1999 (2)

The Zimbabwe Law Reports 1999 [Part 2]

S *v* MUNGATI & ANOR 1999 (2) ZLR 1 (HC)

Citation	1999 (2) ZLR 1 (HC)
Case No	HH-173-99
Court	High Court, Harare
Judge	Chinhengo J & Assessors
Heard	June 10, 1999; June 11, 1999; June 15, 1999
Judgment	June 16, 1999
Counsel	E Kurera, for the State C Kuhuni, for the first accused C Chinyama, for the second accused
Annotations	None

Criminal trial

Flynote

Criminal law - general principles - degrees of participation in a crime - accessory after the fact - theft - when accused should be convicted on principal charge as a socius and when should be convicted as an accessory - test to be applied - what conduct is sufficient to make person an accessory

Headnote

Theft being a continuing crime, a person who assists another who has stolen something may, depending on the circumstances, be convicted as a *socius* of the original offender. This will be the case if what he does in relation to the stolen property makes it less easy for the owner to exercise his rights in relation to the property or if the stolen property passes into the joint control of the thief and the person who assists him. But where his conduct falls short of this, he may be convicted as an accessory, if his association with the theft or the thing stolen is such as would on policy grounds require that he should not go scot free.

Cases Considered

Cases cited:

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R v *Albasini (1)* 1967 RLR 9 (G)

R v *Albasini (2)* 1967 RLR 343 (A)

R v *Brand* 1960 (3) SA 637 (A)

R v *Brett & Levy* 1915 TPD 53

R v *Mlooi & Ors* 1925 AD 131

Case Information

E Kurera, for the State

C Kuhuni, for the first accused

C Chinyama, for the second accused

Judgment

Chinhengo J: This is a reconstruction of my judgment handed down on 15 June 1999. The accused were charged with the theft of a Mazda B1800 motor vehicle, white in colour with registration No. 657-409Z. They both pleaded not guilty to the charge.

[*His Lordship considered the evidence and summarised the court's conclusions:*]

The court found, on the evidence before it, that it was the first accused who

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must have stolen the Mazda B1800. He must have been the one who affixed to it false registration numbers. It was he who was in control of the vehicle and used it. He was in possession, contrary to his evidence and consistent with the evidence of the second accused and three State witnesses, of the Mazda B1800, a stolen motor vehicle, soon after that motor vehicle had been stolen. He was in recent possession of it and the inference could safely be drawn that he had stolen it. His own version was entirely unacceptable. The evidence against him was overwhelmingly in favour of a finding that the committed the offence charged. The court was satisfied that the State had proved its case against the first accused beyond a reasonable doubt.

There was no evidence to link the second accused with the theft of the motor vehicle. The first accused's evidence and that of his witness, Shaibu Afana, did not go beyond showing that the second accused associated with the first accused and the Mazda B1800. Taken together with the evidence of the other State witnesses, it was clear that the second accused was associated with the Mazda B1800 after it had been stolen. The second accused explained the basis of his association with the first accused and the motor vehicle before and after he formed the opinion that the vehicle had been stolen. His explanation was that the association was forced upon him. He was unfortunately unable to adduce evidence to show that the degree of duress was so great that he could not act independently of the first accused. While, therefore, the court

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accepted that there was some pressure brought to bear on the second accused by the first accused, that degree of duress was not sufficient to exclude the finding that he acted with volition in his association with the second accused. The question which has to be decided is whether the second accused's association with the first accused and the stolen motor vehicle makes him criminally liable as an accessory after the fact so as to found the basis of his conviction on the theft of the motor vehicle.

The second accused was a young man, whilst the first accused was his uncle, and older, who, it appeared, had some influence over him. Initially, the second accused believed the first accused's story that the motor vehicle belonged to his friend Edmore Gweshe. Later, when he strongly suspected that the motor vehicle was stolen, he had already become so involved with the motor vehicle that he could not resist the first accused's demands that he be in his company all the time. It appeared to the court that, from the time that the second accused entertained a strong suspicion that the motor vehicle had been stolen, he could not extricate himself. The pressure of prior association with the vehicle, his relationship with the first accused, the threats by the first accused and the residual, though unreasonable, conviction that all might still be alright are factors which the court found to have influenced the second accused person to continue to associate with the first accused.

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An accessory after the fact is one who, after the crime has been completed, aids or abets the principal perpetrator by conduct which deprives the owner of his rights. An accessory after the fact cannot be convicted of the principal offence on a charge of murder - see *R* v *Mlooi & Ors* 1925 AD 131. *R* v *Mlooi* does not make it clear whether on a charge of theft an accessory after the fact can be convicted of the principal crime. At p 138, Innes CJ stated that:

> "Enough has been said to show the weight of authority in our law which recognises the distinction between the guilt of a *socius* who assists the perpetrator of a crime beforehand or at the time and the guilt of an accessory who only assists him afterwards; and the effect of that authority is, speaking generally, to negative the idea that an accessory after the fact can properly be regarded as a *socius*. There are exceptions to the rule, which however are more apparent than real. One of them has been noticed above - the accessory becomes a *socius* if the assistance rendered after the event was promised before hand. Another may probably be found in cases where a thief has been assisted in the disposal of the stolen property by one who only intervened after the event. For theft while the article remains in the possession of the thief is a continuing crime; and assistance subsequently rendered by one who had no part in the original taking may well constitute part of the *fraudulosa contrectatio* which is the essence of the offence."

The learned Chief Justice made reference to *R* v *Brett & Levy* 1915 TPD 53 where the accused persons who assisted in the disposal of stolen property knowing that the property was stolen were convicted of theft. But the views expressed in *Mlooi*'s case in respect of an accessory on a charge of theft were *obiter*. In Volume I of the *South African Criminal Law and Procedure* 3 ed, the following statement is made at p 332:

> "... since theft is a continuing crime in the sense that it continues to be committed as long as the thief, his agent or a party to the theft is in possession of the stolen property, one who assists such person after the original taking but while the theft 'continues' could be either a perpetrator or an accomplice."

This statement is not very helpful, depending on the facts of a given case. Theft is indeed a

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continuing offence. A person who assists in concealing the stolen property or disposing of it knowing that it was stolen can be convicted as an accomplice (see Vol 1 *South African Criminal Law and Procedure* at p 338).

To my mind, the proper test to be applied in the present case was laid down in *R* v *Albasini (2)* 1967 RLR 343 (A). The facts in this case appear at 344I-345A. They are that:

> "The respondent had, for the sake of convenience, lent his car to one, Hill. At about 10.30 pm on the night concerned, Hill took the respondent in the respondent's car to Brady Barracks, where Hill left the respondent sitting in the car and returned, half an hour later, carrying a car spotlight, a car wireless aerial and a car wing mirror, all of which he placed in the car. The respondent saw this and realised that the articles had been stolen, but offered no objection. Hill then drove his car to the respondent's quarters, dropped him off there and

> returned to his own home with the stolen property still in the car. About a month later, Hill gave the respondent the stolen wing-mirror which the respondent kept."

The Appellate Division overturned the review judgment of Young J in *R* v *Albasini (1)* 1967 RLR 9 in which he had found the respondent guilty of theft of the car-wing mirror and of being an accessory after the fact to the theft of the car spotlight, the car aerial and the car wing mirror. The Appellate Division, *per* Beadle CJ, found that there was a sufficient *fraudulosa contrectatio* on the part of the respondent and convicted him of theft in respect of all the articles stolen by Hill. Beadle CJ articulated the test to be applied as follows:

> "The distinction between the crime of theft and the crime of being an accessory after the fact to the crime of theft is this: before an accused can be convicted as a principal there must be some element of *fraudulosa contrectatio* in the assistance in which the accused gives the thief. The law on the subject is therefore straightforward enough. Difficulty may arise, however, in the application of the law to the facts of a particular case, especially in deciding what acts do or do not constitute a *fraudulosa contrectatio*. It is neither possible nor desirable to lay down a general test applicable to all cases but I think for the purposes of the instant case a useful test of what acts constitute a *fraudulosa contrectatio* may be evolved from the *dictum* of Schreiner JA in *R* v *Brand* 1960 (3) SA 637 (A) at 637 where the learned Judge of Appeal said:
>
> 'Nothing that he did in relation to it made it less easy for the owner to exercise his rights in respect of it or could in any sense be described as an appropriation or conversion of it.'
>
> If this *dictum* of Schreiner JA's is expressed positively, a useful test may be evolved; thus: 'An accused who assists a thief will be guilty of theft if what he does in relation to the stolen property makes it less easy for the owner to exercise his rights over that property". In other words, if anything the accused does makes it less easy for the owner to exercise his rights in respect of the stolen property then there will have been in what the accused does a sufficient element of *fraudulosa contrectatio* to make him guilty as a *socius*."

