362C-F:

"Nonetheless, it is certain that Mr Sibanda was not present merely as an observer. The minutes reflect that he was permitted to put questions to and make statements concerning the respondent, although the occasions on which he did so were few. The purpose of his attendance was, in his own words, 'to guide the committee'. It is probable, therefore, that he took part in their deliberations. The extent to which he may have influenced the deputy chairman and the two divisional managers or hampered their discussions is not known. What is plain is that in allowing Mr Sibanda to be present, in a capacity other than a silent observer, the disciplinary committee went beyond the parameters of the code. It was an act impliedly forbidden. Thus a procedural irregularity occurred which, if not vitiating the proceedings, rendered them voidable at the instance of the respondent. See *Gründling* v *Beyers & Ors* 1967 (2) SA 131 (W) at 151H-152H; *Cohen* v *SA Pharmacy Council* 1993 (1) SA 297 (C) at 303C. The irregularity was calculated to prejudice the respondent and was not shown by the Corporation not to have caused any prejudice. See *Jockey Club of SA & Ors* v *Feldman* 1942 AD 340 at 359; *Rajah & Rajah (Pty) Ltd & Ors* v *Ventersdorp Municipality & Ors* 1961 (4) SA 402 (A) at 408 A; *Blacher* v *University of Cape Town & Anor* 1993 (4) SA 402 (C) at 408C."

In my view, these comments apply to the facts of the present case with equal force. Although there was no evidence that the group human resources manager put any questions to the appellant and his representative before they withdrew from the disciplinary hearing, it was common cause that he attended the hearing in an advisory capacity.

In the circumstances, the combined effect of the absence of two members of the workers' committee from the hearing, and the presence of the group human resources manager at the hearing was fatal and vitiated the proceedings

SANDURA JA

because the disciplinary committee was not properly constituted in terms of the code.

The appeal is, therefore, allowed with costs. The order of the court *a quo* is set aside and the following is substituted:

"1. The applicant's dismissal from employment by the respondent is set aside.

2. The costs of the application shall be borne by the respondent."

GUBBAY CJ: I agree.

McNALLY JA: I agree.

Mandizha, Chitsunge & Co, appellant's legal practitioners

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Scanlen & Holderness, respondent's legal practitioners

JACKSON *v* UNITY INSURANCE CO LTD 1999 (1) ZLR 381 (SC)

Citation	1999 (1) ZLR 381 (SC)
Case No	Judgment No. S-58-99
Court	Supreme Court, Harare
Judge	Gubbay CJ, Ebrahim JA, Sandura JA
Heard	May 11, 1999
Judgment	May 18, 1999
Annotations	None

Civil appeal

Flynote

Landlord and tenant - lease - cancellation - tenant in breach of lease - landlord giving notice that lease to end at a specified future date - not a valid notice of cancellation

Headnote

The tenant of a residential flat was accused by his landlord of having breached the lease agreement by conducting business from the flat. The landlord, instead of giving the tenant immediate notice of cancellation, gave him notice that the lease was to terminate at the end of the following month. At the end of the notice period the tenant refused to leave and the landlord sought his eviction. The High Court granted the order sought, and the tenant appealed.

Held, that, assuming that the tenant had in fact breached the terms of the lease, the landlord was entitled to terminate the lease immediately. A valid notice of cancellation must clearly inform the guilty party of the wronged party's unqualified, immediate and final decision to treat the contract as being at an end. The right to resile from the contract must be exercised immediately. What the landlord purported to do was to declare that the contract was to terminate at some future date and hold the tenant bound until that date arrived. Since this was not a valid notice of cancellation, ejectment could not be ordered.

Cases Considered

Cases cited:

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Erasmus v *Pienaar* 1984 (4) SA 9 (T)

Ganief v *Hoosen* 1977 (4) SA 458 (C)

Case Information

Miss *W T Miles*, for the appellant

F Girach, for the respondent

Judgment

GUBBAY CJ: The respondent is the owner of Shawdon Flats, a residential property situated in Herbert Chitepo Avenue, Harare. The firm Knight Frank & Rutley manages the property.

On 29 November 1996, the appellant entered into a contract with the respondent in terms of which the latter leased Flat No. 24 (hereafter referred to as "the premises") for the period 1 December 1996 to 30 November 1997. Upon the expiration of the lease, the appellant retained possession of the premises. Under s 31 of the Rent Regulations 1982 (SI 626 of 1982) ("the Regulations") he became a statutory tenant with

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occupation of the premises governed by the terms and conditions of the original contract of lease in so far as such were consistent with the Regulations.

Clause 4.1 of the lease provided that, save with the consent of the respondent, the appellant was authorised to utilise the premises "solely for the purposes of a residential dwelling". And clause 2.2 stipulated, in material part, that the commission of any breach of the contract of lease gave the respondent "the right to *immediately* cancel and terminate the lease, re-enter and take *immediate possession* of the premises" (the emphasis is mine).

On 5 December 1997, the property managers dispatched a registered letter to the appellant, which read as follows:

"24 SHAWDON FLATS: LEASE AGREEMENT/NOTICE TO VACATE FLAT

We have been instructed by the landlord to issue you with notification that the lease agreement with you for Flat No. 24 at Shawdon is to terminate on 31 January 1998 and that you are required to vacate the Flat by no later than 31 January 1998.

This notice of termination of the lease agreement and notice to vacate is on the grounds that you have again started operating a 'Scooters For Hire' business from Flat 24. We draw to your attention that in terms of our letter of even reference dated 7 July 1995, you were issued with a warning to stop the business by no later than 31 July 1995, which you complied with.

The fact that you have resumed the 'Scooter Hire Business' from the flat is again in breach of clause 4.1 and 6.1 of the lease agreement ...

In the event that you do not vacate Flat No. 24 by 31 January 1998, we have been instructed by the landlord to hand

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over this matter to the attorneys to effect your eviction from the flat."

The appellant refused to vacate. He continued to pay the rent within seven days of due date and to perform the other conditions of the lease.

Faced with this impasse, the respondent applied to the High Court for an order of ejectment. In opposing the relief sought, the appellant raised two defences. First, that it was not competent for the court to evict him from the premises in the absence of the issue by an appropriate rent board of a certificate in compliance with s 30(2)(e) of the Regulations. Second, he disputed entirely that since 31 July 1995 he had operated a scooter hire business from the premises. Neither found favour with the learned judge. Her Ladyship granted the application with costs, allowing the appellant seven days within which to vacate.

In deciding the matter, I am prepared to assume in favour of the respondent that the appellant breached clause 4.1 of the contract of lease by not using the premises solely for the purpose of a residential dwelling; and that thereupon it became entitled under clause 2.2 to immediately terminate the lease. Thus, the crucial question that arises is whether the respondent effectively did so. It relied, of course, on the submission that the letter of 5 December 1997,

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properly construed, conveyed to the appellant that it cancelled the lease with immediate effect but permitted him until 31 January 1998 to vacate the premises.

The appellant's argument, on the other hand, was that to be valid a notice of cancellation must clearly and unambiguously inform the guilty party of the wronged party's unqualified, immediate and final decision to treat the contract at an end. And this, the letter of 5 December 1997 had failed to do.

To my mind, the appellant is correct. His contention derives direct support from the judgment in *Ganief* v *Hoosen* 1977 (4) SA 458 (C). In that case, de Kock J considered the very problem debated before this court, namely, whether a notice which purports to terminate a contract, not with immediate effect but as from a future date, is effective in the sense that its puts an end to the contract as from that future date. He said at 460F-G (with the concurrence of Nel AJ):

"I do not think that a lessor who has the right of election to cancel, and who wishes to cancel, is entitled to declare the contract cancelled as from some date in the future and to hold the tenant bound by the lease until the arrival of that date. In my view the right to resile from a contract is one that must be exercised *ex nunc*. Support for the views here expressed are to be found in the case of *Alpha Properties (Pty) Ltd* v *Export Import Union (Pty) Ltd* 1946 WLD 486."

This principle was accepted by Ackermann J in *Erasmus* v *Pienaar* 1984 (4) SA 9 (T) at 17A-B (though its application was not relevant to the facts), and is approved of in Cooper *Landlord and Tenant* 2 ed at 316 and Kerr *The Law of Sale and Lease* 2 ed at 331.

An examination of the letter of 5 December 1997 plainly reveals that what the respondent purported to do was to declare that the contract of lease was to terminate on 31 January 1998 and to hold the appellant bound until the arrival of that date. The letter is headed "Notice to vacate flat"; and the first paragraph thereof notified the appellant that (on account of the alleged

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breach) the lease would terminate and he was to vacate the premises, not with immediate effect, but in eight weeks time.

It necessarily follows that having elected to give notice of termination of the contract of lease from some future date and not to exercise its right to resile therefrom immediately, the respondent was caught by s 30(2) of the Regulations. It was debarred from obtaining relief from the High Court. For it had not obtained, in accordance with para (e) to s 30(2), a certificate that the requirement that the appellant vacate the premises on the ground that he had unlawfully operated a scooter hire business thereon is "fair and reasonable", and that the date specified for the vacation had passed.

GUBBAY CJ

It is for these reasons that the appeal must be upheld with costs and the order of the court *a quo* altered to read:

"The application is dismissed with costs."

EBRAHIM JA: I agree.

SANDURA JA: I agree.

Byron, Venturas & Partners, appellant's legal practitioners

Stumbles & Rowe, respondent's legal practitioners

SAMURIWO *v* ZIMBABWE UNITED PASSENGER CO 1999 (1) ZLR 385 (HC)

Citation	1999 (1) ZLR 385 (HC)
Case No	Judgment No. HH-86-99
Court	High Court, Harare
Judge	Garwe J
Heard	May 4, 1999
Judgment	May 19, 1999
Annotations	None

Civil application

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Flynote

Employment - contract - termination - on notice - when may be made - employment code of conduct in existence - termination without Minister's consent permissible

Headnote

The applicant had been employed by the respondent company as its managing director. Following a dispute with the board, he was given six months' notice of termination of his contract, this being the period of notice provided in the contract. He sought to have the termination set aside on the basis that Ministerial approval had not been given as required by the labour laws.

The company argued that as it had a registered code of conduct, which applied to all employees, regardless of rank, Ministerial approval was not required. The applicant argued that the code did not apply to him for two reasons: (1) that the code only applied to termination for misconduct, not to termination for other reasons; (2) that the code made no provision for a situation where the managing director himself was the subject of a disciplinary enquiry.

Held, that the amendment to the relevant regulations was clear and unambiguous: where there is an employment code of conduct in existence applicable to the employee in question, it is not necessary to apply for the permission of the Minister of Labour to dismiss the employee on notice. The fact that the code itself made no provision for the termination of the managing director's employment on disciplinary grounds was irrelevant, as the termination was under the applicant's contract of employment.

Cases Considered

Cases cited:

Chivinge v *Mushayakarara & Anor* 1998 (2) ZLR 500 (S)

Statutes Considered

Legislation considered:

Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985, s 1A

Case Information

J C Andersen SC, for the applicant

A P de Bourbon SC, for the respondent

Judgment

GARWE J: The Zimbabwe United Passenger Company ("ZUPCO") has a code of conduct registered in terms of the Labour Relations (Employment Codes of Conduct) Regulations 1990. In terms of s 1 of the code of conduct ("the code"), the code shall apply to all employees

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regardless of rank who fall

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under the respondent. Whilst the code makes provision for all the other employees, it says nothing about the managing director except that his decision will be final and any appeals against his decision may be made to the Labour Relations Tribunal. The interesting point that arises in this case is whether the respondent can terminate the managing director's contract of employment upon giving six months notice in terms of his contract of employment without first obtaining permission from the Minister of the Public Service, Labour and Social Welfare.

The facts of this case are largely common cause, or at least not seriously in dispute. The applicant has been employed by ZUPCO since 1982 and with effect from 1992 was the respondent's managing director. In terms of clause 6 of his contract of employment, he is entitled to give 6 months' notice of termination of his employment with the respondent and likewise the respondent is entitled to terminate his employment on 6 months' notice. It is not in dispute that the relationship between the applicant and respondent's board has been strained. On 27 May 1998, the respondent, purporting to act in terms of the contract of employment, gave 6 months notice of its intention to terminate the applicant's employment with effect from after duty on 30 November 1998. This followed a decision by the Minister of the Public Service, Labour and Social Welfare in February 1998 that he had no jurisdiction to entertain the matter as there was in existence a registered code of conduct.

In terms of s 2 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 SI 371 of 85, no employer shall summarily or otherwise terminate a contract of employment with an employee except if four conditions are met, one of which is that the Minister's approval to terminate the employment is sought and granted. The other three conditions are not relevant for purposes of the present matter. The above Regulations were amended by SI 377of 90, which provides that ss 2 and 3 of the 1985 Regulations shall not apply to employees to whom the provisions of an employment code of conduct registered in terms of s 3 of the Labour Relations (Employment Codes of Conduct) Regulations 1990 apply.

It is not in dispute that ZUPCO has a registered code of conduct and grievance procedure. In terms of s 1 of the code, the code shall apply to all employees, regardless of rank, who fall under the respondent.

It is the applicant's contention that the code does not apply to him for two reasons. First, he argues that the code applies where employment is terminated as a result of misconduct and not where termination is for other reasons. Second, he submits that the code does not apply in this case because it makes no provision for a situation where the managing director is himself the subject of a disciplinary inquiry. For these reasons, the applicant argues that

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the Minister's approval is necessary before his employment can be terminated. Alternatively, he submits that any termination must be in terms of the code. He therefore seeks an order declaring that ZUPCO is not entitled to lawfully terminate his employment on giving 6 months' notice without first obtaining the permission of the Minister of the Public Service, Labour and Social Welfare and that the notice dated 27 May 1998, purporting to terminate such employment on six months notice be declared to be invalid.

The respondent company, in its heads, submits that once there is a code of conduct, termination on notice without the Minister's approval is permissible. In support of this submission, the respondent company has cited remarks made *obiter by G*ubbay CJ in *Chivinge* v *Mushayakarara & Anor* 1998 (2) ZLR 500 (S).

Section 1A, inserted by SI 377 of 90, is clear and allows of no ambiguity. Sections 2 and 3 of the 1985 Regulations do not apply to employees to whom the provisions of an employment code of conduct applies. Since it is not in dispute that there is in this case an employment code of conduct in existence, it seems to me that s 2 of the 1985 regulations, which provides, *inter alia*, for termination of employment with the Minister's approval, does not apply. In this regard, I find Mr *de Bourbon*'s submissions persuasive. In 1985, the Minister promulgated Regulations which prohibited termination except in certain circumstances. In terms of s 2 of those Regulations, the Minister was empowered to terminate a contract of employment whilst in terms of s 3 disciplinary proceedings could be instituted. This remained the law until 1990 when by statutory instrument the Minister gave the power to the Registrar of Labour Relations to register employment codes of conduct. The purpose must have been to relieve the Minister of the Public Service, Labour and Social Welfare, in cases where a code of conduct was registered, of the need to determine cases of termination of employment in the areas covered by ss 2 and 3 of the 1985 Regulations. All disciplinary hearings would be dealt with in terms of the relevant code of conduct. By promulgating the 1990 Regulations, the Minister deliberately took away certain powers that he and his Ministry previously enjoyed. Section 101 of the Act provides the criteria for registration of a code of conduct. It is clear that codes of conduct are primarily concerned with conduct or discipline. It must have been the intention of the legislature that codes of conduct should not be concerned with issues such as termination for other reasons other than misconduct. The Minister must have been aware of the provisions of s 101 of the Act when he enacted s 1A through the 1990 Regulations, in terms of which he deliberately gave up his power to grant permission for termination of employment in cases covered by an employment code. In terms of the same Regulations, the powers the Minister previously enjoyed to deal with misconduct cases at

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the workplace were also removed. Once again, I am constrained to agree with Mr *de Bourbon* that had that not been the position, s 1A would only have referred to s 3 of the 1985 Regulations. If I am correct in my interpretation then it follows that ZUPCO is not obliged to seek the Minister's permission before terminating applicant's employment.

There is however, yet another consideration. The applicant has submitted that the code does not in any event apply to him. He has submitted that the code must apply to him before it can

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be argued that the permission of the Minister is not necessary to terminate his employment. The code states in s 1:

"1. *Introduction: Code of Conduct*

This code of conduct shall apply to all employees regardless of rank who fall under Zimbabwe United Passenger Company ..."

The applicant, though the respondent's managing director, clearly falls within the definition of "employee". Being an employee, he would therefore fall to be dealt with in terms of the code. However, it is pertinent to note that ZUPCO's code deals with termination for misconduct, which is not the case in this matter. It also makes no provision for termination on notice. The code, however, acknowledges that no code of conduct can "cover all possible instances of indiscipline and that where ambiguous circumstances occur, the code shall be interpreted through use of discretion and the provisions are to be applied in the spirit of its general intention".

The code, in compliance with s 101 of the Act, steers clear of other matters that have nothing to do with misconduct, such as termination for other reasons. Whilst it must be accepted that the code makes no provision for the managing director himself to be the subject of disciplinary proceedings, it seems to me that this is irrelevant as the termination in the present case is not sought on the basis of the code but in terms of the contract of employment.

I must concede that the law on this aspect is far from being clear. As Bartlett J noted in *Masundire* v *Willowvale Mazda Motors Industries*, a case that was cited in *Chivinge* v *Mushayakarara & Anor supra*, a literal interpretation of s 1A of the 1990 Regulations would mean that since applicant is an employee for purposes of the code, the authority of the Minister is not necessary before his employment can be terminated. Yet, the code does not provide for the manner in which the managing director is to be dealt with in the event of misconduct. It was Mr *Andersen*'s submission that s 1A applies only to the particular areas to which the code refers, such as misconduct. If this were not the position, so he argued, applying s 1A would lead to an absurdity. Whilst I accept these observations, it seems to me, on a correct interpretation of the relevant legislative provisions, that this makes no difference. The remarks by Gubbay CJ in the *Chivinge* case are pertinent. He stated at 504F-H:

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"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, then the other subsidiary protections might just as well be repealed. Finally, there is no ambiguity in what s 1A provides. It clearly specifies ss 2 and 3 do not apply. Nothing could be clearer."

It is my considered opinion that, in the light of the very clear language of s 1A through the 1990 Regulations, the Minister's authority is not necessary before ZUPCO can terminate applicant's employment. As a corollary, therefore, the applicant's employment can be terminated in other ways. The parties to this matter have agreed that either party can give six months notice of termination of employment to the other. The respondent has given such notice. As noted by the Chief Justice in the *Chivinge* case *supra*, s 12 of the Act provides for the periods of time where

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termination on notice is permitted. The protection to which applicant would have been entitled to under s 2 of the 1985 Regulations was done away with once ZUPCO registered a code of conduct.

Whether the employment can be terminated on notice without good reason is an issue that is not before me and, indeed, neither side has made any submissions on this aspect. There is authority to the effect that the implied duty of good faith implicit in the employment contract could be utilised to extend to employers a duty not to terminate an indefinite-period contract, even on notice, without good cause: Reikert's *Basic Employment Law*, 2 ed by John Grogan, pp 53-54. That relations between the applicant and the respondent have deteriorated there can be no doubt. As this issue is not before me, it will not therefore be necessary for me to make a decision on it.

The application must therefore fail. In the result, I make the following order:

"The application be and is hereby dismissed with costs."

Wintertons, applicant's legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners

DOELCAM (PVT) LTD *v* PICHANICK & ORS 1999 (1) ZLR 390 (HC)

Citation	1999 (1) ZLR 390 (HC)
Case No	Judgment No. HH-88-99
Court	High Court, Harare
Judge	Gillespie J
Heard	May 12, 1999
Judgment	May 19, 1999
Annotations	None

Civil action

Flynote

Costs - de bonis propriis - legal practitioner - failure to carry out adequate research which would have shown case should have been settled - special order of costs

Court - officers of - messenger of court and sheriff - not agents of parties to litigation - liability for wrongs done and damage caused in execution of duties - whether indemnified in respect of wrongs carried out

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Delict - actio injuriarum - wrongful attachment - requirements - liability of deputy sheriff or messenger - liability of judgment creditor and attorney

Legal practitioner - duties - advocate - duties of research and preparation - failure to carry out such duties properly, resulting in unnecessary litigation - special order of costs

Practice and procedure - pleadings - special plea - purpose - forms which special plea may take

Practice and procedure - pre-trial conference - purpose - need for parties to be fully prepared for trial - duties of judge at pre-trial conference

Practice and procedure - service - on body corporate - when process may be left at address for service - diligent search at premises to find responsible person - what constitutes

Headnote

The plaintiff had certain of its property attached in execution of a judgment debt. The judgment was actually given against another company. The attorney for the judgment creditor had gone to the Registrar of Companies to find the address for the judgment debtor. A company with a similar name was found, with an address in an office building in Harare. The office was in fact occupied by the plaintiff company, the managing director of which had once

owned the shares in the other company. He had since sold his shares and the other company had moved to another address. The plaintiff's office was not in use for much of the year, due to the seasonal nature of its operations. During the time when the office was not being used, the messenger of court left a notice of removal under the door. A week later, he broke into the office and removed items of property which were sold in execution of the debt, and the proceeds paid to the judgment creditor. The plaintiff company sued the attorneys for the judgment creditor and the messenger of court alleging negligence, and the judgment creditor for unjust enrichment.

The judgment creditor denied that he was negligent. The attorneys denied negligence; alternatively, they claimed they were acting as the judgment creditor's agents. The messenger of court filed what his attorneys called a "special plea in bar". In this, he claimed that he acted as the agent of the attorneys. He did not reply to the allegation against him of negligence. The matter went to pre-trial conference and then to trial.

Held, that the point the messenger was making should not have been made by a special plea. The purpose of a special plea is to permit a defendant to achieve a prompt resolution of a factual issue which founds a legal argument that disposes of the plaintiff's claim. There are three kinds of special plea:

(1) the plea in bar, by which a party may interpose a purely formal objection to the jurisdiction of the court;

(2) the plea in abatement, which avers some good ground, not disclosed in the declaration, which is otherwise admitted, for denying the plaintiff relief;

(3) the "dilatory" plea, which advances some fact, not disclosed in the declaration, which is otherwise admitted, and which entitled the defendant to a stay of proceedings.

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The point the messenger took did not disclose a plea in bar; it should have been taken as an exception.

Held, further, that the matter should not have come to trial. It should have ended at the pre-trial conference, had due diligence been exercised on the part of all concerned. A pre-trial conference has two purposes. The primary one is to assist towards the resolution of the dispute without recourse to trial. The secondary aim, if a settlement is not reached, is to ensure that all pleadings and pre-trial procedures are complete and correct, that the issues are limited as far as possible, and that the case is ready for trial on the merits. It is the duty of legal practitioners to be ready for trial at the pre-trial conference. Unless they are fully researched on the law and prepared on the documents, they cannot hope to reach a settlement, let alone assist the judge to an informed view. The judge, in turn, should do all that is necessary to achieve the objectives of the conference. He should play an active part, expressing his views on the law, the facts, and the prospects of success.

Held, further, that the messenger of court (and the Sheriff of the High Court) is not an agent of the judgment creditor, or of any party. He is an officer of court, acting according to his best judgment as an executive of the law, according to the rules of court and any warrant or writ issued. He is an independent actor, and liable for wrongs done and damage caused in the execution of his duties. Where he seizes a debtors's property, he is protected by the authority of the court. Where the property does not belong to the debtor, then the warrant does not give authority for it to be taken. The goods are attached by the messenger at his own risk. He commits the delict of wrongful attachment or wrongful execution. Even if he acts in good faith and without negligence, he is liable.

Held, further, that even if negligence were a pre-requisite of liability, in this case the messenger was negligent. The rules of court require service to be on an officer of the body corporate. Process may only be left in a prominent place at the address for service in two circumstances:

(1) where the person upon whom the process is to be served keeps the premises closed and thus prevents service; or

(2) where the messenger is unable, after diligent search, to find a responsible person.

There were numerous steps the messenger could have taken in this case, and did not, before he would have been entitled to leave the process in a conspicuous place.

Held, further, that the attorneys were liable on the same basis as the messenger of court, without proof of negligence, having intervened in the messenger's function, making his act their own.

Held, further, that in any event the attorneys had also been negligent, in that they procured the wrongful attachment of property not subject to attachment. They were negligent in obtaining judgment against a non-entity in what seemed to have been no more than a trade name. Their clerk was negligent in not ascertaining that the company's file he consulted did not refer to the name he was searching for. He was also negligent in not consulting the latest notification of the

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other company's latest address for service.

Held, further, that the negligent conduct of the attorneys could be imputed to the judgment creditor. Although the attorneys were not the creditor's employees, they were acting in terms of their mandate. He would in turn have recourse against them.

Held, further, that the advocates had the duty of thorough preparation, original research and persuasion. Had they properly prepared and researched the matter, the messenger and the attorneys could not sensibly have defended the matter. Unnecessary litigation would have been avoided. An exemplary order of costs would therefore be made.

Cases Considered

Cases cited:

Cochrane v *Ngesman* (1906) 23 SC 140

Colonial Mutual Life Assurance Soc v *MacDonald* 1931 AD 412

Goldman v *Peacock Bros* 1916 OPD 138

Hart v *Cohen* (1899) 16 SC 363

Maisel v *van Naeren* 1960 (4) SA 836 (C)

Malcomess & Co v *Love* 1929 EDL 346

National Media Ltd & Ors v *Bogoshi* 1998 (4) SA 1196 (SCA)

Pakendorf en Andere v *de Flamingh* 1982 (3) SA 146 (A)

Parkview Properties (Pvt) Ltd v *Chimbande* 1998 (1) ZLR 408 (H)

Sedibe & Anor v *United Bldg Soc & Anor* 1993 (3) SA 671 (T)

Sieberhagen v *Kaller & Chaatlerr* (1904) 21 SC 205

Smith NO & Anor v *Wonesayi* 1972 (1) RLR 262 (A)

Syfrets Bank Ltd & Ors v *Sheriff of the Supreme Court & Anor* 1997 (1) SA 764 (D)

Vengesayi v *Zimbabwe Glass Industries Ltd* 1998 (2) ZLR 593 (H)

Weekes & Anor v *Amal Agencies Ltd* 1920 AD 218

Statutes Considered

Legislation considered:

Magistrates Court (Civil) Rules 1980 (SI 290/1980), Order 7 r 5(2)(d)

Case Information

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P Nherere, for the plaintiff

A B Chinake, for the 11th defendant

A J Dyke, for remaining defendants

Judgment

GILLESPIE J: Mr Pichanick enjoys the dignity of being the senior partner of his legal firm. His name heads the list of partners. The disadvantage of this

circumstance is that in any litigation wherein Winterton, Holmes and Hill (or as the firm now affects to call itself, with the distressingly informal diminutive, "Wintertons") is sued as defendant, and the plaintiff cites the partners individually rather than by the partnership name, as rules of court permit, then Mr Pichanick appears as the person accused of whatever alleged incompetence, unprofessionalism or malefaction might form the substance of the claim. His partners are all clothed with the blessed anonymity bestowed by the grouping "and others". So in this trial, the partner responsible for the imbroglio, the third defendant, Mr Ferrao, passes without notice in the citation of this judgment.

Also defending the claim are two further parties. One is the company for which the attorneys obtained judgment and which I shall call the clients. The other is a Mr Rose, whom I shall call the messenger of the magistrate's court, for that he is.

The plaintiff sues Wintertons, being the attorneys, the client and the messenger of court, because he blames each of them for the fact that his property was attached and sold in execution by the messenger of court, at the behest of the attorneys in satisfaction of the client's judgment. Normally this is not an actionable wrong. In this case, however, the plaintiff is not the judgment debtor. One can understand its grievance.

What happened was that, having obtained judgment in default of appearance against the debtor, the attorney sued out a warrant of execution. This, the messenger of court, or his deputy, attempted to serve at the place where summons had been served, an address at 6 Tait Avenue, Hillside, Harare. The debtor, however, was no longer there. When the return of service was accordingly returned to the attorneys, Mr Ferrao caused a lodging clerk to undertake a search for a likely address.

The debtor had been cited as Rowland Macleods Electrical. There was no indication on the summons or particulars of claim as to whether this was an individual with an unusual surname, or a company improperly cited, or a non-entity - a mere trading name. Although rules of court (even the rules of this court - most unsatisfactorily in my view) permit such a course, it is exceedingly unwise of a party not to be meticulous in identifying the defendant. That folly lies in the fact that one can only execute against identified juristic persons, and is demonstrated by the facts of this case.

Faced with this lack of knowledge as to the identity of the debtor, Mr Ferrao sent off his lodging

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clerk to the offices of the Registrar of Companies to discover whether the debtor has a proper corporate name and identity and registered address. He does this, mark you, not at the time of issue of summons, but after a warrant of execution has already been issued.

The lodging clerk finds no Rowland Macleods Electrical. He does,

GILLESPIE J

however, find a Rowlands Macleod & Co (MCS) (Pvt) Ltd. The registered office of this company is given originally as 307 Equity House, Rezende Street, Harare. It had subsequently moved, as disclosed on official forms duly filed, to an address in the suburb of Northwood in Harare and thence to the address in Tait Avenue already mentioned. The lodging clerk, however, did not look at these forms. He reported back to Mr Ferrao with his misinformation.

Mr Ferrao then instructed the messenger of court, in writing, to execute the existing warrant against "Rowlands Macleod & Co" (see how he still does not cite the name punctiliously) at 307 Equity House. Equity doesn't enter into it.

As fate would have it, 307 Equity House is occupied by the plaintiff, Doelcam (Pvt) Ltd and its inversely eponymous managing director, Mr Francis Xavier Macleod. Mr Macleod, moreover, used to hold all the shares in Rowlands Macleod & Co (MCS) (Pvt) Ltd, but had disposed of them years previously to a purchaser keen to benefit from that company's accumulated tax loss. Indeed it was consequent upon that sale that the company had changed its address.

Through another unkind chance, 307 Equity House, although occupied by the plaintiff's disembodied corporate ghost, was scarcely ever visited by any person of flesh and blood, particularly during the dead months of March to September. This is because its business is to provide accountancy and tax consulting services through the expertise of Mr Macleod. This gentleman works from home. His busy period of the year is traditionally October to February. The office in Equity House accommodates (or before the intrusion of the deputy messenger of court, used to accommodate) files, filing cabinets, cupboards, desks, chairs and a paper shredder. It is virtually a storage facility which remains uninhabited and unvisited during the dormant period I have mentioned.

On 4 April 1996, when the interior of 307 Equity House resembled nothing so much as the tomb of the boy Pharaoh Tutunkhamun a millennium or so before the inquisitive delving of Howard Carter, wherein dust rained gently down on untrodden floors and locked filing cabinets, there came a banging on the locked portals. No response. A sheet of paper slipped under the barred entrance. The air still stirred feebly. The agitated motes relapsed into torpor. The deputy messenger of court had served his notice of removal.

Come 10 April 1996, and more ominous sounds without the entrance to 307 Equity House. If it were an undiscovered crypt, these were grave robbers! The deputy messenger of court, his tame locksmith, a driver from the auctioneers and four burly porters came to execute the warrant. Locks were picked, grills thrust aside; more locks probed and doors pushed open. Padlocks broken and drawers drawn aside. Suspension files removed.

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GILLESPIE J

Cupboards laid bare. Documents and folders consigned to disordered heaps on the floor. Furniture removed. As the Parthian shot, amidst scattered papers, broken locks and the doom-laden notice of removal, the deputy messenger laid his emphatic inventory of goods seized. There on the floor. The disturbed spectre of Doelcam (Pvt) Ltd subsided again to helpless quietude.

This was the scene that met Mrs Macleod when, at her husband's behest, on 23 September 1996 (her natal day) she came to resurrect the office preparatory to its first visit of the forthcoming season. Although from the outside all seemed securely locked and intact (such had been the locksmith's skill), once she entered the office she could see at a glance it had been burgled. She reported as much to her husband.

He came to take charge. As he set about the sombre task of re-ordering his jumbled records, he discovered the clues to his undoing. The deputy messenger's notices. These started him on a mission reminiscent of that of the Apostle of the Indies, for whom he is named. It took him ultimately to my court past the offices of the messenger of court; via the Registrar of Companies; and through Mr Pichanick or various of his nine partners. He learned all he needed to know to make complaint to one of those partners, Mr Lake. Mr Lake, sensibly and helpfully, scheduled for Mr Macleod a meeting with Mr Ferrao, to be held on 25 September. Mr Ferrao, foolishly and obstructively, refused to deal with Mr Macleod. He demanded instead that any complaint be reduced to writing. Unction and balm were rather indicated. That and a consultation with the partners' professional indemnity insurers.

Thus provoked, Mr Macleod submitted his written demand for damages. The property had long since been sold and the proceeds paid to the client. When that demand remained unsatisfied, then did the plaintiff issue the summons for the claim which I must now adjudicate.

The plaintiff declared against the attorneys a cause in negligence. A vicarious liability against the client it averred; and in the alternative an unjust enrichment. Against the messenger of court was alleged, by inference, the wrongfulness of his (or his deputy's) conduct. The client denied that its attorneys were negligent. It denied that it was unjustly enriched. The attorneys denied that they were negligent. In any event, they pretended to deny liability on the basis that they were acting only as the client's agents.

The messenger of court filed a special plea. His attorneys were pleased to call it a special plea in bar. In that, he tried to make a point that he acted throughout as the agent of the attorneys; he thought it relevant to call them a "disclosed principal". He therefore denied that there existed any legal basis for a claim against him. The plaintiff replied to the special plea and in the course of its reply alleged that the messenger of court had acted negligently.

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The special plea was not set down for prior hearing. No plea to the merits was filed. In that

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inadequate state, the case went to pre-trial conference and was referred to trial.

I am unable to forbear to comment on this. There are many errors in procedure to point out. The purpose of a special plea is to permit a defendant to achieve prompt resolution of a factual issue which founds a legal argument that disposes of the plaintiff's claim. Special pleas are three in kind. The plea in bar, by which a party may interpose a purely formal objection to the jurisdiction of the court. The plea is available as a plea to the jurisdiction or as a plea for the recusal of a judge and in no other case. 1(112) Other special pleas are available to disclose some ground either for quashing or abating a declaration or for delaying proceedings. Both are usually termed pleas in abatement, although that expression is properly used to describe the declinatory, rather than merely dilatory, plea. The plea in abatement, strictly so called, avers some good ground, not disclosed in the declaration, which otherwise is admitted, for denying the plaintiff relief. The dilatory plea advances some fact, not disclosed in the declaration, which is otherwise admitted, and which entitles the defendant to a stay of proceedings.

Since a special plea involves the averment of a new fact, it is susceptible of replication and of a hearing at which evidence on this new fact alone may be led. It is, however, the duty of any party not pleading to the merits to cause the limited issue to be set down within the time limits stated by rules of court. 2(113) Failing that, the party must plead over to the merits and the main issue must proceed.

In this case, we can therefore see that the point taken by the messenger of the court did not constitute a plea in bar. In fact it was not properly a special plea at all. It advanced the legal argument that a messenger of court acts as agent for a judgment creditor. An exception was the appropriate method of raising the point. The replication to the supposed special plea was improper in that it purported to raise a new cause of action in negligence. This would have been improper in a replication, even in the main pleadings, and was quite out of place in a special plea. It should have been struck out. As if all that were not bad enough, however, despite the failure to set down the special point for prior resolution, there has never been any plea by the messenger of the court as to the merits. The consequence is that the matter has been referred for trial with no defence pleaded for the messenger of court other than the special point that he is an agent.

A further anomaly exists in the pleadings. It is that on the eve of the trial the messenger of court has pretended to file a rejoinder to the replication to

the special plea. In it, he denies negligence. All parties were therefore under the mistaken impression that negligence is averred as a cause of action against the messenger and put in issue.

This totally misguided and, I must say, incompetent approach to pleading is deplorable. All concerned ought to be ashamed of themselves. However, in the regrettable awareness that a judge at the pre-trial conference let all this pass without remark, far less correction, and referred the case for trial in its incomplete and embarrassing state, I have thought it just to

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permit issues to be raised as if they had been properly pleaded. This, nonetheless, does not disqualify me from expressing criticism and displeasure.

A very real source of displeasure is that the case came to trial at all. For reasons which I shall make clear in a moment, the plaintiff should never have been forced to litigate. Having issued summons, it should never have had to go to trial. Due diligence on the part of all concerned could, and should, have put paid to this litigation at the latest by the pre-trial conference.

A pre-trial conference has a two-fold purpose. The primary aim is to assist towards the resolution of a dispute without recourse to trial. To this end, the parties are given the benefit of appearing before a judge and of engaging off the record in a frank exchange concerning the merits and weight of the respective cases. The judge will not preside at trial and therefore may, indeed is expected to, express a view in the matter. That view, of course, is not binding upon the parties, but is a persuasive indication of how most judges are likely to see the matter. Since that view will not be expressed outside the conference, the parties need not fear the tainting of the trial judge. The secondary aim, in the event that settlement is not achieved, is to ensure that all pleadings and pre-trial procedures are complete and correct; that the issues are limited to the greatest extent achievable and properly defined; and that the case is ready for trial on the merits without further ado.

It is the duty of legal practitioners to be ready for trial at the pre-trial conference. If they are not fully researched on the law and fully prepared on the discovered documents and their witnesses' statements, they cannot reasonably hope to reach the most favourable settlement, far less to assist the judge to an informed view and to the discharge of his or her duties.

I likewise respectfully consider it to be the duty of the judge to do all that is necessary to achieve the two-fold aim of the conference. He or she ought not meekly to accept the lawyers' say-so that no settlement is possible. He should express a view on the law. He should express an opinion on the factual probabilities. He should attempt to state the competing prospects of success. He should say clearly where fairness lies. He should invite the parties to negotiation and compromise after the clearest indication of the probable consequences of success or failure to each party. Judges who do so with the

active participation of lawyers and parties can achieve a settlement rate of an extreme of 90% of matters. Where settlement is not achieved, then should the judge insist on procedural completeness and finally refer the matter to trial in a minute properly prepared according to his insistence, defining the issues and giving whatever direction may be appropriate, and signed by him.

I turn finally to a decision on the merits. A messenger of court, and in the High Court the deputy sheriff, is not a mere agent of a judgment creditor, or indeed of any party. He is an officer of the court, acting throughout according to his best judgment as an executive of the law, according to the rules of court and any warrant or writ issued. 3(114) The so-called special plea for the messenger was therefore totally misconceived.

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As an independent actor in the matter, the messenger of court is liable for wrongs done and damage caused in the execution of his duties. Although the plaintiff has in some unprocedural way averred negligence, it was not necessary for it to do so in order to found a cause of action.

The messenger of court who seizes and sells the property of another is protected from the consequences of his act by the authority of the court he serves. What would otherwise be a wrongful and intentional invasion of another's rights of property has the element of wrongfulness removed by the existence of a valid warrant of court. The warrant permits not only the removal of the judgment debtor's goods, but also the removal from the judgment debtor's possession of goods of third parties provided that no notice of the third party claim is given to the messenger. That property is deemed to be that of the debtor. 4(115) Where such notice is given, then attachment is unlawful; interpleader proceedings must be instituted.

Where, as here, the property seized does not belong to the judgment debtor, and is not taken from his possession, then the warrant of execution provides no lawful authority for the taking. The goods are attached by the executive of the law at his own risk. He moves outside the four corners of the writ at his peril. For there is no reason why -

> "a third person's goods should become liable for another's debts because the messenger honestly believed that they belonged to the debtor, or because he was not guilty of negligence; or why such a person's goods should be sacrificed because a messenger takes upon himself a paid office which places him 'between the devil and the deep sea'." 5(116)

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This authority has been undoubted for generations and has been cited with approval in this country. 6(117)

The delict committed by the messenger or Sheriff in each case cited is the *injuria* of wrongful attachment or wrongful execution. It is true that since the days of the decisions cited above, the law in relation to *injuriae* has developed to the extent that in other *injuriae* the proof of a subjective *animus injuriandi* is required. Particularly in regard to the delict of defamation, emphasis has been laid on this requirement to the extent that the possibility of a defence has been suggested where there is an honest, but erroneous, belief in the presence of circumstances of lawfulness (eg the existence of a privileged occasion). 7(118) Acting on the grounds of policy, the South African courts have investigated the extent of, and have felt the need to restrict, such a defence to the extent that in the case of the media, strict liability was imposed 8(119) (ie intent to injure was presumed and could not be rebutted by proof of an honest and non-negligent mistake as to a circumstance of justification). Most recently the Supreme Court of Appeal in South Africa has recognised that the question of wrongfulness and fault in *injuriae* are inter-related; 9(120) that a policy decision as to the wrongfulness of an act is properly made in conjunction with a decision as to what element of fault should be present before harmful conduct is categorised as wrongful. 10(121)

If this jurisprudence were to be applied to the existing legal principles on this point, it would leave the way open to the reconsideration of a policy pertaining to the basis, if any, upon which the executive of the court would be permitted a defence to a claim of wrongful attachment.

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Such a policy would attempt to reconcile, or resolve, the competing demands of two principles. On the one hand, is the principle in favour of upholding the individual's right to the protection of his property and rights. The opposite consideration is a principle in favour of upholding court process and indemnifying an officer of court for acts done in good faith in execution of that process.

It does not seem to me that these two conflicting interests are at all equal in weight in the circumstances of a postulated wrongful attachment of property not belonging to a judgment debtor nor taken from the possession of such an one. Denial of a defence to an errant messenger of court does not weaken the court's process. If anything, process is strengthened by such a strict approach to liability since it demands greater care and attentiveness to

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duty and the orders of court on the part of an officer of court. While it may be desirable that such an officer be entitled to recourse to an indemnity, I do not see any reason why he should need greater protection than that afforded by the right to claim an indemnity from the judgment creditor's attorneys before undertaking any action which he considers questionable.

Conversely, or so it seems to me, there is persuasive weight in the consideration of protecting the individual in his property rights. When all is said and done, I can see nothing which satisfactorily rebuts the observation of Juta AJA (above). I would hold, with him, that there is no sound policy demanding that a third person's goods should be sacrificed in favour of a debt he does not owe, merely because a messenger of court in executing upon them unofficiously did so in good faith and without negligence.

In my judgment, the effect of the law is still the same as it was when enunciated in the leading case. It is wrongful on the part of an executive of the court to go beyond the scope of a warrant of execution and to attach property neither belonging to the judgment debtor nor in the possession of the judgment debtor, even if he does so without any fault of *dolus* or *culpa*.

Even if negligence were a pre-requisite of liability, or rather absence of negligence a defence, 11(122) I have no doubt that the deputy messenger of court was negligent. The rules of the magistrates court require service of process to be effected on an individual. In the case of a body corporate, that individual must be a responsible person at the company's place of business or a director or secretary or public officer of the company. 12(123) Process may only be left in a conspicuous place at the address for service in two circumstances. One is when:

> "the person upon whom it is to be served keeps [the premises] closed and thus prevents service." 13(124)

It is impossible legitimately to form the view that a person is preventing service of process by keeping his premises closed on one attempt only. Indeed, the deputy messenger disavowed any such conclusion.

The only other justification for serving process by leaving it at the address is when:

> "the person seeking to effect service of any process is unable, after diligent search at [the premises] to find [a

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> responsible person]." 14(125)

Had the deputy messenger conducted a diligent search, he would have discovered grounds for doubting that the premises were those of the judgment debtor. Diligent search would have entailed enquiring of an appropriate

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person, such as the caretaker or owner of the building, about the identity of the lessee of the premises in question and the identity and whereabouts of its directors or staff. It would have involved enquiry about the hours of opening.

One would, in any event, reasonably expect of an executive of the law, with the potentially deleterious powers of forced sale at his disposal, to be properly cautious in his identification of property to be attached. When faced with locked premises, he should look for a name plate or sign to identify the occupant. He similarly should look for a letter box. He should ask of persons in a position to know sufficient questions to satisfy himself that the premises are those of the person to be served. He should record an attempt at service and set about inquiries in order to trace a director, secretary or public officer. Failing that, he should attempt further service at the same premises. Only after sufficient attempts and inquiries to satisfy himself that the premises are kept locked; that service is thus prevented; and that a director or like officer is unavailable, may he leave process in a conspicuous place.

It is true that the rule concerning execution of a warrant of execution, provides that the messenger may open any door -

> "if there is no person there who represents the person against whom the warrant is to be executed ... [and] the messenger may, if necessary, use force to that end." 15(126)

and also permits the messenger to leave on the premises the relevant notices, inventory and warrant if no-one is present to receive them. A warrant of execution is nevertheless process issued by the clerk of court. 16(127) Service thereof must therefore be done in accordance with Order 7 (above) and the two orders (7 and 26) must be read together.

In this case, I find that the deputy messenger did no more than ask of a security guard directions to room 307. Although he suggested, with much equivocation, that he also sought and received confirmation that the premises were occupied by "Rowlands Macleod Electrical", this cannot be true or is at least so unlikely as to be rejected. Having asked directions to an office, he slipped a notice under a door and a few days later forced that door open. The court requires more of its officers than this. The messenger of court is well rewarded for his efforts and must discharge his office with a responsibility commensurate with the power it possesses, and train his deputies accordingly.

So much for the messenger of court. What of the attorneys and their client, the judgment creditor? This is not a case where valid judicial process has wrongly been put in train or acted upon. It is not a case of malicious proceedings where a valid warrant must be rescinded and proof of malice advanced. 17(128) It is the wrongful departure by the executive of law from the

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terms of the warrant. Since it is the act of the messenger of court, the judgment creditor, or his attorneys, would not normally be responsible. The messenger of court is not acting on their instruction as their agent but on his authority under court process. There is usually no act of the judgment creditor for which he should be liable. 18(129) Where, however, the judgment creditor, or his attorney, intervenes in the process of execution and actively instructs the messenger as to the performance of his duties, then they participate in his act, making it their own, and potentially making themselves liable. 19(130)

The basis upon which the attorneys and their client are liable would seem to be precisely the same as that of the messenger of court. They have procured the wrongful attachment by the messenger of court of property not amenable to attachment under court process. I can see no reason why such participants should be excused liability on the grounds of lack of fault when the officer of court would not enjoy such protection.

Even if that is incorrect, however, and lack of negligence would be a valid defence, I hold Winterton, Holmes and Hill to have been negligent. There appears to have been negligence in obtaining judgment against a non-entity in what seems to be no more than a trade name. The lodging clerk was negligent in not ascertaining that the company's file he was consulting did not pertain to, or refer to, the name given to him to search for. He was negligent, in a manner that directly and indisputably caused the loss, in failing to consult the latest filed form of notification of the registered office of the company he was researching. Mr Ferrao was, perhaps, negligent in failing to advert to the fact that the company he instructed the messenger to execute against had a different name from that of the defendant against which judgment had been given.

The next question is whether the wrongful and negligent instruction of the attorneys should be imputed to the judgment creditor. The rule by which a principal becomes liable for the delicts of his agent is 20(131) that a principal is liable for those delicts committed by an agent, who is not an employee, where the delicts were actually authorised or committed in obtaining the authorised result.

On principle, one would conclude that attorneys are not under the control of their client and that therefore they are not employees - hence no question of vicarious liability would ensue. Nevertheless the act of securing attachment of goods and execution in satisfaction of a judgment debt is incontrovertibly

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part of their mandate and would be expected to be spelt out in their power of attorney. While the client can be assumed not to have authorised specifically the instruction to execute at 307 Equity House, this instruction can be seen as given in obtaining the collection of the debt.

Authority does exist exempting the client from liability in such a situation 21(132) since it is not in the ordinary course of an attorney's mandate to interfere with the messenger of court in the

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performance of his duties. It seems to me, however, that it is frequently the case that the messenger or deputy sheriff, having attempted unsuccessfully to serve or execute process, turns to the plaintiff's or judgment creditor's attorney for instructions as to further attempts. It is part of the attorney's function to take steps to trace the whereabouts or property of a defendant or debtor and to inform the messenger accordingly. This is not "interference" in the function; it is expected of the attorney; and it is done in pursuance of the authorised result. Since the client has not even raised a defence along these lines nor led any evidence, I must on the foregoing reasoning hold the judgment creditor liable even in the absence of express, specific instruction. 22(133) His recourse is against his attorneys.

The quantum of the plaintiff's loss was put in issue. It claimed $38 897.69 as the value of the property attached and sold. Two items of dispute exist. The first is whether there were, amongst the property, two chairs. Mr Macleod said so, as did his wife. The inventory of goods attached excluded these, as did the auctioneer's credit note and the inventory of goods sold. The deputy messenger of court did not positively deny the presence of these items and admitted the possibility of mistake in the inventory. If such a mistake were made, the failure to account for the goods on later documents is insignificant. They could have gone astray anywhere. In the face of the Macleods' certain evidence, I hold that the equivocal stance of the deputy messenger raises no compelling probability to the contrary and I resolve the issue in favour of the plaintiff.

The second dispute relates to the value lost. The criticism advanced by the defendants is that the value claimed is the market price, as at the date of loss, of new replacement furniture and equipment. I can find no validity in this criticism. Although the lost goods were up to two years old, they were, on the plaintiff's unchallenged evidence, unusually lightly used and in immaculate condition. The replacement goods for which quotations were obtained were inferior in standard and quality than those lost. Mrs Macleod was deliberately conservative in her manner of pricing replacements so as to be reasonable. I can find no basis upon which it can fairly be said that an award in the amount claimed will over-compensate the plaintiff.

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It was suggested that a lower value demanded by Mr Macleod in his letter of complaint was the true loss. This value, however, was obtained hurriedly from the newspaper smalls advertisements and is no reliable indication of the quality and state of the scantily described property therein exposed for sale. I resolve this issue too for the plaintiff.

Finally, the plaintiff claimed $9 600 for Mr Macleod's time in re-ordering the files. This claim was based on the company's charge-out rate of that gentleman's services. In the absence of evidence, that revenue was lost by his diversion to this inconvenience, or of other expense, I am unable to be satisfied that loss in this amount or at all, has been suffered. It is true that since the claim is for an *injuria*, loss appropriate to the *actio injuriarum* may be awarded. No claim is advanced, however, for insult, contumely or the like and I do not think I can bring this aspect of the claim under such a head in the absence of amendment or argument. I, therefore, resolve this issue in favour of the defendants.

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It is now my unpleasant duty, to utter some strictures concerning the defendant attorneys, and all counsel and their combined efforts, in the handling of the case.

First, as regards Wintertons, I have already commented on the undesirable manner of Mr Ferrao's handling of Mr Macleod and have found negligence in the cause. It is not that upon which I wish to dwell, but upon the failure of any person responsible to advert to, and dispel, a clear conflict of interest. The attorneys were not only co-defendants in the case with their client, the original judgment creditor, but acted as attorneys of record for themselves and for their hapless client. The defence they pleaded on their behalf was that they were not liable in the cause since they acted as their client's agent in the matter. This, quite apart from being utterly footling at law, exposed their client to considerable prejudice. It debarred the client from averring that it was not liable since the unlawful conduct of the attorneys was committed by them as independent agents; was not specifically authorised; and was not done in pursuance of the authorised objective. This is a defence available at law and needed only the appropriate factual basis for it to succeed. In the absence of averment, however, not to mention evidence for the client, I was in truth left with no option but to hold the client jointly responsible.

Next, counsel. The points that arose in this matter is no novelty to our jurisprudence. It is based on an easily identifiable cause of action, the principles of which are expounded in a leading case but which are by no means invulnerable to argument based upon a development of the law in the time since. Any judge would expect counsel to identify the cause, to state the principles and to seek to justify either departure from, or adherence with,

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those principles by proper argument. The counsel in this case did not even identify the cause of action, much less advance argument on the law. I was detained with submissions of an *actio rei vindicatio*, an *actio ad exhibendum* and various other chimerae. When I put to counsel the principles in *Weeks*' case, and asked for authority on the point, each in turn solemnly assured me that none such could be found after diligent research. This does not make the grade.

The duty of thorough preparation; 23(134) the duty of original research; 24(135) the duty of persuasion, is that of the advocate. If he does not know how to do it, let him read Morris's *Technique in Litigation* before appearing in court. If he does not care to do it ... It is particularly distressing that this criticism has to be addressed to three whose competence or experience or both is such as to win them general high regard. In this matter, all have fallen far short of the required, and perhaps their own, standards.

Had the matter been properly prepared and researched, 25(136) the messenger and the attorneys could not sensibly have defended the matter. The client would have been spared the prejudice of being represented by an interested party. A judge would never have been misled into referring the issues for trial. Unnecessary litigation and cost would have been avoided. I would have been spared the task of writing this rebuke and of making the exemplary order of costs which I think must follow.