In *R* v *Brand* 1960 (3) SA 637 (A), the facts were in broad terms similar to the facts in the present case. There the appellant was charged with stealing a motor car, alternatively with the statutory offence of riding in a motor car without the owner's consent. He was also charged with the theft of a suitcase. The evidence showed that the car had been stolen at Parow and it was found by the police at Montagu with one Schoeman sitting in the driver's seat and the appellant was seen to come out a farmhouse and take his seat next to Schoeman. In the car was a suitcase and clothes. Schoeman had been separately charged and convicted. He gave evidence in defence of the appellant from which it appeared that he alone had stolen the car,

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had gone to the appellant's home and had invited him to go with him to Touws River. They did not go to Touws River but stopped at Bonnievale where he had stolen a suitcase. On the way to Montagu, the appellant, at Schoeman's request, had sold some of the clothes taken from the suitcase. No evidence

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had been given that the car had passed into the joint control of Schoeman and the appellant after the suitcase has been stolen. He was convicted on both counts. The appellant appealed against his conviction on the theft of the motor car. It was held that he should not have been convicted of theft as no more had been proved than that, with knowledge that the car had been stolen, he had used it whilst in the control of Schoeman. He was convicted of the statutory offence.

The Appellate Division defined the question before it as being whether what the appellant had done in relation to the motor car was sufficient to constitute the crime of theft, that is to say: accepting that the thief in the first place was Schoeman alone, was it proper to have found him guilty of theft of the motor car because he must have known that it was stolen and had driven in it well knowing that it had been stolen and had used it in relation to the theft of the suitcase? At 641C-642A, Schreiner JA stated:

> "Now in *von Elling*'s case he had physical control over the car and his acts in taking control over it and putting it into the garage constituted a sufficient *actus reus*. But in the present case there is no evidence that the appellant was ever in control of the car. It was always, so far as appears, in the control of Schoeman and nothing that the appellant did assisted Schoeman to exercise that control. While they were on their way to Montagu the appellant was no doubt in a sense using the car, but he was doing so only as a passenger, and nothing that he did in relation to it made it less easy for the owner to exercise his rights in respect of it or could in any proper sense be described as an appropriation or conversion of it.
>
> Does it then make a difference that at Montagu they stole the suitcase and that thereafter the appellant sold some of the clothes from the suitcase, while it was in the car? Where one only of two persons has stolen a car and thereafter, the other being aware that it is a stolen car, they join in a venture in which the car is made part, as it were, of the joint capital, so that the control over it is exercised on behalf of both of them, it may be assumed that even if the original thief continues to do all the driving, his partner would also be guilty of theft as from the time when the venture came into operation. But although the facts in the present case bear some resemblance to such a situation they are also consistent with Schoeman's having remained in sole control of the car, the appellant merely having, in addition to the benefit of driving in it, which he had enjoyed before they reached Montagu, the further advantage that Schoeman conveyed the suitcase in the car and provided the appellant with the opportunity to sell the clothes to persons whom they saw along the road. The trial court did not find, and the facts do not establish beyond reasonable doubt, that the car passed into their joint control after they stole the suitcase. The importance of the factor of control appears from *von Elling*'s case *supra* at p 251. It seems to me that no more was proved against the appellant than that, with knowledge that the car had been stolen, he used it while it was in the control of Schoeman. Since he did not assist Schoeman in controlling and thus dealing with the car (cf. *von Elling*'s case *supra* at pp 239 and 240) and since the car was not taken into their joint control, the conduct of the appellant in selling the goods from the suitcase in the car did not affect the rights of the car's owner any more than did his use of the car by being driven in it as a passenger. Throughout it was Schoeman's theft alone that was depriving the owner of the use and benefit of his car."

Can the second accused in this case be said to have been in control of the

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motor vehicle in view of the fact that it was kept at the place where he resided? I do not think so. The motor vehicle remained in the control of the first accused. Although the second accused enjoyed a ride in it I do not see that he assisted the first accused in controlling it or otherwise dealing with the car. It was solely the first accused's conduct which was depriving the owner of the use and benefit of his car. The second accused first became suspicious that the Mazda B1800 had been stolen a week after the theft, when the first accused informed him of the arrest of Edmore Gweshe and of Edmore's wife's warning that he should not be seen driving the motor vehicle. Later, his suspicion became stronger that the motor vehicle had been stolen. No evidence was led to the effect that the motor vehicle was parked behind the house or otherwise hidden. He had driven around in it with the first accused and driven with him again in another vehicle whose number plates had been changed for those of the B1800. He surely must have foreseen that some crime had been committed by the first accused. In this connexion, I am satisfied that the proper test is whether he foresaw the possibility that the first accused had engaged in unlawful conduct. On these facts, the second accused cannot be said to have formed the necessary *mens rea* to make him a *socius criminis*. The degree of his involvement with the Mazda B1800 was not sufficient to constitute part of the *fraudulosa contrectatio* which is the essence of the offence of theft. But his association with it was sufficient to make him an accessory after the fact to the crime of theft as opposed to a *socius criminis*. This is the distinction made in *Albasini*'s case *supra*. It is a case where the distinction made therein between a *socius criminis* and an accessory after the fact to the crime of theft is easier to appreciate than to articulate. This is perhaps the reason that text book writers have criticised this decision - see PMA Hunt in *South African Criminal Law and Procedure* 3 ed at pp 644-645. It is difficult to appreciate what the *actus reus* is in respect of the offence of accessory after the fact to the crime of theft. It seems to me that this would be some association with the theft or the thing stolen as would on policy grounds require that the person concerned should not go scot free. As I understand it, where a person has not assisted the thief before the theft, nor assisted the thief after the theft in such manner as to make it less easy for the owner to exercise his rights in respect of the property stolen, or where the stolen property has not passed into their joint control such person cannot be convicted as a *socius* but may, as in the present case, have so sufficiently associated with the stolen property to warrant his conviction as an accessory after the fact to theft. Whilst the accused did not do anything to make it less easy for the owner to exercise his rights in relation to it, he did not, however, remain inactive in relation to the stolen property. He associated with the thief in repairing the motor vehicle; in having it parked at the house where he

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resided and in taking joy rides in it. On these facts, the court was satisfied that the second accused was an accessory after the fact to the crime of theft. That, however, cannot be quite the end of the matter.

Section 146 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] provides in subs (1)

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that:

> "... each count of the indictment, summons or charge shall set forth the offence with which the accused is charged in such manner, and with such particulars as to the alleged time and place of committing the offence and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge."

It is trite that an indictment or charge must be sufficiently clear and detailed so as to suggest to the accused person, in his knowledge of the matter, whether he has a defence to offer. Can an indictment which charges that the accused stole a motor vehicle be regarded as reasonably sufficient to inform him that he is also charged with being an accessory after the fact to the crime of theft? I think it can. The crime of being an accessory after the fact to the crime of theft is a competent verdict on a charge of theft. The accused must have been aware of it and so was his defence counsel. Evidence was led in this trial which showed that the first accused appreciated that he could be found guilty as an accessory after the fact. I am therefore satisfied that on a charge of theft, the indictment as framed is sufficiently clear, because of the nature of the offence, to inform the second accused that he may be found guilty as an accessory after the fact. The indictment as framed enabled him to prepare his defence. On this basis, the court was satisfied that the accused could be convicted of being an accessory after the fact to the crime of theft of the Mazda B1800.

Accordingly, the first accused is found guilty as charged and the second accused is found guilty as an accessory after the fact to the crime of theft of the motor vehicle.

[The first accused was sentenced to 9 years' imprisonment of which two years was suspended for 5 years on condition of good behaviour. The second accused was sentenced to 2 years' imprisonment all of which was suspended for 5 years on condition of good behaviour.]

RUSSELL NOACH (PVT) LTD *v* MIDSEC NORTH (PVT) LTD 1999 (2) ZLR 8 (HC)

Citation	1999 (2) ZLR 8 (HC)
Case No	Judgment No. HB-57-99
Court	High Court, Bulawayo
Judge	Malaba J
Heard	June 18, 1999
Judgment	June 18, 1999
Counsel	A Sibanda, for the applicant S Takundwa, for the respondent
Annotations	None

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Civil application

Flynote

Practice and procedure - pleading - plea to summons - time within which must be made - notice of intention to bar given to defendant - extension of time within which to file plea - may not be secured by filing request for further particulars

Headnote

The respondent company instituted an action against the applicant company, claiming payment for services rendered. A summons was served on the defendant. Shortly before the expiry of the time within which it was required to plead, the applicant asked for further particulars. Some of the particulars asked for were irrelevant, but the relevant particulars were delivered timeously. The time within which the applicant was required by the Rules of the High Court to file its plea or make a request for further and better particulars expired and notice of intention to bar was given to the applicant. Instead of filing a plea within the four days allowed by the Rules, the applicant filed what it called a request for further and better particulars. The respondent imposed the bar and applied for default judgment, which was in due course granted. The applicant applied for rescission of judgment, arguing that the respondent had no right to bar it from filing a plea before having supplied the further and better particulars it had requested.

Held, that the respondent was entitled to ignore the request for further particulars. If the applicant had wanted further and better particulars, it had 12 days from the date when the particulars were delivered either to file a plea or request the further particulars. By failing to do so, it lost the right to dictate the next procedural step and so became liable to being barred. The power was then vested in the respondent to determine the next step. The applicant failed to do what was required of it by the respondent, which was to file its plea within four days. It had no right to file a request for further particulars. The request was invalid for being filed out of time, and improper, because it was not what it was required to do. The bar was thus properly imposed and default judgment properly obtained.