The reasons for the order of costs are these. The plaintiff, having been substantially successful

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against all parties, is entitled to its costs. Indeed, had it claimed costs on a higher scale on the grounds of the vexatiousness of the defence, I would have considered this closely. The defendant attorneys, because of the conflict of interest they have permitted to develop and to prejudice their co-defendant client must expect to bear the costs to which that client has been unfairly exposed. Finally, none of the counsel can properly expect reward for the inadequate research and lack of assistance to the court.

I therefore enter judgment for the plaintiff against all defendants jointly and severally, any one paying the others to be absolved, in the sum of $38 097.69 in damages, together with interest thereon at the prescribed rate from the date of judgment, and costs of suit; provided as follows:

(a) such costs shall not include any costs attributable to research by the plaintiff's counsel;

(b) all costs of the twelve defendants as between attorney and client shall be borne by the first to the tenth defendants *de bonis propriis*;

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(c) no fees shall be charged by counsel for any party in respect of research, and any such fees already paid shall be reimbursed;

(d) for the purposes of provisos (a) and (c) hereto counsel shall apportion fees already charged as between research and the balance of the fee;

(e) any person aggrieved by any provision of the special order as to costs may make, within 10 days hereof, chamber application, on notice to other interested parties, showing good cause why such order or provision thereof should not be set aside.

C Phiri and Associates, c/o Gill, Godlonton & Gerrans, plaintiff's legal practitioners

Winterton, Holmes and Hill, defendants' legal practitioners

S *v* CHIWONDO 1999 (1) ZLR 407 (HC)

Citation	1999 (1) ZLR 407(HC)
Case No	Judgment No. HH-84-99
Court	High Court, Harare
Judge	Chinhengo J, Chatikobo J
Heard	May 19, 1999
Judgment	May 19, 1999
Annotations	None

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Criminal review

Flynote

Criminal law - statutory offences - Miscellaneous Offences Act [Chapter 9:15] - s 12(2) - being found in possession of goods in regard to which there is a reasonable suspicion that they were stolen - whether person may be convicted on this charge on his plea alone

Criminal procedure - admissions - what may be admitted - accused - may only make admissions in respect of matters of which accused has knowledge

Criminal procedure - plea - guilty plea - conviction on basis of plea - charge under s 12(2) of Miscellaneous Offences Act [Chapter 9:15] - whether conviction may be recorded without leading evidence

Headnote

The accused was charged with contravening s 12(2) of the Miscellaneous Offences Act [*Chapter 9:12*], that is, being found in possession of goods in circumstances giving rise to a reasonable suspicion that they were stolen and being unable at the time to give a satisfactory account of his possession. He pleaded guilty to this charge. The magistrate proceeded in terms of s 271(2)(b) of the Criminal Procedure and Evidence Act and, after questioning the accused, he found the accused guilty on the basis of his plea. On review the court considered whether it was competent to convict the accused of this offence without leading evidence.

Held, that one of the essential elements of the offence under s 12(2) of the Miscellaneous Offences Act is that the person finding the accused in possession of the goods formed a reasonable suspicion that the goods were stolen. The obligation for the accused to give a reasonable explanation for his possession of the goods only arises if there is evidence that the person finding him in possession had a reasonable suspicion that the goods were stolen.

Held, further, that the procedure under s 271(2)(b) of the Criminal Procedure and Evidence Act requires that the accused makes admissions. The accused can only admit to facts known to him. It is absurd in plea proceedings to ask the accused if he admits that the person finding him in possession of the goods had a reasonable suspicion that the goods were stolen. The accused cannot know what was in the mind of the person who found him in possession. The person who found him in possession of the goods should testify about the basis upon which he formed his suspicion that the goods were stolen. It is on the basis of this testimony that the court can evaluate whether the suspicion was reasonable or fanciful.

Held, therefore, that the court cannot find an accused guilty of this offence without evidence being led from the person who found the accused in possession about what led him to believe that the goods were stolen. The basis upon which the finder formed his suspicion is not a fact known to the accused and is not a fact to which he can admit.

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S v *Kayimbanemoyo* 1997 (1) ZLR 211 (H) disapproved.

Cases Considered

Cases cited:

S v *Chitombo* 1978 RLR 243 (G)

S v *Chitsinde* 1982 (2) ZLR 91 (S)

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

S v *Ganyu* 1977 (2) ZLR 97 (A)

S v *Karasa* HH-527-87

S v *Kayimbanemoyo* 1997 (1) ZLR 211 (H)

Statutes Considered

Legislation considered:

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 271(2)(b)

Miscellaneous Offences Act [*Chapter 9:15*], s 12(2)

Judgment

CHINHENGO J: The accused was charged with contravening s 12(2)(b) of the Miscellaneous Offences Act [*Chapter 9:15*] ("the Act"). He pleaded guilty and was sentenced to 12 months' imprisonment.

I shall recount the facts of this case in detail and quote from the record of proceedings because I think the issues which arise in this case require detailed treatment. There are basically two issues which arise. The first is the propriety of plea proceedings where an accused is charged with contravening s 12(2)(b) of the Act. The second is the propriety of the conviction following upon the plea proceedings.

The outline of the State case reads as follows:

> "3. On 9 September 1998, the accused approached Anbel Garikayi at Mbisva Village, Chief Makope, Chiweshe, and he offered to sell a maroon mountain bike he had in his possession for $200.
>
> 4. On 30 November 1998, members of the Criminal Investigation Department, Bindura, acting on information that the accused sold a stolen bike, they arrested the accused and when the accused was questioned about the bike, he admitted to have sold the bike and he made some indications and the mountain bike was recovered.
>
> 5. When the accused was further questioned as to how he acquired the mountain bike, he failed to give a satisfactory account.
>
> 6. The value of the mountain bike is $2 500 and all was recovered."

These facts were read out to the accused and the elements of the offence were put to him as

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follows:

"Q. Do you admit that on 9 September 1998, you were found with a mountain bike?

A. Yes.

Q. You failed to explain how you had gotten it?

A. Yes.

Q. Where did you get the bicycle?

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A. I bought it from someone I do not know.

Q. Did he give you a receipt?

A. No.

Q. Did you inquire where he had gotten it?

A. No.

Q. Do you have any defence to offer?

A. No.

Verdict: Guilty as pleaded."

The scrutinising magistrate questioned the propriety of the conviction in these words:

"I wish to bring to the attention of the trial magistrate that it is not easy to convict on a plea of guilty to such an offence. Firstly, this is so because the State must prove that the accused's explanation was not satisfactory and the court must find thus. To merely say the accused's explanation was unsatisfactory without stating the explanation by the accused, is in itself unsatisfactory where the State outline does not state the explanation given by the accused upon arrest.

In court, the accused said that he bought the bicycle from someone he did not know and he was not given a receipt. Can that be said to be unsatisfactory without any test?

In my view, the conviction may not have been appropriate."

The trial magistrate replied that he thought that the accused's explanation was unsatisfactory because in his view a person cannot buy a mountain bike valued at $2500 from a stranger. He believed that such person would at least take the seller's particulars.

Section 12(2) of the Act provides that:

"Any person who -

(a) is found in possession of; or

(b) has been in possession of;

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any goods of any description in circumstances which give rise, either at the time of the possession or at any tine thereafter, to a reasonable suspicion that at the time of such possession the goods were stolen and who is unable at the time to give a satisfactory account of his possession shall be guilty of an offence."

The essential elements of this offence are (a) possession of goods; (b) in circumstances giving rise; (c) to a reasonable suspicion that the goods were stolen; and (d) failure to give a satisfactory account of the possession. The possession must be possession by the accused person, whether at the time that he is apprehended or at some time before his apprehension. The satisfactory account must be given by the accused person either at the time that he is apprehended or at any time thereafter when he is called upon to give such account. The circumstances which give rise to the suspicion that the goods were stolen must be circumstances as perceived and considered as such by the person calling upon the accused to account for his possession.

In *S* v *Chitsinde* 1982 (2) ZLR 91 (S), the Supreme Court ruled that there must be evidence of circumstances giving rise to a reasonable suspicion that

the goods were stolen and that, unless such evidence exists, the obligation to give a reasonable explanation of his possession does not arise for the accused person.

In *Chitsinde*'s case *supra*, the accused faced several charges arising from his possession of various goods which were taken by the police after a search of his house. One of the counts involved goods which it was alleged the accused had failed to give a satisfactory account of his possession of them and should be convicted under s 12(2)(b). At 98C-G, Georges JA said:

"The record is woefully short with regard to evidence of the circumstances which could give rise to a reasonable suspicion that the chair and cutlery were stolen. There is no description of the cutlery and no evidence of its value. It is accordingly not possible to hold that it was the type of cutlery which one would not expect a person in the appellant's circumstances to own. The same applies to the chair. It may be contended that other stolen property had been found in appellant's house and because of that there was a reasonable ground for suspicion that the chair and cutlery were stolen. This seems unacceptable. A great deal of property was taken from the appellant's house. A lorry was used to move it but comparatively few items formed the subject of the charges laid against him and no special reason has been given for picking out that particular chair and the items of cutlery.

There was no evidence either of the circumstances in which the items had been found - whether they seemed in any way concealed or whether they were where they would normally be expected. There was no evidence of reports of loss of cutlery of a similar description.

Unless there is evidence which establishes a reasonable ground for suspicion that the items were stolen, the obligation to give a reasonable explanation does not arise."

Dealing with the magistrate's approach on this issue, the learned Judge of Appeal stated further at 99A that:

"Clearly, he did not advert to the evidence of circumstances giving rise to a reasonable suspicion that the articles were stolen. If there does not exist such reasonable suspicion then the *onus* to explain does not arise."

It seems to me that the learned judge, in stating that "if there does not exist such reasonable suspicion then the onus to explain does not arise", did not deal with the stage when the onus

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either would arise or would not arise. I have stated earlier that the circumstances giving rise to the reasonable suspicion that the goods were stolen must be circumstances as perceived, considered or appreciated by the person arresting the accused person. It is, in my view, at that stage that the onus would or would not arise. At the stage when the accused has been arrested and is before the court on the charge of contravening s 12(2)(b), what can only be given is evidence of the circumstances which the arresting detail considered to give rise to a reasonable suspicion that the goods were stolen. As such, therefore, if such evidence has to be placed before the court, I cannot see how plea proceedings would be appropriate or how the court could dispense with the evidence of the arresting detail. It may be argued that such evidence could appear in the outline of the State case

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showing how the arresting detail formed the reasonable suspicion that the goods were stolen and what those circumstances were which he considered gave rise to that reasonable suspicion.

Rarely would evidence given in such manner, be sufficient for purposes of securing a proper conviction. That such reasonable suspicion is to be entertained by a person (other than the court) who initially calls upon the accused to account is self evident and it is supported by the following statement in *S* v *Ganyu* 1977 (2) ZLR 97 (A) at 104G:

"It follows that a reasonable suspicion that goods have been stolen does not cease to be either a suspicion or to be reasonable because the person entertaining it perceives the possibility that his suspicion may be unfounded and that the goods may have been acquired by nefarious or unlawful means or innocently."

And at 105B -

"Since however, suspicion is based on conjecture, it can never point unerringly and exclusively in a particular direction only."

The drift in my argument so far is contrary to what was stated by Adam J in *S* v *Kayimbanemoyo* 1997 (1) ZLR 211 (H) at 216H-217D where he said:

"Section 271(2)(b) of the Criminal procedure and Evidence Act lays down the procedure on a plea of guilty. It clearly provides that the court must explain to an unrepresented accused the charge and the essential elements of the offence and requires the prosecution to outline on what acts or omissions the charge is based by stating the facts of the case. Thereafter, the court must inquire from the accused whether he understood the foregoing and whether his plea of guilty constituted an admission of the essential elements of the charge.

Section 272 lays down the procedure where there is doubt in relation to a guilty plea. In such a case, any time before sentence is passed the court must record a plea of not guilty and then a trial must be conducted in the normal way with the calling of witnesses.

There is nothing said by the Supreme Court in *S* v *Chitsinde supra* which can be interpreted as negating what is provided in s 271(2)(b). It was not a case where the accused had tendered a plea of guilty. Also that case did not make an exception to what is provided in s 271(2)(b) where an accused enters a plea of guilty to a charge under s 12(2) of the Miscellaneous Offences Act [*Chapter 9:15*]. If the Attorney-General meant to indicate that *S* v *Chitsinde supra* required a trial in the normal way by calling witnesses where an accused enters a plea of guilty to a charge under s 12(2), then he erred."

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I accept that *S* v *Chitsinde supra* did not decide that a plea of guilty may not be entered by the accused and accepted by the court or that in every case of a charge under s 12(2), a trial must, despite a plea of guilty, be conducted in the normal way by calling witnesses. This was evidently so because in that case the accused had not pleaded guilty. But, in my view and with due respect to the conclusion of his Lordship in *S* v *Kayimbanemoyo supra*, the reasoning in *S* v *Chitsinde supra* would lead to the conclusion that a charge under s 12(2) of the Act cannot be proceeded within terms of s 271(2)(b) of the Criminal Procedure and Evidence Act. The essential element of the offence that the

person who initially accosts the accused and demands an explanation must have formed a reasonable suspicion based on the circumstances of possession by the accused as he appreciates them could not, in my view, be fully explained to and properly admitted by the accused in plea proceedings. There are two elements of the offence which are not directly related to the other elements of the offence in so far as the accused is concerned - the suspicious circumstances of possession and the failure to give a satisfactory account which the accused himself could not be expected to comment upon or to admit. The elements of forming a reasonable suspicion and of circumstances giving rise to such reasonable suspicion are peculiarly for the person (other than the accused) whose suspicion is aroused. That person must therefore be called to give evidence and to be cross-examined by the accused on his evidence. This is what may have been at the back of Georges JA's mind when he stated in *Chitsinde*'s case *supra* at 97B-D that:

"It is well, however, for the investigating officer to bear in mind that as far as possible evidence should be brought before the court in as complete a manner as possible ... The aim is to achieve as high a degree of precision as is possible. Investigating officers on the spot may see a mass of evidence which convinces them of the guilty of the accused person. They should remember, however, that unless that evidence is accurately observed, properly recorded and *clearly presented to the court* the court may well be left in doubt" (my emphasis).

The words which I have emphasised suggest to me that the presentation of the evidence to the court can only be done by the investigating officer himself in proceedings in which a plea of not guilty has been entered. That evidence is not such as the accused may himself place before the courts or be called upon by the court to admit as valid because it is evidence peculiarly to be adduced by the investigating officer (ie the person in whom the suspicion is aroused). This I believe underlines the statement in *Chitsinde*'s case *supra* that if a reasonable suspicion does not exist then the onus to explain does not arise for the accused person. Chidyausiku J (as he then was) had no difficulty in agreeing with the Attorney-General's views in *S* v *Karasa* HH-527-87 that the magistrate in the court *a quo* ought not to have convicted the accused without hearing evidence. I am constrained to the conclusion that, on a charge under s 12(2) of the Act, plea proceedings in terms of s 271(2)(b) of the Criminal Procedure and Evidence Act are inappropriate. Even where the accused person enters a plea of guilty, the presiding magistrate should still receive evidence on the circumstances giving rise to a reasonable suspicion that the goods were stolen. The result would be that, if the person giving such evidence fails to satisfy the court that circumstances giving rise to a reasonable suspicion existed, then the State case would have crumbled on the first hurdle. In *Ganyu*'s case *supra*, a

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caution was given that

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the provisions of s 12(2) "must be applied with exceptional care if the manifest possibility of injustice is to be avoided" (at 106F) and it was appreciated that the accused "may prejudice himself if he fails to give evidence under oath, more particularly where he has given no account at all, or no acceptable account of his possession prior to trial" (at 106G).

The conviction in the present case must therefore be set aside because the court proceeded in terms of s 271(2)(b) of the Criminal Procedure and Evidence Act which was, in my view, undesirable.

The conviction may also be quashed on the basis, as suggested by the scrutinising magistrate, that when the accused explained that he had bought the mountain bicycle from a person he did not know, the presiding magistrate should have entered a plea of not guilty so that the accused's explanation could have been properly investigated. Support for this is to be found in *S* v *Kayimbanemoyo supra* at 215G-216A where Adam J, commenting on *Karasa*'s case *supra*, correctly stated that:

"It is clear from the foregoing that the error committed by the trial magistrate was to continue with the trial on the basis that accused had pleaded guilty in spite of the fact that he had given an explanation about the goods. In such a situation, the magistrate should have altered the plea to not guilty in terms of s 272 of the Criminal Procedure and Evidence Act and required the prosecution to proceed to trial by calling witnesses to give oral evidence."

It is quite possible that the accused person was known to the investigating officer as a person with two previous convictions relating to the theft of bicycles. To establish that that there existed circumstances giving rise to a reasonable suspicion that the goods were stolen, the investigating officer may for the purpose of showing why he entertained such a suspicion (apart from reliance on the sale of the bicycle for $200 which is the only such circumstance apparent on the record) he may have regard to the accused's previous convictions - see *Ganyu*'s case *supra* at 107B-E.

This is a case which could have been handled more safely by charging the accused with theft *simpliciter* whereby his failure to give a satisfactory explanation, if he did fail to do so, would have formed part of the evidence before the court on which a conviction could be based. The words of Georges JA in *Chitsinde*'s case *supra* at 99H-100A would find application. He said:

"A person found in possession of stolen goods can be convicted of theft or of receiving the goods knowing them to have been stolen if the evidence necessary to prove these offences has been established. Such a person would also face the possibility of a conviction if he fails to give a satisfactory explanation."

I would accordingly quash the conviction, set aside the sentence and remit the matter for a trial *de novo*. It is so ordered.

CHATIKOBO J: I agree with the conclusion which my brother Chinhengo

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has arrived at. I merely wish to add a few of my own thoughts on the matter. The advisability of convicting a erson for contravening s 12(2)(b) of the Act on his own plea of guilty does not depend solely on compliance with the provisions of s 271(2)(b) of the Code. Much depends on the essential elements of the offence charged. In cases where the facts are not known to the accused it is not possible for the accused to make an informed admission of those facts. Proof of them is necessary. That is precisely the point which Dumbutshena CJ was at pains to stress in *S* v *Dube & Anor* 1988 (2) ZLR 385 (S) 390A-B when he said:

"Not every fact should be regarded as proved simply because it is admitted. Thus an admission of 'being in a prohibited area' should not be blindly accepted. The court should require proof that the area was indeed a prohibited area - *S* v *Deka & Anor* S-199-88. The same is true of an admission of 'possession'. The court must be careful to establish what it is that the accused is admitting, because possession is a difficult concept."

In road traffic cases, the courts do not, as a matter of practice, convict an offender of driving with an excessive concentration of alcohol in his blood on his plea of guilty standing alone without proof of how the blood sample was taken and analysed. Thus, Newham J in *S* v *Chitombo* 1978 ZLR 243 (G) 246F-G stated that:

"A contravention under s 45(1) involves something outside the accused's knowledge, at least in a case where the evidence is that the accused was slightly intoxicated. In such circumstances, the court is generally concerned with an accused who has consumed a quantity of alcohol but is not shown to have been incapable of having proper control of the vehicle. Section 45(1) is a section which envisages scientific evidence and it should be clear that the accused understands what he is pleading to. In *S* v *Godden* 1970 (3) SA 709 (N) at 210E onwards, the point is made of how difficult it is for a layman properly to admit to this offence. It seems to me that, save in what are likely to be exceptional cases, a magistrate should call for the evidence which proves the commission of the offence."

The words of Henning J in *Godden*'s case bear repetition:

"I should imagine that most laymen really have no appreciation of what it means when it is said that the percentage of alcohol in a person's blood exceeds 15 [milligrams] per one hundred millilitres of blood. One wonders how a charge under the section can be properly explained to an accused who lacks the necessary scientific knowledge. A further problem is that, in general, a person who has consumed intoxicating liquor is hardly in a position to estimate the percentage of alcohol with any degree of accuracy without the aid of scientific examination. This makes it all the more necessary that, even where an accused has pleaded guilty to a charge under the section, a conviction should not follow in the absence of sufficient admissible evidence that the offence was committed. A plea of guilty on such charge is not really of assistance to the State for, save perhaps in most exceptional cases, the State would still have to prove by evidence *aliunde* that the accused committed the offence."

In context, it would be absurd to ask an offender in plea proceedings if he admits that there was a reasonable suspicion that the goods found in his

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possession had been stolen. It is not the accused who suspects himself. The suspicion is formed by a third person, usually a police officer. It is such person who harbours the suspicion. He it is who assesses the circumstances under which he finds the accused in order to determine if the suspicion harboured by him is reasonable. When asked if he admits that there was a reasonable suspicion that the goods found in his possession had been stolen the

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accused can at best shrug his shoulders and say, "if you say so I can't dispute it" because he cannot enter into the mind of the police officer nor can he decode the mental processes of the arresting officer. The police officer must, in all cases, give evidence to prove that he formed a suspicion and to describe the circumstances which led him to satisfy himself that his suspicion was not fanciful.

No court can convict an accused person under the section purely on the basis that the accused has not put in issue the question of his guilt. A conviction can properly be based on an admission of facts which are known to the accused. Where facts are not known to the accused evidence must be led to establish them. The fact that the accused may not be in a position to controvert such evidence is not a reason for not putting such evidence before the court.

I understand Adam J's reasoning in *Kayimbanemoyo supra* at 215H to be that where a person pleads guilty to contravening s 12(2) of the Act and he proffers an explanation for his possession the court must then alter the guilty plea to one of not guilty and proceed to trial. With respect, this amounts to working backwards. What in effect the learned judge is saying is that the magistrate must call for an explanation at the plea stage and if the explanation given is inadequate, he must proceed to find that it is unsatisfactory. As the learned judge seems to accept, a court cannot make a finding on the satisfactoriness of an explanation given by the accused in court in the absence of evidence from the person who formed the suspicion. The accused is never in a position to apprise the court on the nature of that suspicion. The giving of a satisfactory account of his possession by the accused person is a separate and distinct element of the offence; the existence of a reasonable suspicion in the mind of a third person is another. It is not enough for the court to listen to the accused's explanation in court and to then conclude that because the accused's explanation is unsatisfactory, the arresting person must have formed a reasonable suspicion that the goods were stolen. To start with the existence of a reasonable suspicion is a separate element which must be put to and be admitted by the accused. What Chinhengo J has demonstrated in his able judgment and what I am struggling to bring out is that an offender is never in a position to make an admission of what someone else suspected him of doing. More importantly, it is not for a judicial officer in plea

proceedings to listen to an explanation and then to proceed to make a finding on the satisfactoriness or otherwise of the explanation. Findings are made on evidence after hearing both sides.

It must follow that where a contravention of s 12(2) of the Act is alleged, evidence must always be led to prove the circumstances which gave rise to the suspicion, thereby enabling the trial court to determine if there was a reasonable suspicion that the goods had been stolen in the first place. If the court comes to the conclusion that there was no reasonable suspicion the matter ends there and the accused must be acquitted. If the court finds that a reasonable suspicion existed then the court must proceed to test the satisfactoriness of the explanation given by the accused, either at the time of being found in possession or at any time thereafter. This is not something which can be achieved during plea proceedings.

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It is for these reasons that I agreed with the views expressed by Chinhengo J in the face of another judgment of this court, which is to the contrary. I refer of course, to the judgment of Adam J in *Kayimbanemoyo* with which I respectfully disagree.

AMBALI *v* BATA SHOE CO LTD 1999 (1) ZLR 417 (SC)

Citation	1999 (1) ZLR 417 (SC)
Case No	Judgment No. S-56-99
Court	Supreme Court, Harare
Judge	McNally JA, Muchechetere JA, Sandura JA
Heard	May 3, 1999
Judgment	May 21, 1999
Annotations	None

Civil appeal

Flynote

Employment - contract - termination - wrongful dismissal - damages for - how to be calculated - requirement for dismissed person to mitigate loss by taking any reasonable alternative employment

Headnote

Where a person has been wrongfully dismissed (rather than wrongfully suspended) from his employment, and seeks damages rather than reinstatement, he is entitled to be awarded the amount of wages or salary he would have earned had his contract not been prematurely terminated. He may also be compensated for the loss of any benefit to which he was entitled and of which he was deprived by as a result of the wrongful termination. But he must mitigate his loss immediately. He must look for alternative employment; he is not entitled to sit around and do nothing. If he does not look for alternative employment, his damages will be reduced. He will only be compensated for the period between his dismissal and the date when he could reasonably have been expected to find alternative employment.

Cases Considered

Cases cited:

Reserve Bank of Zimbabwe v *Exor Siwawa's Est* 1999 (1) ZLR 185 (S)

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Toerien v *Stellenbosch University* 1996 (1) SA 197 (C)

Zimbabwe Sun Hotels (Pvt) Ltd v *Lawn* 1988 (1) ZLR 143 (S)

Zimbabwe United Passenger Co v *Chisvo* 1999 (1) ZLR 67 (S)

Case Information

Appellant in person

F Girach, for the respondent

Judgment

McNALLY JA: This court concluded, in judgment S-100-98 on 13 July 1998, that Ambali had been wrongfully dismissed. We remitted the matter to the Tribunal "so that it may specify an amount of damages to be awarded to the employee concerned as an alternative to his re-instatement or employment, in terms of s 96(1)(c) as read with s 91(2)(a) of the Labour Relations Act [*Chapter 28:01*]".

Before the Tribunal, Bata offered $20000 while Ambali claimed just under $4million. The claim seems to have escalated to just under $40million on appeal. The Tribunal awarded $30000. Ambali appealed against that award.

I remarked recently in *Zimbabwe United Passenger Company* v *Chisvo*

McNALLY JA

S-5-99,*(137) that the question of the *quantum* of an award of damages in lieu of re-instatement had not yet come before this court. We have not yet had an opportunity to consider the principles to be applied, in detail. We have, however, dealt with them in general terms, in the judgment of the Chief Justice in *Gauntlet Security Svcs (Pvt) Ltd* v *Leonard* 1997 (1) ZLR 583 (S).

The Tribunal, in its award dated 17 September 1998 (but apparently signed on 30 October 1998), approached the calculation as follows:

1. Ambali had been paid up to the end of March 1990 (though he had been suspended since 1985).
2. He was earning $800 a month.
3. He had been on suspension without pay from April 1990 to July 1998 (the date of this court's judgment), a period of 63 months.
4. He should be able to find a job within a further 12 months.
5. He should have mitigated his loss by earning at least half his gross earnings.

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6. So his damages were $400 x 75 = $30000.

Before one becomes involved in questions of principle, there are two major errors in that calculation. The first, relating to para 2, is that he was earning $800 a *fortnight*, or approximately $1750 gross per month. The second, relating to para 3, is that it is not 63 months, but 99 months, from 1 April 1990 to 31 July 1998.

The principle set out in *Gauntlet Security Svcs (Pvt) Ltd* v *Leonard supra*, is simply this:

" 1. The employee is entitled to be awarded the amount of wages or salary he would have earned save for the premature termination of his contract by the employer. He may also be compensated for the loss of any benefit to which he was contractually entitled and of which he was deprived in consequence of the breach.

2. But he must mitigate his loss. He must look for and accept any reasonable offer of alternative employment. If he fails to take other employment when it would have been reasonable for him to do so, a deduction will be made in respect of the remuneration he would have earned from the substituted employment."

Subsequently, in *Reserve Bank of Zimbabwe* v *Estate Siwana* 1999 (1) ZLR 185 (S) the Chief Justice made the point, by reference to *Myers* v *Abrahamson* 1952 (3) SA 121 (C) at 127C, that we are not concerned with what are called "surrogate damages". This is precisely the basis upon which such cases as *Toerien* v *Stellenbosch University* 1996 (1) SA 197 (C) are to be distinguished. In that judgment, at 200C-D, Traverso J said "one must be careful not to approach the case as if it is one for damages". Here, we are dealing with a case for damages. *Toerien*'s case *supra* is not relevant.

I think it is important that this court should make it clear, once and for all,

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that an employee who considers, whether rightly or wrongly, that he has been unjustly dismissed, is not entitled to sit around and do nothing. He must look for alternative employment. If he does not, his damages will be reduced. He will be compensated only for the period between his wrongful dismissal and the date when he could reasonably have expected to find alternative employment. The figure may be adjusted upwards or downwards. If he could in the meanwhile have taken temporary or intermittent work, his compensation will be reduced. If the alternative work he finds is less well-paid his compensation will be increased.

There are also those, and Ambali is one of them, who seem to believe that they must on no account look for alternative employment; that so long as their case is pending they must preserve their unemployed status; that if they look for and find a job in the meanwhile they will destroy their claim.

It cannot be emphasised too strongly that this is wrong. There may be some confusion arising out of cases which deal with wrongful suspension rather than wrongful dismissal. *Zimbabwe Sun Hotels (Pvt) Ltd* v *Lawn* 1988 (1) ZLR 143 (S) is an example. But if an employee is wrongfully dismissed his duty to mitigate his loss arises immediately. If he is offered a good job the day after he is dismissed he must take it, or forfeit any claim for damages. If he is offered a good job only after he has been unemployed for six months, he must take it. If in the meantime

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he has instituted proceedings for re-instatement, he may continue there, but his claim for damages will usually then be limited to his loss over the six month period.

Thus, in the present case it seems to me clear that the Tribunal erred in principle in adding the 12 months "job seeking" period to the 63 (or, correctly, 99) months of unemployment between 1 April 1990 and 31 July 1998.

The evidence, which the Tribunal accepted, was that it should not have taken Ambali more than 12 months from 1 April 1990 to find an equivalent job. Given that finding, which was a finding of fact, the award should have been limited to an award of 12 months pay ie 12 x $1750 = $21000. And indeed, any liability to tax should have been deducted from that figure. His loss, after all, was his salary after tax.

We have figures in the file which show his PAYE deduction as $201.50 per fortnight, ie $5227.30 for the year in question. Therefore, his after tax salary for the year would have been $15772.70. There may be some slight adjustment in tax at the year's end, so the figure may be rounded up in his favour to $16000. On that figure, he will be entitled to interest at the court rate, on each fortnightly payment as it fell due, to date of payment. It is not for the court to make calculation, but the resultant figure will be in excess of $30000, which was the figure awarded. (The interest rate has been 25% *per annum* since 10 September 1993, in terms of SI 273/93.)

McNALLY JA

Accordingly, our finding must be that he was fortunate to be awarded $30000.

I should add that there is no basis, in a claim in contract such as this, for assessing punitive damages.

The appeal is dismissed with costs.

MUCHECHETERE JA: I agree.

SANDURA JA: I agree.

Danziger & Partners, respondent's legal practitioners

VAN NIEKERK *v* VAN NIEKERK & ORS 1999 (1) ZLR 421 (SC)

Citation	1999 (1) ZLR 421 (SC)
Case No	Judgment No. S-47-99
Court	Supreme Court, Harare
Judge	McNally JA, Ebrahim JA, Sandura JA

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Heard January 18, 1999
Judgment May 24, 1999
Annotations None

Civil appeal

Flynote

Administration of estates - Master of the High Court - review of decision by - correct procedure is to proceed by way of application, not by trial action

Administration of estates - Master of the High Court - review of decision by - locus standi of applicant - when applicant is a "person aggrieved" in terms of the legislation

Company law - corporate veil - lifting of - circumstances in which justifiable - allegation of fraud

Practice and procedure - motion proceedings - disputes of fact on the papers - approach to be taken by the court

Practice and procedure - locus standi - aggrieved person - who is - whether it is only party to dispute or includes other persons who are aggrieved

Headnote

A man had died leaving a will. The son and the wife of the deceased, who was the son's stepmother, were beneficiaries in the will. The executor had been persuaded by the wife not to include a certain property as part of the deceased's estate. She persuaded the executor that this property should not be included because it had been fraudulently registered by the deceased in his own name whereas in fact it should have been registered in the name of a company in which the wife was a 50% shareholder. The deceased held the rest of the shares in this company.

The son objected to the Master about the exclusion of this property from the deceased's estate. The Master upheld the objection and directed that the property should be included as part of the deceased's estate. The wife successfully applied to the High Court for an order setting aside the Master's decision. The son then appealed to the Supreme Court against the decision of the High Court on four grounds. These were that (1) the wife should have proceeded by way of action instead of bringing the decision of the Master on review; (2) the wife was not an aggrieved person in terms of s 52(9)(i) of the Administration of Estates Act [*Chapter 6:01*] and therefore had no *locus standi* to apply to court to have the Master's

direction set aside; (3) there were disputes of fact that could not be resolved on the papers; and (4) if the wife's company did have a claim against the estate, that claim had prescribed. Section 52(9)(i) of the Administration of Estates Act provides that when the Master of the High Court gives a direction relating to the administration of an estate, any person aggrieved by such

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direction may, within thirty days of the date of such direction, apply on motion to the court for an order to set aside the direction. Before making the application the applicant must give notice to the executor and to any person affected by the direction.

Held, that the wife was correct to proceed by way of court application (previously called motion proceedings).

Held, further, that the wife had *locus standi* as she was an "aggrieved person" in terms of s 52(9)(i) of the Administration of Estates Act. This phrase should not be interpreted to mean that the only person who could be aggrieved is a person who is a party to a dispute and who has had a decision given against him. The provision must be given a wider and more liberal interpretation, so as to encompass any person who has a genuine grievance because an order has been made which prejudicially affects his interests. It does not, however, include a mere busybody who is interfering in things which do not concern him. In the present case the widow was not a mere interfering busybody. She was the widow of the deceased and was alleging was that her late husband had defrauded a company in which she was a 50% shareholder by registering in his own name property intended for the company. She was therefore definitely an aggrieved person in terms of this legislation. Although normally property rights of a company must be kept separate and distinct from those of its shareholders, there are exceptions to this principle. In the present case, the allegation of fraud in the conduct of the company's affairs justified the lifting of the corporate veil as a ruling that the widow did not have *locus standi* would, in effect, amount to protecting the fraud allegedly perpetrated by the deceased.

Held, further, that in motion proceedings the court should endeavour to resolve the dispute raised in affidavits without hearing evidence. It must take a robust and common sense approach and not an over fastidious one, providing that it is convinced that there is no real possibility of any resolution on the affidavits doing an injustice to the other party concerned. The crucial question is whether there is a real dispute of fact which requires determination in order to decide the matter and not merely an illusory dispute of fact. If the respondent intends to dispute a material fact deposed to on oath by the applicant, it is not sufficient for the respondent merely to make a bald denial of the applicant's averment. The respondent's affidavit must at least disclose that there are material issues in relation to which there is a *bona fide* dispute of fact capable of being properly decided only after *viva voce* evidence has been heard. The son could not challenge the widow's averment that on a number of occasions, when the son was not present, the deceased had promised to transfer the property into the name of the company.

Held, further, that as regards the son's contention that the claim by the company against the deceased estate in relation to the property had prescribed, the widow had averred that prescription had been interrupted because the deceased had kept on promising right up to the time of his death that he would transfer the property into the name of the company. The son was not in a position to challenge this averment. All he had done was to advance an unsubstantiated argument. This did not disclose any material issue in which there was a genuine dispute of fact capable of being determined only after the hearing of oral evidence.

Cases Considered

Cases cited:

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A-G, The Gambia v *N'jie* [1961] 2 All ER 504 (PC)

Concorde Leasing Corp (Rhodesia) Ltd v *Pringle-Wood NO & Anor* 1975 (2) RLR 4 (G)

da Mata v *Otto NO* 1972 (3) SA 858 (A)

Sidebotham Ex p (1880) 14 ChD 458 (CA)

Lategan & Anor NNO v *Boyes & Anor* 1980 (4) SA 191 (T)

Plascon-Evans Paints v *van Riebeeck Paints* 1984 (3) SA 623 (A)

Salomon v *Salomon & Co* [1897] AC 22 (HL)

Shipping Corp of India Ltd v *Evdomon & Anor* 1994 (1) SA 550 (A)

US v *Milwaukee Refrigerator Transit Co* 42 Fed 247 (1905)

van Niekerk v *Master of the High Court & Ors* 1998 (1) ZLR 418 (H)

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

Statutes Considered

Legislation considered:

Administration of Estates Act [*Chapter 6:01*], s 52(9)(i)

Case Information

J B Colegrave, for the appellant

A J Dyke, for the respondent

Judgment

SANDURA JA: This is an appeal against the order of the High Court which set aside the decision of the second respondent upholding the appellant's objection to the third respondent's Liquidation and Distribution Account in relation to the property known as Subdivision H of Homefield. See *van Niekerk* v *Master of the High Court & Ors* 1998 (1) ZLR 418 (H).

The background facts in this case are as follows. The appellant is the son of the late Izak Jacobus Marthinus van Niekerk ("the deceased"). The first respondent ("Iona") is the deceased's widow and the appellant's stepmother.

At all material times both Iona and the deceased were shareholders in Franklin Trading (Pvt) Ltd ("Franklin Trading") and Lone Oak Stud (Pvt) Ltd ("Lone Oak"), both companies having been registered according to the laws of Zimbabwe. Iona was a 50% shareholder of Franklin Trading, and a 49% shareholder of Lone Oak. The remaining shares in both companies were held by the deceased.

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The deceased died on 18 February 1995 and left a will in terms of which both the appellant and Iona were beneficiaries, and the residual heir was the Izak Jacobus Marthinus van Niekerk Family Trust ("the Trust"). The appellant was a beneficiary of the Trust.

In January 1996, the third respondent ("the executor") produced the first and final liquidation and distribution account of the deceased's estate ("the account"). Thereafter, the account lay open for inspection, and on 17 July 1996 the appellant filed with the second respondent ("the Master") an objection to the account. Although the objection was in relation to three items in the account, only one is relevant for the purposes of this appeal. That item related to the immovable property known as Subdivision H of Homefield ("Homefield").

Homefield was registered in the deceased's name. However, before the

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account was drawn Iona managed to convince the executor that the property should have been registered in the name of Franklin Trading but had, instead, been fraudulently registered by the deceased in his own name. Consequently, the account indicated that Homefield had been incorrectly registered in the deceased's name and that Franklin Trading had a claim against the deceased's estate in that regard. The appellant objected to this, alleging that Homefield was the deceased's property and was part of the deceased's estate.

The objection was upheld by the Master who directed that the account be re-drawn so as to reflect that Homefield was part of the deceased's estate. That decision dissatisfied Iona. She subsequently filed a court application in the High Court seeking an order setting aside the Master's decision, and she succeeded. The appellant has now appealed against that order.

Mr *Colegrave*, who appeared for the appellant, made the following four submissions:

1. that the first respondent should have proceeded by way of action rather than bringing on review the decision of the second respondent;

2. that the first respondent did not have the *locus standi* to bring the second respondent's decision on review as she was not a "person aggrieved" for the purposes of s 52(9) of the Administration of Estates Act [*Chapter 6:01*];

3. that there were disputes of fact which could not be resolved on the papers; and

4. that the claim of Franklin Trading to Homefield was prescribed.

Counsel submitted that the appellant's success in respect of any one of the four submissions would be fatal to Iona's case. I agree.

I now wish to examine the submissions made by counsel individually.

PROCEDURE

Counsel for the appellant submitted that Iona followed the wrong procedure when she filed a

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court application for the review of the Master's decision. He submitted that, instead, she should have instituted a trial action, in the name of Franklin Trading, against the appellant, the executor and the Registrar of Deeds, seeking the transfer of Homefield to Franklin Trading.

In order to test the validity of this submission, it is necessary to look at the relevant statutory provisions. Section 52(9)(i) of the Administration of Estates Act [*Chapter 6:01*] ("the Act") reads as follows:

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

Provided that:

(i) any person aggrieved by any such direction of the Master may, within thirty days after

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the date of the Master's direction, and after giving notice to the executor and to any person affected by the direction, apply by motion to the court for an order to set aside the direction and the court may make such order as it may think fit."

That is the procedure provided for by the Act and that is the procedure which Iona followed. It should be noted, however, that what was previously termed an application on notice of motion is now called a court application, but the procedure is basically the same.

In the circumstances, assuming that Iona had the *locus standi* to institute the proceedings, the procedure which she followed was correct. However, if she did not have the *locus standi*, she should not have instituted the proceedings. I now proceed to deal with the second submission made by counsel for the appellant.

LOCUS STANDI

The second submission advanced by counsel for the appellant was that Iona did not have the *locus standi* to institute the proceedings because she was not a "person aggrieved" for the purposes of s 52(9)(i) of the Act. He submitted that even if the procedure adopted by Iona were correct the proceedings should have been instituted in the name of Franklin Trading, the company alleged by Iona to be the owner of Homefield and which would have been aggrieved by the Master's decision.

The crucial issue is whether Iona was a "person aggrieved" for the purposes of s 52(9)(i) of the Act. That expression has received judicial consideration in a number of cases.

In Ex p *Sidebotham* (1880) 14 ChD 458 (CA) (an English case), the dispute concerned the Bankruptcy Act 1869. A court refused to act upon a report by the Comptroller that a trustee had been guilty of negligence which resulted in loss to the estate. It was held that neither the bankrupt nor any creditor was entitled to appeal against such refusal. In the course of his judgment, James LJ said the following at 465:

"It is said that any person aggrieved by an order of the court is entitled to appeal. But the words 'person aggrieved' do not really mean a man who is disappointed of a benefit which he might have received if some other order had been

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made. A 'person aggrieved' must be a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully affected his title to something."

The next case I wish to refer to is *Attorney-General of The Gambia* v *N'jie* [1961] 2 All ER 504 (PC). The essential facts in that case were as follows. The Rules of the Supreme Court of The Gambia gave a judge the power, on reasonable cause, to have the name of a legal practitioner struck off the roll of the court. If such an order was made the practitioner concerned could

appeal to the West African Court of Appeal ("the Court of Appeal"). Certain allegations were made against N'jie, a barrister, and at the instance of the Attorney-General an inquiry was conducted by a deputy judge who ordered that N'jie's name be struck off the roll. N'jie successfully appealed to the Court of Appeal which set aside the deputy judge's order. Thereafter, the Attorney-General petitioned the Privy Council for special leave to appeal against the decision of the Court of Appeal.

Before the Privy Council, N'jie's counsel raised the preliminary objection that the Attorney-General had no *locus standi* to petition the Privy Council for special leave to appeal because he was not, in terms of the relevant Order in Council, "... any person aggrieved by any judgment of the court ...". In making that submission, counsel relied upon what James LJ said in the *Sidebotham* case *supra*.

At 510I-511D, Lord Denning commented on the definition of the expression "person aggrieved" given by James LJ in the *Sidebotham* case *supra* as follows:

"If the definition were to be regarded as exhaustive, it would mean that the only person who could be aggrieved would be a person who was a party to a *lis*, a controversy *inter partes*, and had had a decision given against him. The Attorney-General does not come within this definition, because, as their Lordships have already pointed out, in these disciplinary proceedings there is no suit between parties, but only action taken by the judge, *ex mero motu* or at the instance of the Attorney-General or someone else, against a delinquent practitioner.

But the definition of James LJ is not to be regarded as exhaustive. Lord Esher MR pointed that out in Re *Reed, Bowen & Co*, Ex p *Official Receiver* (1887) 19 QBD at p 178. The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests. Has the appellant a sufficient interest for this purpose? Their Lordships think that he has. The Attorney-General in a colony represents the Crown as the guardian of the public interest. It is his duty to bring before the judge any misconduct of a barrister or solicitor which is of sufficient gravity to warrant disciplinary action. True it is that, if the judge acquits the practitioner of misconduct, no appeal is open to the Attorney-General. He has done his duty and is not aggrieved. But if the judge finds the practitioner guilty of professional misconduct, and a Court of Appeal reverses the decision on a ground which goes to the jurisdiction of the judge or is otherwise a point in which the public interest is concerned, the Attorney-General is a 'person aggrieved' by the decision and can properly petition Her Majesty for special leave to appeal."

His Lordship then concluded that the Attorney-General was a "person aggrieved" by the decision of the Court of Appeal.

The wider and more liberal interpretation of "person aggrieved" by Lord Denning was approved in this jurisdiction by Beadle ACJ in *Concorde Leasing Corp (Rhodesia) Ltd* v *Pringle-Wood NO*

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& Anor 1975 (2) RLR 4 (G) at 8G-H.

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In the present case, Iona could hardly be described as a mere busybody interfering in things which do not concern her. She is the widow of the deceased and a 50% shareholder in Franklin Trading, a private family company which was in practice controlled by the deceased. She is not a mere shareholder.

In addition, she alleged that after she and the deceased had agreed that Homefield would be bought and registered in the name of Franklin Trading, the deceased fraudulently gave instructions to the conveyancers that Homefield be registered in his own name. On her allegations, therefore, the deceased cheated her by telling her one thing and doing another, and defrauded her and Franklin Trading by transferring Homefield into his own name. That transfer devalued her shareholding in Franklin Trading. She is definitely a "person aggrieved" for the purposes of s 52(9)(i) of the Act.

Whilst it is true that if Homefield should have been registered in the name of Franklin Trading, as alleged by Iona, Franklin Trading would be a "person aggrieved" for the purposes of s 52(9)(i) of the Act, in reality the "person aggrieved" is Iona. In saying this I am mindful to the fact that it is of cardinal importance that the property rights of a company be kept separate and distinct from those of its shareholders.

However, there are exceptions to the principle, enunciated in *Salomon* v *Salomon & Co* [1897] AC 22 (HL), that a company is a separate entity from its members.

In *US* v *Milwaukee Refrigerator Transit Co* 42 Fed 247 (1905), Sanborn J, after stating that a company should be seen as a separate entity from its shareholders, said the following at 255:

"... but, when the notion of a legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association."

That approach was mentioned with approval in *Lategan & Anor NNO* v *Boyes & Anor* 1980 (4) SA 191 (T) at 200H-201B. In my view, it is appropriate to adopt that approach in the present case. As Le Roux J said in the *Lategan* case *supra*, the approach is based on common sense and a developed sense of equity. In the present case, a ruling in favour of the appellant on the ground that Iona did not have *locus standi* would, in effect, amount to protecting the fraud allegedly perpetrated by the deceased.

More recently, Corbett CJ said the following in *The Shipping Corp of India Ltd* v *Evdomon Corp & Anor* 1994 (1) SA 550 (A) at 566C-E:

"It seems to me that, generally, it is of cardinal importance to keep distinct the property rights of a company and those of its shareholders, even where the latter is a single entity, and that the only permissible deviation from this rule known to our law occurs in those (in practice) rare cases where the circumstances justify 'piercing' or 'lifting' the corporate veil ... I do not find it necessary to consider, or attempt to define, the circumstances under which the court will pierce the corporate veil.

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Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs."

In my view, the present case is one of "... those (in practice) rare cases where the circumstances justify 'piercing' or 'lifting' the corporate veil ..." As already stated, Iona alleged that the deceased had acted fraudulently when, instead of transferring Homefield to Franklin Trading, he transferred it into his own name. That is an allegation of fraud in the conduct of the company's affairs which, in the circumstances, justifies the lifting of the corporate veil.

I am, therefore, satisfied that the learned judge in the court *a quo* correctly found that Iona was a "person aggrieved" for the purposes of s 52(9)(i) of the Act, and that she had *locus standi* to bring the second respondent's decision on review.

I now wish to consider the third and fourth submissions made by counsel for the appellant. These were that there were disputes of fact which could not be resolved on the papers, and that the claim of Franklin Trading to Homefield was prescribed.

The approach to be adopted where there are disputes of fact on the papers has been set out in a number of cases. In *da Mata* v *Otto NO* 1972 (3) SA 858 (A) Wessels JA, said the following at 882F-H:

"The crucial question is, therefore, whether there is a real dispute of fact which requires determination in order to decide whether the relief claimed should be granted or not. If such a dispute does arise, it is ordinarily undesirable to settle the issue solely on probabilities disclosed in contradictory affidavits, in disregard of the additional advantages of viva voce evidence. (*Room Hire Co (Pty) Ltd* v *Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T)).

In the preliminary enquiry, ie, as to the question whether or not a real dispute of fact has arisen, it is important to bear in mind that, if a respondent intends disputing a material fact deposed to on oath by the applicant in his founding affidavit or deposed to in any other affidavit filed by him, it is not sufficient for a respondent to resort to bare denials of the applicant's material averments, as if he were filing a plea to a plaintiff's particulars of claim in a trial action. The respondent's affidavits must at least disclose that there are material issues in which there is a *bona fide* dispute of fact capable of being properly decided only after viva voce evidence has been heard."

That case was cited with approval by Corbett JA (as he then was) in *Plascon-Evans Paints* v *van Riebeeck Paints* 1984 (3) SA 623 (A) at 634I.

More recently, in our jurisdiction Gubbay JA (as he then was) said the following in *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech* 1987 (2) ZLR 338 (S)at 339C-D:

"It is, I think, well established that in motion proceedings a court should endeavour to resolve the dispute raised in affidavits without the hearing of evidence. It must take a robust

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and common sense approach and not an over fastidious one; always provided that it is convinced that there is no real possibility of any resolution doing an injustice to the other party concerned. Consequently, there is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a *bona fide* and

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not merely an illusory dispute of fact."

That is the approach which I shall adopt in determining the validity of the submissions made by counsel for the appellant in this case.

The main issue which counsel for the appellant alleged could not be resolved on the papers was whether it was Franklin Trading, Lone Oak or the deceased who was to exercise the option to purchase Homefield. According to Iona, she and the deceased agreed that Franklin Trading would purchase Homefield and that the purchase price of $18000 would come from the Lone Oak partnership account. On the other hand, the appellant's version was that it was the deceased who was to purchase Homefield. He alleged that at the relevant time Franklin Trading was dormant and did not have the necessary capital.

In her founding affidavit, Iona averred as follows:

"I only discovered the property was held in the deceased's name when I went through one of the office drawers and discovered numerous documents pertaining to our business affairs that I had never seen before. I removed these documents from the drawer in their original files. Amongst these files was one marked Franklin Trading (Pvt) Ltd. In this file, I found the Deed of Transfer of the property into the deceased's name. I immediately confronted the deceased and we had a terrible argument over his deception. He was incensed that I had gone through what he called his private drawer and demanded that I return all the documents before he would even discuss anything with me."

That version of events was strongly supported by John Brown ("Brown"), Lone Oak's and Franklin Trading's accountant. He averred as follows:

"On 14 April 1992, I was present at a meeting held for the members of both Lone Oak Stud (Pvt) Ltd and Franklin Trading (Pvt) Ltd. Also present at this meeting was the deceased and Mrs Iona van Niekerk. It was often the practice of the deceased to wholly exclude Mrs Van Niekerk from business decisions relating to the above companies; this would include holding meetings in the absence of Mrs van Niekerk and having minutes drafted that would indicate that she was (present). The purpose of the meeting on 14 April 1992 was to resolve these irregularities by way of either ratification or amendment.

At the meeting and in my presence it was agreed that Mrs van Niekerk would ratify the disputed minutes and in return the deceased would take positive steps to transfer the property being Sub-division H of Homefield into the name of Franklin Trading (Pvt) Ltd, which transfer he had previously undertaken to perform. To that end I recall a lengthy discussion between myself and the deceased debating how best the property could be transferred without attracting unnecessary costs and taxes. The meeting ended without a final decision being made."

In my view, the appellant cannot challenge Iona's averments because he was not present when Iona discussed the purchase of Homefield with the deceased, nor did he have any first hand information on the matter. Similarly,

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he cannot challenge Brown's averments because he was not at the meeting where the transfer of Homefield into the name of Franklin Trading was discussed.

In the circumstances, the main issue raised by the appellant does not constitute a genuine dispute of fact.

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The other issue alleged by the appellant to be a dispute of fact which could not be resolved on the papers was whether the claim by Franklin Trading to Homefield was prescribed.

In this regard, Iona's version of what happened was that the deceased kept on promising that he would transfer Homefield into the name of Franklin Trading right up to the time when he died in February 1995. She therefore argued that there was an interruption of the period of prescription and that, in the circumstances, the claim was not prescribed.

Again, the appellant is not in a position to challenge Iona's averments. He cannot seriously dispute Iona's allegation that the deceased repeatedly undertook to transfer Homefield to Franklin Trading right up to the time he died.

In my view, all the so-called disputes of fact raised by the appellant in this case are no more than unsubstantiated arguments. The appellant's papers do not disclose any material issue in which there is a genuine dispute of fact capable of being properly determined only after the hearing of oral evidence. The appeal cannot, therefore, succeed.

However, as far as the costs are concerned, my view is that they should be borne by the deceased's estate.