Cases Considered

Cases cited:

Costa v *van Zyl & Anor* 1957 (4) SA 156 (T)

IMF Mgmt Svcs (Pvt) Ltd v *Sicom Spa (Zimbabwe) Ltd* 1991 (1) ZLR 309 (S)

Marley Floor Tile Co (SA) (Pty) Ltd v *Geldenhuys* 1967 (3) SA 585 (GW)

Nangle & Anor v *Aronowitz* 1949 SR 47

Schooling v *Profile Entprs Ltd* 1971 (1) SA 555 (O)

Swart v *Flugel* 1978 (3) SA 265 ((E)

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Statutes Considered

Legislation considered:

High Court Rules 1971 (RGN 1074 of 1971), rr 80, 119, 137(d) and 142(a)

Case Information

A Sibanda, for the applicant

S Takundwa, for the respondent

Judgment

Malaba J: This application raises the question whether or not an opposing pleader can secure an extension of the time prescribed in the Rules of Court for filing a plea, by filing and delivering a request for further particulars out of time and when he has been given a notice of intention to bar under Order 12 r 80 of the High Court Rules 1971.

The facts of the case are these. On 4 September 1998, the respondent (to which I shall refer as the plaintiff) instituted action against the applicant (to which I shall refer as the defendant) with the issue of a summons endorsed with the particulars of the claim. The plaintiff claimed against the defendant payment of the sum of $50925.02 with interest thereon, being the amount allegedly due by the defendant for certain security services rendered by the plaintiff to it at its premises in Harare during the period from January to August 1998 in terms of a contract of service.

The summons was served upon the defendant on 9 September 1998 and appearance to defend the action entered two days later. On 8 October, a day before the expiry of the twenty-two days period prescribed in the rules for filing a plea, the defendant filed a request for further particulars. The first four questions asked for particulars of facts relating to the cause of action. The information asked for was to reveal the form of the contract, the number of security guards on duty during the relevant period, the number of hours worked and the names of the premises that were guarded. The other four questions asked for particulars of facts which were not part of the plaintiff's cause of action. The irrelevant information requested for was to show whether the parties entered into a contract of service for the period prior to January 1998, whether the security services rendered during that period were paid for and whether a dispute arose between them over the quality of services rendered.

On 13 October 1998, the plaintiff supplied the defendant with the particulars asked for in the first four questions and indicated, in respect of the rest, that the information requested for was unnecessary to enable the defendant to plead.

Order 18 r 119, as read with Order 21 r 137(d), provides that a defendant shall file his request for further particulars or plea within twenty-two days after the service of a specially endorsed summons. Particulars supplied become part of the declaration or particulars of claim.

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Order 21 r 142(a) provides that if a party applies for particulars and they

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are supplied voluntarily by the pleader, the time for replying to the pleading of which particulars are sought shall be calculated from the date on which the particulars are supplied. In terms of r 119, the time within which the defendant ought to have filed its plea or request for further and better particulars after the supply of particulars on 13 October, is twelve days. The *dies induciae* for filing a plea or request for further and better particulars expired on 29 October 1998 without any of the two procedural steps having been taken by the defendant.

On 5 November, the plaintiff delivered to the defendant, a notice by which it required the latter to file its plea to the claim within four days or be barred. The notice of intention to bar was given in terms of Order 12 r 80 which provides that:

> "A party shall be entitled to give four days notice of intention to bar to any other party to the action who has failed to file his declaration, plea or request for further particulars within the time prescribed in these rules and shall do so by delivering a notice in Form No. 9 at the address for service of the party in default."

The defendant was clearly in default, in that it failed to file a plea or a request for further particulars within the twelve-day period prescribed in the rules. Instead of filing and delivering a plea within four days as required by the notice of intention to bar, the defendant filed, on 10 November, what it called a request for further and better particulars. The plaintiff took the attitude that the request for further and better particulars was filed and delivered out of time and refused to take cognisance of it.

On 12 November, the plaintiff's legal practitioner wrote to the defendant's lawyer:

> "Your request for further and better particulars was filed out of time in terms of r 119 Order 18 [see *Swart* v *Flugel* 1978 (3) SA 265 (E)]. Accordingly, we shall apply for judgment. It is clear that your client is simply trying to buy time especially seeing that the request is for particulars which are not necessary to enable your client to plead ..."

The event was let to pass by the defendant. On 19 November, the plaintiff imposed the bar. It applied for judgment in default which was granted on 14 December 1998. Notwithstanding the bar, Mr *Sibanda*, for the defendant, wrote to the plaintiff's legal practitioners, arguing in effect that the defendant had a right to file a request for further and better particulars out of time, notwithstanding the delivery to it of the notice of intention to bar by the plaintiff.

On 3 February 1999 the defendant applied for rescission of judgment. The founding affidavit was deposed to by defendant's legal practitioner, Mr *Sibanda*. He averred that the defendant was not in wilful default because it believed that the plaintiff had no right to bar it from filing a plea before supplying the further and better particulars requested of it on 10 November.

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He alleged that the defendant had a *bona fide* defence to the plaintiff's claim in the form of a counter-claim for damages for negligent performance of security duties during the period prior

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to January 1998. A supporting affidavit to the same effect was deposed to by the defendant's director. The plaintiff filed a notice of opposition and the opposing affidavit.

The defendant took no further step to prosecute the application for rescission of judgment. The plaintiff had to prepare and deliver its heads of argument to the defendant and set the matter down for hearing on 18 June 1999. Instead of filing heads of argument, Mr *Sibanda* got and filed what he called an answering affidavit. The defendant's heads of argument, prepared by Mr *Sibanda*, were filed on 2 June 1999.

When the application was called in court for hearing on 18 June, Mr *Sibanda* applied for the postponement of the hearing. He said the defendant had briefed Mr Cherry to represent it at the hearing. Mr Cherry had gone to England a few days ago. Mr *Takundwa*, for the plaintiff, strongly opposed the application for postponement.

I refused to have the hearing postponed and directed Mr *Sibanda* to present argument in support of the defendant's application. It was clear to me that the application for postponement of the hearing was yet another attempt by the defendant to delay the outcome of the plaintiff's claim. There was nothing in the papers filed of record to show that Mr Cherry had been instructed to represent the defendant at the hearing. Mr *Sibanda* was unable to say why Mr Cherry left for England a few days before the hearing without notice to the Assistant Registrar. The heads of argument filed of record were prepared and signed by Mr *Sibanda.*

In support of the application for rescission of judgment, Mr *Sibanda* argued that the defendant was not in wilful default because it genuinely believed that the plaintiff had no right under the rules of court to impose the bar before it supplied the further and better particulars requested of it. In the same breath, he conceded that the further and better particulars asked for by the defendant were not necessary for purposes of enabling it to plead to the plaintiff's claim. The defendant was, in fact, not denying liability for the payment of the money claimed by the plaintiff. After hearing Mr *Takundwa* for the plaintiff, I dismissed with costs the application for rescission of judgment. My reasons for the decision are the following.

The defendant had, within the twenty-two days period prescribed in the rules, filed a request for further particulars which were voluntarily supplied by the plaintiff on 13 October 1998. It then had twelve days after the date when the particulars were delivered to file and deliver a plea or a request for further and better particulars. It was under a duty to make the election to plead or request for further and better particulars within the period prescribed. Only

if the defendant filed and delivered a request for further and better particulars within twelve days after 13 October 1998, would the time within which to file its plea have been automatically extended to take effect after the date when the further and better particulars would have been supplied by the plaintiff.

A party who fails to deliver a pleading (declaration or plea) or request for further particulars within the time stated in the rules is made subject to penalties. When the defendant failed to file and deliver its plea to the plaintiff's claim or a request for further and better particulars by 29

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October 1998, it automatically lost the right to dictate the next procedural step in the action and became liable to being barred.

Rule 80 makes it clear that the failure by the defendant to file a plea or a request for further and better particulars within the period prescribed in the rules automatically vested in the plaintiff the power to determine what the next procedural step in the action should be. The plaintiff had to give the defendant a notice of intention to bar. It, however, had a discretion to exercise in deciding upon the nature and terms of the obligation it intended to impose on the defendant by the notice of intention to bar.

In *IMF Management Services (Pvt) Ltd* v *Sicom Spa (Zimbabwe) Ltd* 1991 (1) ZLR 309 (S) at p 313D-E, Gubbay CJ said:

> "Rule 80, unlike its South African equivalent, r 26, expressly provides that not only the failure to file any pleading will entitle a party to give notice of intention to bar, but failure to file a 'request for further particulars' will do so as well ... Rule 80 also lays down the requirement that the form of relief specified may only be sought where the other party 'has failed to file ... within the time prescribed in these rules'."

Generally, failure to file a request for particulars within the time prescribed in the rules raises the presumption that the pleading in respect of which a reply is required is sufficiently particularised. It may be difficult, therefore, to think of a situation where a plaintiff, for example, may require the defendant to file a request for further particulars of his declaration, thereby implying that his pleading is not sufficiently particularised. Since a valid request for further particulars has the effect of extending the time within which the defendant must file his plea to have effect after the date when the particulars are supplied, a plaintiff who gives a notice of intention to bar under r 80 which requires the defendant to file a request for further particulars, subjects his claim to further delays.

Be that as it may, r 80 is couched in clear and unambiguous language which imposes on the party giving the notice of intention to bar the duty to choose the procedural step he intends to require the defendant to take within four days of delivery of the notice of intention to bar. What the plaintiff, for example, requires the defendant to do within four days of delivery of the notice, the latter must do in order to avoid being barred.