In the circumstances, the appeal is dismissed, but the costs of the appeal shall be borne by the deceased's estate.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

Stumbles & Rowe, appellant's legal practitioners

Gollop & Blank, first respondent's legal practitioners

HARTLEY *v* HARTLEY 1999 (1) ZLR 431 (SC)

Citation	1999 (1) ZLR 431 (SC)
Case No	Judgment No. S-60-99
Court	Supreme Court, HarareS
Judge	Gubbay CJ, Ebrahim JA, Sandura JA
Heard	May 10, 1999
Judgment	May 26, 1999
Annotations	None

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Civil appeal

Flynote

Practice and procedure - execution - writ of - when may be sued for - competent to issue a writ provided amount is definite and certain, even if it is subject to fulfilment of conditions

Headnote

The marriage between the appellant and the respondent was dissolved, the appellant being the plaintiff in the action. There was a settlement agreement which provided that two farms and certain livestock and other farm assets would be transferred by the respondent to the appellant; the plaintiff undertook to pay her $3 million. It was agreed that he would apply for a loan of $1 million, by mortgaging the farms. When the loan was received, he was to pay the sum of $1 million to the respondent. He undertook to pay the balance of $2 million by paying four equal instalments of $500000 each.

A few days after the first instalment was due, the respondent sued out a writ of execution against the appellant, directing the Sheriff to attach and take into execution the appellant's movable goods and caused to be realised the sum of $1500000. By the time the writ was served on the appellant, he had paid the first instalment of $500000. He tendered, but did not pay, the interest thereon. However, two motor vehicles were attached in respect of the claim for $1million. The appellant applied to have the writ of execution set aside, contending that the writ had been improperly issued, because the $1 million was not payable until a mortgage bond had been registered and the loan received, which had not happened.

Held, that a writ of execution will be set aside on application if the judgment was not definite and certain. In the present case, the order of court incorporating the settlement agreement constituted a judgment from which there could be gathered the amount of money the appellant was liable to pay the respondent. The amount was definite and exact. The fact that $1 million was payable on the fulfilment of certain conditions caused no uncertainty as to how much was payable. The issue of a writ was thus competent, although the respondent put herself at risk of liability for costs if the writ were set aside on the ground of it being found that the condition could not be deemed to have been fulfilled.

Held, further, that even if the writ was bad in relation to the $1 million, it was good in relation to the $500000, because at the time the writ was issued the payment had not been made and, when made, did not include the interest. The *causa* had not fallen away and the writ was competent.

Cases Considered

Cases cited:

Butchart v *Butchart* 1997 (4) SA 108 (W)

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de Crespigny v *de Crespigny* 1959 (1) SA 149 (N)

Dunlop Rubber Co v *Stander* 1924 CPD 431

du Preez v *du Preez* 1977 (2) SA 400 (C)

Le Roux v *Yskor Landgoed (Edms) Bpk en Andere* 1984 (4) SA 252 (T)

McNutt v *Mostert* 1949 (3) SA 253 (T)

Perelson v *Druain* 1910 TPD 458

Ras v *Sand River Citrus Ests (Pty) Ltd* 1972 (4) SA 504 (T)

Statutes Considered

Legislation considered:

High Court Rules 1971 (RGN 1047/1971), r 323

Case Information

A P de Bourbon SC, for the appellant

J C Andersen SC, for the respondent

Judgment

GUBBAY CJ: The marriage between the appellant and the respondent was dissolved on 7 May 1997, the former being the plaintiff in the action. The order incorporated a settlement agreement which, *inter alia*, contained the following clauses:

" 1. The defendant shall transfer to the plaintiff the property known as Moahana, measuring 803.25 hectares and situate in the District of Gweru, such transfer to be effected immediately upon the grant of an order of divorce with the costs of the transfer to be borne by the plaintiff. The defendant nevertheless undertakes to sign and return to the plaintiff's legal practitioners, Coghlan Welsh & Guest, all documents necessary to effect the transfer of this property with minimum of delay and she shall discharge any outstanding overdraft facility necessary to secure the release of the title deeds and all outstanding rates in respect of the farm to enable transfer to be effected immediately ...

2. The defendant shall further transfer and make over to the plaintiff from 1 April 1997 all movable farm assets situate upon the aforesaid farm Moahana and upon the property situate in the District of Insiza being the farm called The Glade, 2677.2570 hectares in extent, which is registered in the plaintiff's name but leased to the defendant by the plaintiff, (which lease the plaintiff and the defendant have agreed shall terminate on 31 March 1997). The movables to be so transferred and made over to the plaintiff shall however exclude all the cattle on the two farms aforesaid.

3. The defendant acknowledges that in the course of conducting farming operations on Moahana over the past 20 years and as lessee of The Glade she has from time to time received loans and advances from or through the Robin Hartley Trust which have resulted in her being indebted to the said Trust in an amount compromised to stand at $1900000. This debt has been formally ceded to the plaintiff by the Trustee of the said Trust, but the plaintiff accepts the transfer of the farm Moahana, as provided in clause 1, and the delivery of the movable assets, as provided in clause 2, in full and final settlement of that debt so that all

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the defendant's liabilities to the plaintiff and the Trust will be extinguished by the transfer of that property and the delivery of those assets.

7. The defendant further agrees to transfer all her rights and interests in the cattle and other livestock situate on the farms Moahana and The Glade as at 1 April 1997 against payment to her by the plaintiff of the sum of $3000000. She accepts this

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payment in full and final settlement of all her rights and interests in the cattle and livestock on those said farms. The said cattle and livestock are to be counted in the course of a physical count to be conducted on or as at 31 March 1997 and thereafter listed and described in a document to be annexed hereto.

8. The $3000000 (three million dollars) payable by the plaintiff to the defendant for the cattle and other livestock shall be paid by the plaintiff to the defendant as follows:

   (a) As soon as this settlement is incorporated in a court order, the plaintiff shall apply for a loan of $1000000 (one million dollars) from a bank or other financial institution offering as security for that loan either The Glade or Moahana or both those properties. Upon registration of the bond and disbursement of the $1000000 (one million dollars) loan to the plaintiff, the plaintiff shall pay that sum without interest to the defendant.

   (b) The balance of $2000000 (two million dollars) shall be paid without interest to the defendant who shall notify the plaintiff of the Bank and Account number, which shall be paid in four (4) equal instalments of $500 000 (Five hundred thousand dollars) each on 31 January 1998, 30 June 1998, 31 January 1999 and 30 June 1999.

9. Notwithstanding the provisions of the preceding clause, it is agreed that the monies to be paid in settlement of the plaintiff's liability for the purchase of cattle in the sum of balance of the $3000000 (three million dollars) is to be paid from the sale of the cattle in terms of this settlement ... "

On 2 February 1998, the respondent sued out a writ of execution against the appellant in terms of Order 40 r 323 of the High Court Rules. The writ directed the Sheriff to attach and take into execution the movable goods of the appellant and cause to be realised (i) the sum of $500000 with interest thereon at the prescribed rate of 25% *per annum* from 1 February 1998 to date of payment; (ii) the sum of $1000000 with interest thereon at the prescribed rate of 25% *per annum* from 3 February 1998 to date of payment; and (iii) all costs and charges of the respondent taxed according to law, together with the costs incurred by the Sheriff.

The respondent alleged, in an affidavit placed before the Registrar, that the appellant had defaulted in making payment, on or before 31 January 1998, of the first equal instalment of $500000 as stipulated by clause 8(b) of the settlement agreement. It was further alleged that the appellant was in breach of clause 8(a) thereof, in that he had failed, within a reasonable period of time, to pay the sum of $1 million in the form of a loan obtained by him from a bank or other financial institution upon the security of either The Glade or Moahana, or both of those immovable properties.

The writ of execution was served upon the appellant at his residence on 6 February 1998. By then, he had made payment of the $500 000 instalment, but not the interest accruing thereon, which was tendered in the amount of $1027 on 10 February 1998. In respect of the $1 million

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claim, two motor

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vehicles and various household contents were attached, the latter items soon being released as not belonging to the appellant.

On 12 February 1998, the appellant applied to the High Court for an order setting aside the writ of execution and the release from attachment of the two motor vehicles. He contended that the writ had been improperly issued in that, in terms of clause 8(a) of the settlement agreement, the $1 million was only to become payable when a mortgage bond was registered and he had received a loan in such amount. This had not occurred. The appellant also sought from the court a *declarator* that he was not obliged to pay the $1million until after Moahana had been compulsorily acquired by the Government and he was compensated for it, or after four months had elapsed from the date of withdrawal of the preliminary notice and the respondent has transferred the property to him.

The appellant's entitlement to both forms of relief was strongly opposed by the respondent. In the event, the learned judge who presided at the hearing dismissed the application with costs and confirmed the attachment made under the writ of execution in so far as it related to the motor vehicles.

The first argument addressed to this court on behalf of the appellant was that the writ of execution should have been set aside by the learned judge as incompetent. This was because, as at 2 February 1998, there was (and still is) no definite and certain judgment against the appellant obliging him to pay $1million to the respondent; that in the absence of an averment by the respondent that the loan contemplated in clause 8(a) had been dispersed to the appellant, there was no basis entitling her to certify to the Registrar that $1 million was due in terms of the judgment. The thrust of the argument was to this effect. As it was contended that the appellant must be deemed in law liable to pay the sum of $1 million because of either the expiration of a reasonable period of time from the date of the order of court, namely, about nine months, or him having deliberately prevented the fulfillment of the condition expressed in clause 8(a), it was essential for the respondent to seek a definition of her rights under the judgment of 7 May 1997, by making an application for a *declarator*.

I may say that this attack upon the competency of the writ of execution was not advanced before the learned judge. However, I see no basis not to entertain it, subject to the making of a special order for costs should it succeed.

Rule 323 provides:

"One or more writs of execution may be sued out *at his own risk* by any person in whose favour any such judgment (ie for the payment of money, for the delivery of goods or premises, or for ejectment), has been pronounced if such judgment is not then satisfied, stayed or suspended" (emphasis added).

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The old Provincial Rules of Court considered in *McNutt* v *Mostert* 1949 (3) SA 253 (T) (r 67(a), Transvaal) and *de Crespigny* v *de Crespigny* 1959 (1) SA 149 (N) (Order XXII r 1, Natal) are different from r 323. The latter accords more with the current r 45(1) of the South African Uniform rules of court. Nonetheless, and despite the somewhat wider language in r 323 and its counterpart r 45(1), the approach propounded by Clayden J (as he then was) in *McNutt* v *Mostert supra* at 255, and followed in *de Crespigny* v *de Crespigny supra* at 150F-G and 151 *in fine*, to my mind is the correct test to apply. It is that:

"the judgment upon which execution is issued must be a judgment from which there can be gathered what money or thing the judgment debtor must deliver."

Thus, as occurred in *de Crespigny* v *de Crespigny supra*, a writ of execution will be set aside on application if the judgment was not definite and certain. In that case the agreement between the parties, which was made an order of court, provided for the payment to the wife as maintenance of "one hundred and fifty pounds *per annum* free of English income tax". The husband paid the wife £150 *per annum* and after some years the wife caused a writ to be issued for the sum alleged to represent the English income tax on £150 *per annum* for that period. Brokensha J set aside the writ on the application of the husband. On appeal, Holmes J (as he then was) held that since it would be necessary, in order to confirm the writ, to determine the question of legal liability for English income tax, the writ had been properly set aside (see at 152A). Milne J agreed, although he found that no liability for income tax had been established (see at 157B-C).

In *du Preez* v *du Preez* 1977 (2) SA 400 (C) Shock AJ (as he then was) had to decide whether the amounts of maintenance payable in terms of a consent paper that had been made an order of court were sufficiently certain to allow a writ competently to be issued in terms of r 45(1). The provision was to the effect that the husband (the appellant) was to pay R50 per month for each of the three minor children, and that when he became registered as an ear, nose and throat surgeon the amount would be increased to R100 per month. In upholding the writ, the learned judge said at 403C-E:

"Insofar as the judgment in the present case provides in clause 2(b)(i) of the consent paper for the payment of R50 per month in respect of each of the three minor children as maintenance, I can conceive of nothing uncertain in the judgment. The fact that it is not payable during the time envisaged in clause 2(a)(iii) introduces no uncertainty. The amount of money applicant must pay is clearly stated. The fact that in a certain eventuality stipulated in the consent paper the maintenance is not payable in no way makes the judgment uncertain in the sense above set out."

More recently, in *Butchart* v *Butchart* 1997 (4) SA 108 (W), the Full Court held that a writ may be validly issued as an "expense clause" contained in a maintenance order (ie in respect of medical, dental, pharmaceutical,

hospitalisation and related expenses), provided that the amount is easily ascertainable and is particularised in an affidavit filed on behalf of the judgment creditor (see at 115F-G).

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In the present matter, I do not believe it can be gainsaid that the order of court incorporating clause 8 of the settlement agreement constituted a judgment "from which there can be gathered" the amount of money the appellant is liable to pay the respondent. The amount is definite. There is exactitude as to what the respondent is entitled to receive under the judgment. The fact that the $1 million was to become payable "upon registration of the bond and disbursement of the $1000000 loan" causes no uncertainty as to how much is payable. Expressed differently, clause 8(a) provides for the payment of a defined sum of money if specific conditions are fulfilled. Does the conditional aspect render the issue of a writ of execution incompetent? I think not.

As pointed out by Shock AJ in *du Preez* v *du Preez supra*, at 403E:

"the mere fact that a judgment is conditional does not in itself make the judgment one in respect of which it is incompetent to issue a writ. This was decided in the case of *McNutt* v *Mostert supra* (at 256)."

To support the issue of a writ of execution the respondent deposed in an affidavit that payment of the $1 million had become due. In doing so she put herself at risk by virtue of r 323. That risk included the liability for costs if the writ were set aside on the ground of it being found that the condition could not be deemed to have been fulfilled; and of having to pay damages for malicious execution. See *McNutt* v *Mostert supra* at 256; *Butchart* v *Butchart supra* at 116C-D.

It follows that the challenge to the propriety of the writ, directed at the amount of $1 million claimed under clause 8(a) of the settlement agreement, must fail.

There is yet another reason why the writ cannot be set aside. Even if it be assumed that the writ was bad in relation to the $1 million, it was certainly good in respect of the $500000 claimed by the respondent to be due under clause 8(b) of the settlement agreement. At the time the writ was issued, payment was overdue by a couple of days and, furthermore, when made did not include the amount of interest that had accrued. In other words, the *causa* had not fallen away. See *Ras* v *Sand River Citrus Estates (Pty) Ltd* 1972 (4) SA 504 (T) at 510E; *Le Roux* v *Yskor Landgoed (Edms) Bpk en andere* 1984 (4) SA 252 (T) at 257E-F; Herbstein and van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed at 809. Accordingly, the writ was competent. Part of the judgment was in an amount definite, certain and unconditional and so could not be set aside. See *Perelson* v *Druain* 1910 TPD 458 at 461; *Dunlop Rubber Co* v *Stander* 1924 CPD 431 at 435; *du Preez* v

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du Preez supra at 403F-G; Harms *Civil Procedure in the Supreme Court* at 569.

Having dismissed the preliminary procedural objection, it remains to consider whether on the facts the appellant was justified in withholding payment of $1 million from the respondent.

[*The learned Chief Justice then dealt with the merits of the case and concluded:*]

The appeal was not entirely hopeless either in respect of the procedural objection or on the merits. I consider that it deserves to be dismissed only with costs on the ordinary scale.

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EBRAHIM JA: I agree.

SANDURA JA: I agree.

Coghlan Welsh & Guest, appellant's legal practitioners

Winterton, Holmes & Hill, respondent's legal practitioners

SOMMER RANCHINSG (PVT) LTD *v* COMMISSIONER OF TAXES 1999 (1) ZLR 438 (SC)

Citation	1999 (1) ZLR 438 (SC)
Case No	Judgment No. S-65-99
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA, Ebrahim JA
Heard	May 20, 1999
Judgment	June 1, 1999
Annotations	None

Civil appeal

Flynote

Revenue and public finance - capital gains tax - assessment - objection to - sale of land - farm owned by company - all shares in company sold for price close to market value of land - price allocated partly for shares and partly as dividend - Commissioner entitled to look at substantive nature of transaction and make assessment accordingly

Revenue and public finance - income tax - imposition of penalty tax by Commissioner of Taxes - appeal to special court - special court has original jurisdiction when considering decision where Commissioner has exercised a discretion - when special court's discretion may be interfered with on appeal

Headnote

A company owned a farm which was its only asset. The farm was being sold. Instead of selling the land as such, all the shares in the company were sold to the buyer. On the advice of an accountant, the land was revalued at a lower price and the balance of the price was declared as a dividend of the company. As the dividend was inter-company no income tax or capital gains tax would be payable. The purchase price was then allocated partly for shares and partly to the seller's loan account.

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The Commissioner of Taxes initially accepted the company's tax return but later issued an amended tax assessment, requiring the payment of capital gains tax on the full amount. In addition, he imposed a 100% penalty for "misrepresentation" in the tax returns. The company appealed to the Special Court for Income Tax Appeals against these rulings by the Commissioner. The court dismissed the appeal against the imposition of the capital gains tax, finding that the Commissioner had correctly determined that the seller had sold the assets at a price less than the fair market price. However, it reduced the penalty from 100% to 10% on the basis that there had been no intention to evade tax or to defraud; the tax returns had been drawn up by the accountants and there had been no deceit by the accountants or the taxpayer but simply inadvertence. The company appealed to the Supreme Court against these decisions by the Special Court for Income Tax Appeals. As regards the 10% penalty, the appellant argued that no penalty at all should have been imposed.

Held, as regards the matter of the capital gains tax, that the Commissioner had been justified in looking beyond the effect of the accounting practices utilised to the substantive nature of

the transaction. The Commissioner, as found by the Special Court for Income Tax Appeals, had correctly decided that the shares had been sold at a price less than the true market related price for the land and that capital gains tax was due on the true market related price.

Held, as regards the imposition of the 10% penalty, that the Supreme Court can only interfere with this determination by the Special Court on narrow grounds, such as that the determination was one which no reasonable court could have arrived at. None of these grounds applied here and the determination could not be interfered with. Although the person signing the tax returns on behalf of the company had acted innocently and had placed confidence in a reputable firm of accountants, the penalty was still justified. The purpose of the penalty was both to punish the appellant and to act to deter other prospective wrongdoers. It was to bring home to the appellant and other taxpayers the need to ensure the accurate rendition of tax returns, inasmuch as the Commissioner is to a large extent dependent on them to do so.

Cases Considered

Cases cited:

CIR v *da Costa* (1985) 47 SATC 87 (A); 1985 (3) SA 768 (A)

K v *CoT* 1993 (1) ZLR 142 (S); 55 SATC 276 (ZS)

Case Information

E W W Morris, for the appellant

A P de Bourbon SC, for the respondent

Judgment

GUBBAY CJ: This is an appeal, consequent upon the grant of leave in terms of s 66(1)(b) of the Income Tax Act [*Chapter 23:06*], as read with s 25(2)(b) of the Capital Gains Tax Act

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[*Chapter 23:01*] ("the Act"). It is against the decision of the Special Court for Income Tax Appeals, reported as *ITC No. 1631* 60 SATC 63, (i) dismissing an objection to an amended assessment for capital gains tax for the year ended 31 March 1991, in an amount of $158502.30; and (ii), failing to discharge in its entirety the penalty (technically "additional tax") imposed upon the appellant pursuant to s 46(1) of the Income Tax Act, as read with s 23(i) of the Act, for the year ended 31 March 1991.

The material facts, which gave rise to the objection and its determination by the learned President, were straight forward and non-contentious. They may be outlined as follows.

In February 1988, the appellant purchased four adjoining pieces of farm land in Matabeleland South (hereinafter referred to as "the land"), together with a number of head of cattle, for $260 000. The value of the land was $100000. Later that same year the land was transferred into the name of the newly formed subsidiary company Dornoch Estates (Pvt) Ltd (shortly, "Dornoch Estates") for $100 000, with all the issued 50 000 shares, at $2 each, being held by the appellant.

Mr Jeffrey Sommer and his brother commenced to run cattle on the land, but soon found that the bovines fell short of acquiring their expected weight gains. So towards the end of 1989 it was decided to sell the land, which was

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the sole asset of Dornoch Estates. It was shown in the company's accounts at $91225, the value having been reduced by $8745, representing deductions for buildings, fencing and wear and tear. At that time the prices of farm land in Matabeleland had increased considerably.

The land was offered for sale on 6 April 1990 at a public auction conducted by Tunmer Midlands (Pvt) Ltd. A reserve price of $800000 was placed on the sale. The highest bid received was from a Mr John Dudman at $400000. It was refused. Five days later Mr Dudman made a written offer to purchase the land for $800000, payable by an immediate deposit of $80 000 (being ten per cent of the purchase price) and the balance of $720000 on or before 31 July 1990. He retained the right to purchase the share capital in Dornoch Estates as opposed to taking transfer of the land. On 17 April 1990, the appellant, represented by Mr Sommer, accepted the offer.

Mr Sommer consulted his accountant. The advice given was to sell to Mr Dudman the shares owned by the appellant in Dornoch Estates rather than the land, thereby avoiding the payment of capital gains tax; otherwise an amount of $690000 would be payable by the appellant for the year ended 31 March 1991. After discussing the matter with Mr Dudman, it was accepted that the transaction should not be in respect of a sale of the land but of the shares in Dornoch Estates. This would save Mr Dudman from having to pay transfer duty and would obviate the need to secure a certificate of no present interest under the Land Acquisition Act [*Chapter 20:10*]. However, recognising that the arrangement would be of far greater benefit to the appellant than to Mr Dudman it was agreed that the selling price of the land should be reduced by $50000 to $750000.

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Thereupon, proceeding on the advice of the accountant, Dornoch Estates re-valued the land at $100000 and then declared the increase of $650000 as a dividend to the appellant. To effect payment of the dividend a loan account was created in the books of account of Dornoch Estates for $650000. As the dividend was inter-company, no income tax or capital gains tax would be payable.

Then on 4 September 1990, some five months after the acceptance of the offer of 6 April 1990, the appellant and Mr Dudman concluded another written agreement. It provided that:

" 1. For the sum of $750000 the seller has sold to the purchaser the seller's shares and loan account in Dornoch Estates (Pvt) Ltd on the following terms and conditions.

2. The purchase price of $750000 shall be allocated as to $100000 to the issued shares hereby sold and $650000 to the seller's loan account."

Subsequent clauses dealt with the manner of payment. The penultimate clause read:

"The agent's commission due to Tunmer Midlands (Pvt) Ltd shall be paid by the seller."

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Notwithstanding the apportionment shown in clause 2 of the agreement, the sale's commission paid by the appellant was the sum of $37500, being an agreed five per cent of $750000.

Initially, the Commissioner accepted and acted on the returns of income rendered by the appellant. On 2 March 1994, however, he issued an amended assessment for the year ended 31 March 1991, in terms whereof capital gains tax of $158502.30 was imposed together with additional tax in an equal amount. The assessment contained an endorsement to the effect that it had been:

"amended to tax full capital gains on sale of Dornoch Estates at $750000 per sale agreement. Full penalty imposed for misrepresentation."

Capital gains tax is charged, levied and calculated on the capital gains received by, or accrued to or in favour of any person in a particular year of assessment. Section 14 of the Act recites in material part:

"Where a person ... sells a specified asset to any other person at a price less than the fair market price the Commissioner may, for the purpose of determining the capital gain ... of such first-mentioned person, determine the fair market price at which such ... sale shall be taken into his accounts or returns for assessment."

In his judgment, the learned President emphasised that s 14 gives the Commissioner wide powers to determine the fair market price where a specified asset is sold at a price less than the fair market price. And that the Commissioner can only exercise the power conferred where the factual position exists that the specified asset is sold at less than the fair market price. He cannot exercise the power if the specified asset is sold at a price which is less than what he considers a fair market price to be; there must be reasonable and objective evidence as to what the fair market price is. See *ITC No. 1554* 55 SATC 115 at 124. These observations are, with respect, correct.

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The learned President then went on to hold that as the sole asset owned by Dornoch Estates was the land and since Mr Dudman bought the shares (i.e. "marketable securities" and, therefore, a "specified asset" as defined in s 2(1) of the Act) in order to acquire the land and was prepared to pay $800000 for such shares, the Commissioner was justified in deciding that the lower figure of $750000 was the fair market value. (See *ITC No. 1631 supra* at 70).

Both Mr Sommer and the accountant testified before the learned President. The former candidly conceded under cross-examination that to his mind the appellant received $750000 for the sale of all the shares in Dornoch Estates which owned a single asset, the land. The accountant likewise accepted that the reality of the situation was that what Mr Dudman purchased was either the land or the shares in Dornoch Estates worth $750000. Plainly, the payment to the auctioneer of $37500 was totally consistent with that mutual

appreciation. I have little doubt that had Mr Dudman been called as a witness his understanding would have been no different.

Nonetheless, the submission advanced on behalf of the appellant before the learned President and this court as well, was that the re-valuation of the land in the hands of Dornoch Estates and the enhanced value of $650000 declared as a dividend and credited to the loan account of the appellant was in keeping with normal accounting practice. Certainly it was asserted by the accountant, and not disputed, that the re-valuation of the assets of a company was not uncommon; nor, for that matter, was it unusual for a loan account to be sold separately from the shares. This I accept. But the crucial question is whether what aptly has been described as "creative accounting", may be utilised to reduce the real price at which a specified asset has been purchased, for the sole purpose of avoiding, in whole or part, the payment of capital gains tax.

I think not. It was the nature of the transaction that had to be determined. Exactly what were seller and purchaser intending and aiming to achieve? What Mr Dudman elected to purchase for $750000 were the shares in Dornoch Estates. That election was entirely permissible, provided the shares were sold at the true market related price for the land. In reality, he did not purchase the shares for $100000 and a loan account that had to be specially created for $650000. The true value of the shares was not $100000. Initially, Mr Dudman offered $800000 for the land or for the shares. It was the accountant who advised that it would be to the best advantage of the appellant if the purchase price were apportioned between a sale of the shares and the loan account in Dornoch Estates. To that end, the requisite entries in the books of account were made and the agreement of 4 September 1990 prepared and signed.

On these facts, I am satisfied that the Commissioner was justified in looking beyond the effect of the accounting practice utilised in Dornoch Estates to the substantive nature of the transaction between the appellant and Mr Dudman. His determination that the fiscus was entitled to be paid thirty per cent of the true capital gain received by the appellant, as indeed the learned President found, cannot be faulted.

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I come now to the second issue of whether the learned President ought to have remitted the whole of the penalty set by the Commissioner.

Section 46 of the Income Tax Act empowers the Commissioner to impose a penalty in any instance where a person either fails to submit a return or submits an incorrect return. The maximum penalty is one hundred per cent of the tax applicable to the default. However, the Commissioner may remit the whole or part of such penalty if he considers that the default in submitting the return was not due to any intent to defraud the revenue or to postpone

payment of tax, or that the omission of an amount in submitting the return was not due to any intent to evade tax.

Presently, it is well settled that in an appeal against a decision where the Commissioner exercised a discretion, the Special Court is called upon to exercise its own original discretion. Nor is it restricted to the evidence which the Commissioner had before him. The appeal to the Special Court is not only a rehearing but can involve the leading of evidence and the submission of facts and arguments of which the Commissioner was unaware. See *Commissioner for Inland Revenue* v *da Costa* 47 SATC 87 (A) at 95; 1985 (3) SA 768 (A) at 775B-G; *K* v *CoT* 1993 (1) ZLR 142 (S) at 147B-F; 55 SATC 276 (ZS) at 281.

In determining whether the submission of the incorrect return by the appellant - which reflected that it had incurred a loss totalling $25097 from the sale or disposal of immovable property ñ should be penalised, the learned President reasoned as follows:

"Had the false statement been made with intent to evade payment of the capital gains tax, the penalty would have been unassailable. However the incorrect statement had no effect on the incidence, or otherwise, of capital gains tax. Moreover, the accompanying returns set out the true position which was that part of the capital loss was in respect of the sale of immovable property and part was in respect of the sale of shares. In the circumstances, I consider that (the appellant) has established that there was no intent to evade the payment of tax ... I consider that Mr Sommer merely signed the forms that were put before him by his accountants. He was not aware of what they were doing and there was no collusion. Moreover there was no intent to defraud. The error arose due to inadvertence. It was a mistake. In the circumstances, I consider that, acting in accordance with the principles set out in *Commissioner for Inland Revenue* v *da Costa*, the penalty should be reduced to 10%" (see *ITC No. 1631 supra* at 70).

The relevant ground in the notice of appeal merely alleged that the learned President "failed in the exercise of his discretion in imposing any penalty at all". It did not point to a specific misdirection.

This court will interfere with the determination of the extent of a penalty (or the exercise of any discretion) by the Special Court only on the limited basis on which a value judgment by a court of first instance may be set aside or raised on appeal; if it did not bring an unbiased judgment to bear on the question, or did not act for substantial reasons, or exercised its discretion capriciously or upon a wrong principle.

Appreciating the inherent difficulty in urging that the penalty fixed by the Special Court was one at which no reasonable court could have arrived at, counsel moved outside the ground of appeal by seeking to raise a misdirection. It was that the learned President had been influenced

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to penalise the appellant on account of a mistaken view of the facts in *da Costa*'s, case *supra*.

It is true that there is a significant difference between the facts in this matter

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and those in *da Costa*. Although in that case there was a definite intent to evade taxation on the part of the accountants, it was held in mitigation of the penalty that the taxpayer was innocent (see *supra*, respectively, at 97 and 776I-J). *In casu*, it was correctly held by the learned President that there was no deceit; only inadvertence by both the accountant and the appellant. Yet, the penalty was abated to ten per cent of the maximum, as in *da Costa supra*.

There would have been merit in the charge of a misdirection if the learned President had stated unequivocally that since the situation of the appellant equated to that of *da Costa* he had decided to reduce the penalty to the same level. But he did not so declare. Rather he paid regard to the *principles* laid down in *da Costa supra* and then assessed the amount of the penalty directly to what he deemed to be the degree of the appellant's individual blameworthiness. That approach, in my opinion, is beyond criticism.

The purpose of the penalty was both to punish the appellant and to act as a deterrent to other prospective wrongdoers. To bring home to the appellant and other taxpayers the need to ensure the accurate rendition of returns, in as much as the Commissioner is to a large extent dependent on them to do so.

In the circumstances, I am unable to accept that the wrong committed by Mr Sommer in blindly signing the return on behalf of the appellant, albeit because he placed confidence in a reputable firm of accountants, ought not to have been visited with a penalty.

The appeal is dismissed with costs.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

Atherstone & Cook, appellant's legal practitioners

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

MTANDWA *v* ZIMBABWE BANKING CORPORATION LIMITED 1999 (1) ZLR 445 (HC)

Citation	1999 (1) ZLR 445 (HC)
Case No	Judgment No. HH-87-99
Court	High Court, Harare

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Judge	Bartlett J
Heard	January 13, 1999; April 21,1999; May 3, 1999
Judgment	June 2, 1999
Annotations	None

Opposed civil application

Flynote

Surety - deed of suretyship - not instrument of debt - does not have to comply with s 12 of Moneylending and Rates of Interest Act - if instrument of debt, surety agreement had to be read together with loan agreement - enough that loan agreement complies with s 12 of Moneylending and Rates of Interest Act

Headnote

A company obtained a loan from a bank. The applicant entered into an agreement making him surety and co-principal debtor for the repayment of this loan by the company. The company defaulted on its repayments and the bank looked to the applicant for repayment and sought to execute against the applicant's property.

The applicant argued that the deed of suretyship was unenforceable because it did not comply with the requirements of s 12 of the Moneylending and Rates of Interest Act [*Chapter 14:14*] ("the Act). Section 12 requires that an instrument of debt in respect of a loan of money must state the amount of the loan and the rate of interest charged. The applicant argued that the suretyship agreement was unenforceable because it contained neither of these details, although the loan agreement between the bank and the company did include these details.

Held, that the Act provides protection against moneylenders charging unlawful and usurious rates of interest.

Held, further, that the words "in respect of a debt" in s 12 of the Act must be given a restrictive interpretation. Where the document does not relate to the loan of money but is a document guaranteeing security in respect of a loan that has been made to a third party, it is not an instrument of debt and therefore does not have to state the amount of the loan and the rate of interest being charged. Such a restrictive interpretation of s 12 in no way compromises the policy aims of the Act. There was no suggestion in the present case that the loan which the surety was guaranteeing contravened the Act by charging unlawful or usurious rates of interest. If it had being doing this, then the claim for payment of the loan or, in default, for payment from the surety could have been resisted under other provisions of the Act, irrespective of the requirements of s 12. This position is not altered by the fact that the applicant bound himself not only to be surety but also as co-principal debtor as he had not undertaken liability separately and independently of the principal debtor.

Held, further, that even if a surety agreement is to be construed as an instrument of debt in

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terms

of the Act, the loan agreement had to be read together with the suretyship agreement in deciding whether there has been compliance with s 12 of the Act. Every suretyship is conditional on the existence of a principal obligation. If the loan agreement does not contain details as to the amount of the loan and the interest to be charged, both the loan agreement and the suretyship agreement would be unenforceable. But if the original loan agreement contains these details and is enforceable, it would be absurd if the surety guaranteeing the loan were to be held to be unenforceable simply because it did not contain these details.

Cases Considered

Cases cited:

Boshi v *Salisbury Business Svcs (Pvt) Ltd* 1976 (2) RLR 1 (A)

Gervis v *Hammon & Anor* 1956 (4) SA 413 (W)

Gurland v *Caltex (Africa) Ltd* 1965 (2) SA 659 (R)

Knightbridge Investment (Pvt) Ltd v *Gurland* 1963 R&N 37; 1964 (4) SA 273 (SR)

Goldberg v *Grosvenor Finance and Trust Co* 1950 (4) SA 154 (W)

Mooljee NO & Anor v *Rodrigues* 1971 (2) RLR 1 (G)

National Industrial Credit Corp Ltd v *Gumede & Anor (2)* 1964 (4) SA 258 (SR)

Neon & Cold Cathode Illumination v *Ephron* 1978 (1) SA 463 (A)

Schafer v *National Industrial Credit Corp (Rhod) Ltd* 1973 (1) ZLR 39 (A)

Statutes Considered

Legislation considered:

Moneylending and Rates of Interest Act [*Chapter 14:14*], s 12

Case Information

W Ncube, for the applicant

P Nherere, for the respondent

Judgment

BARTLETT J: In May 1991, the Zimbabwe Banking Corporation ("the Bank") granted J N Chidemo Enterprises (Pvt) Ltd ("Chidemo") a loan of $15000. On 23 September 1991, James Cosmos Mtandwa ("the applicant") was kind enough (some might say silly enough) to sign an agreement making himself surety and co-principal debtor for the repayment of all monies which

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Chidemo might owe or might come to owe to the Bank. Chidemo did not repay the Bank. Instead, it repaid the applicant's kindness by defaulting on the bank loan. So the Bank, as banks are wont to do, looked to the applicant as surety for the payment. Default judgment was obtained against the applicant on 2 November 1994. Execution proceeded and included the sale in December 1996, of an immovable property of the applicant - which unfortunately, only yielded a small portion of the interest- inflated debt. The Bank was, however, unrelenting in seeking full repayment and commenced civil imprisonment proceedings against the unfortunate surety. The applicant, having initially done his best to meet the obligation under the surety agreement, now fought back. On l July 1998, he filed an application for rescission of judgment, together with an application for condonation for late noting of that application.

BARTLETT J

THE ISSUES

The basis of the applicant's rearguard action is that the Bank's claim against him was based upon a deed of suretyship which was unenforceable in law. He argued that, being an instrument of debt, it should have complied with s 12 of the Moneylending and Rates of Interest Act [*Chapter 14:14*] ("the Act"). It did not comply with that section, alleged the applicant, because it failed to state the amount of the loan and the rate of interest charged.

The Bank disputes the applicant's contention in regard to the application of s 12 of the Act (the old Usury Act) and also makes predictable and understandable noises concerning the finality of litigation and the extreme lateness of the application.

The application came before me on 13 January 1999. It seemed to me that the argument concerning the application of s 12 of the Act required serious consideration. It also seemed to me that the heads of argument filed by learned counsel might well have not incorporated all the relevant learning on the question. I accordingly postponed the matter, specifying dates by which supplementary heads should be filed by each party, and guaranteed that I would allow the matter to be reset down before me once this had been done. Letters of reminder from the legal practitioners ensured that I met the guarantee and the matter was set down for hearing during the vacation. I am grateful to learned counsel for the much more detailed supplementary heads filed. After lengthy argument on 21 April, I indicated to counsel that since the South African equivalent of s 12 of the Act had been the same as the Zimbabwean section until amendment in 1933, that South African authority prior to 1933, on the interpretation of the relevant section, might well be of substantial assistance. I accordingly allowed counsel for the applicant to file a list of any further relevant authorities for consideration by 28 April, with counsel for the respondent given until 3 May to provide any further authorities he considered relevant.

It is important to remember that the substance of the application is, however, the question of whether this court should condone the late application for rescission of the default judgment. The criteria to be considered in that regard are of course the reason for allowing the default judgment to be entered in the first place, the reasons for the lateness of the application for rescission, and the basis of the applicant's defence to the Bank's action based on the surety agreement. On the first two heads, the applicant has substantial difficulty. Default judgment was

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originally granted after the withdrawal of his appearance to defend by his then legal practitioner. And the application for condonation and recission were only filed almost four years after

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judgment had been entered, after execution against immovable property, and in the face of a civil imprisonment summons.

I propose, however, to consider first the question of whether the applicant's attack on the legality of the surety claimed is reasonably arguable.

The interpretation of s 12 of the Moneylending and Rates of Interest Act

Section 12(1) of the Act provides as follows:

"Every instrument of debt, other than a mortgage or general covering bond, executed within Zimbabwe, in respect of a loan of money shall separately and distinctly set forth:

(a) that it is executed for money lent; and

(b) the amount actually paid to the borrower; and

(c) the rate of interest which is to be charged in respect of the loan."

Instrument of debt is defined in s 2 of the Act as follows:

"'instrument of debt' includes a negotiable instrument, bond, written contract or agreement or other document containing the terms of any contract or agreement in respect of any loan of money, but does not include any *bona fide* covering bond in so far as it purports to convey security for future advances."

Mr *Ncube* argued that a surety agreement clearly falls under the definition of instrument of debt and points out that it is common cause that the surety agreement in question did not comply with s 12 of the Act - in that it did not specify the amount actually paid to the borrower and the rate of interest to be charged in respect of the loan. He referred, as authority for his argument, to the Appellate Division decisions of *Schafer* v *National Industrial Credit Corp (Rhodesia) Ltd* 1973 (1) RLR 39 (A) and *Boshi* v *Salisbury Business Services (Pvt) Ltd* 1976 (2) RLR 1 (A).

In both these cases it was held, in effect, that because the surety agreements in question related not to existing debts but only to future debts, they were not instruments of debt. See *Schafer*'s case at 43G-H and *Boshi*'s case at 7F-G. Accordingly, the agreements were not required to comply with s 12 of the Act and remained enforceable. But, argued Mr *Ncube*, the present surety document related not to a future loan but to an existing debt. Therefore, by following the reasoning process in *Schafer* and *Boshi*, a deed of suretyship covering monies already advanced was an instrument of debt - and would require compliance with s 12 of the Act. In the absence of such compliance, the surety agreement would be unenforceable - *Knightsbridge Investment (Pvt) Ltd* v *Gurland* 1963 R&N 37; 1964 (4) SA 273 (SR), *Mooljee NO & Anor* v *Rodrigues* 1971 (2) RLR 1 (1) at 3A-C. In further support of his contention, that a surety agreement in respect of an existing debt required compliance with section 12 of the Act, Mr *Ncube* found support in reference to Christie *Business Law in Zimbabwe* at p 457-8, *Knightsbridge Investment (Pvt) Ltd* v *Gurland supra*, *Goldberg* v *Grosvenor Finance and Trust*

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Co & Ors

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1950 (4) SA 154 (W) at p 155-6 and *Gervis* v *Hammon & Anor* 1956 (4) SA 413 (W) at 415E-G.

Mr *Nherere* appeared on behalf of the respondent - though the heads of argument had been filed by Mr *de Bourbon*. In the heads of argument, it was emphasised that the issue was whether or not, on the facts of the present case, the deed of suretyship was an instrument of debt for the purposes of s 12(1) of the Act. Mr *Nherere* accepted that, for purposes of the Act, a surety would have the same rights as the principal debtor. But he submitted that it was a far cry from this to state that a deed of suretyship generally, let alone the one in the present case, was an instrument of debt. He argued that the most significant words in the definition of instrument of debt were "in respect of", and that these had to be given a narrow interpretation. Reference was made in this regard to *Mooljee NO & Anor* v *Rodrigues supra* as emphasising the necessity for a narrow interpretation of such words - and that the document being examined must contain the terms of any contract or agreement related strictly to the loan of money. It was argued that where the document relates not to the loan of money, but to security in respect of a loan made to a third party, it is not an instrument of debt. This point, it was argued, was clearly made in *Gurland* v *Caltex (Africa) Ltd* 1965 (2) SA 659 (R) where Jarvis J (as he then was) stated at p 664:

"The contract between them remained a contract or agreement of suretyship, and the surety is not regarded in law as having borrowed money from the plaintiff but has merely assumed joint and several liability for the payment of the debt. In my view, therefore, the deeds of suretyship in this case are not instruments of debt within the meaning of s 2 of the Usury Act."

In dealing with *Schafer supra* and *Boshi supra*, Mr *Nherere* argued that the applicant was seeking to avoid the consequences of those cases by claiming that since the loan overdraft facility was granted in about May 1991, and the surety document signed in September 1991, that therefore there was an existing debt at the time the suretyship agreement was signed. He submitted that this did not follow. The fact that an overdraft facility or loan was granted at a particular time did not mean that some five months later there was an existing indebtedness. It was accordingly argued that the applicant had simply failed to produce sufficient evidence to establish the factual position.

I turn now to attempt to consider the various arguments ably raised by learned counsel - though without providing any guarantee that the conclusion arrived at will be correct!

It is undoubtedly correct that both *Schafer supra* and *Boshi supra* place considerable emphasis on the fact that the surety agreements related to future debts and not existing debts as the basis for s 12 of the Act not being

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applicable. The implication emerging from the approach in those cases is that, if the debt had

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been in existence at the time the surety agreement was signed, that s 12 of the Act would have been applicable - and the surety agreements unenforceable for failure to comply with it.

If my reading of the sentiments, as opposed to the legal reasoning, behind the words in *Schafer & Boshi* is correct, it is that the learned judges found the prospect of ordering s 12 of the Act applicable and the surety agreements unenforceable, as unacceptable. They accordingly (following the approach of the inimitable Lord Denning) found a legal reasoning process to arrive at what they believed to be the right result. The approach of the learned judges (if that was the approach) is easily understandable. There was no question of the loans, in respect of which the surety agreement had been signed, containing usurious rates of interest. There was no the question of any of the laudable public policy aims of the Usury Act being put at risk of being defeated by the loan or surety agreements. In effect, the sureties were looking for any legal loophole to squeeze through to avoid liability under legitimate agreements they had presumably consciously signed. The Appellate Division did not allow them through the loophole they were so desperately searching for. And rightly so.

In giving consideration to the effect to be given to the decisions in *Schafer* and *Boshi*, it must be remembered that these authorities were not dealing with the situation where the debt was in existence at the time the surety agreement was signed - the situation as alleged by the applicant in this matter. The Appellate Division was accordingly not addressed with arguments as to what the legal position would be if the debt was in existence at the time the surety was signed and therefore did not apply its mind to that legal position. As I have indicated, an implication emerging from the above Appellate Division decisions is that such a surety agreement would need to comply with s 12 of the Act to be enforceable - but that is certainly not the ratio decidendi of those decisions. The furthest the Appellate Division went was to comment on the *dictum* of Jarvis J in *Gurland* v *Caltex (Africa) Ltd supra* and relied on by the respondent as follows (at p 44B):

"In the light of the above conclusions, it is unnecessary to consider the *dictum* of Jarvis J, relied upon by the magistrate in reaching his conclusion. It is possible that in certain circumstances a written agreement to accept liability as a surety, and in particular as a co-principal debtor may constitute an 'instrument of debt' within the meaning of s 2 of the Act."

The question in issue, however, is whether the surety in this matter constitutes an instrument of debt within the meaning of s 2 as read with s 12 of the Act. In this regard, it is important to consider Mr *de Bourbon*'s argument (through Mr *Nherere*) as to the restrictive interpretation to be given

to the words "in respect of" in s 12 of the Act and in the definition of instrument of debt.

In *Mooljee NO & Anor* v *Rodrigues supra* loans had been made and not repaid. Promissory notes had then been issued in payment of the pre-existing debts and then replacement notes issued. It was on these new notes that the plaintiff's action was brought. The plaintiff averred that the notes on which he was seeking to sue were not "executed in respect of a loan of money" in terms of s 12 of the Act. He argued that they were "given in payment of an existing

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obligation and in order to avoid the legal proceedings which would otherwise have been taken by the plaintiff to the prejudice of the company had the latter not executed the original notes ... and had these original notes not been replaced by the latter notes now being sued upon" (at 2E-G). The defendants, however, alleged that on the facts averred by the plaintiff, the promissory notes were instruments of debt which needed to comply with s 12 of the Act.

Beck J was of the clear view that the words "in respect of" prefacing "a loan of money" in s 12 of the Act required a restrictive approach in interpretation. He referred at pp 3-4 of the very surprising consequences which could result from a wide interpretation being given to the words:

"It would be surprising if a lender, upon being given a cheque by, or on behalf of, his debtor, in repayment of moneys previously lent and advanced, could not enforce that cheque against its drawer for want of writing on the cheque setting forth the particulars required by s 13(1). It would be startling if, additionally, both the payee and the drawer of such a cheque could be prosecuted criminally for the adoption of this customary form of repayment of an existing indebtedness, by reason of having overlooked the requirements of s 13(1). Might it not, indeed, be urged that, if the section is to have such consequences, the statutory particulars should be written upon banknotes, which are in form promissory notes, whenever these are delivered in repayment of a loan? The possibility that s 13(1) might be so all-embracing in its application would surely lend a new significance to the Polonian assertion that 'loan oft loses both itself and friend'."

And, I might add change Polonius's immediately prior assertion from "Neither a borrower nor a lender be" to "Only a borrower, but not a lender, be!"

Beck J then emphasised at p 4C-D that the objects of the Usury Act did not require a wide meaning to be given to the term "in respect of":

"It does not appear to me to be necessary, for the adequate protection of the public against usurious practices, to give to the expression 'in respect of' in s 13(1) the wide connotation for which the excipients contend. Sections 9, 10, 12, 15, 16, 17 and 19 of the Act contain comprehensive provisions designed to protect borrowers against the risk of being required to pay usurious interest. Against the background of these provisions I do not think that the mischief which the Act is designed to combat will be fostered if s 13(1) is restrictively construed so as to require a closer and more direct form of relationship with the loan of money 'in respect of' which an instrument of debt is executed."

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After a detailed analysis of the law the learned judge concluded by stating (at 7E-H) that:

"For the reasons I have mentioned, I take thSSe view that the words 'in respect of' in s 13(1) of the Act fall to be restrictively construed. The section requires a direct or causal relationship between the agreement of loan and the instrument of debt containing the terms of that agreement. The instrument of debt must be executed as part of the agreement of loan concluded between the parties, in the sense that its execution is part of the *quid pro quo* to be rendered by the borrower in return for the benefit of the loan. If it is given quite *dehors* the terms of a concluded agreement of loan, such as when it is given in order to discharge the obligation to effect a repayment that has become due, it is not such an instrument as needs to comply with s 13(1) of the Act to be capable of enforcement."

It seems to me that the position in *Mooljee*'s case is not dissimilar from that pertaining in the present case. Just as there was no question of the public policy aims of the Usury Act being compromised in *Mooljee*'s case, there is no question of the same public policy aims of its successor, the Moneylending and Rates of Interest Act, being compromised in this matter. There is no suggestion that the loan or overdraft from the Bank involved unlawful or usurious rates of interest. If it did, the loan and the surety would be subject to an unrepellable attack

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under other provisions of the Act, irrespective of the requirements of s 12. Furthermore, just as a wide interpretation of "in respect of" in *Mooljee* would have led to the surprising conclusions adverted to by Beck J, a wide interpretation in the instant matter would lead to a surety agreement being held unenforceable as contravening provisions of the Act - when there was no suggestion of the loan the surety was guaranteeing contravening the provisions of the Act.

It also seems to me that, Beck J's words at p 7G-H of *Mooljee*'s case *supra* can also be regarded as being applicable to the surety agreement in this matter. The instrument of debt, said the learned judge, "must be executed as part of the agreement of loan concluded between the parties, in the sense that its execution is part of the *quid pro quo* to be rendered by the borrower in return for the benefit of the loan". That is not the case with the surety agreement in this matter. Beck J concluded by stating that "if it is given quite *dehors* the terms of a concluded agreement of loan, such as when it is given in order to discharge the obligation to effect a repayment that has become due, it is not such an instrument as needs to comply with section 13(1) of the Act to be capable of enforcement". While those words do not describe a surety agreement, they are in my view equally applicable. By parity of reasoning, the same principle for Beck J not regarding the notes before him as being an instrument of debt "in respect of" a loan of money, and thereby requiring compliance with s 12(1) of the Act to be enforceable, applies to the surety agreement in this matter.

Accordingly, applying a restrictive interpretation of "in respect of" in s 12

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and in the definition of instrument of debt, I agree with counsel for the Bank that where the document relates not to the loan of money, but to security in respect of a loan made to a third party, it is not an instrument of debt.

I am aware in coming to this conclusion that the Appellate Division stated in *Schafer supra* at 44B that - "It is possible that in certain circumstances a written agreement to accept liability as a surety, and in particular as a co-principal debtor, may constitute an instrument of debt within the meaning of s 2 of the Act". I am also aware that the agreement in this matter also made the applicant a co-principal debtor. It was, however, stated in *Neon and Cold Cathode Illumination* v *Ephron* 1978 (1) SA 463 (A) at 472B-C by Trollip JA that:

"it appears that generally the only consequence (albeit an important one) that flows from a surety also undertaking liability as a co-principal debtor is that *vis à vis* the creditor he thereby tacitly renounces the ordinary benefits available to a surety, such as those of excussion and division, and he becomes liable jointly and severally with the principal debtor."

Furthermore, as stated by Caney *The Law of Suretyship* 4 ed at 50-51 in regard to the significance of the surety also binding himself as co-principal debtor:

"he is liable with him jointly and severally. But he does not undertake a separate independent liability as a principal debtor; he is a surety."

See also the observations of Fieldsend J in *National Industrial Credit Corp (Rhod) Ltd* v

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Gumede & Anor 1964 (4) SA 258 (SR) at 263B.

Accordingly, I do not consider that the surety's status as also being a co-principal debtor alters the conclusion I have reached. I would also point out that the Appellate Division, in *Schafer* and *Boshi*, was not asked to consider the approach to interpreting "in respect of" in the relevant sections of the Act.

The relationship between a surety agreement and the principal debt considered against the provisions of s 12 of the Act

"Love and marriage, love and marriage

Go together like a horse and carriage.

You can't have one without the other."

Or so the words of the old song say. If I may be allowed some poetic licence, the same applies to a surety's relationship with the principal debtor (although the converse is of course not true). *Caney supra*, describes the inter-relationship as follows at p 27:

"Put another way, every suretyship is conditional upon the existence of a principal obligation."

The co-relationship between the surety agreement and the agreement of

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loan and between the borrower and lender is at the core of a submission made by Mr *Nherere*, not in the heads of argument but in oral argument. This is that, in interpreting s 12, as read with the definition of instrument of debt in s 2, of the Act, it is necessary, when considering a surety agreement guaranteeing an existing loan, that the two agreements must be read together. This submission is in my view both obvious and sensible. The surety agreement cannot, in itself, be expected to evidence the details of the debt. For evidence of the existence of the debt and its details one must go to the agreement - see the comments of Macdonald JP in *Schafer supra* at 42H - between the principal debtor and the money lender. If that agreement does not contain the requirements of s 12 of the Act, then that agreement and the relating surety would not be enforceable. But if the agreement of loan does meet the requirements of s 12 of the Act and is enforceable, it would seem absurd if the surety guaranteeing that agreement of loan were held to be unenforceable, simply because it did not specify the requirements of s 12, already clearly specified in the loan agreement. The same position emerges, in my view, with equal clarity when the surety agreement - as in this matter - makes the surety a co-principal debtor as well. If it is spelt out that the surety is also a co-principal debtor, common sense cries out that the surety agreement and the principal debtor agreement need to be read together in deciding whether s 12 of the Act has been complied with.

The mischief which the Legislature sought to avoid by enacting s 12 of the Act, as read with the definition of an instrument of debt - see the comments of Macdonald JP in *Schafer supra* at 42C-H - would in no way be compromised by reading the surety agreement together with the loan agreement. To the contrary, by not reading them together when they are clearly the

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opposite sides of the same coin, would be to lay the law open to its timehonoured fate of being likened to a not overly intelligent ass.

Accordingly, it is my view that, in deciding whether a surety agreement is an instrument of debt and complies with the requirements of s 12 of the Act, the surety agreement must be read with the loan agreement. Not to do so would, I emphasise, be facile and productive of absurd results. Where the debt is not yet in existence, this stricture is obviously inapplicable. But as has been ruled by the Appellate Division in *Schafer supra* and *Boshi supra*, a surety agreement does not fall within the ambit of s 12 of the Act when the debt is not yet in existence. However, once the debt or loan agreement is consummated, the loan agreement and surety read together must comply with s 12 for the surety not to be stillborn.

I would emphasise that in the present case, there is no suggestion at all of the loan agreement itself not complying with s 12 of the Act or indeed any other provisions of the Act relating to usurious rates of interest.

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Was there an existing loan when the surety agreement was signed?

Lest I am incorrect in my approach to the interpretation of "in respect of" in s 12, and my finding that a surety agreement must be read with an existing loan agreement in assessing compliance with the section, I turn to consider the further submission made on behalf of the Bank. It was argued that, in order to avoid the consequences of the Appellate Division decisions in *Schafer supra* and *Boshi supra*, it is basic to the applicant's contention that there was in fact an existing debt at the time the surety agreement was signed. The Bank contends that this has not been established by the applicant. It is the Bank's argument that the fact that an overdraft facility or loan was granted in May 1991 does not mean that five months later there was an existing indebtedness. The Bank further points out that the surety agreement refers specifically to monies to be advanced in the future and emphasises that the applicant has simply failed to produce sufficient evidence to establish the factual position.

It is necessary for an applicant in a rescission application to put sufficient material before the court to establish a *prima facie* defence. In this case, critical to the defence being put forward by the applicant is the contention that there was an existing debt at the time the surety agreement was signed.

I had initially thought that the applicant's papers did not establish, with sufficient clarity, that there was an existing debt when the surety agreement was signed. But a reading of paras 3, 4 and 6 of the applicant's founding affidavit and para 6 of his affidavit for condonation, and the response to those paragraphs in the opposing papers, satisfies me that the Bank's submissions on this aspect are not correct.

A further argument raised by the Bank was that the judgment granted against the applicant created a new debt that superceded and replaced the previously existing debt and that it would be permissible for a judgment to be entered against the applicant as the surety of the judgment debt. I do not propose to consider the argument because, as the Bank concedes, this was not

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the basis on which the summons was issued - I have definite doubts, however, as to whether it would have succeeded.

The South African authorities

Section 5 of the South African Usury Act 37 of 1926 contained precisely similar provisions to s 12 of the Act. As I have indicated, I had accordingly asked learned counsel whether further research might not uncover any helpful cases on the interpretation of the relevant section of the South African legislation. The window of opportunity is a limited one, as the relevant

provisions of s 5 of the South African Act were consigned to history in 1933. Mr *Ncube* conducted a detailed search of South African authorities for the period concerned and was unable to find a case of specific relevance to the issues arising in this matter. Mr *Nherere* has not sought to suggest that there are any such authorities. My research into the South African authorities accords with Mr *Ncube*'s findings. Those South African cases which are of general relevance are referred to in *Mooljee supra*, *Schafer supra* and *Boshi supra*. None are, however, of specific relevance.

When South Africa amended its equivalent of s 12 of our Act by Act 1 of 1933, the amended section read as follows:

"Notwithstanding anything in this section contained, but subject to the provisions of section two, an instrument of debt shall not be invalid or deemed to be defective for the purpose of enforcing payment thereof or conferring any preference merely by reason of the fact that it does not comply with any provision of subsection (1)."

The subsection (1) referred to is the equivalent of our provisions in s 12 of the Act requiring the amount paid to the borrower and the rate of interest charged to be specified.

It seems to me that the amendment to the South African equivalent of s 12 of our Act in 1933 was eminently sensible. If a similar amendment had been made to the Zimbabwean legislation, the difficulties and questions which arose in *Schafer*, *Boshi* and *Mooljee*, etc - not to mention this matter - would not have arisen.

Summary

In summation, my view is that a restrictive interpretation of "in respect of" in s 12 and in the definition of instrument of debt in s 2 of the Act, means that the surety agreement is not an instrument of debt in terms of those sections.

It is also my view that, if that conclusion is incorrect and the surety agreement is an instrument of debt, then it needs to be read together with the loan agreement in deciding whether there has been compliance with s 12 of the Act. If that is done it is not even suggested by the applicant that there has not been compliance with s 12.

On either basis, the applicant fails. I am accordingly of the view that, the applicant has not established that it is reasonably arguable, to use Mr *Ncube*'s words, that s 12 of the Act has not

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been complied with.

I should point out that I am aware that in *Knightsbridge Investments* v *Gurland supra* it was held that the written agreement in question constituted an instrument of debt within the meaning of the Act. But in that matter the loan agreement and surety agreement were contained within the same document - but despite that, it failed to comply with the requirements s 12

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of the Act. The agreement was in fact a sham trying to disguise a loan at usurious rates of interest - see the observations of Lewis J (as he then was) at p 277C-H.

I am accordingly of the view that *Knightsbridge Investments* is clearly distinguishable from the matter before me. I am also of the view that my findings in regard to the interpretation of "in respect of", and the need to read the loan agreement and surety agreement together, in assessing compliance with s 12 of the Act, are not contradicted by anything said in *Knightsbridge Investments*. I agree, save for Lewis JA's (as he had become to be) correction in *Boshi supra* of Lewis J (as he previously had been), that the document in *Knightsbridge Investments* was an instrument of debt in terms of s 12 of the Act.

I conclude by saying that, I might justifiably be accused of having approached this application in a back to front manner, by considering the basis of the defence first, as opposed to the basis of the explanation for the default and the delay in applying for rescission. But on those aspects, the applicant is guaranteed failure. The suggestion that his legal practitioner should not have withdrawn his appearance to defence had its best prospect of success if made shortly after judgment was entered. Four years down the line it has a distinctly hollow ring. The reason put forward to justify condoning the lengthy time delay between the judgment and the application for rescission is the strength of the defence on the merits. By that approach, the applicant is effectively putting the chicken before the egg. There should be an acceptable explanation for the delay divorced from the strength of the defence. The explanation also avoids the need to deal with uncomfortable concepts like the finality of litigation. The strength of the defence is, however, an aspect on which I have already ruled against the applicant. Accordingly, there is no basis for granting the application for condonation for late noting of the application for rescission. The application is dismissed with costs.

Mabuye & Co, applicant's legal practitioners

Gill, Godlonton & Gerrans, defendant's legal practitioners

N *v* N 1999 (1) ZLR 458 (HC)

Citation 1999 (1) ZLR 458 (HC)

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Case No	Judgment No. HH-95-99
Court	High Court, Harare
Judge	Gwaunza J
Heard	May 19, 1999
Judgment	June 2, 1999
Annotations	None

Civil application

Flynote

Family law - child - custody - right of access to children by non-custodian parent - when access may be refused - test - what is in best interests of children - extent to which children's stated wishes can be taken as indicator of their best interests

Headnote

A man and a woman who were living apart were going through a bitter divorce. The woman had custody of the three minor children. The man, who said that the woman had consistently refused to allow him to see the children, applied to court for certain access rights to the children to be granted to him pending the finalisation of the divorce action. The woman opposed the application on the grounds that such access was not in the interests of the children. The children themselves stated that they were opposed to their father having access to them. The woman alleged that the man had used excessive corporal punishment against the children and the children confirmed this and said that they were frightened of their father.

Held, that although the non-custodial parent normally has a right to reasonable access to his children, the exercise of this right is not without qualification. The overriding consideration is what is in the best interests of the children. The court may refuse the non-custodian parent access to his children if this is in the interests of the children. However, the court will only deny access to the non-custodian parent in exceptional circumstances such as where he has abused his children.

Held, further, that the court will not lightly interfere with the custodian parent's right of control over the day to day life of the children in his or her custody. In the present case the custodian parent wanted to deny access by the father of the children. The children also did not want their father to have access to them. However, it would be unwise for the court to regard the children's stated wishes as a sole indicator of what is in their long term interests. The custodian parent may have influenced the attitude of the children. In the present case while it might be inimical to the interests of the children to be forced to see the non-custodian parent immediately, it might be in their long-term interests to see their father later.

Held, further, that rather than denying the non-custodian parent access completely, it would be better to defer access and to leave the way open to the father to apply for access at a later

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stage after he had satisfied certain conditions involving undergoing a period of counselling. The counselling that he should undergo was joint therapy together with his children. He was willing to undergo such therapy, which might repair or re-establish the father-child relationship. It would help if, whilst the therapy was taking place, the woman tried to encourage the children to adopt a more positive attitude towards their father.

Held, therefore, that the father and the children should undergo joint family therapy starting

within a specified period. The parties were to agree upon a suitable therapist or, if they failed to agree on a therapist, the organisation called "Connect" would identify a suitable therapist. The mother was to allow access to the children by the therapist. The therapist was to submit periodic reports to the Registrar of the High Court. The father was granted leave to make a further application for access to the children after at least three months had elapsed since the commencement of the joint therapy sessions.

Cases Considered

Cases cited:

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

Greenshields v *Wyllie* 1989 (4) SA 898 (W)

Marais v *Marais* 1960 (1) SA 844 (C)

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

Case Information

J C Andersen SC, for the applicant

Mrs *J B Wood*, for the respondent

Judgment

GWAUNZA J:

[***Editor's Note:*** *The first part of the judgment is omitted. It deals with the facts in relation to the relationship between the father and his children.*]

THE LAW ON ACCESS

The right of the non-custodian parent to reasonable access is well established in our law. In *The Law of Access to Children*, 1(138) the learned author suggests that such right is inherent:

"More often that not, an access dispute is likely to revolve around the nature and extent rather than over the fact of access. This is because the non-custodian parent has an inherent right to reasonable access ... It would seem that the onus is on the applicant to establish the reasonableness of the access sought."

According to H R Hahlo in *South African Law of Husband and Wife,* 2(139) *dictum* by de Villiers

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J in the case of *Marais* v *Marais*: 3 (140)

"What is aimed at is the perservation of some degree of parent and child relationship between the non-custodian parent and the child, for the benefit of both, but in a manner not incompatible with the vesting of undivided control and regulation of the care and upbringing of the child in the custodian parent ... On the other hand, access arrangements are, in the absence of good reason, not to be so confined as to stultify the nurturing of real affection and companionship between non-custodian parent and child."

Thus, as a starting point and given this legal context, it can be said that the applicant, *in casu,* is doing no more than seek to exercise a right that the law clearly guarantees him. The exercise of this right is however, not without

qualification. In asserting that it is "in the best interest" of the children that they enjoy a meaningful and substantive paternal relationship the applicant has in fact put a finger on the overriding principle to be applied in disputes concerning children generally, including issues of access. The position is aptly summarised in the following words by the learned author in *The Law of Access to Children*: 4 (141)

"When a court is called upon to resolve a disputed access case, it has to resort to two basic principles. The first and overriding principle which runs like a golden thread through the fabric of our whole law relating to children is that the interests of the children are paramount. The second principle is that reasonable access is subject to the custodian parent's right of control." 5(142)

However, just as the non-custodian parent's rights to access must take second place to the best interests of the children, so too does the exercise of parental control by the custodian parent in matters of access, as explained below:

"When exposing or setting out conditions of access the custodian parent must, if necessary, bear in mind that the non-custodian parent has rights of access which he ought not to render illusory by imposing autocratic restrictions or limitations upon the exercise of such rights of access ... subject to this constraint, and subject to the fact that the conditions must not be contrary to the interests of the child, the court will not readily interfere with the exercise of the custodian parent's discretion." 6(143)

On the facts of this case, would the children's interests be served by granting access to the applicant or would they be served by denying the applicant such access? That, it appears, is the question that I must determine. While both parties base their contentions for and against granting access to the applicant on the best interests principle, the combined weight of the children's opposition has been added to that of the mother.

THE CHILDREN'S WISHES

The children's direct involvement in this dispute raises the question of the extent, if any, to which children's own wishes should be taken into account.

The authorites that I have consulted suggest divergent views on this subject.

In *Germani* v *Herf & Anor* 7(144) where the court had made an order granting access to a 14 year old who was strongly opposed to seeing his father, the learned judge's sentiments are

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summarised as follows:

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"In regard to questions concerning a parent's rights of access to a child, the attitude of the child ought, no doubt, to be taken into account in appropriate circumstances especially where he is nearly adult. But, where the child, despite appearing older than he actually is, is still young, immature in mind, impressionable and, notwithstanding his stubbornness, unable to decide for himself what is in his best interests, the position is different. To attach decisive importance to the child's own professed intractable attitude (against having anything to do with his father) means that the child is thereby being allowed to frustrate access orders ... Generally, the correct judicial approach should be that the refusal or reluctance of a young child to submit to access is not by itself a reason for disobeying an order of court conferring such access."

Noting that *Germani*'s case is an old authority and that in that case the age and maturity of the child in question appeared to be decisive factors in deciding whether to have regard to the child's wishes the learned author, ID Schafer, 8(145) criticises the approach of the learned judge to the issue of a child's expressed wishes as follows:

"Before the court resorts to forcibly requiring a child to allow the non-custodian parent access, it should be satisfied it is in fact in the interests of the child that the non-custodian parent should have access and not merely because it is the so-called right of the non-custodian parent to have access to his children come what may ... It is therefore wrong to override a child's wishes, whether or not the child's wishes are an extension of the custodian parent's wishes, simply in order to allow the non-custodian parent his so-called rights of access as the courts did in both *Oppel* 9(146) and *Germani* v *Herf*. 10(147) If, despite any counselling that may have taken place, the child persists in his opposition to see the non-custodian parent, the reality of the situation should be recognised for what it is. It should not at this stage matter what the reason is for the child's implacable opposition. After all, it is the child's interests that are at stake and not the court's integrity."

While the above *dictum* does no more than re-state the paramountcy of the children's interests over the non-custodian parent's right to access, it seems to regard the children's wishes as being synonymous with what is in its best interests. The learned author confirms this attitude when he cites, with approval, the views of Wilkinson in *Children and Divorce* (1981) p 69, 11(148) as follows:

"If access or the prospect of it is genuinely disturbing to a child, his interests will hardly be served by a judicial insistence that it be pursued regardless of his feelings."

While I would concur with this view in so far as the immediate future of the child is concerned, I would hesitate to conclude the same should necessarily apply in the longterm. As correctly contended by the applicant, children are impressionable.

I would in that respect concur with the views of Flemming J in *Greenshields*

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v *Wyllie* 12(149) "human beings and having personalities of their own, having emotional preferences of their own, being normal," made the following observation:

"At the age of 12 and 14, it is particularly difficult to know who you are and where you are going. Everyone knows that.

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I might add that I have four daughters. It is understandable they may resent certain things and that they may not like Southbroom[13] or at times not even their mother or grandmother and at times not even their best boyfriend. That is normal. But the court also knows that as time goes by, their own perspective changes ... It is therefore, not that the court simply ignores their desire but, as a father sometimes tells a child 'no', the court, as the children's super father, can tell both them and their father and mother 'no' when it is necessary."

What commends this view to me, given the facts of the present case, are two considerations that to my mind must be taken into account in spite of the children's stated opposition to the application. These are, firstly, the respondent's attitude as a measure of the excercise by her of the custodian parent's right of control, and secondly, the question of whether or not by his actions the applicant can be said to have irrevocably forfeited his rights to access to the children. I would in other words disagree with the contention by Mrs *Wood* for the respondent that "if having interviewed them the judge is satisfied that they (children) do not wish to see their father, that should be an end of the matter".

THE RESPONDENT'S ATTITUDE

As stated above, the court will not interfere lightly with the custodian parent's right of control over the day to day life of the child. The basis upon which the court will interfere is explained by Tebbutt AJ in *Segal*'s[14] case as follows:

"The court must have regard objectively to all relevant factors and then 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."

In casu, a manifestation of the excercise by the respondent of her right of control is to deny or oppose access to the children, by by their father. This attitude is shared by the children. As long as the possibility exists that the children's views may be coloured by their mother's attitude, it would, in my view, be unwise for the court to regard the children's stated wishes as the sole indicator of what is in their long-term interests. That the custodian parent's influence is not to be underestimated is well illustrated by the following dictum in *Germani*'s case *supra*:

"Moreover, the child's recalcitrance has undoubtedly been encouraged by the negative

attitude she (custodian parent) - has constantly adopted towards it. She repeatedly said in evidence that on access occasions she merely told the child that he ought to see or accompany the appellant, but when he refused she did nothing, she did not try to compel or force him, she left it to himself ... It is quite possible too that the child adopts an intractable attitude mainly because he thinks that will please the first respondent. That is not uncommon behaviour by a child whose divorced parents constantly bicker about access to him."

The same could be said of the circumstances in this case. The respondent has made it clear she is vehemently opposed to the idea of the respondent having access to the children, she has done nothing more than ask whether they wanted to see their father, and simply accepted it when they said they did not. The children are left in no doubt as to their mother's attitude towards access; it is not even necessary for her to say so in so many words. Each child knows if they were to indicate willingness to see the father, they would certainly be going against their mother's wishes, which would obviously not please her.

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Where the custodian parent's attitude influences that of the child, my view is that while it may be inimical to the interests of that child to be forced to see the non-custodian parent immediately, it might well be in its interest later, after the custodian parent's influence has been diluted or removed, to enjoy such access by the non-custodian parent. In my view, it is only to that extent that the children's wishes can be said to be synonymous with its best interests.

A custodian parent whose exercise of parental control ignores the real possibility that children's views may very well change with time and changed circumstances does not, in my view, act in their long-term interest. Nor does she do so by not encouraging the children to forget the unpleasant experiences they may have suffered in the past. I am satisfied on the facts of this case that as long as the possibility exists that the children, without their mother's influence, might begin to regard the issue in a different light, there is room for appropriate judicial intervention.

This conlusion would of course be academic were the court to find that by his actions, the applicant has forever forfeitrd his rights to access of the children, which brings us to the second issue I said earlier should be considered.

WHEN ACCESS MAY BE DENIED

Despite the non-custodian parent's unquestionable right to access, if it is in the interests of the children to do so, the court may make an order refusing the non-custodian parent access to his children.

However, according to the the learned author in *The Law of Access to Children* 15(150) at p 115:

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"The courts generally take the line that it will 'only be in very unusual and special cases' where access is denied to a non-custodian parent."

Asserting that in South Africa there do not appear to be any reported cases where the courts have refused access outright, the author cites circumstances that he considers might lead to such refusal. These include neglect and/or abandonment of the children, sexual abuse, disturbing effect on the child, health of the child, and unacceptable conduct of the non-custodian parent e.g. that he is in prison, engages in harmful religions indoctrination, or has a serious criminal record that indicates he has nothing meaningful to contribute to the child, etc.

Rather than deny the parent access, Schafer asserts the approach of the South African courts is to defer access and leave the way open to the aggrieved parent to apply again at a later stage, usually after certain conditions have been met, e.g. after the parties have undergone a period of counselling. He refers to this arrangement as *deferred access* and defines it thus;

"Deferred access is nothing more than a temporary denial of access leaving the way open for an application for access to be made at a later stage. The determination of access can, therefore, be deferred until such time as certain conditions are met, or until such time as the applicant can satisfy the court that he has purged himself of the reason why access was denied him in the first place." 16 (151)

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I find much to commend in this approach which, in my view, could be adopted, to advantage, in the present case. The applicant admits to physically disciplining the children and mentions using the same means that the children and the respondent allege he used. The difference in opinion is in respect to the parties' assessment of the severity or force exerted in the carrying out of such discipline. Despite the respondent's allegation that the applicant used excessive force, it is true, as contended by Mr *Andersen* that no evidence has been advanced to suggest that the children suffered any physical or mental trauma. Nor has it been suggested that the children's performance at school has been adversely affected. To the contrary, the respondent herself reports the children continue to perform very well.

Despite the respondent's rejection of the suggestion that the whole family be allowed to undergo joint family therapy or father/child therapy, I am satisfied that such therapy could benefit all concerned. That the respondent herself on the advice of her psychologist, was at one time willing for this to happen suggests the idea might not be altogether repulsive. When this is considered together with the willingness of the applicant to now subject himself to this process the idea acquires added merit. Beyond averring that the applicant had once turned down the idea, the respondent has not offered any other good reason for her opposition to the idea.

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I make this suggestion in the light of the fact that while both the children's psychologists have not ruled out visitation or access to the children by the applicant, the children themselves have indicated they are not yet ready to meet directly with the applicant. Given the force of their present anger and bitterness, I am satisfied the prospect of access to them by the applicant is genuinely disturbing to the children, and it would clearly not be in their interests to force them to see him in the immediate future. I would say in this case the immediate interests of the children should supercede those of the applicant, at least in the near future. But that is in so far as access, supervised or not, is concerned. Professionally, managed interaction through family therapy is something else. Quite apart from providing much needed therapy, the process should create the opportunity for "the breaking-in" period that the applicant alludes to. Thus, while I am satisfied it would not be in the children's interest to force them to see their father in the very immediate future, I do not believe a case has been made for completely ruling outaccess in the long-term.

For practical purposes and in order not to confuse the children any more than has already happened, I would direct that the applicant defers his claim for access until after he and the children have undergone some joint therapy. I do not consider it advisable for the applicant to exercise access rights at the same time that he and the children would be undergoing therapy as the former process may jeopardise the effectiveness of the latter. In my view, the processes must be consecutive and not simultaneous.

While, as I believe, there is merit in pursuing the option of deferred access as a first step in the process to repair or re-establish the father-child relationship with the applicant, in my view, it would help if, concurrently with the therapy sessions, the respondent were to adopt a positive attitude towards this matter by encouraging the children to forget the past and attempt to meet their father halfway. This can only work to their long-term benefit. The respondent has indicated

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she uses non-violent means to discipline the children. I would suggest she uses the same effective means to persuade the children to undergo the therapy. Further to which, she could also refrain, if indeed she was wont to do so, from doing or saying anything denigrating of the applicant, to the children. Although not for the same reasons, I would concur with Mrs *Wood* that it is not in the best interests of the children to continue to be caught up in the acrimony that presently exists between the parties.

In granting this order - in which none concerned is getting quite what they asked for - I am cognisant of the fact that I have done what Flemming J *supra* says the court, as the children's "super father" can do when it is necessary, that is, "tell both the children and their father and mother, 'no'."

It is accordingly ordered as follows that:

1. the applicant and the three children undergo joint family therapy on the following terms and conditions:

   (a) the therapy is to commence within 30 days from the date of this order and proceed at the rate and for a period to be determined by the therapist in question;

   (b) the therapy is to be undertaken by an impartial and reputable family therapist mutually agreed to by the parties;

   (c) the parties are to agree on the choice of a family therapist within 10 days of the date of this order;

   (d) in the event that the parties fail to reach an agreement as indicated in para (c) above the Zimbabwe Institute of Systemic Therapy, otherwise known as Connect, is hereby directed to identify a suitable therapist for the purpose of undertaking the joint family therapy;

   (e) the respondent is to allow access to the children by the family therapist determined in terms of either para (c) or (d) above for the purposes of the joint family therapy.

2. the therapist referred to in para (e) of clause 1 shall prepare and submit to the Registrar of this court, periodic progress reports, the first of which is to be submitted within a period of six weeks after commencement of the joint family therapy.

3. the applicant is granted leave to make a further application on the same papers and within a period of not less than three months from the date of commencement of the joint family therapy, for determination of the issue of access to the 3 children.

4. that a copy of this order shall be served on Connect.

5. that costs be and are hereby reserved.

Atherstone & Cook, applicant's legal practitioners

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Coghlan, Welsh & Guest, respondent's legal practitioners

S *v* MAKHADO 1999 (1) ZLR 467 (HC)

Citation	1999 (1) ZLR 467 (HC)
Case No	Judgment No. HH-94-99
Court	High Court, Harare
Judge	Gillespie J
Heard	June 2, 1999
Judgment	June 2, 1999
Annotations	None

Criminal review

Flynote

Criminal procedure - admissions - what are - distinction between formal and informal admissions - what may be admitted - accused being asked by prosecutor to admit facts not relevant to charge - impropriety of allowing prosecutor to ask for multiple admissions

Criminal procedure - charge - particulars - of negligence - amendment - when may be made - not permitted when accused will be prejudiced - impropriety of conviction based on particular of negligence not charged

Criminal procedure - trial - conduct of - unrepresented accused - warning to be given to accused before being asked to make admission

Criminal procedure - trial - defence case - defence evidence - reliance on defence outline - prejudice caused by asking accused to adhere to defence outline

Headnote

Formal admissions of fact, made in response to a formal request, are to be distinguished from informal admissions. The latter are concessions contrary to his interest made by the accused in the course of his evidence. They are evidence, to be accorded whatever weight is proper, of the circumstances acknowledged. The former, once made, constitute proven facts of which no evidence need be led. The formal request for an admission is a procedure appropriate only to a plea of not guilty. It constitutes a departure from the fundamental principle *nemo tenetur se ipsum accusare*, and must be limited to the extent allowed by statute.

When the State seeks an admission from an undefended accused, the accused must be warned that he is not obliged to make any admission. Admissions may only be made on facts

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relevant to the issue and may not be asked for in order, in effect, to ask the accused to admit that which he denied by his plea of not guilty. It is unfair to ask of the accused admissions relating to points on which no accusation has been made and on which no evidence was available, and then to convict him.

Where an accused pleads not guilty, he is effectively obliged to make a statement outlining his defence. This diminution of the right to silence is designed to curb the evil of an accused

falsely tailoring a defence to meet the evidence as it unfolds. The procedure ought to be strictly controlled so as to further that legitimate aim without putting unfair compulsion on the accused. It is thus unfair to impose on the accused a greater standard of accuracy and detail in outlining his defence than is expected of the State in its outline. The practice in the magistrates courts now is to take a full, discursive and unsworn narration of events from the accused, down to the finest detail, before the State leads any evidence. Once the State case is closed, the accused is asked to adopt his outline as the evidence for the defence. This practice is highly prejudicial. It is conducive to a serious denial of the right to silence. It exposes the accused to unequal treatment *vis-à-vis* the State. It either requires him to give too much detail in a defence outline or lures him into giving inadequate and incomplete evidence. It does not give him the opportunity to give evidence in his own words in answer to the State evidence. It obscures the incidence of onus. It creates an inquisitory and inequitable proceeding.

Particulars to a charge are not essential but where given the State is bound by them. Amendment is only permitted where the accused will not be prejudiced in his defence. The provision in the Criminal Procedure and Evidence Act [C*hapter 9:07*] saving the proceedings in the absence of amendment is designed to cure inadvertence by the prosecutor as to the need for amendment, or the lack of close scrutiny of the charge. It is not there to permit the conviction of an accused of an offence with which he has not been charged.

Cases Considered

Cases cited:

S v *Chikukutu* 1996 (1) ZLR 702 (S)

S v *Dhliwayo* 1987 (1) ZLR 1 (H)

S v *Jeffries* 1971 (2) RLR 147 (G)

R v *Makwambere* 1962 R & N 476 (FS)

R v *Magiya* 1959 R & N 272 (FS)

S v *Mandwe* 1993 (2) ZLR 233 (S)

S v *Matimba* 1989 (3) ZLR 173 (S)

R v *Narua* 1953 SR 156

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S v *Nicolle* 1991 (1) ZLR 211 (S)

R v *Scott-Crossley* 1969 (2) RLR 270 (A)

S v *Seda* 1980 ZLR 109 (G)

S v *Todzvo* 1997 (2) ZLR 162 (S)

S v *Zhou* HB-36-96

S v *Zingeni* HH-4-99

Statutes Considered

Legislation considered:

Criminal Procedure and Evidence Act [*Chapter 9:07*], ss 146(1), 153, 177, 188(a), 189(2), 202, 314

Judgment

GILLESPIE J: In my view, the accused has been denied a fair trial by a series of procedural irregularities. The first of these was an unfair and improper use of the procedure for requesting formal admission from one on trial. The second is an inequitable and impermissible manner of adduction of evidence from the accused. These were both compounded by the third: the conviction of the accused on particulars not laid to his charge.

The charge is culpable homicide. The particulars of negligence are that the

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accused drove an omnibus without keeping a proper lookout; that he failed to stop or yield precedence at a controlled intersection; and that he failed to stop or act reasonably when an accident seemed imminent. The facts, which were not in dispute, showed that the accused, while driving a bus along its route, entered an intersection without stopping, notwithstanding the "stop" sign regulating his progress. In doing so, he drove his vehicle into another omnibus that had entered the intersection and that in any event had precedence. In the collision, two passengers in the other bus were killed.

The accused pleaded not guilty. He outlined a defence relying upon an averment that the vehicle was mechanically defective. He stated that the vehicle had received attention before it was taken out. He test drove the vehicle after the work had been done on it. He requested further attention to the brakes and two sets of brake shoes were fitted. He was instructed to proceed on his route and to return the vehicle thereafter for further brake shoes, which were not then available, to be fitted to other wheels. He complied with this instruction. The fatal accident occurred as he approached the intersection on a downhill gradient: he selected a lower gear preparatory to stopping at the regulatory sign but failed to stop because of a mechanical inefficiency in the brakes.

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The State led no evidence. Rather, the prosecutor requested a series of admissions from the accused. He did so in the form of the following questions:

" 1. Whether the axxd was aware the vehicle had no brakes when he drove it.

2. Whether because the vehicle had no brakes he failed to stop at the stop sign.

3. Whether he failed to stop or act reasonably when the accident seemed imminent.

4. Whether he admits he failed to keep a proper lookout.

5. Whether he admits that because he drove an unroadworthy vehicle he was involved in an accident.

6. Whether he admits the deceased died because of this accident.

7. Whether he agrees that the bus in which he rammed when you failed to stop (*sic*) was enjoying right of way."

The magistrate recorded an admonition to the accused that he was not obliged to make any admissions but that if he did then the substance of the admission would be taken as a proven fact concerning which no evidence need be led. The accused agreed to make admissions. These are recorded as:

" 1. Admission is made.

2. Admission is made.

3. The admission is made although I tried to change gears it failed.

4. This is not made.

5. I admit that.

6. I admit that.

7. I make the admission."

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The prosecutor then closed his case.

The accused was invited to open his defence with an exchange recorded by the following note:

"I recall my D.O. [defence outline].

I abide by that.

I have nothing to add or subtract.

I adopt it as my evidence in chief"

In fact, these were obviously monosyllabic affirmative answers to questions put by the magistrate. The accused was then cross-examined by the prosecutor. The thrust of the short cross-examination was that the accused was at fault in taking the bus onto the road knowing it

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to be unroadworthy. His answers appeared to acknowledge the point.

A conviction followed. The magistrate commented in judgment that the defence outline disclosed no defence. He thought it unsurprising that the prosecutor proceeded as he did. He convicted the accused on the basis that he knowingly drove a vehicle with "no efficient brakes". He also held - mistakenly - that the accused had admitted failing to keep a proper look out.

The admissions sought and obtained from the accused are formal admissions as opposed to informal ones. That is to say, they are admissions of fact made in response to formal requests, as opposed to concessions contrary to his interest made by the accused in the course of his evidence. 1(152) The former, once made, constitute proven fact concerning which no evidence need be led. The latter are evidence, to be accorded whatever weight is proper, of the circumstances acknowledged. The formal request for an admission is a procedure appropriate only to a plea of not guilty. 2(153) It constitutes a departure from the fundamental principle *nemo tenetur se ipsum accusare*, a departure permitted by statute. It follows that such a departure will be tolerated only within the circumstances ordained by statute and that the statute will be restrictively construed. 3(154)

The provisions of statute are that:

"if he considers it desirable for the purpose of clarifying the facts in issue or for obviating the adduction of evidence on facts which do not appear to be in dispute, the judge or magistrate may, during the course of a trial or preparatory examination and on application by the prosecutor, the accused or his legal representative ask the accused or his legal representative or the prosecutor, as the case may be, whether any fact relevant to the issue is admitted in terms of this section." 4 (155)

If an accused is unrepresented then he must be warned that he need not

do so before being asked to admit a fact. 5(156) Of course, an accused may volunteer a formal admission without being requested to do so 6(157) but concessions in defence outlines or evidence ought not to be construed as such and never in the case of an unrepresented accused who has not been warned. 7(158)

These principles having been stated, the following objectionable features of the instant case can be recognised. The first is that the requests numbered (1), (2) and (5) do not concern facts relevant to the issue. As I show below - dealing with the third irregularity - these relate to a circumstances not laid to the accused's charge as a particular of negligence. The prosecutor was quite clearly attempting to secure from the accused's own mouth an argumentative "fact" of which he had no evidence in order to use those facts, without amendment of the charge to warn the accused of his peril, to found a conviction of the accused. It was a grossly unfair advantage to take of an unrepresented person.

The next objectionable feature is that the requests numbered (3) and (4) cannot be regarded as relating to "facts which do not appear to be in dispute". In fact, the accused is being asked to recant his plea of not guilty and to admit two of the particulars of negligence alleged. This is most misleading to, and unfair towards, a person without legal representation. In fact, the

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accused avoided danger by not making the admissions. He was nevertheless inaccurately represented by the magistrate as having acknowledged the blame imputed in the prosecutor's request.

The only requests for admission which could properly have been made are requests (4) and (5). These relate to relevant *facta probanda* being matters which, from the defence outline, either were not addressed or would otherwise appear not to be in dispute.

Had the magistrate acted according to well-established, and frequently propounded, precepts concerning the court's duty to an unrepresented person, things would have gone very differently. Particularly on this unfair method of tricking the accused into damning himself with his own mouth, let me repeat the words of Tredgold CJ:

"We do not permit the interrogation of the accused with the sole object of obtaining a conviction against him. This may and does lead to a failure of justice in individual cases but is in the general interest of the administration of justice. To all, a practice which offends against the sense of what is fair, felt by the community at large, alienates that general support upon which the administration of justice depends." 8(159)

GILLESPIE J

Similar words were uttered in this court recently by Chatikobo J, when criticising a like abuse of the procedure of recording admissions:

"It is not for the prosecutor to assume the role of an inquisitor. It is wrong for the court to sit back and watch while the accused is badgered to make admissions which inculpate him." 9(160)

It was not fair to ask of the accused admissions relating to points on which no accusation had been made and no evidence was available. Nor to convict him on the strength of his responses - which he understandably believed to be a defence to the charge actually preferred.

I have also intimated criticism of the manner of adducing the accused's evidence. It has come to the attention of the superior courts that the procedure in criminal trials in the magistrates courts is degenerating into an insidious perversion of accepted procedure. The ancient right of an accused to remain silent has been considerably altered by statute. An accused, after pleading to a charge and hearing an outline of the state case, is effectively obliged to make a "statement outlining the nature of his defence and the material facts on which he relies". 10(161) I say "effectively obliged" because failure to do so, or omission of a material averment, in the absence of reasonable explanation, justifies an inference adverse to the accused. 11 (162)

This diminution of the right to silence is designed to curb the evil of an accused, falsely tailoring a defence to meet the evidence as it unfolds. The procedure really ought to be strictly controlled so as to further that legitimate aim without putting unfair compulsion on the accused. Thus, it is unfair to impose upon an accused a greater standard of accuracy and detail in outlining his defence than is expected of the State in its outline. Yet, that is precisely the unintended result of the *dictum* of Korsah JA, who, when cautioning against too strict an approach to a State outline, said that since it is:

"often a *précis* of the testimony of the State's witnesses, often compiled by a policeman with no legal training (as opposed to the defence outline being a categorical assertion by the accused person of facts upon which he relies for

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his defence) the divergence between the State outline and the testimony of a State witness must be so gross as to be utterly unreasonably, so as to invite an adverse conclusion." 12(163)

One sees the sparsest, and or occasion most contradictory, of State outlines pass without question by an unrepresented accused (and worse, by a magistrate)

GILLESPIE J

and an accused questioned in parsing detail on the most innocuous divergences in evidence from his defence outline.

The consequence of this tendency to demand more and more of the accused in admitting his defence is that the invariable practice in the magistrates courts is now to take a full discursive and unsworn narration of events from the accused, down to the finest detail, before the State leads evidence. Then, once the State case is closed, the accused is driven, by a series of questions such as those suggested by the record in this case, to "adopt the defence outline as his evidence in chief". The sole justification for this apparently being the tedium avoided by not having to listen to the same story all over again. Having done thus, the accused is then immediately exposed to cross-examination, which can frequently be expected to bring to light some new details. Upon these, the prosecution then pounces. There typically follows a string of questions, "Why was this not said in the defence outline ... the evidence in chief ..." and so on. Badgering the accused.

This sort of procedure is simply not found in the High Court. I know of no judge who would tolerate it. It is condusive to a serious denial of the right to silence. It exposes the accused to unequal treatment *vis-à-vis* the State. It either requires him to give too much detail in a defence outline or lures him into giving inadequate and incomplete testimony. It does not afford him the opportunity of giving evidence in his own words in answer to the State evidence. It obscures the incidence of the onus. It creates an inquisitory and inequitable proceeding differing *toto caelo* from the intent in the legislative changes mentioned above.

For this reason, as the practice has spread its infection, it has been criticised by the Supreme Court. In criticism of a magistrate for this course, the following has been said:

"His method of letting the appellant give his evidence-in-chief was simply to ask if he adhered to the defence outline and confirm he had nothing to add to it. This might be convenient to the court, but is not a satisfactory way of allowing an unrepresented accused to conduct his defence. It is bound to lead to confusion, and accusations of omitting things, as indeed happened here." 13(164)

In this court too, the practice has been condemned.

"To ask an accused if he has anything to add or subtract from his defence outline is not another way of asking him to give evidence ... [T]he question may be construed as an invitation to amplify or correct errors in his defence outline. It must be borne in mind that before he gives his defence outline the provisions ... which require the accused to outline the material facts were explained to him ... When it came to the defence case it should have been explained to the accused that the time had come for him to give evidence under oath

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to give flesh and blood to the skeleton of his defence. It was equally wrong in my view, to ask if the accused wishes to adopt his defence outline as his evidence-in-chief. His defence outline is no more than a summary of the facts upon which he relies. It is not a full account of the accused's defence." 14(165)

In this case, moreover, this prejudice has been compounded by the third irregularity to which I finally turn. By law, a charge must contain particulars:

"as may be reasonably suficient to inform the accused of the motive of the charge." 15 (166)

It is not necessary generally to set forth:

"the manner in which or the means or instruments by which any act is done unless the manner, means or instrument is an essential element of the offence" 16(167)

The court may order the giving of particulars further to a charge. Where particulars are given, then:

"the trial shall proceed in all respects as if the indictment summons or charge had been amended in conformity with such particulars." 17(168)

Hence, it is generally held that even where particulars are not necessary but have been given, the State is bound by its particulars. 18(169) This principle is applied particularly to cases involving allegations of negligent driving. 19(170) Indeed, in such cases the supply of particulars to the charge is regarded as generally desirable and necessary. 20 (171)

It is possible to amend a charge:

"where there is any variance between the statement therein and the evidence offered proof of such statement, or if it appears that any words or particulars that ought to have been inserted in the indictment, summons or charge have been omitted ... " 21(172)

It is even the law that the fact that such an amendment has not been made

"shall not, unless the court has refused to allow the amendment, affect the validity of the proceedings." 22(173)

under the unamended charge.

An amendment, however, may only be permitted where this will not prejudice the accused in his defence. 23 (174) Likewise, if the accused was prejudiced in his defence by the proceedings continuing without amendment, in the face of variance between charge and evidence, the State cannot take refuge behind

the provision saving the validity of proceedings in the absence of amendment. The provision is:

"designed to cure inadvertence by the prosecutor as to the need for amendment, or the lack of close scrutiny of the charge ...The test of prejudice operates to prevent the upholding of a conviction which takes the accused unawares". 24(175)

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It is not there to permit the conviction of an accused of an offence with which he has not been charged.

In the instant case, I have no doubt that the accused was grossly prejudiced in his defence by the entering of a conviction based upon a particular of negligence not charged and without amendment to the charge. Had an amendment been moved, the accused would have been entitled to an explanation that the claiming of the vehicle in an unsound state itself may have been negligent if he ought to have known its condition might be likely to cause harm. Had an amendment been granted against his opposition, it could only firmly have been done on condition of a postponement. 25(176) Such as would enable him potentially to meet the new charge. It could only have been done fairly before the grossly improper interrogation for admissions and prior to the close of the State case - leaving the State to prove its new averment. Finally, it should have been done if at all before the accused was obliged to "adopt a defence outline" given in ignorance of the unfair trap set for him.

I therefore hold a serious miscarriage of justice to have occurred. I quash the conviction and set aside the sentence. I make an order of a remittal for retrial.

Chatikobo J agrees.

BANDE *v* MUCHINGURI 1999 (1) ZLR 476 (HC)

Citation	1999 (1) ZLR 476 (HC)
Case No	Judgment No. HB-37-99
Court	High Court, Bulawayo
Judge	Malaba J
Heard	February 9, 1999; February 10, 1999
Judgment	June 3, 1999
Annotations	None

Civil action

Flynote

Court - contempt of - contempt in facie curiae - what is - requirement that act or words complained of must have been committed in court and that judicial officer be acting in judicial capacity - prison officer speaking insolently to magistrate in office at hospital when magistrate carrying out informal investigation - not contempt of court

Damages - amount - actio injuriarum - malicious prosecution - magistrate wrongfully causing prison officer to

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be prosecuted for contempt of court after prison officer had spoken insolently to him

Delict - actio injuriarum - malicious prosecution - requirements to establish - giving of information and laying of charge - malice - what must be shown to establish malice

Headnote

The plaintiff was a prison officer stationed at Hwange. He and another prison officer had to escort an unconvicted prisoner to the Colliery Hospital for treatment for a black eye. When the doctor asked the prisoner what had caused the injury, the prisoner replied that he had been assaulted by a prison officer. The doctor, disturbed at this report, telephoned the defendant, who was the local magistrate. He came to the hospital and there saw the prisoner and the plaintiff in an office. A discussion with the prisoner took place. At some stage during these proceedings, the plaintiff queried the defendant's right to conduct the inquiry. The defendant took exception to this query and said that he was going to charge the plaintiff with contempt of court. Some days later, the plaintiff was questioned by the police on an allegation of contempt of court. A charge was preferred and he was brought to trial about 6 months after the alleged incident. The trial began; the plaintiff pleaded not guilty. The trial was then postponed at the request of the plaintiff. Meanwhile, the defendant had been promoted and transferred to Bulawayo. Some time later, while on a visit to Hwange, he approached the local public prosecutor and prevailed on him to withdraw the charge. This the prosecutor did when the trial resumed, and the plaintiff was acquitted. The plaintiff then brought an action for malicious prosecution.

Held, that for the action to succeed, it had to be shown that the defendant actively set the law in motion. Simply giving a statement to the police is not the same as launching a prosecution; but the defendant did more than that. He told the police the specific crime with which he

said the plaintiff should be charged. He must have known that the police would entertain the charge.

Held, further, that the plaintiff had to show that the defendant acted without reasonable and probable cause. For the defendant to have had reasonable and probable cause he would have to understand the offence as defined and to have reasonable and probable cause to believe that the plaintiff had committed it. The crime of contempt of court protects justice in the particular proceedings in a court of law from being violated; it does not concern itself with conduct which violates the personal repute and dignity of the particular judicial officer. It is not contempt of court to violate the dignity, prestige and authority of an entity which is not a judicial body.

Held, further, that the facts showed that what was said by the plaintiff constituted information seeking; it was not derogatory of the defendant's performance of his judicial duties. The defendant was not in court; he was in a private office at the hospital, which had not been appointed as a place where a magistrate's court could be held. A reasonable man in the defendant's position could not have believed that the plaintiff was probably guilty of contempt of court, since there was no court and the defendant was not acting in a judicial capacity. Even if he was purporting to be acting as a visiting justice, he would have been performing an

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administrative, not a judicial, function.

Held, further, that the reasons the defendant gave for withdrawing the charge showed a lack of honest belief in the probable guilt of the plaintiff.

Held, further, that "malice" did not here mean spite or ill-will or a spirit of vengeance; it had a wider connotation. It included any motive different from that which is proper for the institution of criminal proceedings, which is to bring an offender to justice and thereby aid in the enforcement of the law. The facts showed that the defendant thought that the plaintiff had not shown him proper respect and that he wanted to punish him for that perceived transgression. This was an improper motive.

Held, further, that the plaintiff was entitled to damages for the injury to his personality and for pecuniary loss suffered. He had not, however, suffered loss of liberty, and the charge was ultimately withdrawn, which saved the further humiliation and anxiety that would have been caused had the plaintiff been convicted. Damages in the sum of $7000 would therefore be adequate.

Cases Considered

Cases cited:

Baker v *Christiane* 1920 WLD 14

Brown v *Hawkes* [1891] AC 718

Hick v *Faulkner* (1881) 8 QBD 167

Madnitsky v *Rosenberg* 1949 (1) PH J5

Ndlovu v *Sibanda* 1968 (2) RLR 113 (G)

Ochse v *King William's Town Municipality* 1990 (2) SA 855 (E)

Prinsloo & Anor v *Newman* 1975 (1) SA 481 (A)

S v *Thooe* 1973 (1) SA 179 (O)

Waterhouse v *Shields* 1924 CPD 155

Statutes Considered

Legislation considered:

Prisons Act [*Chapter7:11*], s 46

Case Information

J K H Stirling, for the plaintiff

L Tshuma, for the defendant

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Judgment

MALABA J: This is an action for $20000 damages for malicious prosecution. The declaration states that on 24 February 1994 the defendant (to whom I shall refer as "Mr Muchinguri" or "the defendant" as contextual clarity may require) maliciously and without reasonable and probable cause set the law in motion against the plaintiff ("Mr Bande") on a charge of contempt of court of which he was subsequently found not guilty and acquitted.

In his plea, Mr Muchinguri did not deny that criminal proceedings were instituted against Mr Bande. He denied that he was responsible for the institution of the prosecution, alleging that that was done by the public prosecutor in the exercise of his own discretion. The defendant said all he did was to give the police information on which they decided on the charge of contempt of court. He denied that he acted maliciously and without reasonable and probable cause.

The onus is on Mr Bande to prove on a balance of probabilities the following requirements:

(a) that the defendant set the law in motion (instigated or instituted the prosecution) against him;

(b) that at the time he instigated or instituted the legal proceedings the defendant was without any reasonable and probable cause to do so;

(c) that the defendant was actuated by express or implied malice (any indirect and improper motive) to set the law in motion against him;

(d) that the prosecution terminated in his favour; and

(e) that he suffered damages as a result of the prosecution: *Nyawo* v *Kadada* S-45-92.

I shall set out the facts that are common cause before proceeding to consider the evidence led by the parties on those in dispute. In January 1994, Mr Bande was a grade 2 prison officer stationed in Hwange where the defendant worked as a provincial magistrate. He is now a grade 1 prison officer stationed in Marondera, whilst Mr Muchinguri is now a legal practitioner in private practice.

At about 10.30 am on 24 January 1994, Mr Bande and the late Mr Gwanunga, a medical prison officer, escorted an unconvicted prisoner, Mr Fisher Sibanda, to Hwange Colliery Hospital for medical treatment. The prisoner was suffering from a black eye. At the hospital, he was attended to by Dr Nylander who in the course of examining the black eye asked the prisoner what had happened to it. The prisoner told the doctor, in the presence of the two prison officers, that he had been assaulted by a prison officer at prison.

The doctor was disturbed by what she heard. She asked the prison officers for the Officer-in-Charge of Hwange prison's telephone number. Mr Bande gave it to her. She asked the prison officers and the prisoner to leave the

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treatment room and wait outside whilst she contacted the Officer-in-Charge. The doctor phoned the defendant instead at Hwange Magistrates Court. They were social friends.

Dr Nylander reported to Mr Muchinguri what the prisoner had said about the cause of the black eye. She asked him to come to the hospital and meet the prisoner. He agreed. It was agreed that an office would be made available at the hospital in which the defendant would meet the prisoner. He went to the hospital alone and on arrival was shown into the office by a nurse.

In the meantime, the prison officers and prisoner were called back into the treatment room. The prisoner received treatment. The doctor then instructed the prison officers to take the prisoner to the office next door where he was to meet the defendant. Mr Bande's evidence on what happened in the office is to this effect.

Before they left the treatment room, the doctor gave him a letter in a brown envelope to give to the defendant. They found him seated on a chair. He asked the prisoner to sit on a bench and left the prison officers standing. Mr Muchinguri asked for the letter from Dr Nylander and Mr Bande gave it to him. He took the envelope and put it into a coat pocket without opening it. Mr Muchinguri did not deny that this incident happened. He said he could not remember receiving the letter. The evidence remained unchallenged.

Mr Bande said the defendant proceeded to ask the prisoner in SiNdebele what had happened to his eye. There was no interpreter. The prisoner answered in SiNdebele saying that he was assaulted by a prison officer called Ndlovu. The exchanges between the prisoner and Mr Muchinguri went on for quite sometime whilst the prison officers remained silent in standing positions. Mr Bande said when he had finished interviewing the prisoner the defendant asked Mr Gwanunga whether the alleged assault had been reported to him. Mr Gwanunga said the prisoner had not reported the assault. Mr Muchinguri wondered whether Mr Gwanunga would have taken down in writing a report of an assault on a prisoner by another prison officer.

He then asked Mr Bande for an opinion on the allegations of assault made by the prisoner. Mr Bande said he told the defendant that prisoners often made false allegations of assault against prison officers. He made the comment that the prisoner would have reported the assault to the magistrate before whom he had appeared in court on remand.

Mr Bande said he then asked Mr Muchinguri for permission to put a question. The permission was duly granted. He asked the defendant whether it was proper to interview a prisoner at a hospital on a matter concerning his stay in prison without the knowledge of the Officer-in-Charge of the prison. The question did not go down well with Mr Muchinguri. He became visibly angry and stood up from where he had been seated. With a finger pointed at

Mr Bande the defendant asked him whether he was challenging his authority. Mr Bande said he answered politely in words to the effect,

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"No Sir! I was merely asking whether this was the right procedure of holding an inquiry."

He said Mr Muchinguri said he was to charge him with contempt of court. The defendant picked up papers from the table and rushed out of the office leaving them behind.

I pause for a moment to consider Mr Muchinguri's evidence of what he said transpired in the office after Mr Gwanunga had said the prisoner had not reported the alleged assault to him. He agreed with Mr Bande on what happened up to the time when he wondered whether Mr Gwanunga would have recorded a complaint by a prisoner against a prison officer.

He said he continued to ask the prisoner questions. Mr Bande then asked for permission to ask a question. He gave him the permission. Mr Bande asked the prisoner why he had not reported the alleged assault to the magistrate before whom he had appeared on remand. Mr Muchinguri said he told the plaintiff not to ask that question because he intended to ask it himself. After that he went on with the interview of the prisoner. It was when the prisoner was saying he could not report the assault to prison authorities for fear of being victimised that Mr Bande barged in again and asked for permission to put another question. The permission was granted. He said Mr Bande asked him in a disparaging manner a question in these terms:

"Do you not know the correct channels? Why do you put prisons into disrepute by having an investigation of a prisoner in a private hospital? Do you not know that prisons are constituted by an Act of Parliament?"

Mr Muchinguri said he asked Mr Bande whether he doubted the propriety of the proceedings. Before Mr Bande could answer he warned him that he risked being in contempt of court. Mr Bande looked up as if to show that the building in which they were was not a courtroom and exclaimed:

"What court? You are not wearing robes."

The defendant said at the time he believed that he did not have to be in court or to be putting on a magisterial gown for contempt of court to be committed. He said he told Mr Bande that he was performing a judicial function and that he was going to prefer a charge of contempt of court against him. The plaintiff retorted:

"Charge me! Charge me. I don't care."

Mr Muchinguri said he felt extremely humiliated and embarrassed. He picked up his papers from the table and unceremoniously left the office. At his office he reduced to writing what had happened at the hospital.

I pause again to make a finding of facts. On Mr Muchinguri's evidence, Mr Bande asked for permission to ask a question on two occasions in the course

MALABA J

of the interview of the prisoner. I however found Mr Bande's version of events the more probable. In his statement to the police, Mr Gwanunga states that Mr Bande asked for permission to ask a question once. The statement which was produced in evidence with the consent of the defendant supports Mr Bande's version of events. One would expect the prisoner

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to mention in his statement that Mr Bande asked him directly why he had not reported the alleged assault to the magistrate before whom he appeared on remand. The prisoner's statement makes no mention of Mr Bande asking him the question. Mr Bande's version of events is therefore also supported by the prisoner in his statement to the police.