MALABA J

A defendant who is specifically required in the notice of intention to bar to do one thing but does another, and the four-day period expires, has not complied with the terms of the notice and becomes liable to the penalty of being barred. The notice of intention to bar given to the defendant in this case on 5 November 1998 specifically required it to file its plea to the plaintiff's claim within four days. The defendant had to do as required. It had no right to file a request for further and better particulars. That was not what the plaintiff had required it to file.

The request for further and better particulars was invalid or irregular for being filed out of time. It was also improper because it was not what the defendant was required by the notice to file within the four-day period prescribed. The plaintiff did not supply the particulars asked for because, had it done so, it would have by implication accepted that its declaration was

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incomplete and incapable of being pleaded to thereby regularising the request: *Nangle & Anor* v *Aronowitz* 1949 SR 47 at 51.

The plaintiff was entitled to ignore the irregular and improper request for further and better particulars and proceed as if it had not been filed as long as it did not supply the particulars. It is immaterial whether the invalid request was made before or after the delivery of the notice of intention to bar to the party in default. The defendant failed to file a plea to the plaintiff's claim within the four-days period specified in the notice of intention to bar. The bar for failure to plead was therefore properly imposed on 19 October and default judgment applied for and granted on 14 December 1998: *Costa* v *van Zyl & Anor* 1957 (4) SA 156 (T) at 156H; *Marley Floor Tile Co (SA) (Pty) Ltd* v *Geldenhuys* 1967 (3) SA 585 (GW) at 588B-D; *Schooling* v *Profile Enterprises Ltd* 1971 (1) SA 555 (O) at 556H-557A; *Swart* v *Flugel* 1978 (3) SA 265 (E) at 267H.

The defendant was clearly in wilful default. Its legal practitioner deliberately refrained from filing a plea as required by the notice of intention to bar. He decided to abuse court process by filing a request for further and better particulars out of time. Even when the plaintiff's legal practitioner warned that default judgment would be applied for, the defendant's lawyer did not apply for the removal of the bar. One gets the clear impression that the defendant, on the advice of its legal practitioner, deliberately decided to refrain from applying for the removal of the bar in the hope that the application for rescission of judgment would be successful.

The defendant has no *bona fide* defence to plaintiff's claim. It does not deny liability for the payment of the amount of money claimed in the summons. It failed to formulate the counter-claim it intended to make against the plaintiff until the default judgment was granted. At the time the default judgment was applied for and granted on 14 December 1998, the particulars

of the counter claim were unknown to the plaintiff. An attempt was only made to formulate the alleged counter-claim in the supporting affidavit annexed to the founding affidavit in the application for rescission of judgment. That was too late.

It was for the reasons stated above that I refused the application for the postponement of the hearing of the application for rescission of judgment and dismissed the main application with costs.

Joel Pincus, Konson & Wolhuter, applicant's legal practitioners

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

GUMUNYU v NYONI 1999 (2) ZLR 15 (HC)

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Citation	1999 (2) ZLR 15 (HC)
Case No	Judgment No. HB-48-99
Court	High Court, Bulawayo
Judge	Kamocha J
Heard	June 25, 1999
Judgment	July 1, 1999
Counsel	N Mazibuko, for the plaintiff P Ncube, for the defendant
Annotations	None

Civil Action

Flynote

Customs and excise - customs officer - action against in respect of acts done by officer in official capacity - time within which action must be commenced - prescription period not affected by unlawfulness or malice on part of officer

Prescription - period of in respect of official actions taken by customs official

Headnote

Acting in her official capacity, a customs official had caused the detention of plaintiff's vehicles. This action had caused financial loss to the plaintiff. The plaintiff alleged that the customs official had abused her position and that her actions were wrongful, unlawful and actuated by malice. The defendant raised a special plea of prescription.

In terms of s 196 of the Customs and Excise Act *[Chapter 23:02),* an action against a customs officer in respect of actions taken by the officer in the course of her employment must be commenced within eight months from the date that the cause of action arose.

Held, that wrongful acts, even those actuated by dishonesty or malice, can still done in the course of employment.

Held, further, that in the present case the customs official had been acting in an official capacity and during the course of her employment when she committed the acts leading to the plaintiff s financial loss and thus the eight months prescription period applied.

Held, further, that as the action had been brought well after the eight months prescription period, the plaintiff's claim had prescribed.

Cases Considered

Cases cited:

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Denton v Dir of C & E 1989 (3) ZLR 41 (H)

Fawcett Security Operations (Pvt) Ltd v Omar Entprs (Pvt) Ltd 1991 (2) ZLR 291 (S)

Min of Home Affairs v Badenhorst 1983 (2) ZLR 248 (S)

SAR & H v Marais 1950 (4) SA 610 (A)

Statutes Considered

Legislation considered:

Customs and Excise Act [*Chapter 23:02*], s 196

Case Information

N Mazibuko, for the plaintiff

P Ncube, for the defendant

Judgment

Kamocha J: On 11 June 1998, the plaintiff instituted an action wherein he claimed from the defendant payment of damages totalling $85 278 arising from the alleged defendant's wrongful, unlawful and malicious detention of plaintiff's two motor vehicles, a Nissan Sunny, registration No. 652-004Z and a BMW 320, registration No. 628-644H, for over five months, resulting in damage to the same and loss of business for the plaintiff.

The plaintiff also claimed interest off the sum of $85 278 at the rate of 25% *per annum* calculated from 1 February 1998 to the date of full payment, and payment of costs of suit.

In his declaration the plaintiff alleged that on 3 January 1997 the defendant, who purported to act as a customs officer, seized the plaintiff's Nissan Sunny motor vehicle registration number 652-004Z. It was alleged the vehicle had previously been cleared by the Department of Customs and Excise and a customs clearance certificate number 635532 and a receipt of payment of duty in the sum of $31 101.53 were produced and shown to the defendant. Nonetheless, the defendant caused the vehicle to be detained from 3 January 1997 to June 1997. According to the plaintiff, the defendant had no justification in causing the detention of the motor vehicle; in doing so the defendant was alleged to have been abusing her position as a customs officer; and her actions were wrongful, unlawful and actuated by malice.

Her alleged wrongful actions resulted in the vehicle being detained for five months causing the plaintiff to suffer damages representing loss of income amounting to $40 000. The vehicle was also damaged on the left side whilst under the custody of the Department of Customs and Excise and the cost of repairing the damage was $4 500.

As if that was not enough, the defendant, on 6 March 1997, again caused the seizure of yet another vehicle belonging to the plaintiff, a BMW 320 registration number 628-644H. The vehicle had been cleared duty free since plaintiff was a returning resident and a customs

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clearance certificate was issued to the plaintiff which certificate was produced to the defendant. The document was allegedly ignored by the defendant, who caused the detention of the motor vehicle.

The plaintiff claimed that he lost business amounting to $20 000 as a result of the detention. The vehicle was damaged and the repairs thereto cost $13 200, whilst there was also missing a cellphone holder valued at $1 800. Fuel worth $320 was drained from the vehicle's tank, the car battery valued at $958 was also missing, as was a mag wheel valued at $4 500.

Prior to their seizure, both vehicles were being used in the plaintiffs business of organising and undertaking tours of places of interest for tourists and the like and their detention resulted in loss of business since the such tours could no longer be undertaken.

KAMOCHA J

The defendant did not plead on the merits but instead raised a special plea in which she stated that at all material times she was a customs officer employed by the Government of Zimbabwe in the Department of Customs and Excise. She claimed that the plaintiff's cause of action arose out of acts performed by her during the course of her duty in pursuance of the provisions of the Customs and Excise Act *[Chapter* 23:02] "the Act". She contended that, since the cause of action arose more than 8 months prior to the date upon which summons was served upon her, the claim was prescribed in terms of s 196(2) of the Act and prayed that the plaintiff's action be dismissed with costs.

The relevant provisions of the Act are recited as follows:

> "196 NOTICE OF ACTION TO BE GIVEN TO OFFICER
>
> (1) No civil proceedings shall be instituted against the state, the Director or an officer for anything done or omitted to be done by the Director or an officer under this Act or any other law relating to customs and excise until sixty days after notice has been given in terms of the State Liabilities Act *[Chapter* 8:151.
>
> (2) Subject to subsection (9) of s 193 any proceedings referred to in subs (1) *shall be brought within eight months after the cause thereof arose,* and if the plaintiff discontinues the action or if judgment is given against him, the defendant shall receive as costs full indemnity for all expenses incurred by him in or in respect of the action and shall have such remedy for the same as any defendant has in other cases where costs are given by law" (my emphasis).

What is not disputed is the fact that the defendant was employed as and still is a customs officer who from start to finish acted in her official capacity in terms of powers conferred by the Act. It was in her capacity and while so employed that she performed the acts the plaintiff complains of.

It is also common cause that her actions were performed more than 8 months before the plaintiff instituted his present proceedings. Summons was served not less than 15 months after the cause of action had arisen.

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While admitting that ordinarily s 196(2) *supra* would have covered the defendant, Mr *Mazibuko,* who appeared for the plaintiff, still argued that the plaintiff's claim was not prescribed because, so his argument went, the defendant acted wrongfully, unlawfully and maliciously, Reliance was placed on the case of *South African Railways and Harbours v Marais* 1950 (4) SA 6 10 (A). The manner in which the argument was presented revealed that Mr *Mazibuko* refrained from referring to recent local cases on the subject. His first port of call should have been the case of *Minister of Home Affairs v Badenhorst* 1983 (2) ZLR 248 (S) where GUBBAY JA (as he then was) had this to say at 253F-G;

> "The theory that a servant acting in the course of his employment has no authority to act

KAMOCHA J

> negligently or improperly was exploded very many years ago. The mere fact that the act complained of was wrongful does not in itself denote that it was not pursuant to the performance of a legal duty ... It is only the negligent or improper performance of duty which will give rise to a cause of action to which s 76 applies, for if that provision were confined to regular or lawful actions, there would be no need for it. It is obvious that where anybody does a lawful act under the Act, he needs no protection and no action lies against him whether brought within six months or not ..."