Mr Muchinguri said he immediately reacted to Mr Bande's question directed at him by asking the latter whether he doubted the propriety of the proceedings. In my view, the evidence corroborates Mr Bande's evidence. Answering a question by a question suggests confrontation. Mr Bande said Mr Muchinguri was visibly angry when he asked him the question whether he was challenging his authority. Mr Muchinguri himself said he was offended by the suggestion in the question asked by Mr Bande that he did not know the provisions of the Prisons Act. In saying he was "offended", the defendant supports Mr Bande's evidence that he became visibly angry.

The evidence given by Mr Muchinguri sought to create the impression of Mr Bande being rude, abrasive and disrespectful to the extent of attracting a warning that he was risking being held in contempt of court. The inherent improbabilities discredit the evidence. Why would the defendant contemplate a possible charge of contempt of court against Mr Bande before hearing what the latter had to say? The view that Mr Bande was disrespectful emanated from the interpretation the defendant placed on the question asked of him by the former. In other words, it was a view reached by an inference not borne out by the facts.

Had the plaintiff behaved in the obtuse manner described by the defendant in his evidence, Mr Gwanunga and the prisoner would probably have mentioned the same facts in their respective statements to the police. The fact that both of them do not mention the kind of behaviour described by Mr Muchinguri suggests that it did not happen. I accept the facts contained in Mr Bande's evidence where it is in conflict with that of the defendant.

I continue. On 4 February 1994, Mr Bande was questioned by the police on allegations of contempt of court. Mr Muchinguri had reported the matter to the police. Statements were recorded from Mr Gwanunga and the prisoner. Mr Bande was charged with contempt of court, the allegations being that after the defendant had conducted an inquiry into an allegation of assault by a prison officer on the prisoner he violated the dignity, repute and authority of the magistrate in his capacity as a judicial officer by accusing him of bringing

prisons into disrepute by interviewing a prisoner at a hospital without going through the officer-in-charge of the prison.

The trial commenced before a provincial magistrate in Bulawayo on 21 July 1994. Mr Bande pleaded not guilty. He applied for the postponement of the trial to give him time to seek legal representation from the Civil Division of the Attorney-General's Office. The application was granted. On the next remand date, the matter was again postponed because he had not received communication from the Attorney-General's office.

Mr Muchinguri was, in the meantime, promoted to regional magistrate and transferred to

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Bulawayo. The evidence shows that it was during this time that he decided to withdraw the charge against Mr Bande. He said he was influenced in his decision by a request he said Mr Denya made to him to forgive the accused. Mr Denya, the Officer-in-Charge of Hwange Prison, vehemently denied making the request. His denial was not disproved because the defendant could not say where and when the request was made. Mr Muchinguri further discredited himself when he said he also decided to withdraw the charge because he believed that Mr Bande was sorry for what he had done at the same time admitting the fact that the plaintiff did not express contrition to him. He said on some unspecified occasion he met Mr Bande in a car park at Bulawayo magistrates court. He said Mr Bande showed him the respect he expected from a prison officer. Mr Bande denied meeting the defendant as alleged. Mr Muchinguri could not say when the alleged meeting took place. Even if they met, there was nothing to lead him to decide to withdraw a charge against a person he believed was guilty of the crime charged.

Be that as it may, the defendant waited for an opportunity to disclose to Mr Bande his intention to withdraw the charge against him. The opportunity came his way when there was a regional court circuit in Hwange over which he presided. When in Hwange Mr Muchinguri phoned Mr Denya and invited him to his office at Hwange magistrates court. Mr Denya said the defendant told him over the phone that he intended to withdraw the charge against Mr Bande. He told Mr Muchinguri that the criminal proceedings had reached an advanced stage for the charge to be withdrawn. The defendant told him to come to the office with Mr Bande.

Mr Bande corroborated Mr Denya's evidence in that he confirmed that the latter told him about the conversation he had had with the defendant. They both went to the office where they met with Mr Muchinguri who told him that he wanted to withdraw the charge against him. Mr Bande said he told the defendant in no uncertain terms not to withdraw the charge as the criminal proceedings had reached an advanced stage.

Mr Muchinguri admitted meeting Mr Denya in the office at Hwange

magistrates court. He surprisingly claimed that he could not remember whether Mr Bande was at that meeting. He was clearly being mendacious in claiming loss of memory of such a remarkable encounter with the man he had accused of committing contempt *in facie curiae* (in face of court). The defendant could not afford to forget that Mr Bande was at the meeting. If he honestly believed that the plaintiff was probably guilty of contempt of court he would not withdraw the charge when the accused himself insisted on being tried.

By claiming loss of memory of the presence of Mr Bande in the meeting with Mr Denya, the defendant sought to avoid an adverse inference being drawn from his subsequent withdrawal of the charge.

An accuser who withdraws a charge against an accused against a challenge from the latter that he should prove his guilt exposes himself to an inference that he did not hold an honest belief in the probable guilt of the accused.

Despite the warning not to withdraw the charge, Mr Muchinguri approached Mr Sibanda the

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senior public prosecutor and told him that he wanted the charge against Mr Bande withdrawn after plea. Mr Sibanda said he was reluctant to have the charge withdrawn, but Mr Muchinguri insisted upon the withdrawal. He said he acceded to the withdrawal of the charge when the defendant told him that Mr Bande had apologised to him for the wrong he was alleged to have committed. Mr Sibanda was called as a witness by the defendant. He had no reason to lie against him. His evidence, once again, shows the mendacity in Mr Muchinguri because it is common cause that Mr Bande had not expressed any contrition to him in respect of the charge.

Mr Bande said he was shocked when the public prosecutor announced in court on 2 November 1994 that the State was withdrawing the charge against him after plea. He had gone to court prepared to defend his innocence. He was nonetheless found not guilty and acquitted of the charge of contempt of court.

It was his turn to attack. On 8 February 1996, Mr Bande instituted action for damages for malicious prosecution. He said the criminal proceedings injured him in his reputation and dignity. He was viewed by the superiors at work as an insubordinate officer who was disrespectful of the courts.

Promotion to grade 1 prison officer eluded him until after the termination of the criminal proceedings. The reports on the incident were filed and remain part of his service record. He said he felt humiliated and embarrassed when made to stand in the dock used by the prisoners he guarded.

I now decide whether Mr Bande has established on a balance of probabilities the elements of the delict of malicious prosecution. A prosecution was of course instituted against Mr Bande which terminated in his favour. The criminal proceedings were instituted by the public prosecutor in the exercise

of the delegated powers of the Attorney-General contained in s 76(4)(a) of the Constitution of Zimbabwe.

The question is whether Mr Muchinguri instigated the institution of the prosecution against the plaintiff.

J G Fleming *The Law of Torts* 7 ed at p 582 states that:

"The defendant must have been actively instrumental in setting the law in motion. Simply giving a candid, account however incriminating, to the police ... is not the equivalent of launching a prosecution: the critical decision to prosecute not being his 'the stone set rolling [is] a stone of suspicion only'. *But if besides giving information he proceeds to lay a charge, this amounts to an active instigation of proceedings which he cannot shrug off by saying that they were in the last resort initiated at the discretion of the public authority*" (the emphasis is mine).

In *Baker* v *Christine* 1920 WLD 14, Bristowe J said the "test" "is whether the defendant did more than tell the detective the facts and leave him act on his own judgment". The principle that giving an honest statement of fact to the police on which the prosecution is then instituted is not "instigating" a prosecution was referred to with approval by Price J in *Madnitsky* v *Rosenberg*

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1949 (1) PH J5 at pp 15-16. See also *Waterhouse* v *Shields* 1924 CPD 155 at 160; *Prinsloo & Anor* v *Newman* 1975 (1) SA 481 (A).

The defendant in this case, did not confine his contribution to the institution of the prosecution against Mr Bande to giving to the police information on what transpired in the office at the hospital. He went on to tell them the specific crime he alleged the plaintiff should be changed with. In his statement to the police he said:

"I said, officer I am charging you with contempt of court."

The police did not have to act on their own judgment to appreciate that the offence revealed by the facts was contempt of court. Mr Muchinguri impressed upon the police how desirable it was that the plaintiff should be charged with contempt of court. He told them that if he did not get Mr Bande charged the prisoner would be left with the impression that even magistrates could not "correct a wrong done by a prison officer, thus further putting his office into disrepute". He was telling the police that they had no option but to charge the plaintiff with contempt of court.

The defendant must have known that the police would take immediate action which would result in the prosecution of Mr Bande. His intention was clearly that the police should entertain the charge in respect of which prosecution was to be instituted. The plaintiff has, in my view, proved that the defendant instigated his prosecution.

The next question is whether Mr Bande has adduced evidence which proves that in setting the law in motion the defendant was acting without reasonable and probable cause. The question is a question of fact dependent

MALABA J

upon the circumstances peculiar to each case. There is no precedent upon which a court may rely for guidance. The facts which it has to deal with are nearly always materially different from those which it may find recorded elsewhere. The plaintiff must prove a negative in the sense that he has to give some evidence tending to establish an absence of reasonable and probable cause operating on the mind of the defendant at the time he set the law in motion against him. To do this he must show the circumstances in which the prosecution was instituted. It is not enough to prove that the real facts established no criminal liability against him unless it also appears that those facts were within the personal knowledge of the defendant. If they were not it must be shown what was the information on which the defendant acted.

In *Hick* v *Faulker* (1881) 8 QBD 167 at 171, Hawkins J defined "reasonable and probable cause" to be:

"... an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances which assuming them to be true would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed."

One of the facts the court must assume is that, the accuser understood the offence charged as defined in law. In this case, the definition of the crime of contempt of court which the defendant

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must be assumed to have had in mind, if he had a reasonable and probable cause to believe that the plaintiff had committed it, is set out in Hunt *SA Criminal Law and Procedure* Vol II Common Law Crimes 2 ed p 185. Contempt of court is said to consist of "unlawfully and intentionally violating the dignity, repute or authority of a judicial body or interfering in the administration of justice in a matter pending before it." It is stated further in the same work at p 193 that the offence "concerns itself *only with the conduct which impinges upon the administration of justice in or by the courts*" (the emphasis is mine).

The first requirement is that the facts known to the defendant must show that the conduct complained of was capable of falling within the category of contempts. The facts found proved show that the plaintiff asked a question which was information seeking. It was not insultive or derogatory of the defendant's performance of his duties at the time or at any other time. The plaintiff has shown that the objective view of the question asked of the defendant shows that it was not inherently offensive but that in his subjective interpretation the defendant concluded that it was disrespectful of his repute, dignity and authority. The relevant view of what is a contempt being that of a reasonable man the subjective view of the defendant becomes unreasonable.

Mr Muchinguri knew of the facts that showed that he was not in court. He was in a private office at the hospital. The office had not been appointed in

terms of s 4 of the Magistrates Court Act [*Chapter 7:10*] as a place where a court of a magistrate could be held. In *Ndlovu* v *Sibanda* 1968 (2) RLR 113 at p 115 Young J said:

"A court should be properly constituted, formally conducted and any issue before it should be regularly initiated."

In view of the fact that contempt of court protects the justice in the particular proceedings in a court of law from being violated and does not concern itself with conduct which violates the personal repute and dignity of the individual magistrate or judge, the facts had to show that what Mr Muchinguri was doing at the time was being done in or by a court. As the defendant acknowledged in evidence that he was not in court, one essential element of contempt *in facie curiae* (contempt in the face of court) was missing.

A reasonable man in Mr Muchinguri's position could not believe that the plaintiff was probably guilty of contempt of court when it was clear from the facts that there was no court whose repute, dignity and authority could have been violated. For the defendant to say he did not believe it was necessary for him to be in court or to be putting on a magisterial robe for contempt of court to be committed is to personalise the crime.

The facts also show that the defendant was not acting in a judicial capacity. The interview he was conducting of the prisoner was not anything approximating a judicial proceeding. There was no case before him involving two parties to hear and try. He was conducting the interview himself. He was not enjoined to make a final and definite decision on any question.

He said that the object of the interview was to get information from the prisoner which he

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intended to use to persuade the doctor to administer treatment to the latter's black eye. If the defendant was performing a judicial function he would have been bound by the provisions of s 5(2) of the Magistrates Court Act which requires that the proceedings in all cases in a court of a magistrate shall be in the English language and shall be carried out in open court. Not only was the interview held in a private office, the medium of communication between the defendant and the prisoner was Ndebele.

It is illuminating that Mr Muchinguri said he understood himself to be performing a function similar to that which he performed in the capacity of a visiting justice in terms of s 46 of the Prisons Act [*Chapter 7:11*]. When acting in the capacity of a visiting justice a magistrate has the power to inquire into a complaint or request made to him by a prisoner during his visit to prison. The inquiry must, however, be held in prison. A magistrate is in fact not performing a judicial function when he conducts an inquiry into a prisoner's complaint under the provisions of s 46 of the Prisons Act. He will be performing an administrative function.

1999 (1) ZLR p487

MALABA J

In *S* v *Thooe* 1973 (1) SA 179, Smit JP said at p 180B-H:

"It is not contempt of court to violate the dignity, prestige and authority of an entity which is not a judicial body ... It must be a court which is held in contempt and not an administrative proceeding before there can be contempt of court ... It is acknowledged in decided cases that an official like, for example, a magistrate performs judicial as well as administrative work and that it is not contempt of court if he is held in contempt in his administrative capacity" (official translation, p 63).

It is clear from the facts that the defendant failed to act upon those facts that indicated that the charge of contempt of court was inappropriate. He had no right to presume the existence of those facts. He did not therefore have a reasonable and probable cause. Where on the facts a magistrate has no competence to charge a person with contempt of court and nevertheless does so, as the defendant did in this case, he acts without reasonable and probable cause.

It is also stated in Addison*'s Law of Torts* 8 ed at p 247 that:

"though abandoning a prosecution is not of itself proof of want of probable cause yet where the prosecution is persisted in and then dropped at the very hour of trial there is strong ground for supposing that the prosecutor had no justifiable reason for commencing it."

Mr Muchinguri had persisted in the prosecution of the plaintiff until at the very hour of trial when he withdrew the charge. The reasons he gave for the decision leave one in no doubt that he withdrew the charge because of lack of an honest belief in the probable guilt of the plaintiff. The prosecution was therefore wrongful.

Has the plaintiff proved that the defendant was actuated by malice? The plaintiff does not have to prove spite or ill-will on the part of the defendant. The fact that the defendant had no reasonable and probable cause for the prosecution may, in an appropriate case, justify an inference that he was actuated by malice in the sense of being driven by an improper or indirect motive.

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Fleming *op cit* at p 590 states that:

"At the root of it (malice) is the notion that the only proper purpose for the institution of criminal proceedings is to bring an offender to justice and thereby aid in the enforcement of the law and that a prosecutor who is primarily animated by a different aim steps outside the pale if the proceedings also happen to be destitute of reasonable cause. 'Malice' has therefore a wider meaning than spite, ill-will or a spirit of vengeance and includes any other improper purpose, such as to gain a private collateral advantage."

In *Brown* v *Hawkes* [1891] AC 718 at p 722 Cave J said:

"Now malice, in its widest and vaguest sense, has been said to mean any wrong or indirect motive and malice can be proved, either by showing what the motive was and that it was wrong, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor."

The motive for the prosecution of the plaintiff is revealed by the defendant's

MALABA J

own evidence and conduct. He said he felt humiliated and embarrassed by the question asked by plaintiff. In his interpretation, the question implied that he did not know the provisions of the Prisons Act. As he was aware that there was no court of law, the repute, dignity and authority of which he needed to protect, the prosecution was instigated in order to avenge the personal humiliation and embarrassment he said he felt.

It is clear that at the time the defendant decided to withdraw the charge he did not care whether the plaintiff was guilty of contempt of court. He felt satisfied that the criminal proceedings had achieved the purpose for which he had them instituted. He said he withdrew the charge because he felt that Mr Bande now showed him the respect he expected a prison officer to accord him. This suggests that, at the time he set the law in motion against Mr Bande, he was of the view that the latter had not accorded him due respect and wanted to punish him for that perceived transgression. That, in my view, was an improper motive for instigating the prosecution.

I turn now to assess the damages claimed by Mr Bande. The charge of contempt of court made against the plaintiff was a pure delict committed under the colour of judicial authority. It is stated in Joubert *The Law of South Africa* Vol 15 para 617 that:

"The successful plaintiff in an action for malicious prosecution is entitled to damages for both injury to personality and pecuniary loss suffered. The former are awarded as a *solatium* under the *actio iniuriarum* while the latter constitute compensation under the *actio legis Aquilia.*"

The damages claimed here are for the infringement of personality rights in unimpaired reputation and dignity. The charge of contempt of court was scandalous of the plaintiff's fair name as a prison officer. Without any reasonable cause he was accused of being disrespectful of the very institution the orders of which it was his duty as prison officer to enforce.

The criminal proceedings affected his chances of early promotion. He said the promotion to grade 1 prison officer was delayed until after he was acquitted of the charge. The charge hung over his head for eight months, during which period he suffered anxiety over the damage it was

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causing to his reputation.

Mr Bande said he felt humiliated and embarrassed when on three occasions he was made to stand in the dock used by the prisoners he guarded. His dignity was violated when he was publicly subjected to degrading treatment and exposed to disesteem. He also suffered the indignity of having to give a warned and cautioned statement to the police in the reception office of his own prison in the presence of prisoners and other prison officers.

I am, however, of the view that $20000 damages would, in the circumstances, be excessive compensation for the injury the plaintiff suffered.

MALABA J

The figure does not sufficiently take into account the fact that the institution of the criminal proceedings was not accompanied by a serious denial to Mr Bande of rights to personal liberty. He was not, for example, arrested and detained. In *Nheta* v *Fernades* HB-29-94 two policemen who had been charged with extortion were awarded $10000 damages for malicious prosecution. They had been arrested before being charged.

The figure of $20000 damages claimed by the plaintiff does not also take into account the withdrawal of the charge by Mr Muchinguri. The prosecution was, of course, without reasonable and probable cause, but cases of people being convicted and sentenced for crimes they never committed are not unknown. The case of *Ochse* v *King William's Town Municipality* 1990 (2) SA 855 (E), cited by Mr *Stirling* in argument, is a good example. The plaintiff in that case was initially convicted and sentenced for malicious injury to property. On appeal, the conviction and sentence were set aside. Awarding R7500 damages for malicious prosecution to the plaintiff, van Rensberg J said at p 860G-H:

"What is more, the plaintiff was subsequently maliciously subjected to the embarrassment of a criminal trial on a charge of malicious damage to property which was followed by the indignity and humiliation of a conviction and being sentenced for a crime in respect of which he should never have been charged. Thereafter, the plaintiff had the further anxiety of having to take the matter on appeal in order to have the conviction and sentence set aside."

The withdrawal of the charge by the defendant saved the plaintiff the further indignity, humiliation and anxiety epitomised by the circumstances of *Ochse's* case *supra.* An amount of $7000, would in my view, provide an adequate award for the injury suffered by the plaintiff to his reputation and dignity.

Judgment is granted to the plaintiff and it is ordered that the defendant shall pay to the plaintiff the sum of $7000 with interest thereon at the prescribed rate from the date of service of summons until the date of final payment. The defendant is to pay the costs of suit.

Coghlan & Welsh, plaintiff's legal practitioners

Webb, Low & Barry, defendant's legal practitioners

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SILVER'S TRUCKS (PVT) LTD & ANOR *v* DIRECTOR OF CUSTOMS AND EXCISE 1999 (1) ZLR 490 (HC)

Citation	1999 (1) ZLR 490 (HC)
Case No	Judgment No. HH-98-99
Court	High Court, Harare
Judge	Smith J
Heard	May 20, 1999
Judgment	June 9, 1999
Annotations	None

Civil application

Flynote

Practice and procedure - affidavit - opposing affidavit from respondent - additional affidavit filed by respondent after applicant's answering affidavit filed - when additional affidavit can be introduced

Practice and procedure - application - urgent application - when may be made - may be made where urgency is of commercial nature

Headnote

The court has the power to hear an application as a matter of urgency not only where there is a serious threat to life or liberty but also where the urgency arises out of the need to protect commercial interests.

It is only in exceptional circumstances that the court will allow the filing of an additional affidavit. There must be an application for leave to file such an affidavit. The party applying for leave must provide a satisfactory explanation for the failure to put the information or facts before the court at an earlier stage and for the late filing of the affidavit. The explanation must be one that negatives bad faith or culpable failure to act timeously. The court must also be satisfied that no prejudice will be caused to the opposing party which cannot be remedied by an appropriate order as to costs. In the present case, a day after the applicants filed their answering affidavit and a few hours before the matter was heard, the respondent filed a so-called supporting affidavit. This affidavit was not admissible as there was no application for leave to file the additional affidavit and no explanation was offered as to why it was not filed with the respondent's opposing affidavit or why it was filed late.

Cases Considered

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Cases cited:

IL & B Marcow Caterers (Pty) Ltd v *Greatermans SA Ltd & Anor* 1981 (4) SA 108 (W)

Kasiyamhuru v *Min of Home Affairs & Ors* 1999 (1) SA 643 (W)

20th Century Fox Film Corp & Anor v *Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W)

Case Information

D Mhiribidi, for the applicants

Mrs *J Zindi*, for the respondent

Judgment

SMITH J: During 1997, the applicants imported goods without paying the duties that should have been paid. The representatives of the applicants held meetings with officials from the Department of Customs and Excise

SMITH J

(hereinafter referred to as "the Department") to discuss the matter. After the meetings it was agreed that the applicants would pay the respondent $2218396.70. The applicants could not pay that amount within 30 days as fixed by the respondent, so a further meeting was held on 22 June 1998 at which it was agreed that the applicants would pay the amount due at the rate of $100000 a month. The first instalment was paid on 22 June 1998. The second instalment was not paid. According to the applicants, that was because Mr Bosha, a customs official, refused to accept the cheque and said that the respondent had directed that no further payments were to be accepted from the applicants and that he would only accept payment of the full amount due. According to the respondent, the applicants neglected or refused to pay the second instalment and therefore breached the agreement that had been reached.

A memorandum dated 6 January 1999 was issued in the name of the respondent to collectors of customs at all border posts and entry points directing that all goods imported by the applicants were to be held "as lien" because the applicants owed in excess of $2 million in unpaid duties.

On 6 January, 19 February and 2 March, customs officials seized various engines and other motor vehicle accessories that had been imported by the applicants. The receipts issued to the applicants gave as the reason for the detention of the goods that they were being held "pending investigations". These goods (hereinafter referred to as "the first lot") are described in Annexures G, H, I, J and K to the founding affidavit.

In February the second applicant ordered some motor vehicle engines from a supplier in Germany. Whilst the goods were being shipped to Africa he sold them to a company in Durban. However the goods were transported to Zimbabwe instead of being delivered to the buyer in Durban. The second applicant applied for authority to export the goods to South Africa but the

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application was refused. It was advised that the goods were being held as a lien in terms of s 201 of the Customs and Excise Act [*Chapter 23:03*] (hereinafter referred to as "the Act") against payment of outstanding duty. These goods (hereinafter referred to as "the second lot") are described in Annexure 9 to the founding affidavit.

The applicants brought an urgent application to try to obtain the release of the goods which have been seized by the respondent. They point out that the respondent has held the goods for four months without doing anything or communicating with them. The applicants claim that the matter is one of urgency for the following reasons. If the goods are not released immediately, the applicants will be forced into liquidation. That would result in 67 employees losing their jobs. The goods were purchased using a bank overdraft facility which attracts interest at the rate of 45% *per annum*

SMITH J

compounded monthly and the overdraft could not be settled until the goods were released and sold.

The respondent denied that the matter was urgent, saying that the applicants had had several months to pay the duty which they do not deny is owing. As soon as the duty is paid, the goods can be released. In submitting that the matter was not urgent, Mrs *Zindi* referred the court to *I L & B Marcow Caterers (Pty) Ltd* v *Greatermans SA Ltd & Anor*; *Aroma Inn (Pty) Ltd* v *Hypermarket (Pty) Ltd & Anor* 1981 (4) SA 108 (W) and *20th Century Fox Film Corporation & Anor* v *Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W). In the former case, the court was swayed by some considerations that are not applicable in this country. At p 113-4, Fagan J said:

"Moreover, the fact that a litigant with a claim sounding in money may suffer serious financial consequences by having to wait his turn for the hearing of his claim does not entitle him to preferential treatment. On the other hand, where a person's personal safety or liberty is involved or where a young child is likely to suffer physical or psychological harm, the court will be far more amenable to dispensing with the requirements of the Rules and disposing of the matter with such expedition as the situation warrants. The reason for this differential treatment is that the courts are there to serve the public and this service is likely to be seriously disrupted if considerations such as those advanced by the applicants in these two matters were allowed to dictate the priority they should receive on the roll. It is, in the nature of things, impossible for all matters to be dealt with as soon as they are ripe for hearing. Considerations of fairness require litigants to wait their turn for the hearing of their matters. To interpose at the top of the queue a matter which does not warrant such treatment automatically results in an additional delay in the hearing of others awaiting their turn, which is both prejudicial and unfair to them. The loss that applicants might suffer by not being afforded an immediate hearing is not the kind of loss that justifies the disruption of the roll and the resultant prejudice to other members of the litigating public."

Fortunately, in Harare at present the hearing of an application as a matter of urgency does not result in the hearing of ordinary opposed applications being delayed.

However, in the latter case, Goldstone J at p 586 said:

"The respondent's counsel submitted that there was no urgency in the absence of some serious threat to life or liberty and that the only urgency here was of a commercial nature. It was because of this factor that the applicants' attorney in fact decided to set the matter down on a Tuesday when the Chamber Court was in any event in session during the court recess to dispose of unopposed applications.

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In my opinion the urgency of commercial interests may justify the invocation of Uniform Rule of Court 6 (12) no less than any other interests. Each case must depend upon its own circumstances. For the purpose of deciding upon the urgency of this matter, I assumed, as I have to do, that the applicants' case was a good one and that the respondent was unlawfully infringing the applicants' copyright in the films in question."

Having regard to the probable consequences to the applicants and their employees of the application is not dealt with without, further delay, I consider that the certificate of urgency is justified.

SMITH J

The facts leading up to this application, which are not in dispute, are as I have set out above. The crux of this matter is the agreement between the applicants and the respondent as to the method of payment of the amount due to the respondent and the reason why it was not implemented. As I have said, the fact that there was an agreement that the applicants would pay $100000 a month is not in dispute. Nor is it disputed that the applicants paid the first instalment. The applicants allege that they tried to pay the second instalment a month later but Mr Bosha refused to accept the cheque and told the deponent to the founding affidavit that the respondent had directed that no further payments were to be accepted from the applicants. The respondent, in his opposing affidavit, said that the applicants refused or neglected to pay any instalments after the first. A day after the applicants filed their answering affidavit and a few hours before the matter was heard, a so-called supporting affidavit from Mr Bosha was filed. There was no application for leave to file the additional affidavit and there was no explanation why it was not filed with the respondent's opposing affidavit or why it was filed late. In *Kasiyamhuru* v *Minister of Home Affairs & Ors* 1999 (1) SA 643 (W) the court was faced with an attempt to remedy deficiencies in a party's submissions. Hoffman AJ ruled as follows at p 649-650:

"Remarkably, however, there is no explanation by either the first or second respondents for the failure to make these averments now sought to be introduced in the answer filed of record. Furthermore, there is no application for leave to file a fourth set of affidavits and no affidavit explaining the circumstances under which that leave is sought. Mr *Marcus* objected to the attempt to persuade me to receive the further affidavits and has argued that I should not do so. He points out that it is not a matter of right for the respondents to hand further affidavits to me and that they seek an indulgence. They have laid no basis, he argues, for this indulgence being granted. I was referred to the well-established principle that in motion proceedings there are normally three sets of affidavits. It is only in exceptional circumstances that a fourth set will be received. Mr *Marcus* in particular referred me to the well-known case of *Transvaal Racing Club* v *Jockey Club of South Africa* 1958 (3) SA 599 (W) where Williamson J, as he then was, said at 604A-E:

> 'It was contended in argument that I really had no discretion on the question of the admission of these further affidavits because authority had decided that a further set of affidavits can only be admitted, firstly, if they are necessary to answer new matter raised in the applicant's affidavits, or, secondly, if the information or evidence was not available to the respondent when the first set of affidavits were filed. No new matter was raised in the answering affidavits of the applicant nor was it sought to answer only alleged new matter. Secondly, it was contended, the information or evidence was at all times available to the respondent in its records. The fact that it was not present to the minds of or known to the officials presently dealing with the matter, did not constitute a compliance with the second or alternative requirement to be satisfied before fresh affidavits could be filed. In my view the authorities do not restrict the discretion of the court in that manner suggested. I think that if there is an explanation which negatives *mala fides* or culpable remissness as the cause of the facts or information not being

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put

SMITH J

> before the court at an earlier stage, the court should incline towards allowing the affidavits to be filed. As in the analogous cases of the late amendment of pleadings or the leading of further evidence in a trial, the court tends to that course which will allow a party to put his full case before the court. But there must be a proper and satisfactory explanation as to why it was not done earlier, and, what is also important, the court must be satisfied that no prejudice is caused to the opposite party which cannot be remedied by an appropriate order as to costs.'

I can only echo and reiterate those sentiments. They are of equal application in this case. As I have said, there was not a tittle of evidence before me as to why the information now sought to be introduced was not put into the answering affidavits. It clearly was at all times available to the respondents.

In the circumstances, there is no basis upon which I am prepared to consider receiving the further affidavits and I decline to do so. That is really the end of the matter."

Similar principles apply in this case. Accordingly the supporting affidavit is not admissible and must be disregarded. The court is therefore left with evidence from the applicants that they tried to pay the second instalment in terms of the agreement that had been reached but it was refused by Mr Bosha. That allegation is not denied by Mr Bosha or by the respondent. The respondent, as I have said, merely responded that the applicants refused or neglected to pay the second instalment. In the circumstances, I must find that the applicants attempted to fulfil their part of the agreement but were unable to do so because Bosha refused to accept payment.

The applicants filed a memorandum allegedly issued by the respondent directing collectors of customs at entry points to hold as "lien" for the unpaid duties owed by the applicants all goods imported by the applicants. The respondent denied that he had issued the memorandum but admitted that he had issued a directive in terms of s 201 of the Act to the effect that all future imports by the applicants must be detained as a lien for unrecovered duty. The applicants claim that goods in the first lot were properly cleared but that they have been held in terms of the respondent's directive as a "lien" for the unpaid duties covered by the agreement that had been reached between the parties. The respondent denies that the goods are being held under the "lien". He says that according to the departmental records the goods had not been lawfully imported in that the applicants had not produced satisfactory proof of clearance. He referred to an affidavit by Mr Sibanda in support of his claim. Mr Sibanda starts his affidavit by saying "the engines referred to in Annexure F have nothing to do with a lien". The Annexure "F" referred to does not mention any engines. It is the alleged memorandum from the respondent ordering the collectors of customs to seize and hold all goods imported by the applicants. The goods concerned were seized, according to the receipts that were issued, on 11 January, 19 February, 2 March and 9 March, and the reason given in each case for their detention was "pending investigation". According to Mr Sibanda, the customs investigators had to go to Beitbridge

SMITH J

and check certain files and documents. That exercise was completed on 4 May and seizure was issued the following day. It seems incredible that it would take, in the case of the goods

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detained on 11 January, almost 4 months to complete the investigations. In his affidavit, Mr Sibanda said that at the end of the exercise conducted by the customs investigators it was discovered that the documents submitted by the applicants did not refer to the detained goods. Therefore the documents were seized because the applicants failed to produce proof that the goods found in their possession had been properly cleared. Some of the goods were not found in the applicants' possession; they were found on the premises of a client and embargoed. Mr Sibanda does not say that he was part of the investigating team and he did not attach to his affidavit any report from any member of the investigating team. He merely states that at the end of the exercise it was discovered that the documents submitted did not refer to the detained goods. He does not state that this finding was made known to the applicants for their comments. Accordingly, the submissions by Mr Sibanda in this regard must be treated as hearsay.

The affidavit by Mr Sibanda has been drawn up very carelessly. In their founding affidavit, the applicants deal in paras 16 to 19 with the goods that were in lot 1 thereof; para 19 deals with the goods seized on 8 March. In the supporting affidavit Mr Sibanda purports to deal with paras 16 to l8. Therefore the goods referred to in para 19 are not dealt with in his affidavit.

The respondent, as mentioned earlier, claims that the goods in lot l and lot 2 were not seized in terms of s 201 of the Act; they were seized because they had not been cleared through customs. However, in a letter dated 5 May, 1999 addressed to the applicants' lawyers, a Mr Masilela, writing on behalf of the respondent, said that the applicants owed the Department a specified amount in unpaid duty and, in terms of s 201 of the Act, the Department had a legal right to detain and "hold as lien" any goods imported by the applicants. He went on to say "so far we have detained a number of consignments and will still detain more. These will not be released and will be disposed of to recover the duty due to the State". He added that if the applicants wished to get the goods released, they must pay the outstanding duty. There was no allegation that the goods concerned had not been properly cleared.

The receipt that was issued for the goods in lot 2 that were seized indicated as the reason for detention that the goods were held as a lien in terms of s 201 of the Act against payment of outstanding duty. The respondent does not try to explain the discrepancy.

Finally, I would refer to the supporting affidavit by Mr Mutandiro. He says that he is a customs officer who was investigating the case. He confirms that there was an agreement in terms of which the applicants were due to pay $100000 a month and he says that Mr MacMillan, a director of both

applicants, neglected to pay any instalment after the first and so, in view of the breach of the contract, the Department had to invoke s 201 of the Act and began to detain the applicants' imports.

It is clear, from the foregoing, that there was a contract between the parties and that the goods in lot l and lot 2 were seized in terms of s 201 of the Act. They were not seized because they

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had not been properly cleared. The applicants allege that they want to comply with the terms of the contract between the parties but could not do so because Mr Bosha refused to accept the second instalment. That allegation is not denied or refuted on the papers properly before the court.

I have commented on the shortcomings in the affidavit filed by Mr Sibanda. The late filing of the so-called supporting affidavit by Mr Bosha without any explanation for its late filing and with no application for condonation is inexplicable and was fatal to the respondent's case. Mr *Mhiribidi* has also submitted that the supporting affidavits of Mr Sibanda and Mr Mutandiro should be disregarded because the deponents do not allege that the matters to which they depose are, to the best of their knowledge and belief, true and correct. The failure on the part of the deponents to make such an averment, together with the other shortcomings in the respondent's papers, show a casual and slapdash attitude towards the preparation of their papers which is to be deprecated. I was tempted to concur with Mr *Mhiribidi*'s argument and to reject the affidavits in question but decided that that would be to adopt too formalistic an approach.

Accordingly, I consider that the applicants are entitled to the order they are seeking.

It is ordered that:

1. The agreement between the applicants and the respondent to the effect that the applicants shall pay to the respondent the $2218396.70 which is owed in respect of duty and penalties in monthly instalments of $100000, shall continue in force subject to the following modifications:

   (a) the first instalment of $100000 having been paid, the next instalment shall become due and payable on the last day of June 1999;

   (b) each subsequent instalment shall become due and payable on the last day of each month after June;

2. In the case of the goods detained by the respondent which are described in receipts No. 319839, 319834, 319835, 099830 and 311076 or embargoed in terms of the notice set out in Annexure I to the founding affidavit, the respondent shall, within 7 days of the date of this order, assess the duty and any penalty or fine that may be payable in respect of the goods and invite the applicants to pay the amount due.

3. If -

   (a) the respondent fails to comply with para 2 hereof; or

   (b) the applicants pay the amount assessed in terms of para 2 hereof within 14 days of being invited to do so; or

   (c) no duty or penalty is payable;

   the goods shall be released or the embargo uplifted, as the case may be.

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4. The respondent shall pay the applicants' costs.

Mhiribidi, Ngorava & Moyo, applicants' legal practitioners

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

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S *v* LIKWENGA & ORS 1999 (1) ZLR 498 (HC)

Citation	1999 (1) ZLR 498 (HC)
Case No	Judgment No. HH-97-99
Court	High Court, Harare
Judge	Bartlett J
Heard	June 9, 1999
Judgment	June 9, 1999
Annotations	None

Criminal review

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(2) - right to fair hearing within a reasonable time - application to trial which has started - trial stopping because of retirement of magistrate - lengthy delay between retirement and attempt by State to revive case - effect on constitutional right

Court - judicial officer - magistrate - resignation of - effect on uncompleted criminal proceedings - proceedings a nullity and can be commenced afresh without order from High Court

Criminal procedure - trial - trial uncompleted due to resignation or retirement of magistrate - no need to refer matter to High Court to order trial de novo

Headnote

Due to gross administrative inefficiencies at the magistrates court, the records in a number of cases were mislaid while the trials were still in progress and after evidence had been led but before judgment had been handed down. In each case, there had been a remand to a specific date for continuation of the trial, but no indication of whether the accused persons appeared on that date or of anything happening or being done. Before the records were found again, the magistrates concerned had left the service. There were lengthy delays, in one instance of nearly 5 years, between the time the records went missing and the time the prosecutor located them and attempted to have the accused prosecuted again. The cases were referred by the provincial

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magistrate to the High Court for an order remitting them for trial *de novo*.

Held, that there was no need to approach the High Court. Although the magistrates had acted irresponsibly in not completing the cases before they resigned, the fact of resignation made the cases abortive. The proceedings became a nullity, and could be commenced afresh without obtaining an order from the High Court.

Held, further, that because of the long delays, the question arose of whether there had been an infringement of the constitutional right to trial within a reasonable time. The purposes behind the constitutional guarantee applied as much to delays in the handing down of judgment and the passing of sentence as it did to delays before the trial began. Because the accused were all unrepresented, they were entitled to rely on the magistrate for the protection of their constitutional rights. The failure by the accused to assert their right to an early trial could not be held against them. Accordingly, they should, if the Attorney-

General decided to proceed afresh, be advised by the trial magistrate of their constitutional rights. If the accused asked for the matter to be referred to the Supreme Court, the magistrate should deal with the matter in accordance with the requirements laid down by the Supreme Court in dealing with such applications.

Cases Considered

Cases cited:

Magubane v *van der Merwe NO* 1969 (2) SA 417 (N)

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

S v *Banga* 1995 (2) ZLR 297 (S)

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

S v *de Koker* 1978 (1) SA 659 (O)

S v *Gwala* 1969 (2) SA 227 (N)

S v *Kusangaya* 1998 (2) ZLR 10 (H)

S v *Mavharamu* 1998 (2) ZLR 341 (H)

S v *Musindo* 1997 (1) ZLR 395 (H)

S v *Musvitisu & Anor* S-229-93

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

S v *Tsangaizi* 1997 (2) ZLR 247 (H)

Statutes Considered

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Legislation considered:

Constitution of Zimbabwe 1980, s 18(2)

Judgment

BARTLETT J: I am concerned in this matter with three uncompleted trials.

Nyumas Likwenga appeared before the magistrate Harare on 11 January 1994, charged with housebreaking with intent to commit some crime to the prosecutor unknown. He pleaded not guilty. The trial proceeded. The State called three witnesses and Nyumas Likwenga gave evidence in his defence. The matter was then remanded from 18 February 1994 to 21 February 1994, presumably for judgment. But nothing according to the court record cover happened on 21 February 1994. Though something surely must have. There is no indication that Nyumas Likwenga decided he did not wish to hear the magistrate's judgment and absented himself from the proceedings - for there is no record of a warrant of arrest being issued that day or indeed on any subsequent day. There is also no indication that the magistrate decided that the question as to whether Nyumas Likwenga broke into a house with intent to commit some crime to the prosecutor unknown was of such complexity as to require further deliberation before the passing of judgment - for there is no record of any further remand.

It would seem that the matter between the State and Nyumas Likwenga went into a state of limbo on 21 February 1994. And there it might have remained for eternity filed in some forgotten recess of the office of the clerk of the criminal court. But almost five years later, somebody in the prosecutor's office finally noticed that the matter remained uncompleted.

1999 (1) ZLR p500

BARTLETT J

The magistrate concerned had long since resigned and left the bench. So, in a letter of 9 November 1998, the public prosecutor wrote to the Provincial Magistrate asking that the proceedings be set aside and a trial *de novo* ordered. The Provincial Magistrate, having done nothing for five years concerning the uncompleted trial, now acted with surprising alacrity. He wrote to the Registrar of the High Court on 9 December 1998, requesting that a trial *de novo* be ordered. He, however, sought to proffer no explanation as to how the record checking system one would expect to be in place in his office, had failed to discover the uncompleted trial. Similarly, the thought of endeavouring to explain why the magistrate concerned had resigned and left before completing his part heard cases, apparently did not occur to him. The further questions of whether a trial *de novo* was desirable, appropriate or necessary, seem also to have been the furthest thoughts from the Provincial Magistrate's mind. I accordingly wrote to him on 17 December 1998, asking all these necessary, elementary and embarrassing questions. I received a vague and unhelpful response on 4 January 1999. I responded on 17 January 1999 requiring a proper response. But none was forthcoming. It would seem that the Provincial Magistrate had been transferred and that the court record and my original query had been lost! Such a state of affairs, though hardly surprising, given the history of the matter, could only politely be described as unfortunate. That which was lost has, however, finally been found again and returned for my attention.

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The other two matters before me betray a similar history. Nedwell Mudzimba appeared before the magistrate Harare on 25 April 1996, charged with indecent assault. He pleaded not guilty. Several State witnesses gave evidence and the matter was remanded ultimately to 4 July 1996. On that day, there is no record of what happened. There is no indication the accused did not appear and that a warrant of arrest was issued and no indication that there was a further remand. Nothing then happened for almost $2^{1}/_{2}$ years until, on 9 November 1998, the public prosecutor, by the same letter as in the previous matter, wrote to the magistrate asking that a trial *de novo* be ordered. The magistrate in question had also long since resigned. In the third matter, the accused, rejoicing in the name Djordjevic Slavoljub, appeared before the magistrate Harare on 22 January 1997 charged with driving without due care and attention. All the evidence was led and the matter remanded to 18 February 1997 for judgment. Whether the case was forgotten because of difficulty in remembering the accused's name is not clear. But according to the record, nothing happened on 18 February 1997. There was no further remand and no warrant of arrest. Once again, the record was apparently relegated to some seldom visited recess of the clerk of court's office. And it was again not until the public prosecutor's letter of 9 November 1998 that it

emerged once more into the light of day. By which time, the magistrate had long since resigned and left the bench.

There are a number of issues which arise for consideration from these unfortunate stories of incompetence and inefficiency in the prosecutor's and magistrates' offices.

The first is whether it is necessary to apply for proceedings to be set aside and for a trial *de novo* to be ordered when a matter is not completed because a magistrate has resigned.

Magistrates being irresponsible and resigning and departing the bench without completing part heard matters is regrettably not as uncommon an occurrence as it should be. Applications for a trial *de novo* in these circumstances are also not uncommon. But they are unnecessary.

In considering the position applicable to uncompleted proceedings when a magistrate resigns or retires in *S* v *de Koker* 1978 (1) SA 659, Flemming AJ stated as follows at 660H:

"According to the decisions of the courts the impossibility of continuing with the trial by reason of the unavailability of the magistrate's results, without more, in the proceedings being regarded as abortive and they fall away without it being necessary for a superior court to set them aside before a new trial can take place."

The legal position was clearly explained by Gillespie J in *S* v *Tsangaizi* 1997 (2) ZLR 247 at 249E-F as follows:

"The principle is that if during the course of proceedings a judicial officer ceases to have jurisdiction then the proceedings up to that point are abortive. In such an event, the person on trial cannot demand a verdict since the presiding officer is incapable of bestowing one. The part-heard matter is accordingly a nullity and may be commenced afresh. Without any order of a higher court setting aside the incomplete proceedings."

See also *S* v *Gwala* 1969 (2) SA 227(A) at 229, *Magubane* v *van der Merwe NO* 1969 (2) SA

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417 at 419B-C and Reid Rowland *Criminal Procedure in Zimbabwe* p 28-6.

There was accordingly no need for the Provincial Magistrate to approach the High Court to sanction a trial *de novo*. Such a trial can take place without the High Court so ordering. The magistrate became *functus officio* on the date he left the bench, and the proceedings abortive and a nullity.

But the matter does not end there. What of the right of the accuseds in terms of s 18(2) of the Constitution of Zimbabwe to "a fair hearing within a reasonable time"?

This right relates not only to delays prior to the commencement of a trial but also to delays in the handing down of judgment and sentence - see the approach of Gillespie J in *S* v *Chakwinya* 1997 (1) ZLR 109, where there was a delay of three years between the accused being convicted in the magistrate's court and transferred to the High Court for sentence.

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The purposes behind the constitutional guarantee are described by Gubbay CJ in In re *Mlambo* 1991 (2) ZLR 339 (S) at 344B-H, and apply, in my view, also to delays in handing down judgment and passing sentence.

Ordinarily, it is the accused who makes the application regarding his right to a fair hearing within a reasonable time. That is what is envisaged by s 24 of the Constitution. But almost all the accused persons appearing before the magistrates court in criminal matters are unrepresented. Most of them probably do not know that there is a Constitution of Zimbabwe, let alone what rights they are given by ss 18 and 24 of that Constitution. Such accused persons - and I emphasise they constitute the overwhelming majority of persons appearing before the criminal courts - rely on the magistrate for the protection of their rights. In this regard, I can do no better than to quote Gillespie J in *S* v *Tau* 1997 (1) ZLR 93 (H) at 99H-100A where the learned judge stated:

"The vast majority of criminal prosecutions are against unrepresented persons. The magistrate is the primary bulwark defending the ignorant or impoverished against the potential injustices wrought through an excess of zeal; pressure of work; administrative inefficiency or plain ineptitude in the investigation and prosecution of offences. Thankfully, most magistrates appear to be equal to this task; were they not, a judge's responsibilities on review would be unbearably burdensome. A major part of the magistrate's task has always been to refuse further remand where such is insupportable; to discharge for want of prosecution where this is indicated. He ought not need to be asked to do this, but should where necessary intervene *mero motu* on behalf of an unrepresented accused."

I would also refer to Gillespie J's further observations in *S* v *Mavharamu* 1998 (2) ZLR 341 (H) at 347C-F:

"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 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

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demanding view can be taken of a duty to assert one's own rights. As I have elsewhere suggested, 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."

Accordingly, the approach which should be adopted in the magistrates court in respect of these three uncompleted trials is as follows.

The Provincial Magistrate is to request that the dockets, together with a

copy of this judgment, be referred to the Attorney-General for the Attorney-General, to decide whether to commence proceedings afresh against any of the accused persons.

Should the Attorney-General decide to commence fresh proceedings against all or any of the accuseds, they should be summoned - and I emphasise that the procedure should be by summons - to appear on the charges as originally preferred. When the accused appear they should be informed that it is the State's intention to proceed on the matters afresh in view of the departure of the original magistrates. The accused should then be informed of their right to apply for a stay of proceedings under the umbrella of s 24 of the Constitution on the basis of a breach of their right to a fair hearing in a reasonable time. The magistrate should make sure that the explanation is fully and clearly made and that it is understood by the accused persons - see *S* v *Musindo* 1997 (1) ZLR 395 at 398H-400D.

Should the accused persons wish to make the appropriate application it is up to the magistrate in each case to follow the requirements laid down by the Supreme Court in dealing with such applications - see *S* v *Banga* 1995 (2) ZLR 297 at 301F-G and 302A-C.

This will require the accused persons to give evidence as the extent (if any) of their responsibility for the delay, as to whether they attended at any time to assert their right to ensure completion of their trials, and in regard to any prejudice they may have suffered as a result of the delay. It will also require the State to properly investigate the cause of the delay in these matters and to lead evidence in that regard if necessary.

The magistrates dealing with the accused's applications will then need to refer them to the Supreme Court in terms of s 24(2) of the Constitution unless they decide that the applications are frivolous and vexatious. Should the applications be referred to the Supreme Court, the magistrates should consider granting the accused legal assistance in terms of s 3 of the Legal Assistance and Representation Act [*Chapter 9:13*].

Before concluding, I would like to make certain observations. These are intended to assist the magistrates and not in any way to interfere with their discretion when they consider any

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application that the accuseds may make. From the explanations so far provided by the State in response to my queries, it would seem that the reason for the delay in each case is apparently the gross administrative inefficiency of the State machinery - within the offices of the public prosecutor and Provincial Magistrate.

In respect of all three matters, the accused were remanded to specific days but there is no record of what happened on those days. If the accused persons were in default, warrants of arrest should have been issued. If the matters could not be completed and the accused were present, they should have been

further remanded. Either way the court record cover should have recorded what happened. If there was an administrative error the record keeping and checking systems of both the clerk of the court and the public prosecutor should have discovered the error within days - or within a month at the outside. The clerk of court's criminal record book should have shown the cases not being further remanded but not being completed. The prosecutor's docket should have shown the same. Remedial measures should have been put into effect within several months, at the most, to summon the accused persons back to court for the completion of their trials. As it is nothing happened for between 21 and 57 months.

The one saving grace is that the public prosecutor's office finally noticed in November 1998 that the matters had not been completed and commenced remedial action. Regrettably, the Provincial Magistrate's office had shown no sign of being aware or of ever being likely to become aware of the gross failure in its checking system. The Provincial Magistrate's reply to my original query in regard to these matters was:

"The magistrate did not know there were such cases. We only became aware of them when written to by Prosecutors on 9 November 1998."

That reply is a sad indictment of the record keeping system in the office of the Provincial Magistrate, Harare. There is, however, some room of hope for improvement. The Provincial Magistrate now in charge has responded to my further queries as follows:

"I assumed this office in November 1998. There was definitely a backlog in court record book checking ... However, as of now we are carrying out regular and effective checking in order to pick out such anomalies."

I would simply say that thorough and regular court record book checks are fundamental to the efficient operation of any magistrates court. It is the responsibility of the Chief Magistrate to ensure that such checking systems are in place and properly supervised at all magistrates courts. Similarly, the Attorney-General needs to ensure that completed docket checks are properly in place at all prosecutors' offices. The existence of the two complementary checking systems should prevent the gross administrative failures apparent in these matters from recurring.

A further disconcerting aspect of this matter is that the magistrates concerned resigned without completing their part heard matters. That is irresponsible. A magistrate should carefully ensure that all part heard matters are completed before his last day of service. If that is not possible

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then he should inform the Provincial Magistrate of matters which are outstanding so that arrangements can be made for them to be completed. There is regrettably no indication from these matters that the magistrates concerned even knew about these matters - let alone cared about them. It is important that the

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Chief Magistrate imposes a strict and carefully controlled régime to ensure that departing magistrates fulfil their duties of employment before they leave.

A final observation I would make may be of assistance to the magistrates if they feel the need to apply their minds to the question of whether the accuseds asserted their rights, in deciding whether any such applications are frivolous and vexatious. I would refer to the comments of Gillespie J in *S* v *Mavharamu supra* at 345E-G, in reference to an accused the State had failed to remand:

"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 ... 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 .... 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 ..."

I would also point out that the delays in Nyumas Likwenga's and Nedwell Mudzimba's matters would apparently clearly be long enough to trigger the enquiry into whether an individual's human rights have been infringed - while that in the case of Djordjevic Slavoljub may fall short of the necessary delay (see, for example*, S* v *Musvitisu & Anor* S-229-93).

All three matters are referred back to the Provincial Magistrate, Harare, who is to ensure that the procedure I have suggested is given effect to - hopefully without any delay.

I hope that one result of this judgment will be that checking systems in Provincial Magistrate's and public prosecutor's offices will be properly administered. The copies of this judgment will be forwarded to the Chief Magistrate and the Attorney-General, with the request that this aspect be investigated. Should, however, the failing that occurred in these cases occur in other cases, then Provincial Magistrates must ensure that a similar procedure is adopted. That is, they must not simply recommence the trials *de novo*. They must ensure that the accused persons affected by the delay are advised of their rights under ss 18 and 24 of the Constitution - and the necessary applications referred to the Supreme Court if appropriate. See *S* v *Musindo supra* and *S* v *Raphael Kusangaya* 1998 (2) ZLR 10 (H).

Chatikobo J agrees.

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LEWIS *v* MUSHANGI & ANOR 1999 (1) ZLR 506 (HC)

Citation	1999 (1) ZLR 506 (HC)
Case No	Judgment No. HB-41-99
Court	High Court, Bulawayo
Judge	Malaba J
Heard	February 11, 1999; February 12, 1999
Judgment	June 10, 1999
Annotations	None

Civil action

Flynote

Practice and procedure - pleadings - failure to plead matter - claim for negligence arising out of motor accident - defendant's plea completely denying negligence and alleging that accident due to plaintiff's negligence - whether court entitled at trial to consider question of contributory negligence

Damages - apportionment - allegation that damage partly caused by fault of plaintiff - meaning - negligent act or omission of plaintiff must contributed causally to damage suffered

Delict - negligence - sudden emergency - duties of driver - car ahead stopping suddenly for no apparent reason

Headnote

The plaintiff sued the defendant for damages arising out of a motor accident. The defendant's vehicle had suddenly stopped in front of the plaintiff's, for no apparent reason. The defendant did not plead contributory negligence on the part of the plaintiff but based his defence on a complete denial that he was negligent and alleged that the accident was due solely to the negligence of the plaintiff. However, during the hearing the defendants' legal practitioner submitted that on the basis of the plaintiff's version of the facts the court should find that the plaintiff was guilty of contributory negligence and that, acting in terms of s 4(1) of the Damages (Apportionment and Assessment) Act [*Chapter 8:06*], the court should reduce the damages awarded to the plaintiff. In terms of s 4(1) of the Damages (Apportionment and Assessment) Act where the court finds that the damage partly by the plaintiff's fault and partly by the defendant's fault it must reduce the damages awarded to the plaintiff if the fault of the plaintiff and defendant contributed to the damage.

Held, that s 4(1) of the Act only applies where the fault that is the negligent act or omission of the plaintiff has causally contributed to the damage he has suffered.

Held, further, that the general rule is that the alternative defence of contributory negligence must be pleaded and the appropriate relief of an apportionment of damages must be claimed in the

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plea. The court is enjoined to reduce the damages to the plaintiff in terms of s 4(1) of the Act only if all the material relevant to proof of contributory negligence has been fully investigated or canvassed in the trial. However, if the evidence adduced during the trial shows that the damage was not caused solely by the plaintiff's fault or was due partly by the plaintiff's fault and party by the defendant's fault, the court must apportion the damages

in terms of s 4(1) of the Act, even though the defendant has not pleaded this defence in the alternative.

Held, further, that on the facts of the present case there had been no contributory negligence on the part of the plaintiff. The plaintiff had been faced by a sudden emergency due to the first defendant's negligence and he did all that a reasonable driver would have done in the circumstances. He was not at fault in failing to prevent the collision between his vehicle and the police car.

Cases Considered

Cases cited:

AA Mutual Ins Assn Ltd v *Nomeka* 1976 (3) SA 45 (A)

Mugari v *Machiri* 1987 (1) ZLR 164 (S)

S v *Mauwa* 1990 (1) ZLR 235 (S)

South British Ins Co Ltd v *Smit* 1962 (3) SA 826 (A)

Statutes Considered

Legislation considered:

Damages (Apportionment and Assessment) Act [*Chapter 8:06*], s 4(1)

Case Information

J James, for the plaintiff

P Ncube, for the defendants

Judgment

MALABA J: The plaintiff is claiming from the defendants jointly and severally payment of $94871.25 damages to his Mercedes Benz motor vehicle registration number 586-327L which it sustained on 23 February 1996 when it collided with a Santana car registration number 6825 belonging to the Ministry of Home Affairs and driven by the first defendant in the course and scope of his employment. The declaration alleges that the collision was caused exclusively by the negligence of the first defendant who was negligent in that:

" (a) the first defendant failed to give way to the plaintiff's motor vehicle which was on the main road.

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(b) the first defendant acted unreasonably in the circumstances by stopping in front of the plaintiff's car."

The defendants denied that the collision was caused by the first defendant's negligence. They alleged that the collision was caused solely by the negligence of the plaintiff who was negligent in that:

" (a) He did not keep a proper look out in the circumstances.

(b) He was travelling at an excessive speed in the circumstances.

(c) He did not act reasonably when the collision seemed imminent.

(d) He rammed into the back of the defendant's motor vehicle when it was part of the flow of traffic."

The *quantum* of damages is agreed upon by the parties. The question of liability only remains to be determined.

[*His Lordship considered the facts and continued:*]

Mr *Ncube* submitted that I should find on plaintiff's version of facts that

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he was guilty of contributory negligence and reduce the damages awarded to him in terms of s 4(1) of the Damages (Apportionment and Assessment) Act [*Chapter 8:06*] ("the Act").

Section 4(1) of the Act provides that if a court finds that damage suffered by the plaintiff was caused partly by his own fault and partly by the fault of the defendant, it shall reduce the damages awarded in respect thereof to such extent as it may deem just and equitable having regard to the respective degrees of fault of the claimant (plaintiff) and the defendant, in so far as the fault of either of them contributed to the damage.

The defendants did not plead in the alternative the defence that, in the event of the court finding that the first defendant was negligent, it was their case that the plaintiff was also negligent and that this negligence contributed to the damage and that the amount of damages to be awarded to plaintiff must be reduced by the court in terms of s 4(1) of the Act to such extent as may to the court, seem just and equitable, having regard to the plaintiff's degree of negligence. The defendants alleged in their plea, however, that the collision was caused entirely by the negligence of the plaintiff.

The question raised by Mr *Ncube*'s submission is whether a defendant who does not plead contributory negligence on the part of the plaintiff but bases his defence of a complete denial, on facts which if proved entitle him to a dismissal of the action, can raise the issue of apportionment of damages to be awarded to the plaintiff on contributory negligence allegedly founded on the facts proved by the plaintiff which he had completely denied.

The answer to the question is that the decision of the court will depend upon the circumstances of each case. The general rule is that the alternative defence of contributory negligence must be pleaded and the appropriate relief of an apportionment of damages must be claimed in the

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plea.

In *Mugari* v *Machiri* 1987 (1) ZLR 164 (S), the plaintiff claimed $6000 damages from the defendant for personal injuries suffered by him in a traffic accident between his vehicle and a mechanical horse and trailer driven by the defendant. The defendant had joined the main road in which the plaintiff was travelling and turned left to travel in the opposite direction to the plaintiff.

The defendant conceded that in executing the turn, he had to swing his long vehicle wide and therefore, would have "overlapped into the right hand side lane". He did not say by how much.

The plaintiff alleged in evidence that the defendant swung out into his pathway so that he could not avoid colliding with the trailer being pulled by the mechanical horse. He did not say why he failed to slow down when he saw the vehicle slowly moving into a position which obstructed his path. The defendant was adamant, however, that he had already returned to his own

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side of the road when the plaintiff's vehicle passed his mechanical horse and struck the wheels of the trailer.

The plaintiff had not alleged in the pleading, as one of the particulars of negligence to be relied upon, that the defendant moved across the centre line of the road in which he was travelling and into the path of oncoming traffic when it was unsafe to do so. In the absence of that particular of negligence, it was very hard to think of any basis on which the defendant could be blamed for the plaintiff's misfortunes. The defendant, on the other hand, had not pleaded in the alternative that if he was negligent the plaintiff was also negligent and invited an apportionment of damages.

Dismissing an appeal against a decision of absolution from the instance by the trial court McNally JA at p 167B-C said:

"Indeed, the defendant's case was equally badly pleaded and he is fortunate that the plaintiff did not make out a *prima facie* case. Had he done so the defendant's failure to plead apportionment of damages ... might have cost him dear. It may not be fatal to fail to allege apportionment (see Cooper and Bamford *South African Motor Law* at pp 287-8) but it is certainly highly desirable that the defendant should, in the alternative, set out the grounds on which he alleges that the plaintiff was negligent and therefore contributed to the occurrence of the accident."

The use by the learned Judge of Appeal of the word "might" underscores the principle that the fate of the defendant's case will depend upon the circumstances peculiar to the case under consideration. The authorities show that where the defendant has not pleaded in the alternative contributory negligence on the part of the plaintiff and claimed apportionment of damages, the court is enjoined to reduce the damages awarded to the plaintiff in terms of s 4(1) of the Act only if all the material that would have been relevant to the proof of contributory negligence has been fully investigated or canvassed in the trial.

In *AA Mutual Insurance Association Ltd* v *Nomeka* 1976 (3) SA 45 (A), the plaintiff claimed damages for personal injuries sustained in a motor collision between a vehicle driven by the

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plaintiff and a motor vehicle insured by the defendant. In its plea, the defendant denied that the collision was due to any negligent driving on the part of the insured. It pleaded that the said collision was due solely to the negligent driving of the plaintiff and set out the particulars of that negligence.

The defendant did not plead in the alternative that, if the court found that the collision was not due solely to the plaintiff's fault but partly to his fault and partly to the fault of the insured, the damages suffered by the plaintiff should be reduced to such extent as the court deemed just and equitable having regard to the degree in which the plaintiff was at fault in relation to the damage.

Counsel for the plaintiff contended that the failure to plead, in the

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alternative, apportionment of damages precluded the defendant from relying on and debarred the court from applying the Apportionment of Damages Act in the event of the court holding that the plaintiff was partly at fault. Viljoen AJA dismissed the argument and said at pp 55D-56A:

"The weight of the decisions is, therefore, that provided the plaintiff's fault is put in issue, an apportionment need not be specifically pleaded or claimed. This is the correct view, in my opinion.

The Act has become part of our law of delict. It has supplanted the former all-or-nothing effect of the common law in this respect."

I agree, with respect, with O'Hagan J that upon a determination of issues properly raised in the pleadings the court must give judgment in accordance with the imperative direction of s 1 (our s 4(1)) of the Act.

In order to decide whether the issues have been properly raised in the present matter, it is necessary to have regard to the substantive law.

In *South British Insurance Co Ltd* v *Smit* 1962 (3) SA 826 (A) at p 835, Ogilvie Thompson JA interpreted the word "fault" in s 1 (our s 4(1)) as meaning negligence causally linked with the damage. The following *dictum* appears on the same and the following page:

"In all cases falling within para 1(a) (our s 4(1)), the damages recoverable by the claimant shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.

Although the paragraph thus refers only to the claimant, it, is, I think, plain from a consideration of the section as a whole that what the court has to measure is the conduct of all parties whose fault caused the damage. Postulating a single defendant, the determination of the 'degree in which the claimant was at fault in relation to the damage' will also automatically determine the degree in which the defendant was at fault in relation to the damage.

It follows from all the foregoing that, when the court reaches the stage of apportionment it is *ex hypothesi* dealing with 'fault' - that is to say, a negligent act or omission - which is causally linked with the damage in issue. In so far, therefore, as any view has hitherto been expressed that the question of causation has nothing whatever to do with the apportionment of damages, I find myself unable to agree with it.

Provided, therefore, it is clearly put in issue that the plaintiff was at fault, either completely or to a certain degree, the

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court has to apply the provisions of the Act. If the determination of the degree in which the plaintiff was at fault in relation to the damage will also automatically determine the degree in which the defendant was at fault in relation to the damage, I fail to see why it should be necessary specifically to plead and claim an apportionment. If the plaintiff has alleged causative negligence on the defendant's part or the driver of his/its vehicle and the defendant has responded by pleading causative negligence on the plaintiff's part, the court cannot consider the negligence of each separately and in isolation. One cannot disentangle the two. The one automatically involves the other and the court must necessarily apportion. What is pleaded must, of course, be followed up by an appropriate prayer. That, however, is a matter of pleading. But once the parties have embarked upon the adduction of evidence on the issue as to

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whether plaintiff was contributorily at fault, considerations relative to pleadings are relegated to the background."

By alleging in their plea that the collision was caused entirely by the negligence of the plaintiff, the defendants put in issue the "fault" of the plaintiff in relation to the damage. I agree with Mr *Ncube*, that, if the evidence adduced in the trial shows that the damage was not due solely to the plaintiff's fault or due solely to the first defendant's fault but due partly to the plaintiff's fault and partly to the fault of the first defendant, I must apportion the damages in terms of s 4(1) of the Act, notwithstanding the fact that contributory negligence on the part of the plaintiff was not pleaded in the alternative by the defendants. The submission by Mr *Ncube* clearly concedes that the facts found proved have established first defendant's negligence in the causation of the damages suffered by the plaintiff.

The question is whether the facts have also proved that the plaintiff was also partly to blame for the damages he suffered. The credible evidence in this case is that when the first defendant forced his way into the outer lane in front of his motor vehicle the plaintiff applied brakes and slowed down his motor vehicle to allow him to complete the dangerous manoeuvre. It is said that he should have then kept a proper look out for the first defendant's motor vehicle stopping suddenly in front of his car. It is said that he was contributorily negligent in that he failed to keep a proper look out and that he did not act reasonably when the collision seemed imminent.

I am not persuaded that the evidence established contributory negligence on the part of the plaintiff. He was entitled to expect that the police motor vehicle would settle into the outer lane in front of his car and continue driving on ahead of him. The first respondent gave no warning of his intention to stop. There was no reason for the plaintiff to anticipate that the motor vehicle ahead of him in a busy highway with no car immediately in front of it could suddenly stop when only a few seconds earlier its driver had shown all the signs of wanting to find space for himself in the outer lane and drive on.

There was nothing to suggest to the plaintiff that the driver of the police car could face a sudden emergency that might force him to stop his car suddenly. There was, in fact, no emergency that faced the driver of the police car. Mr *Ncube* did not deny that the plaintiff was faced with a state of emergency created for him by the first defendant. In my view, the plaintiff did all that a reasonable driver would have done in the circumstances. He was not at fault in failing to prevent the collision between his motor vehicle and the police car.

In *S* v *Mauwa* 1990 (1) ZLR 235 (S), the accused was driving an omnibus towards Zengeza along Chitungwiza Road. An army vehicle cut in front of the omnibus and suddenly stopped.

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The driver of the army vehicle had been ordered to pull off the road by a leading motor cycle escort for the Presidential

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motorcade approaching from the opposite direction. The appellant could not see the approaching motor cyclists because of the size of the military vehicle. He swung the omnibus to the right to avoid a collision with the rear of the army vehicle which had stopped abruptly in front of him. The omnibus collided with and killed the second motor cycle escort. The accused was charged with culpable homicide.

Holding that the accused was not culpable and acquitting him of the charge, Korsah JA said at p 241 A-B:

"In *Brandon* v *Osborne, Garrett & Co* [1924] 1 KB 584 at 552, Swift J expressed the view that if a person does something which a reasonable person in the circumstances ought not to have done, that person would not be entitled to damages, but if what that person did was done instinctively and was in the circumstances a natural and proper thing to do then she would be entitled to recover. I infer from this *dictum* that where a person or third party is placed in danger by the wrongful act of another, that person is not negligent if he exercised such care as may be reasonably expected of him in the reasonable apprehension of the danger in which he is so placed. He is not to blame if he does not do quite the right thing in the circumstances."

The learned Judge of Appeal held that by swerving to the right to avoid colliding with the rear of the military vehicle in the state of emergency the driver of that motor vehicle had placed him the accused acted as an ordinary and careful driver ought to have acted in such circumstances. He acted with the reasonable care and skill which any ordinary driver confronted with such a dilemma may employ.

Judgment is granted to the plaintiff. It is ordered that the defendants jointly and severally, one paying the other to be absolved, shall pay the plaintiff the sum of $94871.25 together with interest on that sum at the rate of 25% *per annum* from 23 February 1996 to the date of final payment. The defendants jointly and severally, one paying the other to be absolved, are to pay the costs of suit.

James, Moyo-Majwabu & Nyoni, plaintiff's legal practitioners

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

NHARI *v* PUBLIC SERVICE COMMISSION 1999 (1) ZLR 513 (SC)

Citation	1999 (1) ZLR 513 (SC)
Case No	Judgment No. S-71-99
Court	Supreme Court, Harare

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Judge	Gubbay CJ, Ebrahim JA, Muchechetere JA
Heard	May 31, 1999
Judgment	June 14, 1999
Annotations	None

Civil appeal

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(2) - s 18(9) - right to legal representation - public servant charged with disciplinary offence - in same position as a person charged with criminal offence - entitled to legal representation - refusal to grant postponement of disciplinary hearing - can amount to denial of right to representation

Headnote

The appellant, a senior public servant, was charged under the disciplinary regulations with various offences. The respondent commission directed that an enquiry be held for the purpose of making a finding on issues of fact relating to the alleged misconduct. The inquiry was to be held by a provincial magistrate. The appellant engaged a legal practitioner to represent him. Dates for the hearing of the inquiry were selected after consultation with the lawyer.

A few days before the hearing, the lawyer renounced agency, alleging a failure to deposit sufficient funds. The appellant consulted another lawyer, who was only able to see him on the morning the inquiry was due to begin. The lawyer was prepared to represent him, but said that the appellant should apply for a postponement. The magistrate refused to grant the postponement, saying that the appellant had already prepared his defence and that the non-appearance of a legal representative was due to the appellant's dilatoriness. The hearing started, but on the second day, the appellant withdrew from the inquiry. The magistrate continued the inquiry in his absence and found the allegations to be proved. The Public Service Commission decided to discharge the appellant from the public service.

An unsuccessful application was made to the High Court by the appellant to have the Commission's decision set aside. On appeal:

Held, that there was no factual basis for the finding by the High Court that the public servant had been dilatory in securing legal representation.

Held, further, that the appellant had an absolute right to procure legal representation. It was not a question of the magistrate having a discretion to permit it; his discretion hinged solely on the grant or refusal of the postponement sought. A refusal arising from the injudicious use of that discretion would constitute a denial of the right to legal representation.

Held, further, that every person who enjoys the fundamental right to be represented by a legal practitioner before a court should be accorded every opportunity of putting his case clearly and succinctly before that court. Almost invariably that function can only be performed properly when

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it is carried out by a person trained and experienced in the law. The absolute right to procure legal representation embraces the right to be afforded a reasonable

opportunity to obtain it. A refusal of that opportunity, where requested, would constitute a denial of the right to a fair hearing guaranteed by s 18(2) and (9) of the Constitution.

Held, further, that it would only be in exceptional circumstances that a court would be justified in refusing a postponement to a person who wished to engage a legal representative at his own request. In the circumstances of this case, the refusal to grant a postponement amounted to a denial of the right to legal representation.

Held, further, that where there has been a violation of a constitutional right, appropriate redress must be granted, whether or not prejudice is shown to have existed.

Cases Considered

Cases cited:

Madnitsky v *Rosenberg* 1949 (2) SA 392 (A)

Maynard v *Osmond* [1977] 1 All ER 64 (QBD)

Ndanozonke & Anor v *Nel NO & Anor* 1971 (3) SA 217 (E)

Nhari v *PSC* 1998 (1) ZLR 574 (H)

Powell v *Alabama* 287 US 45 (1927)

S v *Dangatye* 1994 (2) SACR 1 (A)

S v *Nqula* 1974 (1) SA 801 (E)

S v *Shabangu* 1976 (3) SA 555 (A)

S v *Solo* 1995 (5) BCLR 587 (E)

Wheeler & Ors v *A-G* 1998 (2) ZLR 305 (S)

Statutes Considered

Legislation considered:

Constitution of Zimbabwe 1980, s 18(2) and (9)

Case Information

H Zhou, for the appellant

Mrs *J Zindi*, for the respondent

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Judgment

GUBBAY CJ: Over eighteen years ago, the appellant entered the service of the Department of Immigration. He rose steadily through the ranks and during 1991 gained appointment as Deputy Chief Immigration Officer. However, in 1995 his promising career suffered a setback. In that year, he was suspected by the Chief Immigration Officer of having committed several acts of misconduct in the course of his duties.

On 10 January 1996, the appellant was relieved of his post as Deputy Chief Immigration Officer and transferred to National Archives upon the authorisation of the Secretary for Home Affairs. He was told that the move was necessary in order to facilitate further probing by the committee of investigations into the allegations of misconduct. These were that the appellant had:

(a) failed to obey lawful instructions by making unilateral decisions, instead of holding meetings with other members of the immigration control committee;

(b) engaged in the operation of an immigration consultancy business without permission to do so;

(c) facilitated the unlawful stay, and conduct of business in Zimbabwe, by certain foreign persons;

GUBBAY CJ

(d) issued instructions contrary to the decision of the Chief Immigration Officer; and

(e) misled a foreigner on his eligibility to acquire immovable property in Zimbabwe.

Six months later the appellant was informed in a letter dated 1 July 1996 that the respondent had directed, pursuant to s 7(1), as read with s 17, of the Public Service (Disciplinary) Regulations 1992 (SI 65 of 1992), that an inquiry was to be convened for the purpose of making a finding on issues of fact relating to his alleged misconduct, which thereafter would be referred to the Commission for determination. The inquiry was to be chaired by a provincial magistrate. The dates when and the venue where the inquiry was to be held were to be advised in due course.

The appellant engaged a legal practitioner to represent him at the pending inquiry. On 15 January 1997, a Miss M, who it was the appellant had consulted, indicated that 20 and 21 February 1997, the dates suggested for the hearing, were acceptable. As these days did not suit the availability of the member of the Public Service who had been assigned the task of presenting the evidence at the inquiry, others had to be found.

On 14 February 1997, the respondent wrote to inform the appellant that the inquiry had been set down for 3 to 6 March 1997. Attached to the letter was a copy of the twenty framed charges of misconduct the appellant was to face, together with the names of twelve persons it was proposed to call as witnesses - the list not to be taken as exhaustive. These papers were received by the appellant on 17 February 1997.

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The appellant responded in writing to the charges. In respect of each, wrongdoing was denied. He sought an opportunity to examine the documents pertaining to eight of the counts. This was afforded him on Thursday, 27 February 1997.

On that very day, Miss M wrote to the appellant indicating that since he had failed to deposit sufficient funds to cover the fees of counsel by 25 February 1997, she had renounced agency to represent him. The appellant had in fact paid an amount in excess of $3000.

The appellant was anxious to procure other legal representation. On the afternoon of Friday 28 February 1997, he went to the offices of the legal practitioner, Mr B; not having made an appointment, Mr B was unable to see him. The appellant returned early the following Monday morning before the hour the inquiry was due to commence, and revealed his predicament to Mr B. The latter told the appellant that he was prepared to represent him if he were able to obtain a postponement of the hearing. He said that due to pressing and heavy commitments he would only be available in about two months' time.

I should indicate that the affidavit deposed to by Mr B differed somewhat

from the appellant's version. His recollection, admittedly not absolutely certain, was that he spoke to the appellant on the Friday afternoon, and not on the Monday morning, and gave the advice recounted by the appellant. It seems to me more likely that the appellant is correct. Being intimately involved in the forthcoming inquiry he had a sounder basis for accurate recall than did Mr B. Be this as it may, it was undoubtedly the appellant's continuing intention to obtain legal representation. To that end he took steps to secure it as soon as he learned that his erstwhile legal practitioner was no longer prepared to act.

At the commencement of the inquiry on 3 March 1997, the appellant, in accordance with Mr B's advice, applied for a postponement. He informed the provincial magistrate appointed to conduct the inquiry that Mr B, whom he had engaged that morning to represent him, was unable to appear and required time to study the charges and the documents in order to prepare a proper defence. He gave as the explanation for Miss M's absence that the present dates of set down were unsuitable to her. That, of course, was untrue. Yet understandably the appellant was anxious to avoid any fault he thought might be attributed to him for having failed to provide sufficient funding.

The application was strenuously opposed by the member assigned to lead the evidence at the inquiry. He pointed out that a number of witnesses had come at their own expense from as far away as Vumba, and that obviously a postponement would be to their inconvenience. He added that the appellant had received the detailed charges on 17 February 1997 and had been allowed adequate time to prepare his defence and obtain legal representation. All documents had been made available for his inspection.

The provincial magistrate rejected the application. He held that the reason advanced that Mr B needed time to study the documents was not *bona fide* because the appellant had already prepared his defence. Secondly, he expressed the view that the appellant had been given

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ample opportunity to seek legal representation; the non-appearance of a legal practitioner being due entirely to the appellant's dilatoriness. Accordingly, he ordered that the inquiry proceed.

The appellant remained in attendance. Three witnesses were called to testify and were questioned by the appellant. On the second day of the hearing, however, the appellant informed the provincial magistrate that, acting on the advice of Mr B, he was withdrawing from the inquiry. It then continued in his absence. Ultimately, the finding made was that on all but two counts the appellant had misconducted himself. Thereafter, the respondent, having scrutinised the finding, took the decision to discharge the appellant from the Public Service.

The conduct of the inquiry was brought on review to the High Court. The

appellant sought an order setting aside the determination by the respondent that he be discharged. The ground relied upon was that the refusal to postpone the inquiry effectively denied the appellant the right, accorded under s 14(2) of the Public Service (Disciplinary) Regulations, to be represented by a legal practitioner.

The application was dismissed with costs by Devittie J in a judgment now reported, under the same names, in 1998 (2) ZLR 574 (H). The learned judge recognised that it lay within the discretion of the provincial magistrate to order the inquiry to proceed in the absence of the appellant's legal practitioner, Mr B. He went on to hold at 583C-D that:

> "The applicant gave no satisfactory explanation as to why he had done nothing to secure legal representation, after 12 February 1998 (1997) when he had parted ways with his lawyer. The reason he gave for doing so is hardly convincing, namely, that it was because of problems in securing a trial date. His assertion that he had received the documents at a late stage and needed time for his practitioner to peruse these was rejected because he had prepared his defence in some detail. In these circumstances, I am unable to say that the presiding officer acted upon any wrong principle. Clearly, there were substantial reasons for refusing the application."

It was not correct that the appellant and Miss M had parted company on 12 February 1997. It was only on 27 February 1997 that the letter was sent to the appellant advising that services had been terminated. The appellant's reaction was immediately to seek to engage Mr B. True, the appellant gave a false reason for Miss M's withdrawal of representation; yet at all times he regarded the employment of a legal practitioner to appear on his behalf as imperative. After all, for a person of the appellant's years of service and seniority in the Department of Immigration, the consequences, both financial and upon his standing in the community, of being discharged would be very serious. The fact that he had succeeded in submitting a statement of defence before 3 March 1997 was of no relevance to the merits of the application for a postponement. He was not minded to appear unrepresented. Once Miss M withdrew, it became virtually impossible for any other legal practitioner to be able to prepare in time the appellant's defence to the twenty charges, even if free to appear at such short notice. In any event, it was Mr B who was the appellant's choice of counsel; and he was unavailable. Moreover, the situation was not one in which the appellant had previously requested an opportunity to postpone the hearing to obtain legal representation and had wasted that opportunity.

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In the circumstances, the criticisms that the appellant had been dilatory and that it was not surprising that there was no legal practitioner from Mr B's firm to represent him, were not, in my opinion, valid.

The appellant, of course, had an absolute right to procure legal representation. It was not a question of the provincial magistrate having a discretion whether

to permit it. His discretion turned on the grant or refusal of the postponement sought. See *Madnitsky* v *Rosenberg* 1949 (2) SA 392 (A) at 398; *S* v *Nqula* 1974 (1) SA 801 (E) at 804H. However, a refusal arising from an injudicious exercise of that discretion would constitute a denial of the right to legal representation.

It is, to my mind, a matter of considerable importance, both in the interests and administration of justice, that every person who enjoys the fundamental right to be represented by a legal practitioner before a court or other adjudicating authority established by law should be accorded every opportunity of putting his or her case clearly and succinctly to such body. Almost invariably that function can only be performed properly when it is presented by a person trained and experienced in the law. Indeed, I can do no better than to quote the words of Justice Sutherland, of the United States Supreme Court, in *Powell* v *Alabama* 287 US 45 (1927) at 68-9:

"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."

These *dicta*, although spoken in the context of criminal proceedings, apply with equal force to the position of a person charged with a serious disciplinary offence; one which, if proved, will, as in this case, result in dismissal, the loss of livelihood and ruination of character. See *Maynard* v *Osmond* [1977] 1 All ER 64 (QBD) at 79a *per* Lord Denning MR.

It seems to me that if the absolute right to procure legal representation is to have any meaning and significance, it must embrace the right to be afforded a reasonable opportunity to secure it. A refusal of that opportunity, where requested, constitutes a denial of the right to a fair hearing guaranteed under subss (2) and (9) of s 18 of the Constitution of Zimbabwe.

In *Wheeler & Ors* v *Attorney-General* 1998 (2) ZLR 305 (S), reference was made to the cases of *S* v *Dangatye* 1994 (2) SACR 1 (A) and *S* v *Solo* 1995 (5) BCLR 587 (E). Each illustrated the length to which a court should be prepared to go in order to accommodate an accused seeking a postponement of the trail in order to obtain the services of a legal representative. Accepting that approach as manifestly fair I ventured to suggest the following:

"(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

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absent for good reason. But where

GUBBAY CJ

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 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 casu, and notwithstanding the inconvenience which would have been suffered by all save the appellant, I have not the slightest doubt that the refusal of the postponement constituted sufficiently improper exercise by the provincial magistrate of his discretion as to warrant interference.

Before concluding, I deem it proper to indicate that I share the view expressed by the learned judge that where a postponement ought to have been granted, the refusal of it amounts to a fatal irregularity in procedure, obviating the need of the court of review or appeal to have regard to the merits of the matter. Put differently, where there has been a violation of a constitutional right, appropriate redress must be granted whether or not prejudice is shown to have existed (see *Nhari* v *Public Service Commission supra* at 581E). Of course, in reality, however formidable the merits may appear to be, it remains impossible to assess with certainty what effect a properly conducted defence could have had on the eventual result. Hence, the possibility of prejudice in the refusal to grant a postponement can never be discounted. See *Ndanozonke & Anor* v *Nel NO & Anor* 1971 (3) SA 217 (E) at 221H; *S* v *Shabangu* 1976 (3) SA 555 (A) at 558F.

Thus, for the reasons mentioned, I am in respectful disagreement with the conclusions reached by the learned judge. I would, accordingly, allow the appeal with costs and alter the order of the court *a quo* to read:

" 1. The application is allowed with costs.

2. The determination of the respondent discharging the appellant from service is set aside.

3. The charges of misconduct brought against the applicant are remitted for rehearing *de novo* by a different provincial magistrate."

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

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

CLAN TRANSPORT CO (PVT) LTD *v* PEMHENAYI & ANOR 1999 (1) ZLR 520 (HC)

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Citation 1999 (1) ZLR 520 (HC)
Case No Judgment No. HH-111-99
Court High Court, Harare
Judge Chatikobo J
Heard June 10, 1999
Judgment June 16, 1999
Annotations None

Application for summary judgment

Flynote

Bills of exchange - cheque - signatory - personal liability - individuals signing cheque with name of a business on it - no indication that business was a company - no endorsement indicating that individuals signing as agents - signatories personally liable on cheque

Headnote

The defendants were signatories on a cheque which was dishonoured. The cheque bore the words "LC Agencies" above their signature, but no words indicating that LC Agencies was a company. The defendants put no words indicating that they were signing as agents for or representatives of LC Agencies. When the plaintiff applied for summary judgment against them personally, they pleaded that they were not personally liable as it was apparent *ex facie* the cheque that the cheque belonged to LC Agencies and they were only signing as directors. They said that LC Agencies was the trading wing of a registered company.

Held, that the defendants' claim must be determined on the basis of what appeared on the face of the cheque, without reference to the explanations which appeared in their opposing affidavit. Before they could rely on the defence that they were signing in a representative capacity, it had to be shown that they were acting as agents and that the principal was fully described in the instrument. To show they were acting as agents, some wording such as "for", "pp" or the like had to qualify the signature. No such wording appeared, nor did it appear from the cheque that the principal was a company, the words "Limited" or "(Private) Limited" not appearing on the cheque.

Held, therefore, that the cheque did not meet the requirements for exclusion of liability.

Cases Considered

Cases cited:

Akasia Finance v *da Sousa* 1993 (2) SA 337 (W)

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de Beer v *Diesel & Electrical Eng Co* 1960 (3) SA 89 (T)

Hein v *Hofmeyr & Anor* 1958 (1) SA 29 (W)

Leadbitter v *Farrow* (1816) 105 ER 1077

Levy & Co v *Smith* (1885) 3 HCG 231

Moon & Co (Pty) Ltd v *Jacobs & Ors* 1949 (4) SA 45 (T)

Natridge Finance (Pty) Ltd v *Pillay & Ors* 1971 (4) SA 412 (D)

Puzey & Diss Motors Ltd v *Litherland* 1961 R&N 211 (SR)

Trust Bank Ltd v *Dugmore & Anor* 1972 (3) SA 926 (D)

Statutes Considered

Legislation considered:

Bills of Exchange Act [*Chapter 14:02*], s 25(1)

Case Information

A Moyo, for the applicant

T Gumunyu, for the respondent

Judgment

Chatikobo J: This is an application for summary judgment brought in terms of r 64 of the High Court Rules.

The plaintiff issued summons against the two defendants claiming the sum of $10736.89 which represents the outstanding balance from an original indebtedness of $17736.89. The plaintiff sues in its capacity as the holder of a dishonoured cheque drawn in its favour on the Commercial Bank of Zimbabwe Ltd on 16 October 1997. The cheque, which is annexure "A" to the further particulars supplied by the defendant, bears the words "LC Agencies" above the defendants' signatures and the account number below the signatures. The plaintiff contends that the defendants are personally liable on this cheque by virtue of their failure to indicate the capacity in which they signed the cheque on the face of it. To this, the defendants have pleaded that s 25(1) of the Bills of Exchange Act [*Chapter 14:02*] ("the Act"), upon which the plaintiff relies, does not render them personally liable as it is apparent *ex facie* the cheque that the cheque belongs to LC Agencies and that the defendants only signed as directors.

In the founding affidavit to the application for summary judgment, the plaintiff avers that the plea does not disclose a defence by virtue of the defendants' failure to indicate on the face of the cheque that they were signing in a representative capacity. It is claimed further that it is not indicated on the face of the cheque that LC Agencies is a registered company. In support of

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their opposition to the application, the defendants repeat the averment made in the plea and go on to add that they were the authorised signatories to the account of LC Agencies (Pvt) Ltd, which they describe as the trading wing of a registered company called Pembro Engineering (Pvt) Ltd. They contend, further, that their omission to indicate that they signed in a representative capacity does not make them personally liable on the cheque.

Section 25(1) of the Act provides that:

"Where a person signs a bill as drawer, endorser or acceptor and adds words to his signature, including that he signs for and on behalf of a principal or in a representative character, he is not personally liable thereon:

Provided that if such person had no authority to sign for and on behalf of such principal or in a representative character he shall be personally liable on the said bill."

This provision derives justification from the fact that negotiable instruments, in the course of the usual intercourse of people in commerce, often come into the hands of persons who have no knowledge of the circumstances under which they were generated. Such persons should be able to rely and act on the strength of what appears on the face of the instrument. It is not permissible for a person who has appended his unqualified signature to

an instrument to lead extrinsic evidence to prove that he signed in a representative capacity. In *Puzey & Diss Motors Ltd* v *Litherland* 1961 R&N 211 (SR) at 222D-E, Lewis J (as he then was) stated, in the course of approving of a passage in *Wigmore on Evidence*, that:

"To my mind, it is clear that the question of liability, *vis-à-vis* the payee, of a person who signs a bill of exchange ostensibly as a drawer or co-drawer must be fixed by the instrument itself as one of the 'essential implied features' of it mentioned by Wigmore. If he intends to sign as a mere agent, he has the opportunity of qualifying his signature in the manner laid down in s 25 by the addition of a few simple words. It is not like having to set out a contract of suretyship in the confined space of the negotiable instrument. If he does not comply with s 25 (which, in effect, only embodies the common law), he cannot seek to alter the legal effect of his signature by extrinsic evidence."

The defendants' claim that they signed the cheque in a representative character must accordingly be determined on the basis of what appears on the face of the cheque without reference to the explanations (extrinsic evidence) which appear in the opposing affidavit. The starting point of the inquiry must be a recognition that the defence that the defendants appended their signature to the cheque in a representative capacity is an absolute defence which is available against both a holder and a holder in due course. However, before a person sued on a cheque bearing his unqualified signature can rely on this defence it must be shown that:

1. the principal concerned - that is, the person sought to be held liable - exists, in the sense that it is a natural person or a separate legal entity;

2. the defendants' agency must appear sufficiently from the wording of the signature;

3. the defendant was indeed authorised to sign as an agent; and

4. where the principal is a company or any other corporation, it should be fully described in the

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instrument.

See Sharrock & Kidd *Understanding Cheque Law* p 117.

The first and third requirements are not in issue in this application and nothing more needs be said about them. It is the second requirement, namely, the need for the defendants' agency to appear fully from the wording of the instrument, which forms the core of the plaintiff's cause of action and to which the defendants' defence is directed.

The courts in South Africa and this country have for a long time, consistently followed Lord Ellenborough's *dictum* in *Leadbitter* v *Farrow* (1816) 105 ER 1077 at 1079:

"Is it not a universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable unless he states upon the face of the bill that he subscribes it for another or by procuration of another which are words of exclusion. Unless he says plainly, 'I am the mere scribe' he becomes liable."

These words are today littered in numerous stray *dicta* in the authorities.

CHATIKOBO J

The principle that a person who signs a cheque on behalf of a company without qualifying his signature is personally liable is so engrafted into our law that Hiemstra J in *Hein* v *Hofmeyer & Anor* 1958 (1) SA 29 (W) referred to it as a universal rule. The same judge was driven to remark, two years later, in *de Beer* v *Diesel & Electrical Engineering Co* 1960 (3) SA 89 (T) that Lord Ellenborough's *dictum* in *Leadbitter* v *Farrow* is so entrenched in many decisions that it could only be distinguished or departed from on more impressive grounds than syntactical differences in the English and South African legislation.

In deciding whether the instrument, on the face of it, indicates that the defendants signed in a representative capacity, one considers the instrument as a whole in search of inferences or obvious conclusions, to be gathered from its terms, bearing in mind at all times that the "question has to be decided not according to other documents or allegations but according to the tenor of the cheque which on the face of it renders both defendants jointly and severally liable": *per* Leon J in *Trust Bank Ltd* v *Dugmore & Anor* 1972 (3) SA 926 (D) at 931A.

A signer of a company cheque who does not intend to attract personal liability on the cheque must use words which makes his status as an agent clear. Words or letters which are generally recognised as signifying that the signer signs in a representative capacity are "*per* procuration" (*Moon & Co (Pty) Ltd* v *Jacobs & Ors* 1949 (4) SA 45 (T)), "for" (*Natridge Finance (Pty) Ltd* v *Pillay & Ors* 1971 (4) SA 412 (D) at 413), "per" (*De Beer* v *Diesel & Electrical Engineering Co supra*), "pp" (*Moon*'s case *supra*), "qq" (*Levy & Co* v *Smith* (1885) 3 HCG 231) and words such as "on behalf of" or "as agent for".

It will have become apparent from a recital of the facts of this case earlier on in this judgment that the defendants did not qualify their signatures by employing any of the recognised words or letters or in any other way. They have consequently not excluded personal liability. And, as already stated elsewhere in this judgment, I cannot have regard to averments made in the

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opposing affidavit which seek to contradict the cheque itself.

Finally, where the defendant signs on behalf of a company and fails to reflect on the cheque the registered name of the company, he cannot raise the defence that he signed in a representative capacity. The registered name of the company includes the words "Limited" or Private Limited". In the context of the Act, this is so because unless the full name of the company appears on the face of the cheque it cannot be said that the principal on whose behalf the defendant signs has been properly disclosed or that there is a principal in existence. The cheque involved here bears the words "LC Agencies". This falls short of a full description of a registered company. In

CHATIKOBO J

any case we are now told, through inadmissible evidence, that this is a trading name for a company which is the account holder and purported drawer of the cheque.

The sum effect of these shortcomings is that the cheque does not meet the requirements of s 25(1) of the Act for the exclusion of personal liability. It falls foul of the principle laid down in *Leadbitter* v *Farrow*, which is the same in effect as the provisions of s 25(1) of the Act. There is nothing in this case which would justify my extending the sympathy expressed towards the defendant by Leveson J in *Akasia Finance* v *da Sousa* 1993 (2) SA 337 (W) at 339H. Accordingly, no triable defence is revealed on the papers.

In the circumstances, judgment is entered in favour of the plaintiff in the sum of $10736.89 with interest at 25% *per annum* with effect from 20 October 1997 to date of payment ,together with costs of suit.

Coghlan, Welsh & Guest, plaintiff's legal practitioners

Muvingi & Mugadza, defendants' legal practitioners

PTC *v* XAN ZHONG 1999 (1) ZLR 525 (HC)

Citation	1999 (1) ZLR 525 (HC)
Case No	Judgment No. HH-112-99
Court	High Court, Harare
Judge	Bartlett J
Heard	June 16, 1999
Judgment	June 16, 1999
Annotations	None

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Chamber application

Flynote

Interest - rate - rate applicable to award made in foreign currency

Practice and procedure - summons - liquidated claim - claim for interest - date from which interest is claimed - need to specify - how to specify - rate of interest - how to specify - interest rates applicable to award made in foreign currency

Headnote

The date from which interest begins to run on a liquidated claim depends on the circumstances. The date from which interest is claimed in a summons may vary depending upon whether or not the parties have agreed that interest may be claimed from a specific date. If they have agreed on such a specific date, then interest can be claimed from that date. If no such date has been agreed, interest will run from the date the defendant was put *in mora*. The defendant will be regarded as having been put *in mora* from the date of receipt of a letter of demand, or in the absence of such a letter of demand, from the date of service of the summons. The summons must specify the date from which the interest runs and the legal basis for claiming such interest. Interest should be claimed at the prescribed rate, unless another rate has been agreed upon, in which case this should be specified in the summons. If the award is to be made in foreign currency, interest should be claimed at the rate appropriate to that currency.

Cases Considered

Cases cited:

AMI Zimbabwe (Pvt) Ltd v *Casalee Hldgs (Successors) Pvt Ltd* 1997 (2) ZLR 77 (S)

Baliol Invstm Co (Pty) Ltd v *Jacobs* 1946 TPD 269

Ellis NO v *CoT* HH-265-92

F Kristiansen (Pvt) Ltd v *CoT* HH-266-92

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

K-Air Charter (Pty) Ltd v *Min of Home Affairs & Anor* HH-41-99

SEDCO v *Meda Entprs Ltd t/a Zororo Bakery* HH-199-92

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

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

Judgment

Bartlett J: Xan Zhong apparently guaranteed that Liang Shaoqing would pay his telephone account. Liang Shaoqing did not do so and the PTC is looking to Xan Zhong for payment. The

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matter has come before me as a chamber application for default judgment. I have queried several aspects

BARTLETT J

of the application. The point which concerns me in this judgment, however, is the question as to the date from which interest begins to run on a liquidated claim. I would have not thought that this was a difficult question. However, hardly a day passes when I do not have to correct at least two or three chamber applications for default judgment where the date from which interest is claimed on a liquidated claim is palpably incorrect. Out of twelve chamber applications in front of me today, seven claim interest incorrectly. It is noteworthy that the mistakes invariably favour the creditor and not the debtor!

A summons properly specifying the date from which interest may be claimed and the legal basis for claiming interest from that date is the welcome exception, as opposed to the invariable rule it should be. A variety of incorrect formulations litter chamber applications. They vary from claiming interest: *a tempore morae*; from the date payment was due; from the date of the summons; from the date of demand; or from a date apparently selected at random with no explanation given.

What then is the law? Although the matter is one of *res derelicta* on the part of many legal practitioners as opposed to anything like *res nova*, I will endeavour to summarise the long established principles as simply and as clearly as I can:

1. If the parties have agreed (or the law requires) that interest may be claimed from a specific date, then it shall be claimed from that date. The summons should, however, clearly specify the nature of the agreement (or the legal requirement). The judge may, if he considers it necessary, require to have sight of a copy of the agreement.

2. If the parties have not agreed on the date from which interest will run on an amount due and owing (and the law does not so specify), then interest will run from when the defendant has been put *in mora*. The defendant will be regarded as having been *in mora* from the date of receipt of a letter of demand, or in the absence of such letter of demand, from the date of service of the summons. The summons should accordingly clearly specify the date of receipt or presumed receipt of the letter of demand, if interest is sought to run from a date prior to the date of service of the summons. The draft order attached to the application should specify the actual date from which the interest runs (eg 15 May l999), with the summons itself establishing the legal basis for claiming interest from that date.

The object of stating the principles as simply and clearly as I am able is the hope that this will reduce the number of chamber applications for default judgment, which do not correctly specify the date from which interest should run, from a flood to a trickle. I trust that I have not over simplified the

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principles but I believe that these are the principles as laid down in the following authorities, among many others: *Victoria Falls and Transvaal Power Co Ltd* v *Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 31; *West Rand Estates Ltd* v *New Zealand Insurance Co Ltd* 1926 AD 173 at 182-3 and 195; *Baliol Investment Co (Pty) Ltd* v *Jacobs* 1946 TPD 269 at 272; *Small Enterprises Development Corp* v *Maston Enterprises Ltd t/a Zororo Bakery* HH-199-92 at p 4; *Peter Ellis NO* v *CoT* HH-265-92 at pp 9-10; *F Kristiansen (Pvt) Ltd* v *CoT* HH-266-92 at p 2 (the latter two cases were altered on appeal, but not on the question of the date from which interest should run).

A further observation I should make is in regard to the rate of interest claimed. Interest should be claimed at the rate of 25% *per annum*, which is the correct prescribed rate, unless there is agreement that a different rate should apply. The nature of any such agreement should be clearly specified in the summons or particulars of claim - and once again the judge may, if he considers it necessary, require to have sight of a copy of any such agreement.

If, however, the award is to be made in foreign currency, then interest should be claimed at the rate appropriate to that currency - see *AMI Zimbabwe (Pvt) Ltd* v *Casalee Holdings (Successors) (Pvt) Ltd* 1997 (2) ZLR 77 (S) at 86C-87E. This would normally mean that in such matters interest would be awarded at the rate which would be awarded by a court dealing with a similar matter in the country to which the currency relates - see *Industrial Equity Ltd* v *Walker* 1996 (1) ZLR 269 (H) and *K-Air Charter (Pty) Ltd* v *Minister of Home Affairs & Anor* HH-41-99. Because of the difficulties inherent in establishing the appropriate rate of interest that is applicable in a particular country at a particular date, interest may be claimed at the rate at which commercial banks pay interest on money in a foreign currency denominated account which is held in the foreign currency which is claimed in the summons.

I E G Musimbe & Partners, applicant's legal practitioners

TRADOR (PVT) LTD *v* CHIDZAMBWA 1999 (1) ZLR 528 (HC)

Citation	1999 (1) ZLR 528 (HC)
Case No	Judgment No. HH-99-99
Court	High Court, Harare
Judge	Gillespie J
Heard	June 23, 1999
Judgment	June 23, 1999
Annotations	None

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Application for default judgment

Flynote

Costs - deprivation - legal practitioner incurring unnecessary costs - multiple claims brought separately when should have been consolidated - costs of only one action allowed

Legal practitioner - fees - deprivation of - legal practitioner incurring unnecessary costs - multiple claims brought separately when should have been consolidated - practitioner deprived of fees except in one action - duty - to litigate in the most economical way

Practice and procedure - judgment - default judgment - application for - multiple claims made against same defendant - should be brought by one summons

Headnote

A total of 23 claims for default judgment were brought by the plaintiff against the defendant. In all instances, the claim had been for the price of goods sold and delivered. Payment had been by cheques which were dishonoured.

Held, that the matters should have been dealt with in a single summons.

Held, further, that it is one of the fundamental principles of costs that a party who causes unnecessary costs to be incurred in litigation cannot expect to recover those costs. Where two or more causes of action are made in separate summonses when they could be joined in one, costs of only one action will usually be allowed.

Held, further, that the lawyer owes his client a duty to prosecute or defend a claim in the most economical way. In this case, there was no justification for proceeding by means of separate summonses, and the extra expenses could not be passed on to the defendant. The legal practitioner could recover expenses and fees in respect of only one case; the rest he would have to pay himself. Similarly, the plaintiff could recover the costs of only one case.

Cases Considered

Cases cited:

Key Kabin (Pvt) Ltd v *Megamillion Invstms (Pvt) Ltd* 1999 (1) ZLR 224 (H)

Lobascher v *McFarlane* (1904) 14 CTR 980

Scheepers & Nolte v *Pate* 1909 TS 354

Scotfin v *Ngomahuru* 1997 (2) ZLR 567 (H)

Simpson v *Naude* (1882) 2 EDC 156

Judgment

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Gillespie J: There are, under the name of these parties, no fewer than 23 applications for default judgment. In each case, plaintiff claims payment from the defendant of the price of goods sold and delivered. Payment in each case was originally tendered by cheque. The cheques have all been dishonoured. All cases involve separate transactions over a continuous period between December 1995 and July 1996.

The registrar, seeing the identity of the parties and the substantial similarity of cause of action in each case, did not allow this to pass without comment. He immediately ensured that all files were collated and placed before the same judge to be dealt with together. He addressed this covering memorandum to the judge (me):

"There are 21 applications for default judgments. All the matters contain the same cause of action. Ought this have been brought by one action?"

The answer, of course, is yes.

I accordingly queried of the attorney of record why he had instituted action separately in each case, rather than in one summons, and what justifications there were for the incurring of the additional costs generated by his preferred method of procedure. I asked him why he should not be obliged to bear personally all costs save those reasonably incurred in respect of one action on a consolidated summons. The explanation given is as follows:

"The matters in question were issued separately as our opinion at the time was that the causes of action had arisen at different times i.e. that the R/D cheques were issued on different dates, with the exception of Case No. HC-15696-98 and 15707-98 in which the cheques were issued on the same date. Attached is a schedule showing the date on which each cause of action arose."

The reason advanced for avoiding an order of costs *de bonis propriis* is this:

"Our opinion as indicated above, at the time of issuing summons is that these were different causes of action although in respect of one defendant. In the circumstances, it would be unjustified to order us to bear the costs incurred in more than one case when in fact the claims clearly arise out of different liquid documents issued at different times serve for case numbers 15696 and 15707-98."

I am not persuaded by this.

It is true that each separate summons advances a single cause of action complete in itself. Equally valid, however, is the proposition that all of these cases could have been brought at once in a single summons. It is one of the fundamental principles of costs that a party who causes unnecessary costs to be incurred in litigation cannot expect to recover those costs.

"I think it is the duty of a litigant to avoid any course which unduly protracts a lawsuit or unduly increases its expense." 1(177)

GILLESPIE J

It is but one aspect of this principle that where claims on two or more causes of action are made in separate summonses, when they can be joined in one, costs of only one summons will usually be recovered. 2(178)

Following from this principle is a rule of ethical practice binding on legal practitioners. It is that

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the lawyer owes a duty to his client to prosecute or defend the claim in the most economical way.

"In deciding on method, the attorney's bias should be towards the least expensive but this bias will not preclude the choice of the more costly if the additional expense is justified by other considerations ..." 3(179)

The lawyer who incurs costs that, in hindsight, are unnecessary is not to be criticised, provided he acted with reasonable prudence on his client's behalf. Not so the attorney who acts from foolish overcaution or ignorance, 4(180) or, worse, he who manufactures costs, knowing them to be unnecessary, in order to maximise his fee. 5 (181)

In this case, the attorney's choice of procedure involves the following increased costs:

- instead of one summons, twenty three summonses, each incurring a tariff fee for drafting and a revenue stamp of $120;
- instead of one charge for service of process, twenty three payments of the deputy sheriff's then fee of $52; 6(182)
- not one but twenty three applications for default judgment with attachments, each attracting tariff fees for the drafting thereof.

A further unnecessary expense arises from the attorney's decision to draft a declaration in each case. The claim is for a "debt or liquidated demand" in terms of rules of court. A summons with particulars of claim endorsed on it is all that is required. Hence, twenty three declarations are shown to be unnecessary.

Since the claim is for an uncontested trade debt, 7(183) the attorney charges his client collection commission in lieu of other fees. This prevents the duplication of fees for instructions and other attendances. 8(184) Had there been any opposition, however, the final likely cumulative bill of costs, involving individual attendances on each file, would have been quite staggering. Even as it is, the fees generated far exceed those that would have rewarded

GILLESPIE J

the issue of a single consolidated summons. So much so, that one is very much inclined towards the view that, the sole reason behind the issue of separate summons in each case was the anticipated return in fees. If this were so, it would be a most serious act of unprofessionalism warranting the intervention of the Law Society. I prefer, however, cautiously to refrain from drawing that conclusion and to rely instead on the finding, which I make, that there was no justification for proceeding in this way nor for the extra fees and costs incurred.

In my estimation, these extra expenses cannot be passed on to the defendant. Despite its success, the plaintiff will not recover costs according to tariff in each case but will recover costs in respect of one case alone. Furthermore, since it was clearly the attorney's decision to incur the extra unnecessary costs, he must pay them. He will also be denied excessive fees, being limited to those attributable to one case only. He will be amply (if not over) rewarded by collection commission (which, of course, is not recoverable from the defendant in the absence

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of prior agreement).

I therefore make the following order:

"(a) In case number HC-10556-98, judgment is entered for the plaintiff in the sum of $50000 together with interest thereon at the prescribed rate from 18 December, 1998 and costs of suit, to the extent that such courts are claimable in terms of proviso (iii) to by-law 70(2) of The Law Society of Zimbabwe By-Laws 1982.