Similarly, the headnote to the case *of Denton v Director of Customs & Excise* 1989 (3) ZLR 41 (H) at 42B-C, a case dealing with *s* 178 a predecessor *of* section 196 reads:

> ".. assuming that the Director was in technical breach of the Act and had no lawful power to hold the plaintiff's vehicle, this did not mean that his actions did not constitute "anything done by him under the Act. The fact that he may be acting unlawfully did not jettison the provisions of the section, since the Director's intention was to prosecute the aims and objects of the Act. Indeed, if the Director's actions had been lawful, no cause of action would arise at all."

In the case *of Fawcett Security Operations (Pvt) Ltd v Omar Enterprises (Pvt) Ltd* 1991 (2) ZLR 291 (S) at 294C-E GUBBAY CJ crystalised the point like this:

> "It was formerly thought that an employer could not be held vicariously liable for a theft committed by his employee on the ground that the act of stealing necessarily took the employee out of the course of his employment. Dishonesty or fraud by the employee for his own benefit did not render the employer liable.
>
> This view of the law no longer prevails. It is now recognised and accepted that theft by an employee to whom the goods concerned have been entrusted is, in fact, an improper and dishonest mode of performing what he was employed to do, namely, to take care of the goods. In such circumstances, the employee is acting nonetheless in the course of his employment, and so the employer is vicariously liable for the loss of the goods.
>
> This doctrine of vicarious liability of an employer for the intentional wrongdoing of his employee committed in the course of his employment is part of the law of Zimbabwe..."

The foregoing clearly establishes that the defendant *is fully* covered by the provisions *of s* 196 in which case the plaintiff should have instituted proceedings against her within the stipulated period *of* 8 months. The defendant's special plea was well founded and *is* hereby upheld.

In the result, it *is* ordered that:

(a) The defendant's special plea be and *is* hereby upheld.

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(b) The plaintiff's claim be and is hereby dismissed with costs.

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

Civil Division of the Attorney-General's Office, defendant's legal practitioners c/o Messrs Coghlan & Welsh

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KAMA CONSTRUCTION (PVT) LTD *v* COLD COMFORT FARM CO-OPERATIVE & ORS 1999 (2) ZLR 19 (SC)

Citation	1999 (2) ZLR 19 (SC)
Case No	Judgment No. S-77-99
Court	Supreme Court, Harare
Judge	McNally JA, Muchechetere JA, Sandura JA
Heard	July 1, 1999
Judgment	July 9, 1999
Counsel	R Y Phillips, for the appellant P Nherere, for the respondent
Annotations	None

Civil appeal

Flynote

Property and real rights - spoliation order - when may be granted - limits as to circumstances when may be granted - concept of quasi-possession giving right to spoliation order - not extending to right of access to property granted under a management agreement

Headnote

The appellant company had entered into an arrangement with the trustees of the respondent co-operative with a view to restoring the co-operative to financial viability. It became involved in the management of the farm run by the co-operative and in various of the farm's activities. A dispute later arose and the arrangement was terminated by the co-operative. The appellant sought a spoliation order from the High Court, restoring it to peaceful possession of the farm. A provisional order was granted, but was not confirmed. The appellant appealed against the refusal to grant the spoliation order.

Held, that a spoliation order was not the proper remedy for the wrong alleged by the appellant; it should have sued for specific performance of the contract, together with interlocutory relief in

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the form of an interdict. Nonetheless, it would have been entitled to an interdict if it could have established possession and unlawful dispossession.

Held, further, that the law also recognises so-called quasi-possession or juridical possession. Spoliation would be available as a remedy where a person has been deprived unlawfully of his quasi-possession of a moveable or immoveable incorporeal. For example, to cut off the supply of electricity to an apartment is to seriously interfere with the possession of the apartment. But one must not overstate the availability of spoliation proceedings in regard to quasi-possession or define too widely the concept of quasi-possession.

Held, further, that the appellant had never possessed the farm. It had access to the farm, and still had, as a member of the co-operative. What it had lost was its right to give orders to the farm employees. This was only a contractual right, but did not found a contractual right of use.

Cases Considered

Cases cited:

Beukes v *Crous* 1975 (4) SA 215 (NC)

Botha & Anor v *Barrett* 1996 (2) ZLR 73 (S)

Naidoo v *Moodley* 1982 (3) SA 82 (T)

Plaatjie & Anor v *Olivier NO & Ors* 1993 (2) SA 156 (O)

Sebastian & Ors v *Malelane Irrigation Bd* 1950 (2) SA 690 (T)

Shoprite Checkers Ltd v *Pangbourne Properties Ltd* 1994 (1) SA 616 (W)

Zulu v *Min of Works, Kwazulu & Ors* 1992 (1) SA 181 (D)

Case Information

R Y Phillips, for the appellant

P Nherere, for the respondent

Judgment

McNally JA: Cold Comfort Farm Co-operative on the outskirts of Harare is an enterprise which has played a major role in the history of Zimbabwe. In recent times however it fell into administrative and financial difficulties. It was controlled by Cold Comfort Farm Trust (the Trust), whose Chairman was the Honourable Didymus Mutasa.

Mr Mutasa, in about March 1997, had a discussion with one Israel Magwenzi. Mr Magwenzi, who was the managing director of the appellant (Kama Construction) was initially interested in the farm from the point of view of a property developer. After discussion there was some kind of understanding that Mr Magwenzi and his company would become involved in the management

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of the farm in order to restore it to viability. Whether a contractual management agreement was ever entered into is hotly disputed. Certainly, Mr Mutasa wrote on 28 July 1997, appointing Kama Construction as the director of the Farm "to ensure the day to day running of the Trust". And both Kama Construction and Mr Magwenzi were made members of the Cold Comfort Farm Society. But no remuneration seems to have been discussed.

However, there is no doubt that Kama Construction did become involved in the management of Cold Comfort Farm and of various of its activities as from 1 April 1997. Kama appointed Mr Tobias Rukete to act in a managerial capacity, and a Mr Aboo Karim as a technical manager responsible for non-agricultural operations on the farm.

In about mid-October 1998, this arrangement was abruptly terminated. The details of how this came about are in dispute. Kama Construction says "keys to offices, workshops and vehicles were forcibly and unlawfully taken possession of by the fourth respondent (Mr Gwatidzo). These keys are normally kept by Mr Rukete." On the other hand, Mr Rukete himself denies this. He says he never had most of the keys and he knows nothing of anyone being forcibly deprived of them.

Be that as it may, there is no dispute that as from mid-October 1998 the employees on the farm (who were all employees of the Trust and not of Kama Construction) were told to take their orders in future from Mr Gwatidzo and not from Mr Magwenzi. The management agreement (as the appellant describes it) or the interim management arrangement (as the respondents' describe it) was terminated.

Kama Construction then sought, and obtained, from the High Court on 27 November 1998, a provisional order in the following terms:

" (1) That the first - fourth respondents restore the applicant to the peaceful possession

Mc NALLY JA

of Stand 4548 Tynwald Township, also known as Cold Comfort Farm within seventy two hours of the service of this order, failing which the sixth respondent is ordered to restore the applicant to the peaceful possession of the said Cold Comfort Farm.

(2) That the applicant shall institute proceedings within 10 court days of the confirmation of this order for an order declaring that the management agreement between the first and second respondents and itself still persists, failing which this order shall lapse.

(3) That the first - fourth respondents shall pay the costs of this application jointly and severally, the one paying the other to be absolved.

(4) That fifth respondent shall pay the costs of this application jointly and severally with the first - fourth respondents if it opposes the relief sought by the applicant herein.

INTERIM RELIEF GRANTED

Pending the institution and determination of the proceedings in para 2 of the final order sought:

(1) the purported sale of 70 hectares of Cold Comfort Farm by the first, second and third respondents to the

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fifth respondent is stayed.

(2) the first - fourth respondents are interdicted from transferring the portion of land of Cold Comfort Farm purportedly sold to the fifth respondent.

(3) the first - fourth respondents are interdicted from selling, alienating or disposing of any portion of Cold Comfort Farm without the consent and authority of the applicant."

The provisional order came for confirmation before a different judge on 16 February this year, and on 17 March it was discharged with costs. Kama Construction now appeals. The fifth and sixth respondents have not contested the matter at any stage.

The relief applied for was in essence a spoliation order. It is trite that in order to obtain a "mandament *van spolie"* or spoliation order, the applicant must show that:

(a) he was in peaceful and undisturbed possession of the thing; and

(b) he was unlawfully deprived of such possession.

See Joubert *Law of South Africa* Vol 27 para 78; *Botha & Anor* v *Barrett* 1996 (2) ZLR 73 (S) at 79E-F.