(b) In case number HC-15691-98, judgment is entered for the plaintiff in the sum of $34758.81 together with interest thereon at the prescribed rate from 9 April 1996.

(c) In case number HC-15692-98, judgment is entered for the plaintiff in the sum of $49113.16 together with interest thereon at the prescribed rate from 15 February 1996.

(d) In case number HC-15695-98, judgment is entered for the plaintiff in the sum of $33081.25 together with interest thereon at the prescribed rate from 20 March 1996.

(e) In case number HC-15696-98, judgment is entered for the plaintiff in the sum of $12 847.92 together with interest thereon at the prescribed rate from 25 March 1996.

(f) In case number HC-15697-98, judgment is entered for the plaintiff in the sum of $39 741.08 together with interest thereon at the prescribed rate from 28 March 1996.

(g) In case number HC-15698-98, judgment is entered for the plaintiff in the sum of $36 385.40 together with interest thereon at the prescribed rate from 26 February 1996.

(h) In case number HC-15699-98, judgment is entered for the plaintiff in

the sum of $38 000 together with interest thereon at the prescribed rate from 3 April 1996.

(i) In case number HC-15700-98, judgment is entered for the plaintiff in the sum of $24 760.87 together with interest thereon at the prescribed rate from 19 March 1996.

(j) In case number HC-15701-98, judgment is entered for the plaintiff in the sum of $17 471.72 together with interest thereon at the prescribed rate from 18 March 1996.

(k) In case number HC-15703-98, judgment is entered for the plaintiff in the sum of $32 450.98 together with interest thereon at the prescribed rate from 16 February 19996

(l) In case number HC-15706-98, judgment is entered for the plaintiff in the sum of $33 525.11 together with interest at the prescribed rate from 15 February 1996.

(m) In the case number HC-15707-98, judgment is entered for the plaintiff in the sum of $27 295.69 together with interest at the prescribed rate from 25 March 1996.

(n) In case number HC-15708-98, judgment is entered for the plaintiff in the sum of $51 562.35 together with interest at the prescribed rate from 31 May 1996.

(o) In the case number HC-15709-98, judgment is entered for the plaintiff in the sum of $59 120.82 together with interest at the prescribed rate from 22 July 1996.

(p) In the case number HC-15710-98, judgment is entered for the plaintiff in the sum of $29 205.95 together

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with interest at the prescribed rate from 24 July 1996.

(q) In the case number HC-15711-98, judgment is entered for the plaintiff in the sum of $30 632.41 together with interest at the prescribed rate from 23 February 1996.

(r) In the case number HC-15712-98, judgment is entered for the plaintiff in the sum of $10 500 together with interest at the prescribed rate from 9 April 1996.

(s) In the case number HC-15714-98, judgment is entered for the plaintiff in the sum of $23 701.94 together with interest at the prescribed rate from 23 March 1996.

(t) In the case number HC-15715-98, judgment is entered for the plaintiff in the sum of $26 319.80 together with interest at the prescribed rate from 22 February 1996.

(u) In the case number HC-15716-98, judgment is entered for the plaintiff in the sum of $40 000 together with interest at the prescribed rate from 26 February 1996.

GILLESPIE J

(v) In case number HC-219-99, judgment is entered for the plaintiff in the sum of $30000, together with interest at the prescribed rate from 24 February 1996.

(w) For the avoidance of doubt, no costs shall be recoverable from the defendant save those specifically provided for in para (a) hereof.

(x) Messrs F G Gijima & Associates shall recover no fees or disbursements whatsoever, saving only collection commission and those costs properly claimable in respect of case number HC-10556-98 - and any such fees or disbursements already recovered, shall forthwith be reimbursed by the said legal practitioners to the plaintiff.

(y) The Registrar shall send a copy of this judgment to the plaintiff by registered post."

F G Gijima & Associates, plaintiff's legal practitioners

CHAPEYAMA *v* MATENDE & ANOR 1999 (1) ZLR 534 (HC)

Citation	1999 (1) ZLR 534 (HC)
Case No	Judgment No. HH-93-99S
Court	High Court, Harare
Judge	Chinhengo J
Heard	May 17, 1999; May 18, 1999
Judgment	June 30, 1999
Annotations	None

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Civil action

Flynote

Customary law - marriage - unregistered customary law marriage - effect of - division of property following dissolution of marriage - right of wife to claim a fair division and distribution of assets

Headnote

The parties were married for six years in an unregistered customary law union. They had two children from this union. During the time of marriage a rural home had been built and a house had been acquired in Harare. Soon after buying the house in Harare the husband divorced his wife. The husband claimed that the wife had contributed nothing towards the properties acquired during the marriage. He sought the removal of her name as co-owner of the Harare house. The woman counterclaimed for a fair division and distribution of all the assets, including the Harare house.

Held, that the purpose of the law is to serve the people and meet their expectations. The need to adapt customary law to the changing social and economic conditions either through legislation or through judicial law constantly presents itself. This need has been recognised for quite some time. Yet the legislature has not moved with alacrity, nor has the judiciary addressed this need with clarity and consistency. On the legislative front, the picture remains that of one piece of legislation taking the matter a step forward, hesitatingly within the limited scope of its subject matter, and another piece of legislation making timid inroads into the provisions of the first piece of legislation. The role of the courts in adapting customary law to take account of changing social and economic conditions has been dealt with in a number of Zimbabwean cases. A correct balance must be struck between judicial law-making and legislation. Where the law requires to be revolutionised it is largely the function of Parliament to make such changes. But where within the framework and spirit of the existing law it is possible for the courts to interpret it in a purposive manner and make it more appropriate to changed circumstances, the courts will by such purposive and progressive interpretation bring about necessary changes.

Held, further, that although an unregistered customary law marriage is not valid as far as the general law is concerned, it is nonetheless a valid marriage according to customary law and is recognised by the general law for many purposes. Where a customary law marriage is dissolved, even where a tacit universal partnership has not been pleaded, a division and distribution of property acquired during the subsistence of the customary union is possible.

Held, further, that contrary to the husband's claim, the wife had contributed significantly to the accumulation of property during the marriage. Where the court is satisfied that each of the parties made a significant contribution but the court is unable to quantify the contribution of each of the parties, their contribution should be estimated to be equal.

1999 (1) ZLR p535

Cases Considered

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Cases cited:

Bhazuwere v *Munene* 1994 (2) ZLR 351 (S)

Chapendama v *Chapendama* 1998 (2) ZLR 18 (H)

Deputy Sheriff, Harare v *Mafukidze & Anor* 1997 (2) ZLR 274 (H)

Kader v *Kader* 1972 (1) RLR 302 (G)

Katekwe v *Muchabaiwa* 1984 (2) ZLR 112 (S)

Katsidzira v *Chiromo* 1981 ZLR 87 (G)

Kuzora v *Madondo NO & Ors* HH-147-98

Magaya v *Magaya* 1999 (1) ZLR 100 (S)

Mashingaidze v *Mugombo* HH-3-99

Mhungu v *P J Motoring Svcs* S-60-97

Mukono v *Gwenzi* 1999 (1) ZLR 117 (S)

Muzanenhamo & Anor v *Katanga & Ors* 1991 (1) ZLR 182 (S)

Pasipanodya v *Muchoriwa* 1997 (2) ZLR 182 (S)

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

Case Information

L M Kabote, for the plaintiff

T Magwaliba, for the first defendant

Judgment

CHINHENGO J: The need to adapt customary law to the changing socio-economic environment either through legislation or through judicial law-making constantly presents itself in the courts. That need has been recognised for quite some time. Yet, the legislature has not moved with alacrity nor has the judiciary addressed this need with clarity and consistency. On the legislative front, the picture remains that of one piece of legislation taking the matter a step forward, hesitatingly within the limited scope of its subject matter and another making timid inroads into the provisions of the one. On the judicial front uncertainty as to the law resulted in a number of judgments that appeared to have advanced the adaptation process or appeared, at face value, as a reversal of that process. The recent case of *Magaya* v *Magaya* S-210-99 *(185) is in the eyes of the layman an example of the latter in the area of intestate succession under customary law. In my view, it correctly stated that *Katewe* v *Muchabaiwa* 1984 (2) ZLR 112 (S) was wrongly decided and so were subsequent decisions in which its ratio decidendi was applied. But whether *Magaya* v *Magaya supra*, absent the changes introduced by the Administration of Estate Amendment Act 1997 (No. 6 of 1997), would have achieved the broad objective of

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adapting customary law to the changing times would have been debatable. What it achieved though was a clearer statement of the law on intestate succession as it affected male and female children of a person to whom customary law applied. It also showed the pitfalls that lie in the way of judicial law-making where fundamental principles are involved by turning the table against earlier decisions.

CHINHENGO J

The need to adapt the law, and in this context customary law, to changing times was eloquently stated in *Katsidzira* v *Chiromo* 1981 ZLR 87 (G) at 96G (overruled on appeal) where it was said:

"The courts must keep in step with the times and shed away outmoded concepts in the field of property by Africans and the proprietary rights of married women. The courts must import into the ownership of immovable property the generosity of African custom and law which allows a married woman to acquire property as a result of her labours."

The same sentiments were expressed in *Zimnat Insurance Co Ltd* v *Chawanda* 1990 (2) ZLR 143 (S) at 153 where Gubbay ACJ (as he then was), argued that the process of adapting customary law by the courts is not a usurpation of the prerogative of Parliament to make new law but merely an application of "the modern understanding to the *Lex Aquilia* in a new specific situation". He went on to say at E-F that:

"Law in a developing country cannot afford to remain static. It must undoubtedly be stable, for otherwise reliance upon it would be rendered impossible. But at the same time, if the law is to be a living force it must be dynamic and accommodating to change. It must adapt itself to fluid economic and social norms and values and to altering views of justice. If it fails to respond to these needs and is not based on human necessities and experience of the actual affairs of men rather than on philosophical notions, it will one day be cast off by the people because it will cease to serve any useful purpose. Therefore, the law must be constantly on the move, vigilant and flexible to current economic and social conditions."

The recognition and exhortation that the law must adapt and be deliberately adapted to changing social and economic conditions is indeed a fundamental premise on which our jurisprudence in the area of customary law will develop as well as being a basis on which justice will be done and be seen to be done. The correct balance must however, be struck between judicial law-making and legislation. Where the law requires to be revolutionised the function is largely that of Parliament to change it. But where within the framework and spirit of the existing law it is possible for the courts to interpret it in a purposive manner and render it more useful in the changed circumstances, the courts will by such purposive and progressive interpretation achieve the same goal. The purpose of the law is to serve the people and meet their expectations.

The plaintiff sued his former wife in an unregistered customary union, seeking the relief that her name be deleted by the second defendant from a deed of assignment in terms of which the plaintiff and the first defendant bought a house in Mufakose (No. 22 Handira Road) from the second defendant, by acquiring from the previous owner his rights and obligations to the second defendant in respect of the house for $44000. The first defendant counterclaimed for a fair division and distribution of all the assets, including the house, acquired during the subsistence

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of the unregistered

CHINHENGO J

customary union. These assets, she said, were worth some $350000. The second defendant is only a formal party to this action and will no doubt abide by the judgment of the court.

The plaintiff's case was that in 1990 he was in love with the first defendant. At that time the first defendant was employed as a housemaid by a family in Zimunya Communal Area, Manicaland Province. In his words, he "brought" the first defendant to Harare and they lived together as husband and wife under an unregistered customary union. That their relationship was an unregistered customary union is not in dispute. This means that it was acknowledged that the plaintiff had paid *roora/lobola* and had been accepted as their son-in-law by the first defendant's parents. Whilst so married they happily begot themselves two children, Plaxedes and Prince, who are both still minors.

The plaintiff said that when he "brought" the first defendant to Harare she, at his sole expense, enrolled at a dressmaking school in Highfield and after six months of training qualified as a dress-maker. He said that he later purchased three sewing machines and one knitting machine with the intention that he would established a sewing and knitting venture where the first defendant would assist his workers. He said that the first defendant was not enterprising at all. The machines lay idle until their relationship came to an end. The family expenses were all for him to meet as the first defendant did not make any contribution to such expenses or to the acquisition of the assets to which she now lays a claim. In another breath, however, the plaintiff said that the first defendant did not make any contribution whatsoever because he had deliberately kept her as a housewife. He acknowledged that in this role the defendant cooked for him and the children and generally took care of the household. She would, at his beckoning, run errands for him. In particular, it was she who routinely travelled, on his instruction, to his rural home to give money and other gifts to his parents in Marange District and to pay workers there and do such other things as directed by him. It was his case that over time, and initially using his resources from employment as a security guard, on a salary he could not remember and, accordingly, did not disclose, he established a hardware business which has thrived and currently employs between four and nine people at any one time. It was also his case that he purchased all from his own sweat, savings and benevolence anything that the parties ever acquired during the subsistence of the union. He admitted that the acquisitions were as listed by the first defendant in her counterclaim and did not dispute the values placed by the first defendant against each of these acquisitions. In regard to the major acquisition, the house at No. 22 Handira Road, Mufakose, he said that he withdrew the sum of money with which he purchased the house from his personal account with the Post Office Savings

CHINHENGO J

Bank (POSB). His position was, therefore, that, upon the termination of their unregistered customary union, the first defendant was not entitled to claim or take any one thing of the

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assets. The manner in which he terminated the relationship underlies this conviction. He took the first defendant to his rural home in 1996 without informing her of his true intentions and when they were at his rural home he advised her that he no longer wished to live with her as his wife. He abandoned her there at his rural home and made it clear that he did not want her to come back to the matrimonial home again. In 1996, it was some six years from the time when they had started out together as husband and wife in an unregistered customary union.

The first defendant's case was in stark contrast to that of the plaintiff. She said that the plaintiff was her long time school and classmate. They had fallen in love when they were in Grade Seven and their affair subsisted until they married in 1990. They had done their "O" Levels together and they both had failed. She decided to take up employment as a domestic worker in Zimunya and was so employed, earning $50 per month, when they decided to marry in 1990. It was always her burning desire to improve herself by training as a dressmaker. She said that all the money which she earned as a domestic worker she had saved it with the avowed aim of paying for her training as a dressmaker. Thus, when she married she had saved about $250 which was all she had earned over a period of five months of employment. She said that while she saved this money, her mother and her employer had taken care of all her other needs.

Immediately she came to Harare as the plaintiff's wife, she enrolled at a dressmaking school in Highfield and successfully completed the six month dressmaking course in 1990. During her training, she made many garments, in particular ladies and men's suits, which were later to be sold by the plaintiff and the proceeds of which he used to open, in his own name, the first family banking account with the POSB. She explained that that account was not opened in their joint names because at that time she was away at the plaintiff's rural home and she did not, in any case, have a national identity card which would have been required for the purpose of opening a joint account. She explained further that even when she eventually obtained the identity document she had not found it necessary to insist that the account should be in their joint names - to her the account in the plaintiff's name was a family account into which both of them would and did deposit their respective earnings from time to time. This is the same account from which the plaintiff withdrew $44000 with which the parties purchased the house at No. 22 Handira Road, Mufakose.

The first defendant said that in 1990 and upon completion of her dressmaking course, she and the plaintiff purchased a sewing machine

from a shop called ZEX for $670. They later purchased two other sewing machines. Her sister taught her the art of knitting jerseys for which the plaintiff expressed his gratitude by paying the sister $200. They then purchased a knitting machine. It was her evidence that, operating from home, she used these machines to make garments and jerseys which she and the plaintiff sold in Harare. She would give to her own mother and the plaintiff's mother some of the garments and jerseys to sell in the rural area where the mothers resided. She said that the sewing business was so successful that she would earn about $3 000 a month from it and would deposit this income at least three times a month, into the family POSB account. At one time, she said that her income exceeded that of the plaintiff. The income from the garments and jerseys

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she left with her mother-in-law enabled her to buy their first ever cow which when it was bought was named "Majuzi" by her father-in-law in recognition that it was bought with proceeds from the sale of jerseys. The second cow was bought with money which at one time the plaintiff had intended to pay as part of the *roora/lobola* but the first defendant's parents had decided that the plaintiff and first defendant should use it to purchase another cow to improve their lot. She said that her parents did not wish to receive the money when they knew that the plaintiff and the defendant needed it to build their new family home. Thus, the two beasts were purchased and these have since multiplied to the four which are listed in the first defendant's counterclaim.

The first defendant said that she and the plaintiff started off selling their goods (the garments by her and the hardware items by him) from a table which they had been allocated at a stall in Highfields. When they married they first resided in the plaintiff's brother's house. They later rented successively one roomed accommodation in Highfield. They acquired a stand at Churu Farm on the outskirts of Harare and built thereon a two roomed house of their own. It became inconvenient for the plaintiff to travel daily to the hardware stall in Highfield from Churu Farm and so, when their savings came to about $16000, they agreed and purchased a motor vehicle, one of the two listed in her counterclaim, which the plaintiff used for business and family purposes. They were soon evicted from Churu Farm. They moved to Hatcliffe and lived in a shack for a while before they relocated to Highfield. All this time, she was engaged in sewing and knitting and she was making a significant contribution to the accumulation of property and funds by the family. Part of her income was used to purchase goods for the hardware business. They went together to auction sales and purchased some of the goods for sale in their hardware venture.

In 1995, they had saved about $44000 in the POSB Account. They agreed that it was time they purchased their own home. The plaintiff negotiated with

the then owner of 22 Handira Road, but he was rather reluctant to buy the house. The first defendant urged him on. He signed an agreement of sale (Exhibit 1) which reflected the plaintiff as the purchaser. It did not matter to the first defendant. She said that to her they were purchasing a family home and it did not matter that the agreement of sale reflected the plaintiff as purchaser. He went to the Bank, withdrew $44000 and gave it to the first defendant, who in his company paid the money to the seller. Thus they acquired the house at No. 22 Handira Road Mufakose. In the meantime, they had constructed a dwelling house at the plaintiff's rural home which the first defendant valued at $70 000 as at the time of separation. They also had jointly acquired all the movables listed in the first defendant's counterclaim.

Thirty-five days from the day that they took occupation of 22 Handira Road, Mufakose, the plaintiff's aunt died at the plaintiff's rural home. The first defendant said that they went to the funeral together. After the funeral they agreed that the first defendant was to remain behind to assist the plaintiff's mother in the fields. Little did the first defendant realise that that was to be the last time she would enjoy the property which she and the plaintiff had accumulated as a family in Harare over the six years of their unregistered customary union. She was to be advised later that the plaintiff no longer wished to remain married to her. She attempted to bring

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about a reconciliation. She travelled to Harare in the company of the plaintiff's father and the plaintiff's brother-in-law for this purpose. It was an endeavour in vain. The plaintiff remained adamant. She returned to the plaintiff's rural home and resided there for another year before she left to look for employment. She was not allowed to return to the matrimonial home or to take any of the matrimonial assets. In 1997, she obtained employment as a housemaid again and is currently so employed and is earning $600 per month. From this income, she leases a room for $200 per month and provides for all her needs and the needs of the younger of the two children who is in her custody.

The first defendant attributed the breakdown of their union to the plaintiff who, she said, consorted with many other women. In contrast, the plaintiff was unable to give any reason for the breakdown of the union. That the plaintiff was disposed towards consorting with other women is borne out by the fact that the one witness he called in his cause, Muchekanyanga, has a child by him. She was employed in 1990. Before the end of the first year of employment she was pregnant with the plaintiff's child and gave birth in September of 1991. The plaintiff is maintaining that child.

In her evidence, Muchekanyanga initially did not admit any relationship with the plaintiff, arguing that after she gave birth to the child the relationship ended and she continued to associate with the plaintiff solely as his employee. It appears to me she was called as a witness to bolster the plaintiff's assertion

that the first defendant did not make any contribution to the acquisition of the matrimonial property. Her evidence was a sickening, half-hearted attempt to discredit the first defendant. It was to the effect that the first defendant did not make any contribution, the basis thereof being that although she never visited the parties' residences, she was satisfied that the first defendant did not make any income from sewing for if she had, she (the witness) would have been given some of the garments to sell or at the very least she would have seen the plaintiff selling some of the garments. Despite this assertion, the witness admitted that she did not know if the first defendant made any garments at her home, or if she did, whether she sold them in Harare or elsewhere. Muchekanyanga's evidence was no where near disproving the first defendant's evidence. In my view, this witness was biased in favour of the plaintiff. That was understandable. She has a child by him. He pays maintenance for the child. She is employed by him. I was satisfied that no weight should be attached to her evidence.

It was through Muchekanyanga that the plaintiff produced certain hand-written books of accounts (Exhibits 3-7) showing his hardware business transactions for the years 1994 and 1995. The books were not professionally done. They contained a mass of entries without showing what the business income was, how much were the expenses or sales or what profit was made. She was able, however, to say that from her experience the hardware business grossed some $15000 a month of which about $10000 was used to cover business expenses including purchases. These figures were confirmed by the first defendant who also said that the gross income of the hardware business was in the region of $12000 to $18000 per month as at

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the time of separation.

The plaintiff's manner of giving evidence was most unsatisfactory. He was evasive as to the reason for the breakdown of the unregistered union. He failed to give any sound reason for the breakdown He took inordinately long to respond to some simple and straightforward questions put to him by counsel for the first defendant. In my view, he was, erroneously, content to rest his case on a generalised assertion that the first defendant did not make any contribution to the acquisition of the family assets. This attitude appeared to me to have been based on a perception, and he harped on it, that the law does not confer any entitlement on the first defendant to any of the assets. Any evidence he would give was in his perception, superfluous in the circumstances in view of so clear a position in law. He failed to reconcile the following - that the defendant qualified as a dressmaker; that three sewing machines and one knitting machine were purchased (whether by him alone or jointly with the first defendant) and his assertion that the defendant did not use any of these machines at all, despite the absence of any serious misunderstanding in

their relationship. He feigned lack of recollection as to his monthly wages at the time he was employed as a security guard when the first defendant could say that he earned $212 per month and his take home pay was $208. It appeared to me that his apparent failure to remember the amount of his monthly wage was a deliberate design to counter the first defendant's assertion that at one time she made more income than him. He did not challenge the nature of assets which the first defendant mentioned as having been acquired by them jointly as a family nor did he challenge their values. He in fact admitted that all the property listed in the first defendant's counterclaim was acquired during the subsistence of the union.

The first defendant was a sound witness. She was good in providing detail. She remembered the dates when certain major items of property were purchased and their prices. Where the plaintiff wished to cast himself in the mould of a godfather who had rescued the first defendant from her misery as a domestic worker in the rural areas, the first defendant's version flowed truthfully. Her demeanour was good. Her recollection of detail excellent. Her credibility was high.

The first defendant was able to show that she was not the idle person the plaintiff attempted to hold her out to be. She had worked as a housemaid, assiduously saved her earnings to enable her to pursue her chosen career, enrolled at a dressmaking school as soon as opportunity came her way, successfully completed the course, became the proud housewife and possessor/owner of three sewing machines and one knitting machine, dutifully served her husband and cared for her family and was involved both in family developments at the rural and urban homes. She was able to satisfy me that she made significant income from her sewing. Although she said that she had kept books of account relative to her sewing venture she explained that she was unable to produce them as the plaintiff had not allowed her back into the matrimonial home from the day that he tricked her into going to the rural areas and into the "divorce". She believed that the plaintiff would have destroyed them anyway. In all the circumstances, I am satisfied that she contributed significantly to the acquisition of the family assets and as I stated in *Chapendama* v *Chapendama* 1998 (2) ZLR 18 (H), where a court is satisfied that each of the

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parties made a significant contribution but the court is unable to quantify the contribution of each of the parties their contribution should be estimated to be equal. I am satisfied that on the evidence before me I should hold that the plaintiff and the first defendant contributed in equal measure to the accumulation of the assets by them acquired during the subsistence of their unregistered customary union.

The issue before the court arising from the plaintiff's claim and the defendant's counterclaim and from the evidence given in court may be stated

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in the following terms. A man and a woman contract an unregistered customary union. They live together for six or seven years as husband and wife under such the unregistered union. During those six or seven years, they have two children. They accumulate considerable property through their joint effort. The property, both movable and immovable is valued at $350000. Their relationship is terminated by the husband and the woman leaves everything behind. Is she entitled to claim a fair share of the property? That as I see is the issue before me. But that issue, if viewed from the standpoint of the plaintiff's declaration and the fact that the marriage was not solemnised, means that the court is not being called upon to exercise its matrimonial jurisdiction. In my view, the court's matrimonial jurisdiction is exercised only in relation to cases involving marriages registered in terms of the Marriage Act [*Chapter 5:11*] or the Customary Marriage Act [*Chapter 5:07*]. Different considerations would apply to this case - see *Kader* v *Kader* 1972 (1) RLR 302 (G) at 313 A-E. The plaintiff's relief that the first defendant's name be deleted from the deed of assignment because she did not make any contribution to the purchase of House No. 22 Handira Road, Mufakose would appear to be a claim for a declaration that that house was not jointly owned. He has not specifically sought a *declaratur*. He thus removes this action from the matrimonial jurisdiction of the court. The first defendant, who in her plea denies the plaintiff's averments and alleges that she contributed financially to the acquisition of the house, and in her counterclaim prays for a fair division and distribution of the assets acquired during the subsistence of the unregistered customary law union also does not bring the action within the matrimonial jurisdiction of the court recognised under the marriage statutes. See *Chapendama*'s case *supra* at 28F-G.

The Customary Marriages Act provides in s 3 that:

> "(1) Subject to this section, no marriage contracted according to customary law, including the case where a man takes to wife the widow or widows of a deceased relative, shall be regarded as a valid marriage unless -
>
> (a) such marriage is solemnised in terms of this Act; or
>
> (b) ...
>
> (c) ...
>
> (d) ...
>
> (2) A marriage contracted according to customary law on or after 1 February 1918, and before 1 January 1951, which was not registered under the Native Marriages Act [*Chapter 79 of 1939*] shall, subject to subsection (2) of

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section *seven*, be regarded as a valid marriage.

(3) If a male party to a marriage referred to in subsection (2) fails to have such marriage solemnised in terms of this Act, he shall be guilty of an offence and liable to a fine not exceeding twenty dollars or, in default of payment, to imprisonment for a period not exceeding three months.

(4) A prosecution for a contravening of subsection (3) shall not be a bar to further

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prosecution or prosecutions thereunder if the accused does not thereafter have his marriage solemnised in terms of this Act.

(5) A marriage contracted according to customary law which is not a valid marriage in terms of this section shall, for the purposes of customary law and custom relating to the status, guardianship, custody and rights of succession of the children of such marriage, be regarded as a valid marriage."

Section 7 of the Act provides the grounds upon which a customary marriage officer may solemnise a customary marriage thereby making it a valid marriage according to customary law. Subsection (2) provides that if the customary marriage officer declines to solemnise a customary marriage, whether entered into between 1918 and 1951 (as specified in s 3(2)) or thereafter on any grounds specified in subs (1) such marriage shall become invalid upon his declaration to that effect.

These provisions of the Act penalise by criminal sanction, the male party to a marriage contracted between 1918 and 1951, if he fails to have the marriage solemnised. A male party to such marriage contracted after 1951 is not subject to the criminal sanction. Would this have been deliberate on the part of the legislature? It seems to me to be so. The legislature provided a cut off point of 1 January 1951 and obliged the male party to register, on pain of criminal sanction, a marriage contracted before that date. As far as the failure to solemnise a customary marriage beyond that date was concerned, the legislature, it would appear, was content to visit the marriage relationship with invalidity for all purposes except those specified in s 3(5). Thus, the Act declares that an unregistered customary marriage is invalid if it is not solemnised in terms of the Act save for the purposes stated in s 3(5). The marriage between the plaintiff and the defendant in this case was therefore not a valid marriage except, in the context of the Customary Marriages Act, for the limited purposes relating to the children of the marriage.

The position as provided in the Act has not remained the same over the years. Inroads have been made into this position by other statutes. The Maintenance Act [*Chapter 5:09*] in s 6(3) recognises the customary law wife's entitlement to maintenance by her husband. It provides that:

"For the purposes of determining whether or not a person who is subject to customary law is legally liable to maintain another person, a maintenance court shall regard -

(a) husbands and wives at customary law as primarily responsible for each other's maintenance;

(b) ..."

The Customary Law and Primary Courts Act 1981, by s 12(3) and 4(a), gave a wife in an

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unregistered customary marriage a right to support from her husband and created for the husband a legal obligation to provide such support. The Supreme Court in *Zimnat Insurance Co Ltd* v *Chawanda* 1990 (2) ZLR 143 (S) at 152E-153A extended a dependant's action to a customary

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wife in respect of whom the duty of support arises by virtue of legislation. It reasoned thus:

> "In our opinion, it is socially desirable that liability be imposed upon the wrongdoer. Quite apart from the legal right of the customary law wife to support, the legislature has accorded her the status of a widow or dependent for the purposes of being awarded compensation under the War Victims Compensation Act 1980 and the Workmen's Compensation Act [*Chapter 269*] as recently amended. See also the status accorded customary law wives in the Public Service (Pensions) (Amendment) Regulations 1990 (No. 10) published in SI 154 of 1990. Thus, a fair measure of protection is now available to her. What is offensive to one's sense of justice is that upon the wrongful killing of a breadwinner the position of a widow, who had married according to customary law, should differ adversely from that of another, who had married according to civil rites, albeit both suffer the same kind of loss. As our law accepts customary unions, it should endeavour to secure equality to the parties thereto and discard the intolerable affectation of superior virtue (to borrow a phrase) inherited from the colonial past. To continue to exhibit a vestige of condescension and conservatism towards customary law unions ill befits, and is repugnant to, the current and unyielding movement by the State to remove the legal disabilities suffered by African women. See remarks of Dumbutshena CJ in *Katekwe* v *Muchabaiwa* 1984 (2) ZLR 112 (S) at 124A."

Although the case of *Katekwe* v *Muchabaiwa supra*, has now been disapproved (see *Magaya* v *Magaya* S-210-99 *(186)), the above quoted statement of Gubbay ACJ (as he then was) has an abiding validity in so far as there is a need to adapt customary law to the modern economic and social needs of the society. The passage quoted above recognises that other statutes have made inroads into the position exemplified by s 3 of the Customary Marriages Act.

In *Carmichael* v *Moyo* 1994 (2) ZLR 176 (S), the Supreme Court accepted that the African Law and Tribal Courts Act 29 of 1969 (later replaced by), the Customary Law and Primary Courts Act 6 of 1981 (also later replaced by) the Customary Law and Local Court Act 2 of 1990, maintained the right of a husband in an unsoleminised customary law union to sue in customary law for adultery damages. McNally JA stated at 182H-183A that -

> "I conclude, therefore, that in a court in which customary law is administered, it is lawful for a husband in an unregistered or unsolemnized customary union recognised by customary law to sue for damages for adultery committed with his spouse."

In reaching this conclusion, the court reasoned that if a husband in an unregistered customary union is responsible for the maintenance of his wife the courts (customary law courts) must recognise the correlative right of the husband to claim damages for adultery (at 182F-E). At 181B-C, we find the momentous words by McNally JA regarding the validity of an unregistered customary law union. He said:

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"In short, I am saying that the provisions of Act No. 6 of 1981, construed in their 'historical' context, must be

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interpreted so as to limit the meaning of the word 'valid' in s 3(1) of the African Marriages Act (now the Customary Marriages Act) to the context of the general law. As far as customary law is concerned, a marriage entered into in accordance with that law is valid, whether solemnised or not."

I respectfully agree that this is the position.

Recently, Act 6 of 1997, which amended the Administration of Estates Act [*Chapter 6:01*], further extended the rights of inheritance of a widow of an unregistered customary marriage.

In *Chapendama* v *Chapendama supra* and *Kuzora* v *Madondo NO & Ors* HH-147-98, I recognised the right of a wife in an unregistered customary union to a fair division and distribution of assets acquired during the subsistence of such union. These decisions were made against the finding that a tacit universal partnership existed between the parties to what was an unregistered customary union. The existence of a tacit universal partnership had been specifically pleaded in both those cases. I applied the choice of law rule in the Customary Law (Application) Act and reached the conclusion that the law applicable to the litigant's situation was the general law of Zimbabwe and that the concept of a tacit universal partnership could be relied upon to arrive at a fair division and distribution of the assets of the persons concerned in those cases. In this case, a tacit universal partnership, as I have already stated, was not pleaded. In his closing address, Mr *Magwaliba,* however submitted, conceding that a tacit universal partnership was not specifically pleaded, that the facts of this case, and the evidence adduced during the trial, disclose the existence of such a partnership; and that the court should infer, from the facts and the evidence, that a tacit universal partnership existed between the plaintiff and the first defendant. Whatever inference I may make from the facts and evidence in this case, I recognise that it is generally undesirable to determine a case on the basis of an issue which has not been pleaded. In a case such as the present, where the evidence given during the trial indicates beyond any shadow of doubt that the parties to an unregistered customary union contributed equally for their mutual benefit to the accumulation of property acquired during such a union, a departure may be made from the general rule. None of the parties will be prejudiced by an approach whereby the matter is decided on the basis of the whole evidence led during the trial, which evidence discloses the existence of a relationship on which a fair apportionment of property can be based. In this case, the evidence led disclose the existence of a common law concept and a basis must be laid for its application depending on the choice of law (see *Chapendama*'s case, *supra*).

The first defendant underwent a period of training before she commenced

making garments for sale. The parties bought three sewing machines and one knitting machine which the first defendant used to produce income. These machines, by virtue of their numbers, indicate that the first defendant engaged in business in a commercial sense. Her monthly income was considerable. The parties also established a hardware business whose gross income was considerable. They sold their products both in the urban areas and the rural areas. They acquired two motor vehicles and a house. They lived in Harare until their relationship terminated. They were, in the way of their life, and in the nature of business they were engaged, closer to the common law than to customary law. The application of the concept of a tacit

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universal partnership in this case is fully justified. The division and apportionment of the property acquired by the parties should therefore be decided on the basis of a tacit universal partnership in which their contribution is assessed to be equal ,as I have already determined.

It seems to me, however, that, even where a tacit universal partnership has not been pleaded, a division and distribution of property acquired during the subsistence of an unregistered customary union is possible. The basis thereof, is however, unclear. In *Pasipanodya* v *Muchoriwa* 1997 (2) ZLR 182 (S), a case involving an unregistered customary union and in which prescription had been raised as a bar to a claim for the division and apportionment of property and the court had found that the Prescription Act [*Chapter 8:11*] did not apply, Muchechetere JA said at 184E-G:

"I am of the view that even if the Act (Prescription Act) had been held to apply the claim for a formal distribution of matrimonial property would not have become prescribed. This is because in my view the marriage was not dissolved - a marriage under an unregistered customary law (*sic*) can be dissolved either by giving the wife '*gupuro*' or before a customary law court. The parties merely separated. *On separation, there was no proper distribution of the matrimonial property. In the circumstances, the appellant's claim for a formal distribution cannot be prescribed.*

The respondent was all along labouring under a misapprehension. There is need for a formal distribution of matrimonial property. Formal evidence must therefore be heard over the issue which includes the said property" (my own emphasis).

Unfortunately for my purpose, this matter was remitted for trial. It is significant however that the learned Judge of Appeal quite clearly stated that, when husband and wife in an unregistered customary union terminate their relationship, there must be a proper distribution of property. The judgment unfortunately does not state the law on the basis of which the "proper distribution" would be made. Although it was stated at 184D that the rights and obligations of the parties in that case were governed by customary law, it was not made explicit that customary law would apply to the "proper distribution" of the matrimonial property. It was also not clarified how *gupuro* was to be given.

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In *Deputy Sheriff, Harare* v *Mafukidze & Anor* 1997 (2) ZLR 274 (H), I reached the conclusion that a married African woman (in that case a registered marriage) was capable of acquiring property in her own name if that property was acquired by means of monies earned from employment or from other productive activities by her. At 285F to 286A, I commented on the decision in *Mhungu* v *P J Motoring Services* S-60-97 where the court had held that property acquired by a married woman by means of monies earned from employment was a form of *mavoko* property. I said:

"The learned Judge of Appeal was of course dealing with a case in which s 13 of the Customary Marriages Act was not applicable. The marriage was an unregistered customary law marriage. However, if the property acquired by the married woman in such a marriage can be regarded as a form of *mavoko* property with the result that that property is owned by her, I do not see why similarly acquired property relative to an African woman married under the Marriage Act cannot be classified in the same way. More than that, I think *Mhungu*'s case can be distinguished from the present case, in so far as the categorisation as a form of *mavoko* property of property acquired by means of monies earned from employment by a married African woman is concerned. In *Mhungu*'s case, the learned Judge of Appeal was not categoric in his classification. He said that 'the property is in the form of *mavoko* property'. He seems to me to

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have been saying the property is akin to *mavoko* property. I think I have the latitude to be more categoric and say that such property is owned by her by virtue of the capacity conferred on her by the Legal Act of Majority Act."

No distinction can be made between a woman married in terms of the Customary Marriages Act or the Marriage Act and one married under an unregistered customary union, in so far as the capacity to own property acquired by means of monies derived from her employment or her other productive endeavours is concerned. The power to acquire property (proprietary capacity) implies the freedom to use and dispose of it as well as the right to vindicate it. It is implicit also that the person concerned can be protected in her claims in respect to such property if she has created it or worked for it. A litigant in the first defendant's place would, in a case such as the present, merely be claiming an appropriate share of her contribution to the matrimonial estate, that contribution having been made by means of monies derived from her own productive endeavours.

In *Mashingaidze* v *Mugombe* HH-3-99, Gwaunza J declared that a tacit universal partnership existed in respect of the parties who had during the subsistence of their unregistered customary union (which had been dissolved) acquired considerable property, both movable and immovable. At p 21 of the cyclostyled judgment, the learned judge made the following comment:

"However, while I would support the view that a proven unregistered customary law union should be treated like any other normal marriage when it comes to dissolution and the

division of assets jointly acquired by the parties during its subsistence, such view is currently not supported by the law. All that can be said is that time has surely come to actively consider reviewing the situation, especially in the light of the increasing and not inconsiderable recognition being extended to unregistered customary law unions. The latest is through the Administration of Estates Amendment Act 6 of 1997, where the definition of widow includes one in an unregistered customary law union. This is, however, not to say that registration of marriages is not important or desirable: but that this must be balanced against the practical reality of people's daily lives. Statistics show that the vast majority of 'marriages' (other than non-African marriages) are unregistered customary law unions. In such cases, a situation allowing courts to apply, purely as a guide, the criteria set down in s 7 of the Matrimonial Causes Act for determining the apportionment of matrimonial assets between a divorcing couple would, in my view, go a long way towards ensuring gendered equity in the distribution of resources between parties whose entitlements should by right be measured according to the gendered contribution. After all the problem arises out of a relationship that has all the peculiarities of a marriage."

I think that the learned judge, faced with a case such as the present, would have approached it in the manner suggested hereunder. She stated that the view that in matters of dissolution and division of assets jointly acquired in an unregistered customary union should not be treated like any other "is not supported by the law". Such an approach is not consonant with the perceived need to adapt the law to changing times. Such an approach would lay the superior courts open to the criticism levelled against them by T W Bennett *Human Rights and African Customary Law* at p 85 where the learned author states:

"The judiciary could have modified the official version of customary law to bring it up to date. But empirical studies have revealed that judges in the higher courts, where one would expect to find a greater sensitivity to individual rights, were hesitant to depart from strictly patriarchal, 'traditional' version of customary law. Instead, women were more likely to receive a sympathetic hearing in the lower courts, in spite of the fact that these tribunals are controlled by traditional leaders. The explanation is not that the lower courts were deliberately trying to advance the cause of

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women. Rather, it seems they responded more flexibly to shifts in local attitudes and practice than the higher courts. Unlike western-style courts, they do not feel bound to apply pre-ordained rules to facts; their concern is with substantive justice".

See also his analysis on the question of authenticity of rules of customary law and the inclination of western-style courts to favour the mechanical application of rules at the expense of doing substantive justice at p 60-61 of his book. The law is what the courts say it is, as spoken to by Gubbay ACJ (as he then was) in the passage quoted above in *Zimnat Insurance Co Ltd* v *Chawanda supra* and also at 152B and 154D-F. I think that the task of adapting the law to suit the present socio-economic environment, which task is urged upon the courts by the decisions to which I have referred, is one properly for the courts to undertake. It is true that the Matrimonial Causes Act applies only to marriages registered in terms of the marriage statutes. But the

principles contained in s 7 of the Matrimonial Causes Act and the guidance provided therein can usefully be applied to other like situations without doing harm in any way.

In *Bhazuwere* v *Munene* 1994 (2) ZLR 351 (S) at 354F-G, McNally JA seemed to recognise an unregistered customary union for purposes of an action for breach of promise. This would be a further recognition of customary law unions outside the framework of the Customary Marriages Act.

The above examination of the inroads into the law regarding the rights of spouses in an unregistered customary union exposes a fallacy which, I would say, still exists in s 3 of the Customary Marriages Act. Whereas that section provides, as I have stated, that a customary union which is unregistered is not valid except for the purposes of the children of such union, other statutes and decided cases show that the union is now much more widely recognised for various other purposes. Thus, in addition to -

(a) the status, guardianship, custody and rights of succession of the children of such marriage (s 3 (5) of the Customary Marriages Act), the unregistered customary marriage is also recognised for the purpose of -

(b) the maintenance of the wife by a husband to such union (s 6(3) of the Maintenance Act);

(c) owning *mavoko* property (*Mhungu*'s case *supra*);

(d) owning any other property which she has acquired by means of earnings from employment or other productive endeavours (*Mafukidze*'s case, *supra*);

(e) a claim by her husband for adultery damages (*Carmichael*'s case *supra*);

(f) inheritance in intestate succession to a part of her husband's property (Act 6 of 1997);

(g) payment of compensation under the War Victims Compensation Act, Workmen's

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Compensation Act, pension in terms of the Public Services (Pensions) Regulations (*Chawanda*'s case *supra*);

(h) an action for breach of promise to marry (*Bhazuwere*'s case *supra*);

(i) under the rubic of a tacit universal partnership, for the fair division and distribution of jointly acquired assets (*Chapendama*'s, *Kuzora* and *Mashingaidze*'s cases *supra*).

I am aware that an unregistered customary union is not recognised for other purposes: for example, in respect of a claim for adultery damages by the wife against her husband's paramour. See *Mukono* v *Gwenzi* SC-212-98 at p 3. *(187)

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There are other areas also in the procedural law where such unions are not recognised. I am here concerned with substantive law. To my mind, the various instances or occasionSSs when such unions are recognised in law cry out for their recognition in the area of the division and distribution of jointly acquired property upon its dissolution or termination. The spouses' rights, it must be acknowledged (in the manner of Mr *Magwaliba*'s submissions in this case), derive not from the fact of dissolution or termination of the union but on the contribution by the parties to the acquisition of the property. The situation of a spouse, the wife, in an unregistered customary marriage is worse off upon dissolution or termination of the marriage than upon the death of the husband or during his lifetime. Why should this be so? If it was seen fit that her children's interest be protected (as by s 3(5) of the Customary Marriages Act) or her husband be entitled to claim adultery damages in respect of her or, upon her husband's death, she be entitled to inherit part of his estate or be paid compensation or a pension, what is so magical about the incidence of separation (divorce) that she should be disentitled from claiming more liberally a share of the jointly acquired property? Why should the non-recognition of her marriage in terms of the Customary Marriages Act, for lack of solemnisation, be the sole and pervasive reason that she should not be entitled to claim a share of the joint estate? The customary position with regard to property is well known under our law and it is extensively documented. The wife at customary law is not entitled to any property upon "divorce" except *mavoko* property. That to me is a sad relic of precolonial and colonial law. Gubbay ACJ's words in this regard bear apposite repetition:

"As our law accepts customary unions it should endeavour to secure equality to the parties thereto and discard the intolerable affectation of superior virtue (to borrow a phrase) inherited from the colonial past. To continue to exhibit a vestige of condescension and conservatism towards customary law unions ill befits the current and unyielding movement by the State to remove the legal disabilities suffered by African women (*Chawanda*'s case *supra* at 152G-s153A)."

A conclusion such as that alluded to by Gwaunza J in *Mashingaidze*'s case *supra* to apply as a guide (and it is a good guide) the criteria set out in s 7 of the Matrimonial Causes Act to determine the apportionment of matrimonial assets is called for in relation to cases such as the present one. It would, in the words of Gubbay ACJ, not be an interference with the prerogative of Parliament to make new laws but simply the effect of applying the principles deriving from recent cases and legislative developments to a specific situation. After all, the power of the

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court under s 7 of the Matrimonial Causes Act is a discretionary and equitable power (*Muzanenhamo & Anor* v *Katanga & Ors* 1991 (1) ZLR 182 (S) at 188D). There would be no prejudice

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caused to other tenets of customary law if it was decided in a specific case to apply the principles of the Matrimonial Causes Act to determine the respective proprietary rights of spouse to an unregistered customary union which has come to an end. This case, to my mind, merits the application of those principles. The principles are widely used in all divorce cases in this country. A "divorce" under the régime of an unregistered customary marriage is no less a divorce for the parties. It puts an end to co-habitation. It puts an end to the other reciprocal obligations of the parties. It is a divorce in everything but name. I see no harm in applying those principles to this case.

In regard to the immovable property - ie the house in Mufakose - the matter can be handled quite differently for purposes of determining the parties rights in it. During the trial, reference was made to the deletion of applicant's name from the second defendant's records. Those records were initially not specified either in the pleadings or in oral evidence. I persisted in my questioning of both counsel and the parties in order to understand what those records were in specific terms. They eventually narrowed them to on document - a deed of assignment. I directed, with the consent of both parties, that the deed of assignment be produced. It was handed in after the trial.

[*The deed was then cited in full. His Lordship continued:*]

This deed of assignment was duly and regularly signed by the parties and a representative of the second defendant.

The deed of assignment is unambiguous. The assignor's rights and obligations in terms of the sale (as specified therein) were purchased for $40000 by the assignees, the plaintiff and the defendant. There is no indication that the rights of the assignees in the property accrued to only one of them ie the plaintiff. On the contrary, the indication is that those rights are jointly held. The evidence given by the plaintiff to persuade the court that in fact the defendant has no rights in the property, based as it was on an alleged failure or refusal to contribute to the building up of the $44000 in the POSB account by the defendant, was found to be without substance. There is no basis in law or in fact to grant the relief sought by the plaintiff. His claim must accordingly be dismissed.

The defendant counterclaimed for the house to be declared her sole property. That claim cannot be sustained. The rights evidenced by the deed of assignment are jointly held. I have made a finding that the parties contributed equally to the acquisition of the assets listed in defendant's counterclaim. In her counterclaim, the defendant proposed to retain for herself property worth $188750, including the house in Mufakose. She

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valued the house at $150000. She proposed that the plaintiff should be awarded property valued at $169050 which included a house at the plaintiff's rural home ($75000) and two motor vehicles ($70000) as the major items. It was common cause that after the plaintiff forced the defendant away from the house in Mufakose, he effected certain improvements to it. While acknowledging that in all probability, he used resources accumulated during the subsistence of the unregistered customary union credit should be given to him for improving and developing the house. Whilst proceeding on the basis that the parties should each receive an equal share of the assets, I must make adjustment arising from the fact of the extra work which plaintiff did on the house at Mufakose and at the same time have regard to his retention of the rural home. The plaintiff did not challenge the values placed on the various assets, either because he was confident that the court would declare that the defendant had no entitlement to any of the assets whatsoever or because he was not properly advised. But I must note that some of the values appear to me to be exaggerated somewhat. I will have regard to this factor.

Therefore, applying as a guide the provisions of s 7 of the Matrimonial Causes Act and the fact that the parties' rights in House No. 22 Handira Road, Mufakose are jointly held, the order which I make is the following:

1. The plaintiff's claim is dismissed.

2. The defendant's counterclaim is upheld to the extent that -

   (a) the plaintiff shall pay to the defendant 40% of the declared value of $150000 of the house at No. 22 Handira Road, Mufakose within six months of the date of this judgment.

   (b) the plaintiff shall forthwith deliver to the defendant the following items of movable property or pay to the defendant the amount in respect thereof as shown opposite each item - (description of items as in defendant's counterclaim)

(i)	stove with 2 plates, oven, warmer	-	$3 000
(ii)	kitchen unit	-	$2 500
(iii)	base bed	-	$7 000
(iv)	l knitting machine	-	$7 500
(v)	2 sewing machines	-	$3 333
(vi)	1 wardrobe	-	$1 750
(vii)	2 head of cattle	-	$6 000

   (c) The rest of the movable property and the house at plaintiff's rural home be and are

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hereby awarded to the plaintiff as his sole and exclusive property.

3. In the event that the plaintiff fails to pay to the first defendant, the sum as calculated in terms of para (2) hereof within the period therein stipulated, the Deputy Sheriff be and is hereby authorised to sell the

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property known as No. 22 Handira Road, Mufakose by public auction and pay to the defendant from the proceeds thereof, 40% of the net price realised upon such sale or $60000, whichever is the greater, provided that the plaintiff is hereby prohibited from further encumbering the property in any way whatsoever.

4. The plaintiff shall pay the costs of this action.

Kabote & Company, plaintiff's legal practitioners

Chiwanza Chigadza & Partners, c/o Jakachira Gahadzikwa, first defendant's legal practitioners

MINISTER OF HIGHER EDUCATION *v* BORDER TIMBERS LTD 1999 (1) ZLR 555 (HC)

Citation	1999 (1) ZLR 555 (HC)
Case No	Judgment No. HH-131-99
Court	High Court, Harare
Judge	Garwe J
Heard	June 30, 1999
Judgment	June 30, 1999
Annotations	None

Civil action

Flynote

Prescription - period of - debt owed to State - what is - levy payable to Manpower Development Fund under Manpower Planning and Development Act - fund an organ of the State and levy for fund is a debt due to the State

Revenue and public finance - levy on employers under Manpower and Development Act - persons involved in farming operations exempt from levy - employer involved in forestry operations including sawmilling - whether

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exemption from levy applies to such employer

Headnote

The Manpower, Planning and Development Act [*Chapter 28:02*] gives the Minister the power to impose a levy by on employers which is payable to the Manpower Development Fund. He must do this by statutory instrument which specifies the types of employers who must pay this levy. Acting in terms of this Act the Minister promulgated the Vocational Education and Training (Levy) Notice SI 802 of 1982. This statutory instrument specifies the categories of employers who must pay the levy and the categories of employers who are exempt from such payment. The levy is payable by employers involved in agricultural production, other than general farming.

The defendant company was involved in forestry plantations. Its activities included cultivation of trees, felling and transport of the trees to a sawmill and raw sawing of the tree trunks into units. The company claimed that it was exempt from the payment because it was involved in general farming operations. Alternatively it argued that the claim had prescribed as the debt was not covered by the longer period applicable to debts due to the State because this was not a debt due to the State.

Held, that although the cultivation, felling of trees and transport of the timber falls within the ambit of general farming operations, once the felled timber is taken to a saw mill on the farm and is cut into lengths, this was more than a general farming operation and the company was therefore not exempt from the levy.

Held, further, that the Manpower Development Fund is an organ of the State as it is under the constant and direct control of the Minister, both in its composition and operations. Therefore, the debt was due to the State and as such had not prescribed in terms of the Prescription Act [*Chapter 8:11*].

1999 (1) ZLR p556

Cases Considered

Cases cited:

Ambleside Tobacco Grading Co (Pvt) Ltd v *Min of Labour (SR)* 1958 R & N 842; 1959 (1) SA 295 (SR)

Lerros Motors v *Min of Labour* 1990 (1) ZLR 349 (S)

PTC v *Modus Publications (Pvt) Ltd* 1997 (2) ZLR 492 (S)

R v *Rohold* 1934 TPD 371

Statutes Considered

Legislation considered:

Manpower, Planning and Development Act [C*hapter 28:02*], s 47

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Case Information

A P de Bourbon SC, for the plaintiff

J C Andersen SC, for the defendant

Judgment

GARWE J: This is a stated case in terms of Order 29 of the High Court Rules 1971.

The plaintiff is the Minister of Higher Education. In terms of s 53 of the Manpower, Planning and Development Act [*Chapter 28:02*], the Minister is empowered, by statutory instrument, to impose a levy on such employers as may be specified in the statutory instrument. In 1982, the Minister promulgated the Vocational Education and Training (Levy) Notice (SI 802 of 1982). In terms of that statutory instrument, every employer is obliged to pay a levy assessed at 1% of his total monthly wage bill. However, such a levy shall not, in terms of s 7, be payable in respect of, amongst others, an undertaking in the agricultural and livestock production, including hunting, trapping and game propagation and other prescribed activities.

The defendant in this case is involved in forestry plantations. Its activities involve cultivation and maintenance of established trees, the felling of such timber and transportation of such timber to the forestry mill where raw sawmilling of tree trunks into units is done. In pursuance of these activities, the respondent employs agricultural employees, drivers, sawmillers, administrative personnel, mechanics, fitters and turners.

It is the defendant's contention that all the personnel employed on its estates are involved in an agricultural undertaking and in terms of s 7 of SI 802 of 1982 it is therefore exempt from paying the levy. In particular, the defendant submits that the rough sawmilling of logs into units constitutes no more than removal of waste from an agricultural product prior to transportation. The defendant company also argues that the levy payable under SI 802 of 1982 is not a debt due to the State. That being the position, the defendant submits that part of the plaintiff's claim is therefore prescribed.

The plaintiff argues, on the other hand, that the employees involved in the rough saw milling of the logs on the estate are engaged in an industrial and not agricultural undertaking. Therefore, so the plaintiff argues, the employees must be treated as such, regardless of the fact that the mill is situated on the

estate and is an activity complementary and indispensable to defendant's timber production.

The plaintiff further submits that as the levy is a debt due to the State the prescription period is six years and not three years as submitted by the defendant.

WHETHER DEFENDANT IS EXEMPT FROM PAYING THE LEVY

In terms of the second schedule to SI 802 of 1982, the undertaking in respect of which a levy is not payable is -

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"General farming and ranching, all crops and animals, including all operations relating thereto ..."

That trees are crops for purposes of the statutory instrument is not in dispute. What is in dispute, as already indicated, is whether for purposes of defendant's general farming activities the rough saw milling of logs into units is part of the agricultural operations relating thereto.

In *R* v *Rohold* 1934 TPD 371, the issue that arose was whether the appellant, who carried on the business of a saw mill, in which wood of every description was cut and planed for various customers, was an employer in the furniture industry and therefore obliged to pay the prescribed wages. Whilst accepting that the cutting of timber into certain lengths and to certain shapes is one of the steps in the making of furniture, Tindall J was of the view that because the appellant employed persons to do such work it did not follow that he was engaged in the furniture industry. The learned judge held that the enterprise carried out by the appellant was that of an ordinary saw mill.

In *Ambleside Tobacco Grading Co (Pvt) Ltd* v *Minister of Labour (SR)*; *Selous and Hartley Tobacco Grading Co Ltd* v *Minister of Labour (SR)* 1958 R&N 842; 1959 (1) SA 295 (SR), the issue that arose was whether the business of tobacco grading constituted an undertaking in farming operations as defined in the relevant regulations. Murray CJ remarked at p 844 (R&N); 296 (SALR):

"As a question of practical fact, it is essential for a grower, in order to sell his crop, to have it properly graded. Grading involves no manufacture or processing as it consists of the manual sorting out and separating into various classes, according to the colour, length, texture and position *vis-à-vis* the plant, of the various tobacco leaves grown, reaped and cured by the farmer."

The learned Chief Justice further remarked at p 845 (R&N); 296 (SALR) of the judgment:

"Ever since the case of *R* v *Sidersky* 1928 TPD 109, which has repeatedly and consistently been followed, the question as to whether an employer and his employees are subject to the provisions of an industrial agreement or the like, applicable to a particular field, falls

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to be decided by having regard, not to the special nature of the activities to be performed by the employers, but to the nature of the enterprise in which the particular employees and their employers are associated for a common purpose."

The nature of the enterprise in the present case is the growing of trees. That is the business in which the defendant and its employees are associated for a common purpose. The land preparation, cultivation of seedlings, maintenance of growing trees, felling mature timber, transportation of the timber from one part of the estate to another, the operation and maintenance of earthmoving equipment necessary for land preparation and road development and maintenance would in my view, all be part of the defendant's normal farming operations. It seems to me, however, that once the felled timber is taken to a saw mill on the farm and is then cut into lengths that this is more than a general farming operation related to the growing of trees.

The words used in the statutory instrument are clear. The debarking of logs in a saw mill and

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cutting the logs into sections can hardly be said in these circumstances to be part of general farming operations. Saw milling in any form is not one of the operations in which defendant and its employees could be said to be associated for purposes of cultivation of trees. No issues would arise if the defendant were involved in the mere cultivation and cutting down of trees. In my view, the process of cutting the logs into sections is more than a farming operation. It is not an activity that is incidental to the growing of trees. Whilst it is no doubt complimentary, it is not such an activity as would be part and parcel of the defendant's business of growing trees. I am inclined to agree with plaintiff that saw milling is not an integral part of the defendant's general forestry activity. The operation in which defendant is involved may include felling and transportation of the timber but in my view does not include saw milling of any nature.

I reach the conclusion, therefore, that saw milling is not part of defendant's general farming operations.

THE ISSUE OF PRESCRIPTION

In terms of s 15 of the Prescription Act [*Chapter 8:11*], the period of prescription of a debt shall be six years in the case of a debt owed to the State or thirty (30) years in the case of a debt owed to the State in respect of tax, royalty, tribute, share of profits or other similar charge or consideration payable in connection with the exploitation of or the right to win minerals or other substances.

Is the levy payable under the Act a debt due to the State?

In terms of s 47(2) of the Manpower Planning and Development Act, the Zimbabwe Manpower Development Fund is to consist, *inter alia*, of any

moneys raised by any levy. In terms of s 47(4), the fund is vested in the Minister as trustee of the fund, although administered by a Chief Executive in accordance with the Minister's directions. In terms of s 52(2), the Minister is empowered to impose a levy which in this case he has done by SI 802 of 1982. Further in terms of s 54(4), a levy shall be a debt due to the fund to be recovered by action in a court of competent jurisdiction.

The criteria to be considered in determining whether a fund is an organ of the State has been considered in a number of cases. See *Lerros Motors* v *Minister of Labour, Manpower and Planning & Social Welfare* 1990 (1) ZLR 349 (S); *PTC* v *Modus Publications (Pvt) Ltd* 1997 (2) ZLR 492 (S).

Applying the criteria laid down in the above cases, the following is apparent:

(a) The fund is established by statute - s 47 of the Manpower Development Act is relevant.

(b) In addition to levies, moneys may be appropriated by Parliament for purposes of the fund - s 47(3)(c).

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(c) It is vested in the Minister as trustee - s 47(4).

(d) Although administered by a Chief Executive, the Chief Executive does so in accordance with the Minister's directions, given on the advice of the council - s 47(4).

(e) In order to give effect to the object of the fund, the Minister is allowed to employ persons and determine their conditions of service and to discipline them.

(f) In terms of s 48, the Minister is also empowered to do a host of other things in connection with the fund.

(g) The Minister shall cause proper books of account of the fund to be maintained and submitted yearly to the Comptroller and Auditor General - s 50.

(h) No money may be withdrawn except by means of cheques signed by persons authorised by the Minister.

(i) The Minister imposes a levy.

(j) Any outstanding levy is recoverably not by the Fund itself but by the Minister by civil action - s 54.

(k) The Minister appoints the Chief Executive and fixes his conditions of service - s 56.

Clearly, the fund is an organ of the State. It is under the constant and direct control of the Minister both in its composition and operations. There is virtually no distinction in terms of operations between the fund and other government departments.

I am satisfied that the fund is an organ of the State and not a separate entity.

The levy is therefore, a debt due to the State.

GARWE J

That being the position, the period of prescription is six years and not three years as submitted by the defendant. The defendant's counsel has now conceded that this is the correct position.

I would, accordingly, find for the Minister.

Judgment is accordingly entered in favour of the plaintiff as claimed in the summons, together with interest from the date of service of summons to date of payment and costs on the ordinary scale.

V S Nyangulu and Associates, plaintiff's legal practitioners

Gill Godlonton & Gerrans, defendant's legal practitioners

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MHINI *v* MAPEDZAMOMBE 1999 (1) ZLR 561 (HC)

Citation	1999 (1) ZLR 561 (HC)
Case No	Judgment No. HH-130-99
Court	High Court, Harare
Judge	Garwe J
Heard	June 30, 1999
Judgment	June 30, 1999
Annotations	None

Civil application

Flynote

Practice and procedure - abuse of process - remedy for - order granted restraining party from instituting action without specific leave of the court

Headnote

The respondent was the registered owner of a residential property in Harare. The property was sold by public auction to the applicant after a bank obtained judgment against him. The sale was confirmed by the Sheriff. Since then, the respondent brought numerous proceedings, mostly in the High Court, against the applicant, the Sheriff, and various other persons. His aim was to have the sale set aside. These attempts failed, as did an appeal to the Supreme Court. The respondent, a self-actor who incurred no legal expenses, nonetheless persisted in bringing further proceedings. The applicant sought an order restraining him from bringing any further proceedings in respect of the sale of the property without the leave of court.

Held, that the respondent's conduct amounted to an abuse of process. The relief the applicant sought was recognised by our law, and an order should be granted as sought, with costs to be paid by the respondent on the higher scale.

Cases Considered

Cases cited:

Anastassiades In re 1955 (2) SA 220 (W)

Brown v *Simon* 1905 TS 311

Corderoy v *Union Govt (Min of Finance)* 1918 AD 512

Mapedzamombe v *CBZ & Anor* 1996 (1) ZLR 257 (S)

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Case Information

F Girach, for the applicant

Respondent in default

Judgment

GARWE J: In this application, the applicant seeks the following relief:

1. that the respondent be restrained from instituting any proceedings the against applicant or her employees or making complaint to any authority regarding the purchase by the applicant of property known as Stand 606 Northwood Township 4 of Sumben;

2. alternatively, that the respondent be restrained from instituting any proceedings against the applicant or her agents in respect of the above named property except with the leave of this court;

GARWE J

3. that any application for leave to institute proceedings shall be made on notice of motion and;

4. that the respondent pays the costs of this application on the higher scale.

The facts of this matter are as follows. The respondent was the registered owner of Stand 606 Northwood Township 4 of Sumben. The Commercial Bank of Zimbabwe took judgment against him and on 18 November 1994 the property was sold by public auction to the applicant. The sale was subsequently confirmed by the Sheriff of the High Court. Since then there has been a multiplicity of proceedings in which the respondent has, in the main, attempted to have the sale in execution set aside. These attempts failed. The respondent appealed to the Supreme Court against an order of this court dismissing the claim. The appeal was dismissed with costs. Since the dismissal of the appeal, the respondent has instituted various proceedings in which he has cited the applicant and others as the respondents. Some of the proceedings have not been pursued and in some instances the same relief has been claimed in different cases. The applicant contends that the conduct of the respondent has resulted in her incurring huge legal bills. Previous attempts to execute against the respondent to recover costs have rendered a *nulla bona* return. Since the respondent is unemployed, the applicant believes that she will not recover her legal costs. She submits that the pleadings filed by respondent, apart from being poorly pleaded, carry little or no prospects of success. Once an appearance to defend is entered, the proceedings go no further and fresh legal proceedings on the same relief are instituted. In the circumstances, the applicant prays for an order of perpetual silence, or alternatively, that the respondent should not bring an action before the court except with the leave of a judge.

The respondent, who is a self actor, has opposed the relief sought. He says the application is "fatal, frivolous and vexatious because it has no legal basis/merits and it is also unconstitutional because it infringes on human rights". He further says that "the whole application is based on

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fraud committed by the applicants ... " and that the application should be dismissed with costs.

I have perused various files of this court involving the same parties. What I have found is as follows:

- Case No. HC-7730-92

  A judgment in favour of the Commercial Bank of Zimbabwe was granted against the respondent in the sum of $67180.67 on 22 January 1993. A warrant of execution was subsequently issued.

- Case No. HC-7497-94

  The respondent in the present case, Claudius Mapedzamombe, filed an urgent application, citing the Commercial Bank of Zimbabwe and the applicant in this matter as respondents. A provisional order was granted

by Robinson J interdicting the Sheriff from confirming the sale of the property to the applicant pending the filing of an application by respondent setting aside the sale within 21 days of that order. The application was opposed by the applicant. No application to set aside the sale was filed by the respondent as ordered and the provisional order lapsed. The sale in execution was then confirmed by the Sheriff.

- Case No. HC-1789-95

  This was a chamber application by the respondent, citing the applicant and Sheriff as respondents. In the founding affidavit, no indication was made as to the nature of the relief the respondent was seeking. In the certificate of urgency, he intimated he wanted the sale in execution set aside. The application was dismissed by Smith J on 23 March 1995 (see HH-43-95). In April 1995, the respondent filed a notice of appeal seeking to have Smith J's order reversed. The appeal was dismissed with costs by the Supreme Court (*Mapedzamombe* v *CBZ & Anor* 1996 (1) ZLR 257 (S)).

- Case No. HC-9726-96

  This was an application by respondent citing applicant, the Sheriff of the High Court and the Minister of Justice, Legal and Parliamentary Affairs. He sought nullification of the sale in execution, "re-registration" of the title deeds in his name and eviction of the applicant.

  The matter was heard by Gillespie J together with Case No. HC-11054-96. Gillespie J directed that the trial of both matters was to be instituted by summons within 24 days of the order and the matter was to proceed in accordance with the rules of this court. This was not complied with.

- Case No. HC-11054-96

  In this case, the respondent cited the same parties to Case No. HC-9726-95 seeking the same relief. This matter and Case No. HC-9726-96 were jointly heard and a directive given

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by Gillespie J that the matter be commenced by summons within 24 days.

The respondent did not file a summons within 24 days as directed by Gillespie J.

- Case No. HC-4442-97

  This was a summons issued by the respondent citing the applicant, the Sheriff and the Registrar of Deeds as the defendants and claiming the sum of $1 207 900 for "fraud, perjury, corruption, unlawful transfer of immovable property". Although the summons was issued, it is unknown whether it was served as nothing further happened in that matter.

- Case No. HC-4443-97

  This was a summons issued by the respondent, citing the applicant, the

Sheriff and Registrar of Deeds. In the particulars of claim, the respondent seeks payment by Beverley Building Society of the sum of $31 087.86, being damages for the "release" by the Building Society of the title deeds to one Kurawley, a legal practitioner with Gollop and Blank. Although not cited as one of the defendants, it is Beverley Building Society which, in the body of the summons, is asked to enter appearance. Indeed, Beverley Building Society entered appearance. The respondent then abandoned the matter.

- Case No. HC-4444-97

  In this case, the respondent cites the applicant, the Sheriff and the Registrar of Deeds as defendants, but calls on the Managing Director of Central Real Estate to enter appearance. The claim is for $150 000 for "mental pain suffering, public humiliation for fraud and perjury". The Managing Director of Central Real Estate entered appearance. The respondent then abandoned the matter.

- Case No. HC-4445-97

  This is a summons case in which respondent cites the same parties to Case No. HC-4444-97, but calls upon a legal practitioner, Mr Kurawley of Gollop and Blank, to enter appearance. The claim is for $357000 for "unlawful transfer of property, mental pain, suffering ... loss of collateral use of the property". Mr Kurawley entered appearance. The respondent then abandoned that matter.

- Case No. HC-4446-97

  This is a summons issued by the defendant, citing the applicant, the Sheriff, SEDCO, Mr Nyatanga of the High Court and the Registrar of Deeds, for payment of $791 700 for "general damages for mental pain suffering, emotional stress, loss of esteem, legal costs, lost rentals ... "

  On 2 July 1997, Adam J ordered the plaintiff to put his summons in proper form by filing an amended summons and particulars of claim not only in respect of this matter but also in respect of Case Nos. HC-4449-97 and HC-4450-97. Adam J further ordered that the

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respondent was not to institute any other litigation or make any further application or set any matter down without the leave of a judge of this court.

- Case No. HC-4447-97

  In this case the respondent cites the applicant, Mr Nyatanga of the High Court and the Registrar of Deeds as defendants. However, it is the Managing Director of the Commercial Bank of Zimbabwe who is called upon to answer a claim for $116494.04, being "restitution of financial benefit from a fraudulent transaction". The bank's Managing Director entered appearance and requested particulars. The respondent did nothing further after this.

GARWE J

- Case No. HC-4448-97

  As in Case No. HC-4447-97, the respondent cites the applicant's Mr Nyatanga and the Registrar of Deeds as defendants, but calls upon the Chief Executive of Standard Chartered to answer a claim for $200080 for "restitution of financial benefit obtained through a fraudulent transaction". The Chief Executive entered appearance. The respondent did not pursue the matter.

- Case No. HC-4449-97

  In this case, the respondent cites the same three persons mentioned above as defendants. In the body of the summons, however, he proceeds to call upon the applicant only to answer a claim for $690900 for "fraud, perjury and corruption". The claim is said to be one for "restitution integrum [*sic*], rental, mental pain and suffering, public humiliation, consequential damages ..." The applicant in this matter entered appearance. On 2 July 1997, Adam J ordered the respondent to file a proper summons and particulars in connection with this and other matters and not to institute or litigate without the leave of a judge.

- Case No. HC-4450-97

  In this case, the respondent cites the applicant, Registrar of Deeds and the Sheriff as the defendants. However, in the body of the summons it is the Registrar of Deeds who is called upon to answer a claim for $150000 for "unlawful registration of property into Emily Mhini's name" and for "mental pain and suffering". This matter was also the subject of the order made by Adam J on 2 July 1997, when the respondent was directed not to litigate without the leave of a judge.

- Case No. HC-9000-97

  In this case, the respondent cites the applicant, Mr Nyatanga of the High Court, SEDCO, the Sheriff of the High Court and the Registrar of Deeds for payment of $791700 for mental pain, suffering, etc, and $15000 rental per month. This was not an amendment to the declaration filed in Cases Nos. HC-4449-97 and HC-4450-97, but a new action. The summons in this case was filed on 10 September 1997 contrary to Adam J's directive that

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the respondent was not to institute proceedings without the leave of the court. It is also clear that this claim is the same as in Case No. HC-4446-97. The matter was heard by Blackie J on 18 May 1998, together with Case Nos. HC-4446-97, HC-4448-97 and HC-4450-97. The relief sought was refused for a number of reasons. The respondent then filed a notice of appeal. He did not pursue the appeal, which then lapsed.

- Magistrates Court Case No. 37051/98

  In this case, the respondent sued the applicant in the magistrates court for

GARWE J

virtually the same relief. He obtained a default judgment but stay of execution was thereafter granted.

- High Court Case Nos. 13397/98 and 15027/98.

  The two cases are set down on the opposed roll for today and are the subject of an exception. In both matters, the applicant and others, cited as the defendants, have excepted to the summons as disclosing no cause of action and being vague and embarrassing. Despite having been served with the notice of set down, the respondent is in default.

There is also evidence that the respondent has complained to the police and made allegations against legal practitioners who have been involved in the conduct of this matter.

From the above, it is apparent that the respondent has been involved in a persistent and calculated course of conduct to institute proceedings even after the Supreme Court had thrown out his appeal. It is clear that in most of the proceedings the relief sought remains the same, namely the setting aside of the sale in execution. Later the respondent included an element of damages to the proceedings. Almost invariably, the cause of action has not been properly pleaded. Bald allegations of fraud, bribery, corruption and perjury have been made. In some instances, the person cited as defendant is not the same person called upon to enter appearance. Proceedings are instituted, but once there is opposition they are abandoned.

There is substance in the submission by the applicant that whilst she is incurring substantial legal costs by virtue of the continuing litigation, the respondent, who is a self-actor, incurs no legal costs. There has been an attempt to execute against the respondent, but the Deputy Sheriff has rendered a *nulla bona* return.

In all the circumstances, I am satisfied that the conduct of the respondent amounts to an abuse of the process of this court. The possibility that he may bring further proceedings against the applicant in the same context cannot be ruled out. The order by Adam J that he was not to institute any further proceedings without the leave of the court first being granted has been ignored.

The relief that the applicant seeks is recognised by our law. In *Brown* v *Simon* 1905 TS 311,

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Curlewis J remarked that the procedure:

"... affords a useful means of bringing to a conclusion all threatened actions, and in our opinion it is applicable under due safeguards not only to cases where a claim has been made or an action threatened publicly, but to every case where by demand or threatened action there has been a disturbance of, or interference with, the quiet enjoyment of another's rights" (at p 322).

In this case, the respondent has gone further and has instituted various proceedings against the applicant and others. The proceedings are not

GARWE J

simply threatened. They have been instituted and continue to be instituted.

In *Corderoy* v *Union Government (Minister of Finance)* 1918 AD 512, the South African Appellate Division held that when there has been repeated and persistent litigation between the same parties in the same cause of action and in respect of the same subject matter, the court can make a general order prohibiting the institution of such litigation without the leave of the court but that power extended only to prevent abuse of its own process without being concerned with the process of other courts. Through the Vexatious Proceedings Act of 1956, courts in South Africa are now empowered to impose general restrictions on the institution of vexatious legal proceedings. Attention is also drawn to In re *Anastassiades* 1955 (2) SA 220 (W).

After considering the facts of this case, it seems to me that an order prohibiting the institution of litigation or the setting down of any matter without the leave of this court would be most appropriate.

On costs, I am satisfied an award on the higher scale is warranted. The respondent has continued to institute proceedings despite an order of this court to the contrary. It is clear that he is abusing court process.

Accordingly, it be and is hereby ordered as follows that:

1. the respondent be and is hereby restrained from instituting any proceedings in this court against the applicant or her employee or her agents relating to the applicant or her agents which proceedings relate directly or indirectly to the purchase by the applicant of certain immovable property known as Stand 606 Northwood Township 4 of Sumben without leave of this Honourable Court first being applied for and obtained.

2. the respondent be and is hereby restrained from setting own any matter already filed or commenced with this court without the leave of this Honourable Court first being applied for and obtained.

3. any application for leave to institute proceedings or to set down any matter shall be made on notice to the applicant.

4. the respondent is to pay the costs of this application on a legal practitioner and client scale.

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Stumbles and Rowe, applicant's legal practitioners

Respondent in person

S v NZIRADZEPATSVA 1999 (1) ZLR 568 (HC)

Citation	1999 (1) ZLR 568 (HC)
Case No	Judgment No. HH-114-99
Court	High Court, Harare
Judge	Bartlett J
Heard	June 30, 1999
Judgment	June 30, 1999
Annotations	None

Criminal review

Flynote

Criminal procedure - trial - conduct of - unrepresented accused - magistrate's duty to ensure protection of rights - explanation of technical and specialised expressions - need to ensure accused aware of rights when prosecution seeks to produce statement made by accused

Headnote

The duties of a magistrate towards an unrepresented accused are again emphasized. The magistrate has a duty to ensure that the accused's case is put fairly, to assist the accused in his defence, where necessary, and to see that the prosecutor does not take advantage of the accused. To ensure that the accused has the necessary knowledge to conduct his defence, the magistrate himself (not the court interpreter) should give careful and detailed explanations of what is expected of him. Such explanations should be recorded. In particular, the court should ensure that technical or specialised expressions are carefully explained in simple and understandable terms. If the prosecution seeks to produce by consent a warned and cautioned statement made by the accused, the magistrate should make sure that the accused is aware of his rights, that he is given an opportunity to read the statement, and that it is properly established that the accused is agreeing that he made the statement "freely and voluntarily and without being unduly influenced". The last aspect requires the magistrate to explain in simple, clearly understandable terms, what is meant by that phrase.

Cases Considered

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Cases cited:

S v *Brown* 1984 (3) SA 399 (C)

S v *Davy* 1988 (1) ZLR 386 (S)

S v *Dipholo* 1983 (4) SA 757 (T)

S v *Govazela* 1987 (4) SA 297 (O)

S v *Magore* 1996 (2) ZLR 88 (S)

S v *Mngomezulu* 1983 (1) SA 1152 (N)

R v *Muchena* 1966 RLR 731 (A)

S v *Musindo* 1997 (1) ZLR 395 (H)

S v *Ndebele* 1988 (2) ZLR 249 (H)

S v *Nhindiri* HH-278-87

S v *Sebatana* 1983 (1) SA 809 (O)

S v *Zaranyika* 1997 (1) ZLR 539 (H)

S v *Zingeni* HH-4-99

1999 (1) ZLR p569

Judgment

BARTLETT J: This judgment concerns the thoroughness necessary in the conduct of criminal trials, and the need for magistrates to ensure that the rights of unrepresented accused persons are properly protected.

The accused was charged together with one Levie Masina with the theft of a scotchcart. Masina pleaded guilty, but the accused denied the charge. He stated that Masina had given him a lift on a truck which was transporting the scotchcart and that it never occurred to him that the cart was stolen. A plea of not guilty was entered in respect of the accused. The trials were then separated and the magistrate proceeded without further delay to deal with the contested trial. The accused was convicted and sentenced to 14 months' imprisonment, of which 8 months' imprisonment were conditionally suspended.

The record of the trial is very brief. The evidence implicating the accused comes from two witnesses. Chisanduri stated that Masina hired his truck to transport the scotchcart in question. He stated that the accused was present when Masina hired him and that the accused assisted in loading the scotchcart onto the truck and then off the truck at Chinhoyi. He left Masina and the accused at Chinhoyi. His evidence took up less than a page of the court record and there is no detail at all as regard to the circumstances of the hiring or what was said by the respective persons.

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The other evidence implicating the accused was a warned and cautioned statement in which the accused admitted committing the offence. This statement was produced by consent. The police officer who had recorded the statement was called and stated that the accused had been properly warned and cautioned and elected to give the statement which he then gave freely and voluntarily. The statement thus recorded was tendered. The court record then records as follows:

"Court to accused:

Q. Did you give the statement freely and voluntarily?

A. Correct. I gave the statement freely.

Court - Accused. Statement is admitted."

The conviction of the accused was then based on Chisanduri being a truthful and credible witness and the inconsistency between his denial in his plea of not guilty and defence outline and admission in the warned and cautioned statement produced by consent.

I propose to deal firstly with the question of whether the magistrate was correct in admitting the warned and cautioned statement by consent. The question needs to be considered against the duty of a magistrate to assist an unrepresented accused.

Beadle CJ clearly stated this duty in *R* v *Muchena* 1966 RLR 731 (A) at 736H:

BARTLETT J

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

(Muchechetere JA referred with approval to these observations by Beadle CJ in *S* v *Magore* 1996 (2) ZLR (S) 88 at 92B-C).

Gillespie J has also dealt in detail with the duties of a magistrate towards an unrepresented accused in *S* v *Musindo* 1997 (1) ZLR 395 (H) at 401D-402P and *S* v *Zaranyika* 1997 (1) ZLR 539 (H). In *Zaranyika*'s case at 550C-D, he stated:

"I say it again. It is the duty of a magistrate to ensure that the unrepresented accused has the necessary knowledge to equip himself to conduct his own defence. That knowledge can only come from careful and diligent explanation by the bench. It is obviously monstrously unfair to hold against an accused failures to put questions or failures to call witnesses or failures to mention salient points or any other procedural deficiency if the magistrate has not done his utmost to ensure that the accused is well aware of all that will be expected of him. It is an irregularity for a magistrate not to give all the necessary explanation; it is an irregularity to leave that explanation to an interpreter."

See also *S* v *Sebatana* 1983 (1) SA 809 (O); *S* v *Mngomezulu* 1983 (1) SA 1152 (N); *S* v *Dipholo* 1983 (4) SA 757 (T) and *S* v *Govazela* 1987 (4) SA 297 (O).

I would also emphasise that there is a duty for magistrates to ensure that technical or specialised expressions are carefully explained to unrepresented accused persons in simple

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and understandable terms *S* v *Nhindiri* HH-278-87 and *S* v *Brown* 1984 (3) SA 399 (C).

It is against these criteria that I need to assess whether the warned and cautioned statement was properly admitted by consent.

The accused, as I have indicated, had pleaded not guilty and stated that he had simply obtained a lift in the vehicle in which the scotchcart had been transported. The magistrate could not but have been aware that when the State, against this background, sought to produce a warned and cautioned statement, that the statement would in all probability contradict both the plea and the defence outline. If the statement was to be produced by consent, it was accordingly particularly necessary for the magistrate to make sure that the unrepresented accused was aware of his rights in regard to the production of the statement and that he was clearly agreeing that the statement had been made freely and voluntarily and without undue influence.

The record does not indicate that these requirements, so necessary to protect the rights of the unrepresented accused, were met.

It was necessary in the first place for the statement to be given to the accused to read - or to be read to him by the court interpreter if he was

illiterate - so the accused was specifically aware of what statement was being referred to. This is particularly so since the trial was taking place in May but the offence had allegedly been committed the previous November. It should have been apparent to the magistrate that the statement would have probably been recorded some 5-6 months previously. It cannot be assumed that an unrepresented accused, probably appearing in court for the first time, would know what statement was being referred to. A court room may be home from home to a magistrate. But to an unrepresented accused appearing for the first time it is very likely a strange and frightening place. He can only rely on the magistrate to make it less intimidating. Furthermore, being arrested, questioned and placed on remand can only be a frightening experience - especially so for a person who is unrepresented and has never confronted the police and the justice system previously. Many things would likely happen in the time between arrest and appearance on remand and all when the accused is in a state of fear and tension. He might have been asked many questions and said many different things to the police. A magistrate should be aware of that possible background. To simply ask an accused person, many months later, whether he made a statement freely and voluntarily, without having given him the opportunity to first read and consider that statement, is hardly fair, and hardly likely to ensure that the rights of the unrepresented accused are being protected.

Once the statement has been read by the accused, it is necessary that his legal rights in regard to the statement be explained to him. This requires the magistrate to carefully explain that the statement is only admissible if the accused made it freely and voluntarily and without undue influence. This of course requires the magistrate to carefully emphasise in simple, clearly understandable terms, what is meant by "freely and voluntarily" and "without undue influence". It then requires the magistrate to satisfy himself from carefully and thoroughly questioning the

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accused that the accused is clearly, and with a proper understanding, accepting that he made the statement freely and voluntarily without undue influence.

The concept of "freely and voluntarily and without undue influence" is not necessarily easily understood by an unrepresented accused. It accordingly may well be appropriate for the magistrate to ask simple, clear questions such as, for example: Were you assaulted or threatened in any way in order to induce you to make the statement? Were you made any promises as to your being released from custody if you made the statement? Were you forced, induced, or influenced in any way to make the statement? There is, of course, a balance between putting words in an accused's mouth and ensuring that the rights are properly protected. But it is not sufficient for a magistrate to simply ask, as is recorded in this matter: Did you give the statement freely and

BARTLETT J

voluntarily? The question of whether the accused was accepting that there had been no undue influence was not, for example, even raised with him.

It may be that the magistrate, given the plea of not guilty and the defence outline and the realisation that, since the State was endeavouring to produce the statement it was probably incriminatory, was not expecting the accused to agree to its admission. But that is precisely the time when warning signals should flash in the magistrate's mind. And when, conscious of his duty to the unrepresented accused, he should be very careful that the accused is aware of the content of the statements and clearly accepting that he made the statement freely and voluntarily and without undue influence. That realisation can only come after questioning the accused carefully, fairly and thoroughly - not by asking just a simple question.

Accordingly, the court record does not indicate that the accused's legal rights in regard to the statement were explained to him, that he was given the opportunity to read the statement, or that it was properly established that he was agreeing that he made the statement freely and voluntarily and without undue influence. The court record should, of course, have clearly recorded all these aspects - see *S* v *Davy* 1988 (1) ZLR 386 (S); *S* v *Ndebele* 1988 (2) ZLR 249 (H) and *S* v *Zingeni* HH-4-99.

The next aspect to which I wish to refer is the evidence of Chisanduri. His evidence, which I have summarised earlier in this judgment, is terse and very brief. The circumstances in which Masina in the company of the accused asked him to transport the scotchcart to Chinhoyi are not related at all. There is no indication of where the scotchcart was collected from or what if anything Masina or the accused said about the scotchcart. His evidence gives no clear indication as to whether the accused's defence that he had simply got a lift on the truck might reasonably possibly be true. The circumstances in which the accused was involved with the scotchcart may be described as suspicious. But in the absence of the witness giving detailed evidence as to those circumstances and commenting in detail on the accused's assertion that he was only being given a lift, it cannot be stated that the State had proved its case beyond a reasonable doubt. The fact that the accused helped load and unload the scotchcart when the vehicle had been hired by Masina does not contradict the accused's suggestion that he was

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simply being given a lift. Detailed evidence from the witness as to the apparent inter-relationship between Masina and the accused and the circumstances in which they had arrived, and what each had said to him, might well have provided the vehicle to transport the State case from suspicion to beyond a reasonable doubt. But as it is, the magistrate's finding that Chisanduri was a truthful and credible witness does not assist in sustaining the conviction - the evidence was too brief to provide a sufficient basis for a conviction. I might add that as part of

the magistrate's duty to assist the unrepresented accused and as part of his general duty to ensure a fair trial, it would have been appropriate for him to ensure that the further necessary questions were asked of the witness.

It is also surprising that the State did not seek to call Masina - presumably as a convicted accomplice. It is in fact also surprising that the accused's trial was deal with before Masina's. Normally, Masina's trial would have been heard first to see if he was pleading guilty and to enable the State to seek to call him as a convicted accomplice, if possible and appropriate. If Masina had been call and supported the State, and if Chisanduri's evidence had been led more thoroughly, and if it had been properly established that the accused was consenting to the production of the warned and cautioned statement, then the case against the accused would have been overwhelming. Convictions, however, are based on evidence led establishing a case beyond a reasonable doubt - not on ifs and buts.

As it is, the magistrate did not properly establish that the accused was consenting to the production of a warned and cautioned statement. It was accordingly not appropriate to hold against him the difference between that statement and his defence outline. The evidence of Chisanduri was also not sufficiently detailed to be satisfied that the accused's version could not reasonably be true - and that the State case had consequently been proved beyond a reasonably doubt.

The conviction and sentence imposed are accordingly set aside and a warrant of liberation has been issued.

Omerjee J agrees.

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Endnotes

1 (Popup - Popup)

MUCHECHETERE J (as he then was). - Editor

2 (Popup - Popup)

See 1997 (1) ZLR 595 (H) - *Editor*

3 (Popup - Popup)

See *S v Dube* 1997 (1) ZLR 229 (H) - *Editor.*

4 (Popup - Popup)

See *Dube v Banana* 1998 (2) ZLR 92 (H) - *Editor*

5 (Popup - Popup)

Effected by the enactment of the Matrimonial Causes Act [*Chapter 5:13*].

6 (Popup - Popup)

Cf Gibson J in *kassim v Kassim* 1989 (3) ZLR 234 (H) at 239C

7 (Popup - Popup)

Per Korsah JA in *Ncube v Ncube* 1993 (1) ZLR 39 (S) at 41C.

8 (Popup - Popup)

Section 7 (3).

9 (Popup - Popup)

Wachtel v Wachtel [1973] 1 All ER (CA) at 835.

10 (Popup - Popup)

Beaumont v Beaumont 1987 (1) SA 967 (A) at 995G-I per Botha JA

11 (Popup - Popup)

See eg *Ncude's case supra* (n 3) at 41 & 44.

12 (Popup - Popup)

Per Korsah JA in *Ncube supra* at 44 B; see also *Kassim supra* at 240F.

13 (Popup - Popup)

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Per Gibson J in *Kassim supra* at 240E.

14 (Popup - Popup)

Per Korsah JA in *Ncube supra* at 42 A.

15 (Popup - Popup)

An explicit provision prohibiting discrimination on the grounds of gender was incorporated into s 23 by Act of 1996, which came into effect on 6 December 1996. Subsection 3, which sets out exemptions, was not amended. - *Editor*

16 (Popup - Popup)

This case involved an action for seduction damages brought under customary law by the guardian of seduced female who had reached the age of majority. - *Editor*

17 (Popup - Popup)

Section 23 (2) of the Constitution was amended with effect from 6 December 1996 to include the word "gender", but the section as it stood before the amendment applied to this case. -*Editor*

18 (Popup - Popup)

S v Beyers 1968 (3) SA 70 (A) ; S v Benatar 1984 (1) ZLR 296 (S).

19 (Popup - Popup)

Cape Times Ltd v *Union Trades Directories (Pty) Ltd & Ors* 1956 (1) SA 105 (N) at 120 A.

20 (Popup - Popup)

Ibid at 126G

21 (Popup - Popup)

Harare West Rural Council v Sabawu 1985 (1) ZLR 179(H)

22 (Popup - Popup)

Cape Times Ltd supra at 121C-D; Naidu & Ors v *Naidoo & Anor* 1993 (4) SA 542 (D) at 544H

23 (Popup - Popup)

Cf Scheelite Knig Mining Co (Pty) Ltd v *Mahachi* 1998 (1) ZLR 173 (H)

24 (Popup - Popup)

[*Chapter 9:07*].

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25 (Popup - Popup)

Cf s27 (2)(a) ibid.

26 (Popup - Popup)

S v Sibanda 1989 (2) ZLR 329 (S)

27 (Popup - Popup)

Sibanda supra at 333; *Sv Musindo* 1997 (1) ZLR 395 (H) at 404-5.

28 (Popup - Popup)

R v Cowan 1969 (2) RLR 20 (G) at 20-1.

29 (Popup - Popup)

In terms of s 356 [*Chapter 9:07*]

30 (Popup - Popup)

Cf s356 (3) *ibid.*

31 (Popup - Popup)

Cf s356(1) and (10) *ibid*.

32 (Popup - Popup)

Lansdown and *Cambell South African Criminal Law and Procedure* Vol 5 p441.

33 (Popup - Popup)

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

34 (Popup - Popup)

Hunt South African Criminal Law and Procedure Vol II, 2 ed, by Milton p47.

35 (Popup - Popup)

This properly charged as indecent assault - *S v Macheka* 1979 RLR 49 (A) at 51.

36 (Popup - Popup)

1998 (2) ZLR 423 (H).

37 (Popup - Popup)

At pp 434B and 435E-G.

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38 (Popup - Popup)

1995 (1) ZLR 270 (H)

39 (Popup - Popup)

2 ed, p141.

40 (Popup - Popup)

2 ed, p409.

41 (Popup - Popup)

1954 (4) SA 432 (N).

42 (Popup - Popup)

1964 RLR 7 (G) at 11; 1964 (2) SA 21 (R) at 25.

43 (Popup - Popup)

Norman's Purchase and sale in South Africa, 4 ed at p 102.

44 (Popup - Popup)

1921 CPD 301, cited in Christie Law of Contract in South Africa 2 ed at p59.

45 (Popup - Popup)

In a dissenting judgment with which W E Cooper *supra* agrees at p 144.

46 (Popup - Popup)

Le Roux v Odendaal & Ors 1954 (4) SA 432 (N).

47 (Popup - Popup)

(1948) 65 *SALJ* 564, cited in Cooper's *Landlord and Tenant supra* at p 94.

48 (Popup - Popup)

See Kerr's *The Law of Sale and Lease* 1 ed at p 388

49 (Popup - Popup)

Cooper *op cit* at p 95.

50 (Popup - Popup)

Paragraph 2 of the respondent's supplementry affidavit.

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51 (Popup - Popup)

1978 (1) SA 1109 (A) at 1139.

52 (Popup - Popup)

On appeal, the Appellate Division found it unnecessary "to enter upon the interesting dispute about whether or not the *exception doli* is still in our law ": *per* Trollip JA in *Aris Enterprises* (*Finance*) (*Pty*) *Ltd* v *Waterbeg Koelkammers (Pty) Ltd* 1977 (2) SA 425 (A) at 431-2 -*Editor*

53 (Popup - Popup)

This was the wording of the section before its amendment by thr Constitution of Zimbabwe (Amendment) (No.14) Act, 1996. -*Editor*

54 (Popup - Popup)

H-H133-94

55 (Popup - Popup)

Volume 2 at p 48.

56 (Popup - Popup)

4 ed at p 754.

57 (Popup - Popup)

Supra, cited in respondent's heads of argument.

58 (Popup - Popup)

See *Zvirawa v Makoni & Anor* 1988 (2) ZLR 15 (S).

59 (Popup - Popup)

1996 (1) ZLR 626 (H) at 633D-E and 635H-636A

60 (Popup - Popup)

Supra.

61 (Popup - Popup)

1973 (2) RLR 280 (G).

62 (Popup - Popup)

1996 (1) ZLR 257 (S) at 260D-E.

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63 (Popup - Popup)

At p 634D-E.

64 (Popup - Popup)

Per McNally in *Smith & Anor* v *Acting Sheriff & Anor* 1995 (1) ZLR 158 (S) at 161G.

65 (Popup - Popup)

Per Ebrahim JA in *Naran* v *Midlands Chemical Industries (Pyt)Ltd* S-220-91 at p 7.

66 (Popup - Popup)

Supra at 630D-E.

67 (Popup - Popup)

Paragraph 1(b) of the respondent's supplementary heads of argument.

68 (Popup - Popup)

Supra at 627E-F.

69 (Popup - Popup)

Lewis *Ethics* p 226; s68 Law Society od Zimbabwe By-laws SI 314/1982.

70 (Popup - Popup)

s 68(1)(e) of SI 314 of 1982.

71 (Popup - Popup)

Mxumalo & Ors v *Guni* 1987 (2) ZLR 1 (S) at 7C.

72 (Popup - Popup)

Jacobs & ehlers *Law of Attorneys' Costs and Taxation Thereof* p3.

73 (Popup - Popup)

Lewis, *op cit* p 231.

74 (Popup - Popup)

Walker v *Syfret, Godlonton & Low* (1906) 16 CTR 814.

75 (Popup - Popup)

Rule 308(1) of the High Court Rules 1971 (RGN 1047/1971).

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76 (Popup - Popup)

Ibid r 308(3).

77 (Popup - Popup)

S 68(2) of SI 314 1982.

78 (Popup - Popup)

Mxumalo & Ors v *Guni* (Supra, n 3) at 8F-G.

79 (Popup - Popup)

Jacob & Ehlers (*supra* p 1) 11.

80 (Popup - Popup)

Per McNally JA in *Mheresi* v *McNaught Wickwar* 1997 (2) ZLR 386 (S) at 388B.

81 (Popup - Popup)

Ibid at 388A & E.

82 (Popup - Popup)

de Wet v Meyer (1834) 1 menz 59.

83 (Popup - Popup)

Mheresi, (*supra*, n 12) at 388E

84 (Popup - Popup)

Walker v *Syfret*, *Godlonton & Low* (*supra* n 6).

85 (Popup - Popup)

For example, *Layton* v *Oehley* 1909 EDC 101; van *Copenhagen* v *Wiid* 1913 CPD 83.

86 (Popup - Popup)

Charke v *Henning & Henning* 1923 EDl 315, 328.

87 (Popup - Popup)

Robert & Letts v *Williamson* 1911 SR 105 at 107-8; note that the case was determined on the basis that the Cape Rules of Court applied - see pp 106 *in fine* -107.

88 (Popup - Popup)

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1984 (1) SA 73 (A) at 83A-85D

89 (Popup - Popup)

Ibid at 85A-D.

90 (Popup - Popup)

Had that been properly claimed; the actual relief sought is unclear from the brief report.

91 (Popup - Popup)

See generally, *Taitz The Inherent Jurisdicion of the Supreme Court* pp 23-26.

92 (Popup - Popup)

1984 (2) SA 507(W).

93 (Popup - Popup)

Ibid at 509C.

94 (Popup - Popup)

Potentially, quite apart from what I already cited herein, a court has a judicial discretion to refuse a grant judgment in default, a descretion written into the rules of the court-see rr 57-62 of the High Court Rules, all of which permit but do not oblige a court to give judgment.

95 (Popup - Popup)

A similar formulation is, I think to be inferred from the observation of McNally JA in *Mheresi* (*supra,* n12).

96 (Popup - Popup)

Cf McNally JA In *Mheresi* (*supra*, n12).

97 (Popup - Popup)

1997 (2) ZLR 462 (H) at 465 A

98 (Popup - Popup)

Malala v *Min of Law & Order & Anor* 1993 (1) SA 673 (W) at 678H-679D.

99 (Popup - Popup)

High Courts Rules 1971, Order 2, rr 132 and 134.

100 (Popup - Popup)

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Ibid r 133.

101 (Popup - Popup)

If application is made and granted by consent without prior informal request for consent, then the successful applicant is at risk for wasted costs.

102 (Popup - Popup)

Of High Court Rules, 1971.

103 (Popup - Popup)

See p 51 of this volume.-*Editor.*

104 (Popup - Popup)

See pp 54 in fine- 56E of this volume. -*Editor.*

105 (Popup - Popup)

1997 (2) ZLR 395 (H) at 397 G *et seq.*

106 (Popup - Popup)

In terms of Children's Protection and Adoption Act [*Chapter 5:06*] s2 (sub voc"child in need of care")

107 (Popup - Popup)

Ibid, s17.

108 (Popup - Popup)

R v *Mahwahwa & Anor* 1955 SR 297 at 298; S v *C supra.*

109 (Popup - Popup)

Section 57(1) (b) Road Traffic Act [*Chapter* 13:11].

110 (Popup - Popup)

As I suggested in S v *Tendai & Anor* 1998 (2) ZLR 423 (H).

111 (Popup - Popup)

Section 8(2) Children's Protection and Adoption Act [*Chapter 5:06*].

112 (Popup - Popup)

Beck's *Theory and Principles of Pleading in Civil Actions* 3 ed §71-73.

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113 (Popup - Popup)

High Court Rules 1971, Order 21.

114 (Popup - Popup)

Weeks & Anor v Amalgamated agencies Ltd 1920 AD 218 at 225; see also more recently *Sedibe & Anor v United Building Society & Anor* 1993 (3) SA 671 (T) at 676B and *Syfrets Bank Ltd & Ors v Sheriff of the Supreme Court & Anor, Schoerie NO v Syfrets Bank Ltd & Ors* 1997 (1) SA 764 (D) at 773E.

115 (Popup - Popup)

Weeks supra 226 and 238

116 (Popup - Popup)

Weeks supra at 236 per JUTA AJA (the quote in this passage is from the judgment of DE VILLIERS CJ in *Cochrane v Ngesman* (1906) 23 SC 140).

117 (Popup - Popup)

Smith NO & Anor v Wonesayi 1972 (1) RLR 2662 (A) at 286 (D)

118 (Popup - Popup)

Maisel v van Naeren 1960 (4) SA 836 (C) at 850 *in fine*-851A

119 (Popup - Popup)

Pakendorf en Andere v de Flamingh 1982 (3) SA 146 (A)

120 (Popup - Popup)

National Media Ltd & Ors v Bogoshi 1998 (4) SA 1196 (SCA)

121 (Popup - Popup)

Ibid at 1204 D-1; 1212G; 1213F; 1214E; 1215G-I

122 (Popup - Popup)

National Media Ltd & Ors v Bogoshi supra at 9 & 10.

123 (Popup - Popup)

Magistrates Coourt (Civil Court) Rules, Order 7 r 5(2)*(d*)

124 (Popup - Popup)

Ibid, r 6*(a)*

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125 (Popup - Popup)

Ibid, r 6*(b)*

126 (Popup - Popup)

Ibid, Order 26, r 5

127 (Popup - Popup)

Ibid, Order 1, r 5 *sub voce* "process".

128 (Popup - Popup)

Hart v Cohen (1899) 16 SC 363

129 (Popup - Popup)

Sieberhagen v Kaller & Chaatlerr (1904) 21 SC 205 at 210

130 (Popup - Popup)

Sieberhagen supra; *Goldman v Peacock Bros* 1926 OPD 138; *Malcolmess & Co v Love* 1929 EDL 346

131 (Popup - Popup)

As stated in de Villiers & Mackintosh *The Law of Agency in South Africa* 3 ed p 537, following *Colonial Mutual Life Assurance Society v MacDonald* 1931 AD 412

132 (Popup - Popup)

Malcolmess supra at 342

133 (Popup - Popup)

CF Weeks supra at 238-9

134 (Popup - Popup)

Parkview Properties (Pvt) Ltd v Chimbande 1998 (1) ZLR 408 (H) at 410H-411A

135 (Popup - Popup)

Vengesai v Zimbabwe Glass Industries Ltd 1998 (2) ZLR 593 (H) at 596D

136 (Popup - Popup)

That is not the night before argument, if at all, but when the claim was drawn or the plea considered; *Morris Technique in Litigation* 4 ed by Daniels p 144

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137 (Popup - Popup)

See p 67 of this volume. -*Editor*

138 (Popup - Popup)

ID Schaffer at p 68.

139 (Popup - Popup)

5 ed at p 398.

140 (Popup - Popup)

1960 (1) SA 844 (C) at 847.

141 (Popup - Popup)

Supra at p 44.

142 (Popup - Popup)

I D Schafer *The Law of Access to Children* at p 44.

143 (Popup - Popup)

I D Schafer *supra* at p 77.

144 (Popup - Popup)

Supra.

145 (Popup - Popup)

In *The Law Of Access to Chidren* at p61.

146 (Popup - Popup)

1973 (3) SA 675 (T).

147 (Popup - Popup)

1975 (4) SA 887 (A).

148 (Popup - Popup)

Footnote 316 at p 54.

149 (Popup - Popup)

1989 (4) SA 898 and cited at p 55 of *The Law of Access to Children, supra.*

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150 (Popup - Popup)

I D Schafer.

151 (Popup - Popup)

Spiro p 75.

152 (Popup - Popup)

S v *Dhliwayo* 1987 (1) ZLR 1 (H) at 3-5

153 (Popup - Popup)

S v *Jeffries* 1971 (2) RLR 147 (G) at 148-9

154 (Popup - Popup)

R v *Narua* 1953 SR 156 at 158-9; *Makwambere* v *R* 1962 R&N 476 (FS) at 480D-F.

155 (Popup - Popup)

S 314 (2) Criminal Procedure and Evidence Act [*Chapter* 9:07], s 314 (2); *S* v *Zhou* HB-36-96.

156 (Popup - Popup)

Ibid s 314 (3).

157 (Popup - Popup)

Ibid s 314 (1).

158 (Popup - Popup)

Makwambere supra.

159 (Popup - Popup)

R v *Narua* supra at 150-9.

160 (Popup - Popup)

S v Zhou HB-36-96 (unreported) at p 4. See also *S v Zingeni* HH-4-99 (unreported) falling from the same learned judge *supra* n 4.

161 (Popup - Popup)

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 188(a).

162 (Popup - Popup)

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Ibid, s 189(2).

163 (Popup - Popup)

S v *Mandwe* 1993 (2) ZLR 233 (S) at 237D -the better statements of the importance to be attached to State and defence outlines, if I may respectfully say so, and less likely to be misapplied, are those in *S* v *Seda* 1980 ZLR 109 (G) at 110H-111A and *S* v *Nicolle* 1991 (1) ZLR 211 (S) at 214B-G.

164 (Popup - Popup)

Per EBRAHIM JA in *S* v *Chikukutu* 1996 (1) ZLR 702 (S) at 705D-F; see also *S* v *Todzvo* 1997 (2) ZLR 162 (S) at 165B.

165 (Popup - Popup)

Per Chatikobo J in *S* v *Zhou supra* pp 6-7.

166 (Popup - Popup)

[*Chapter 9:07*], s 146(1).

167 (Popup - Popup)

Ibid, s 153.

168 (Popup - Popup)

Ibid, s 177(1) & (2).

169 (Popup - Popup)

Magiya v *R* 1959 R&N 272 (FS) at 275C-D.

170 (Popup - Popup)

R v *Scott-Crossley* 1969 (2) RLR 270 (A) at 274G-275D.

171 (Popup - Popup)

S v *Matimba* 1989 (3) ZLR 173 (S) at 175G-H and 178B-C.

172 (Popup - Popup)

[*Chapter 9:07*], s 202(1).

173 (Popup - Popup)

Ibid, s 202(3).

174 (Popup - Popup)

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Ibid, s 202(1).

175 (Popup - Popup)

Per CLAYDEN FJ In *Magiya supra* at 277 F-G.

176 (Popup - Popup)

[*Chapter 9:07*], s 202(2).

177 (Popup - Popup)

Per Innes CJ in *Scheepers & Nolte* v *Nolte* 1909 TS 354 at 356.

178 (Popup - Popup)

Simpson v Naude (1882) 2 EDC 156; *Lobascher v McFarlane* (1904) 14 CTR 980.

179 (Popup - Popup)

Lewis Legal Ethics p 237 §21.

180 (Popup - Popup)

Lewis s*upra* p 235 §18

181 (Popup - Popup)

Ibid 9 235-6 §19.

182 (Popup - Popup)

The duty sheriff has correctly apportioned his travelling expense when serving some of these summons simultaneously (see *Key Kabin (Pyt) Ltd* v *Megamillion Investments (Pyt) Ltd* 1999 (1) ZLR 224 (H)), but is entitle to his fee for service of such summons.

183 (Popup - Popup)

According to the Law Society By-laws (SI 314 of 1982).

184 (Popup - Popup)

Scotfin v Ngomakuru 1997 (2) ZLR 567 (H).

185 (Popup - Popup)

See p 100 of this volume. -*Editor*

186 (Popup - Popup)

See p 100 of this volume. -*Editor.*

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187 (Popup - Popup)

See p 117 of this volume-*Editor.*

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