The only valid defences that may be raised are that:

(a) the applicant was not in peaceful and undisturbed possession of the thing in question at the time of the dispossession;

(b) the dispossession was not unlawful and therefore did not constitute spoliation;

(c) restoration of possession is impossible;

(d) the respondent acted within the limits of counter-spoliation in regaining possession of the article.

Mc NALLY JA

See Joubert *op cit supra* para 79.

In my view, the confirmation of the order was properly refused in the court *a quo*. I come to this conclusion because I consider that a spoliation order was not the proper remedy for the perceived wrong alleged by the appellant. The real complaint of Kama Construction is that it alleges that the respondents are in breach of the alleged management agreement. They should have sued for specific performance of the alleged contract, together with interlocutory relief in the form of an interdict, if they believed such relief was available.

Despite this, Kama Construction would still be entitled to relief in the form of a spoliation order if it established the two averments mentioned earlier, i.e. possession and unlawful dispossession.

The concept of "possession" is widely defined (see Joubert *op cit* para 52). Joubert states that:

"The law also recognises so-called quasi-possession or juridical possession (*possessio juris)*. This notion consists

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> in the exercise of control over an incorporeal coupled with an animus to exercise such control. Factual control of an incorporeal is exercised whenever the thing is exploited in accordance with an actual or presumed legal right (for example, a servitude or a contractual right of use) with regard to the thing."

It follows that a spoliation order is available as a remedy where a person has been deprived unlawfully of his quasi-possession of a moveable or immovable incorporeal. Such orders have been granted where, for example, a lessor cuts off the flow of electricity to the lessee's apartment (*Naidoo* v *Moodley* 1982 (4) SA 82 (T)), where a public authority cuts off the flow of water to a farm (*Sebastian & Ors* v *Malelane Irrigation Board* 1950 (2) SA 690 (T)), or where the owner of a servient tenement padlocks a gate and closes down a road used by the owner of the dominant tenement across his farm (*Beukes* v *Crous* 1975 (4) SA 215 (NC)).

But one must be careful not to overstate the availability of spoliation proceedings in regard to quasi-possession. Or, to put it another way, one must be careful not to define too widely the concept of quasi-possession. To cut off the supply of electricity to an apartment is seriously to interfere with the possession of that apartment. The quasi-possession is an essential incident of the possession of the apartment. One may comment similarly on the other two examples given. In the present case, we are not concerned with quasi-possession incidental to actual possession.

The applicant never "possessed" Cold Comfort Farm. It had access to the farm. It still has that access, as a member of the Cold Comfort Farm Society. What it has lost is its alleged contractual right to give orders to the workers on the farm in pursuance of an alleged management agreement. Such an agreement does not found a "contractual right of use".

The distinction, difficult to define but easy to recognise, has been

acknowledged in a number of decided cases. Mr *Nherere* cited *Zulu* v *Minister of Works, Kwazulu & Ors* 1992 (1) SA 181 (D) at 188H *et seq*; *Plaatjie & Anor* v *Olivier NO & Ors* 1993 (2) SA 156 (O) at 159F-160A, and *Shoprite Checkers Ltd* v *Pangbourne Properties Ltd* 1994 (1) SA 616 (W) at 622B-623C.

I rely in particular on one quotation from these cases, a passage from the judgment of Hattingh J in *Plaatjie supra* and from that of Thirion J in *Zulu supra*, cited with approval by Zulman J (as he then was) in *Shoprite Checkers supra* at 623B-C:

> "If the protection given by the *mandament van spolie* were to be held to extend to the exercise of rights in the widest sense, then rights such as the right to performance of a contractual obligation would have to be included, which would be to extend the remedy beyond its legitimate field of application and usefulness."

As Thirion J said at 190G-H in *Zulu supra*:

> "To hold otherwise, would in effect mean that the court would grant an order for specific performance of a contractual obligation in proceedings where the respondent is precluded from adducing evidence to disprove the existence of the obligation."

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The appeal is dismissed with costs.

Muchechetere JA: I agree.

Sandura JA: I agree.

Dube Manikai & Hwacha, appellant's legal practitioners

Stumbles & Rowe, respondents' legal practitioners

BLANCHARD & ORS *v* MINISTER OF JUSTICE 1999 (2) ZLR 24 (SC)

Citation	1999 (2) ZLR 24 (SC)
Case No	Judgment No. S-88-99
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA, Ebrahim JA, Muchechetere JA, Sandura JA
Heard	July 7, 1999
Judgment	July 9, 1999
Counsel	J C Andersen SC, for the applicants J Musimbe, for the respondents
Annotations	None

Constitutional application

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 15(1) - protection against inhuman or degrading treatment - unconvicted prisoners - constitutional rights of unconvicted prisoners - purpose of detaining unconvicted prisoners - restraints which may be placed on such prisoners - limits to such restraints - prisoners kept in solitary confinement, isolated from co-accused, deprived of own clothing and cell light on at all times - such treatment inhuman

Human rights - treatment of unconvicted prisoners in inhuman way - violation of s 15(1) of Constitution

Headnote

Three prisoners were awaiting trial on allegations that they had committed serious crimes of a security nature. Because of the nature of the crimes they had allegedly committed, the prison authorities treated them as high risk prisoners who might attempt to escape. It was considered that they required utmost security and vigilance. For several months, each prisoner had been held in a small individual cell in a heavily guarded and secure cell block. They were kept locked

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in their cells for most of the day, except for a period when they were allowed to exercise and shower. Each prisoner exercised alone in the absence of other prisoners. The lights in their cells were continually on day and night. Initially, when the prisoners went to bed they were stripped naked and shackled in leg-irons. They were not able to see one another and were not permitted to call out to each other. The only occasions when they were allowed to be in one another's company and were able to converse with one another were during consultations with their legal representative and when taken to court on remand under armed escort. They were obliged to wear prison clothing and were not allowed to have their wristwatches. They were not allowed to receive food from sources outside the prison.

The prisoners applied to the Supreme Court on the grounds that they were being subjected to various forms of inhuman or degrading treatment in violation of s 15(1) of the Declaration of Rights of the Constitution and for an order against the prison authorities to stop them from violating their rights. They complained that they were not being treated like other prisoners awaiting trial. They also alleged that they had been intimidated and tortured while in police custody as a result of which they were suffering from physical and mental

trauma and fearful of a recurrence of this ill treatment. These allegations which were not denied by the respondents.

Held, that the courts will afford the prison authorities wide-ranging deference in the adoption and execution of policies and practices which in their judgment are needed to preserve internal order and discipline and to maintain institutional security. Nonetheless it remains the continuing responsibility of the courts to uphold the constitutional rights of prisoners. Even where there are relevant security considerations, a just balance must be struck between security requirements and the protection of the constitutional rights of prisoners. The aim of s 15(1) of the Constitution is to protect the dignity and the physical and mental integrity of the individual. The prohibition relates not only to acts that cause physical pain but also to those that cause mental suffering to the victim.

Held, further, that prisoners awaiting trial are unconvicted and such prisoners are presumed to be innocent of any wrongdoing. The purpose of the detention of unconvicted prisoners is to to secure their attendance at the trial and not to punish them. The restraints imposed upon them must be only those that are absolutely necessary to ensure that they remain in custody and do not endanger themselves, other inmates or prison staff.

Held, further, that notwithstanding that the most serious charge against the applicants was not being proceeded with, the conditions under which the applicants were incarcerated had not been relaxed.

Held, further, that there may be special circumstances in which it is permissible to isolate a prisoner from other prisoners. But the onus lies on the prison authorities to justify such stringent action as enforced and prolonged isolation can cause psychological harm and mental suffering. The prison authorities had not discharged this onus in the present case. The prison authorities sought to justify the isolation of the prisoners on the grounds that they were facing serious charges and they might attempt to escape. However, the security conditions in place made

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escape very unlikely. Furthermore, the charges now being faced by the prisoners were not as serious as they were initially. The continuous lighting of the cells disturbed sleep and could cause other psychological effects. It was not necessary for security and to guard against escape as claimed. It seemed to be aimed at worsening the conditions of confinement by making it as uncomfortable and severe as possible.

Held, further, that the prolonged ill-treatment the applicants have been compelled to endure and its physical and mental effects upon them attained the minimum level of severity necessary to constitute a violation of s 15(1) of the Constitution. This suffering was not simply the inevitable consequence of the operation and administration of a high security prison and the usual element of humiliation associated with detention on remand.

Held, further, that the applicants, as unconvicted prisoners, had a right to wear their own clothing and should not have been forced to wear prison clothing. To make them wear prison clothing was to debase and humiliate them.

Held, further, that the stripping of the appellants at night and shackling them in leg irons was a manifestly inhuman measure. However, on the instructions of the Attorney-General the prison authorities had discontinued these measures, though their resumption had been threatened. Prison authorities should not use leg-irons and handcuffs except to prevent escape during transportation or restrain violent behaviour that would endanger safety of the prisoner or others or would significantly damage property and where there are not other effective measures to restrain the prisoners. The resort to these unwarranted punitive measures gravely aggravated the condition of solitary confinement to which the applicants were subjected. As awaiting trial prisoners, they were victims of arbitrary harshness with no regard to the trauma they had already suffered at the hands of the police, about which treatment the prison authorities were aware.

Held, further, that the applicants, as prisoners awaiting trial, were entitled to receive food from outside the prison but the prison authorities were entitled to inspect the food and to taste it before it was delivered to the prisoners.

Held, further, that the prison authorities were entitled to remove the applicants' wristwatches as there were sound penological reasons for doing so.

Held, further, that as a mark of disapproval of the treatment meted out to the applicants, the respondents should be penalised by the payment of costs on the higher scale.

Cases Considered

Cases cited:

August & Anor v *Electoral Commission & Ors* 1999 (3) SA 1 (CC)

Bell v *Wolfish* 441 US 520 (1979)

Brenneman v *Madigan* 343 F Supp 128 (1972)

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Cassiem & Anor v *Commanding Officer, Victor Verster Prison & Ors* 1982 (2) SA 547 (C)

Conjwayo v *Min of Justice & Anor* 1991 (1) ZLR 105 (S)

Dillard v *Pitchess* 399 F Supp 1225 (1975)

Goldberg & Ors v *Min of Prisons & Ors* 1979 (1) SA 14 (A)

Governor of Johannesburg Gaol v *Whittaker* 1911 TPD 798

Hassim & Anor v *Officer Commanding, Prison Command, Robben Island & Anor* 1973 (3) SA 462 (C)

Herczegfalvy v *Austria* (1993) 15 EHRR 437

Inmates of Suffolk Country Jail v *Eisenstadt* 360 F Supp 676 (1973)

Ireland v *UK* (1979-1980) 2 EHRR 25

Jones v *Wittenberg* 323 F Supp 93 (1971)

Koskinen v *Finland* (1994) 18 EHRR CD 146

Le Maire v *Maass* 745 F Supp 623 (1990)

McFeeley v *UK* (1981) 3 EHRR 161

Min of Justice v *Hofmeyr* 1993 (3) SA 131 (A)

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Strydom v *Min of Correctional Svcs & Ors* 1999 (3) BCLR 342 (W)

Whitaker v *Roos & Bateman; Morant* v *Roos & Bateman* 1912 AD 92

Wolff v *McDonnell* 418 US 539 (1974)

Woods & Anor v *Minister of Justice & Ors* 1994 (2) ZLR 195 (S); 1995 (1) SA 703 (ZS)

X v *UK* (1983) 5 EHRR 162

Statutes Considered

Legislation considered:

Constitution of Zimbabwe 1980, s 15(1)

Case Information

J C Andersen SC, for the applicants

J Musimbe, for the respondents

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Judgment

Gubbay CJ: This application was brought jointly by Gary George Blanchard, Joseph Wendell Pettijohn and John Lamonte Dixon direct to this court pursuant to s 24(1) of the Constitution of Zimbabwe. It concerned an alleged violation of s 15(1) of the Declaration of Rights by both the first respondent, who is the Minister responsible for the administration of the Prisons Act [*Chapter 7:11*] and the second respondent, who is the Officer-in-Charge of Chikurubi Maximum Security Prison. It is there, where the three applicants are presently incarcerated.

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On 9 July 1999, two days after argument was addressed by the parties, an order was made in the following terms:

" 1. The individual cells occupied by the applicants, as unconvicted prisoners in Chikurubi Maximum Prison, are to remain unlocked and open between the hours of 0700 and 1600 every day of the week, including Saturdays, Sundays and Public Holidays, thereby affording them freedom of movement and communication within the cell block in which they are detained.

2. The electric light in each applicant's cell is to be switched off between the hours of 2200 and 0600.

3. The applicants, while remaining unconvicted prisoners, shall be entitled to use and wear their own civilian clothing at all times.

4. The applicants, while remaining unconvicted prisoners, shall be entitled to receive every day, from sources outside the prison, as much food as they require.

Reasons for this order will be furnished in due course. The question of the costs of the application will be dealt with in the judgment."

These are the reasons that led to the grant of the redress specified in the order.

The three applicants are citizens of the United States of America, the country where they are ordinarily resident. They claim to be missionaries and members of the Harvestfield Pentecostal Church. During the late afternoon of 7 March 1999, they were arrested at Harare International Airport when about to depart aboard a Swiss aircraft destined for Zurich. An X-ray screening of their luggage had revealed the presence of a large quantity of offensive weapons and offensive materials. A subsequent search of a locked Sierra truck left by the applicants in the paid for security parking area of the airport resulted in the discovery of a further quantity of weaponry and ammunition.

The applicants were held in custody for six days, at different police stations, while under investigation by members of the Criminal Investigation Department and Law and Order Section of the police. In breach of s 32 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] they were only taken before a court for remand on 13 March 1999, several days beyond the prescribed period. At that hearing, presided over by a regional magistrate, they were jointly charged with contravening s 51(2) of the Law and Order (Maintenance) Act [*Chapter 11:07*] - plotting the commission of acts of terrorism and sabotage - alternatively, with contravening s 37(2) of the same Act - the unlawful possession of offensive weapons and offensive materials.

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Both offences permit of a sentence of imprisonment for life. The legal practitioner who appeared made it known to the regional magistrate that, in the course of interrogation, members of the Criminal Investigation Department had subjected the applicants to various forms of inhuman treatment, including torture, assault, intimidation and a denial of fundamental

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human rights. The occurrence of such abuse, which was particularised in later correspondence, was not denied by the respondents. Nor was it put in issue that at that time the applicants were in a state of shock. They were suffering from physical and mental trauma and fearful of a recurrence of ill-treatment.

Upon admission to Chikurubi Maximum Security Grade IV Prison, the applicants were classified as "D" class prisoners, a category relating to those prisoners, whether convicted or unconvicted, who are deemed to require the utmost security and vigilance. This was on account of the serious nature of the charges the applicants were due to answer and the belief that they might attempt to escape. Since then each of the applicants has been confined in a single cell in the same heavily guarded and very secure cell block. There are eleven cells in the block. A row of five cells faces another row of six. Each cell is small, measuring approximately 4.5 metres long by 1.5 metres wide. The side and rear walls are solid and windowless. Across the front of the cell are a number of closely spaced iron bars; attached thereto is a steel mesh screen or grill in which is a locked gate of similar construction. Inside the cell is a self-flushing toilet and a low concrete platform covered with a mattress and blanket. Eight of the eleven cells are occupied, four by convicted prisoners, three by the applicants and one by another awaiting trial prisoner. Those holding the applicants are not adjoining. They are not able to see one another by looking out of the grill gate. Nor are they permitted to call out to each other. Save for being allowed an adequate period every day to exercise and shower, which activities must be taken alone, the applicants are kept locked in their individual cells. An electric light burns in each cell and is never extinguished. The applicants receive personal visits from the prison chaplain and have been seen infrequently, yet again individually, by United States consular officials. The only occasions when the applicants are in one another's company and able to converse with each other are during consultations with their legal representative and when taken to court on remand under armed escort.

Until towards the end of April 1999, the practice adopted was that after the evening meal (provided at mid-afternoon to each cell) the applicants, preparatory to going to sleep, were stripped naked and shackled in leg-irons. It was only at the first meal of the next day that the leg-irons were removed and the clothing returned. This manifestly inhuman measure was discontinued upon the instruction of the Attorney-General, though a resumption of it was threatened.

I feel bound to condemn any recourse by prison authorities to the use of leg-irons and handcuffs except for the prevention of escape during transportation or in order to restrain violent behaviour provided, in the absence of other

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effective methods, the prisoner would endanger his own or other persons' safety or significantly damage property.

The applicants are dressed in prison clothing. They are not being permitted to wear their own civilian attire. They are also without their wristwatches which were removed from them, along with other items of value, upon admission to Chikurubi Prison.

More recently, the Attorney-General has decided not to indict the applicants upon a contravention of s 51(2) of the Law and Order (Maintenance) Act. At their trial the applicants are to be charged, first, with a contravention of s 37(2) of the same Act; and, second, with an attempt to contravene s 7(1)(a) of the Aircraft (Offences) Act [*Chapter 9:01*] - attempting to carry, place or cause to be placed dangerous goods aboard an aircraft. In extra-curial statements made to the police the applicants deny that they were in possession of the weapons and materials recovered from them for any sinister purpose and that they had undertaken any illegal activity with them either within or outside Zimbabwe. Notwithstanding that the most serious charge is not being proceeded with, the conditions under which the applicants are incarcerated have not been relaxed.

In *Conjwayo* v *Minister of Justice, Legal and Parliamentary Affairs & Anor* 1991 (1) ZLR 105 (S); 1992 (2) SA 56 (ZS), and *Woods & Ors* v *Minister of Justice, Legal and Parliamentary Affairs & Ors* 1994 (2) ZLR 195 (S); 1995 (1) SA 703 (ZS), this court emphatically recognised that while prison administrators should be accorded wide-ranging deference in the adoption and execution of policies and practices which in their judgment are needed to preserve internal order and discipline, and to maintain institutional security, it nonetheless remains the continuing responsibility of the courts to enforce the constitutional rights of all prisoners. For a prisoner retains all the rights of a free citizen except for those withdrawn by law, expressly or by implication; or those inconsistent with the legitimate penological objectives of the corrections system. See also *Goldberg & Ors* v *Minister of Prisons & Ors* 1979 (1) SA 14 (A) at 39C-E; *Minister of Justice* v *Hofmeyr* 1993 (3) SA 131 (A) at 141C-D; *August & Anor* v *Electoral Commission & Ors* 1999 (3) SA 1 (CC) at para 18; *Strydom* v *Minister of Correctional Services & Ors* (1999) 3 BCLR 342 (W) at para 14.

Insofar as awaiting trial prisoners are concerned, it must never be overlooked that they are unconvicted and, accordingly, presumed to be innocent of any wrongdoing. The purpose of their detention is merely to bring them to trial. Sufficient security must assure that they will remain in custody and will not pose a danger to themselves or to other inmates or staff. Punishment, deterrence or retribution in such a context are out of harmony with the presumption of innocence. Indeed, it has been well

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established since the days of Blackstone that an awaiting trial prisoner must otherwise be

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treated with all of the consideration that the need for confinement will allow:

> "Upon the whole, if the offence be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the *mittimus* of the justice ..., there to abide till delivered by due course of law ... But this imprisonment, as has been said, is only for safe custody, and not for punishment: therefore, in this dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters, or subjected to other hardships than such as are absolutely requisite for the purpose of confinement only ..." (See 4 *Commentaries* 300).

This valid principle was also given expression to by Solomon J in *Whittaker* v *Roos & Bateman; Morant* v *Roos & Bateman* 1912 AD 92 at 130:

> "(The) whole object of the detention of awaiting trial prisoners is to ensure their attendance at the trial, and that object is properly borne in mind by the authorities in their general treatment of such prisoners while in gaol. Any further encroachment upon their liberty than is necessary to secure this object or is required by the prison rules for the discipline or management of the gaol, is an infringement of their personal rights, and cannot be justified on the ground that the authorities considered it desirable in the interests of public safety."

See also Innes J *ibid* at 122 *in fine*-123; *Cassiem & Anor* v *Commanding Officer, Victor Verster Prison & Ors* 1982 (2) SA 547 (C) at 551F-G; and the decisions of the United States Federal District Courts in *Jones* v *Wittenberg* 323 F Supp 93 (1971) at 100, *Brenneman* v *Madigan* 343 F Supp 128 (1972) at 138, *Inmates of Suffolk County Jail* v *Eisenstadt* 360 F Supp 676 (1973) at 685-686, *Rhem* v *Malcolm* 371 F Supp 594 (1974) at 622, and *Dillard* v *Pitchess* 399 F Supp 1225 (1975) at 1232-1233.

The lawful incarceration of the applicants causes the necessary withdrawal or limitation of many privileges and rights previously enjoyed in a free and democratic society. Persons in custody simply do not possess the full range of freedoms of unincarcerated individuals. They cannot come and go as they please. In the words of Justice Rehnquist (as he then was) in *Bell* v *Wolfish* 441 US 520 (1979) at 537:

> "Once the Government has exercised its conceded authority to detain a person pending trial, it obviously is entitled to employ devices that are calculated to effectuate this detention. Traditionally, this has meant confinement in a facility which, no matter how modern or how antiquated, results in restricting the movement of a detainee in a manner in which he would not be restricted if he simply were free to walk the streets pending trial. Whether it be called a jail, a prison, or a custodial center, the purpose of the facility is to detain. Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment'."

But such restraints must be circumscribed. They must encompass only those which are absolutely necessary. They must be measured against the

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State's sole objective in presenting the awaiting trial prisoner for trial. They must be judged against a standard of basic humanity towards men innocent in the eyes of the law, and not against abstract penological standards. See *Inmates of Suffolk Country Jail* v *Eisenstadt supra* at 686.

The first and most important complaint to consider is that the applicants are not being treated in

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the same manner as other awaiting trial prisoners. They are locked up in small single cells for most of the day. They cannot walk freely outside their cells in the section patrolled by a warder. They must endure the continuous lighting of their cells. They are deprived of the sight of each other. Except when interviewed by their legal representative, they speak to no other inmate, only to the prison chaplain and a consular official. In effect, for prolonged periods of each day, for many months now, the applicants are being held in solitary confinement in the wide meaning conveyed in Black's *Law Dictionary* Abrig. 5 ed at 723:

> "In a general sense, the separate confinement of a prisoner, with only occasional access of any other person, and that only at the discretion of the jailer. In a stricter sense, the complete isolation of a prisoner from all human society, and his confinement in a cell so arranged that he has no direct intercourse with or sight of any human being, and no employment or instruction."

There may well be special circumstances in which it is permissible to subject an awaiting trial prisoner to more severe treatment than the rest - to effectively isolate him from the others. This was acknowledged by Solomon J in *Whittaker* v *Roos & Bateman supra* at 128 *in fine*-129. The learned Judge of Appeal was quick to point out, however, that where resorted to the onus lies upon the prison authorities to justify such stringent action. See also, *Governor of Johannesburg Gaol* v *Whittaker* 1911 TPD 798 at 806 *in fine*; *Minister of Justice* v *Hofmeyr supra* at 153D.

The respondents strove to justify the harsh treatment meted out to the applicants on the ground that they face serious charges and may be induced to attempt to escape. Yet no allegation has been made to the effect that the applicants, by their conduct, have done anything to give rise to such apprehension. Realistically, the extensive security precautions that are in place make it highly unlikely that they would succeed if they were to try to escape, which they deny it is their intention to do. Such zeal for security is recognised as among the most common varieties of official excess. See *Bell* v *Wolfish supra* at 566.

Furthermore, the present charges are not as serious as they were initially. The applicants were intending to remove the weaponry from Zimbabwe. There is now no suggestion by the State that it was the purpose of the applicants to use the offensive weapons and materials in this country. This being so, I can only agree with their counsel that for the Attorney-General to

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brand the applicants as "messengers of death" is a description shown to be unsubstantiated by the evidence.

Ancillary to the complaint of the inhumanity of the conditions of confinement and unnatural isolation, is that relating to the continuous lighting of the cells occupied by the applicants, which disturbs their sleep. The respondents seek to vindicate this particular practice by drawing attention to clause 113(3) of the Prison Security Standing Orders, made by the Commissioner of Prisons in terms of s 21(1) of the Prisons Act. This provides that when confined to their cell "D" class prisoners (whether convicted or unconvicted) shall be inspected every twenty minutes by the officer on duty. He, so it is claimed, would be unable to monitor properly the movements and intentions of the applicants, during the hours of darkness, without the facility of such lighting.

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I find this reasoning unpersuasive. A warder with back-up is always present in this cell block and a torch could be used effectively to check upon the presence of the applicants in their cells at night. The likelihood of them being able to escape therefrom is, as already mentioned, extremely remote, if not fanciful. The insistence upon lighting is therefore irrational and, so it seems to me, directed at exacerbating the effect of the condition of confinement by making it as uncomfortable and severe as possible for the applicants.

The same complaint was raised in *Le Maire* v *Maass* 745 F Supp 623 (1990). The plaintiff, a convicted murderer, serving a life sentence, objected that the twenty-four hour continuous lighting in his cell disturbed his sleep and caused other psychological effects. It amounted, so he contended, to cruel and unusual punishment in breach of the Eighth Amendment. The defendant, the prison superintendent, justified the constant illumination as a security measure so the disciplinary segregation unit could see into the cell. There was no evidence, however, that there was a need to see into the cell for twenty-four hours per day. No reason was offered why the cell could not have a switch outside so that guards could see into it when they needed to. Panner, Chief Judge, held at 636 that:

> "There is no legitimate penological justification for requiring plaintiff to suffer physical and psychological harm by living in constant illumination. The practice is unconstitutional."

Even if it be assumed that a serious security problem attaches to the applicants which must be afforded weight, I would repeat what was said in *Conjwayo* v *Minister of Justice, Legal and Parliamentary Affairs & Anor supra* at 116B (ZLR) and 65F-G (SA), that:

> "nonetheless there must be mutual accommodation between such institutional need and the provisions of the Constitution. A just balance must be struck. It is not an acceptable proposition that undue harshness under the guise of prison security or discipline attracts immunity from judicial review."

The nature of the trauma to which the applicants, as awaiting trial

prisoners, are being subjected, was graphically described by Hoexter JA in *Minister of Justice* v *Hofmeyr supra* at 145G-H as follows:

> "Man is by nature a social animal whose well-being depends upon his association with others. Recluses who voluntarily seek exclusion are known, but they are the exception to the rule. In most people the gregarious instinct is strongly implanted; and to deprive the average person of contact with his fellows is to cause him to suffer anguish of mind. It cannot be gainsaid that any enforced and prolonged isolation of the individual is punishment. It is a form of torment without physical violence. This fact has been recognised since the beginning of time ... "

See also, the similar remarks of Diemont J (as he then was) in *Hassim & Anor* v *Officer Commanding, Prison Command, Robben Island & Anor* 1973 (3) SA 462 (C) at 480B-C; and *Herczegfalvy* v *Austria* (1993) 15 EHRR 437 at para 251.

The abuse of the applicants by police interrogators prior to admission to prison is also to be borne in mind. Their condition was known to the second respondent. It was aggravated by the oppressive manner of their confinement - by isolating them from other awaiting trial prisoners, by depriving them of freedom of movement for the greater part of the day, and initially, by

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stripping them naked and placing them in leg-irons.

Akin to article 7 of the International Covenant on Civil and Political Rights, the aim of s 15(1) of the Constitution is to protect both the dignity and the physical and mental integrity of the individual. The prohibition relates not only to acts that cause physical pain but also to those that cause mental suffering to the victim. It is the duty of the State to afford everyone protection against such acts by legislative and other measures, as may be necessary; not, through its officials, to be responsible for their perpetration.

Taking account of all the circumstances, I am satisfied that the prolonged duration of the ill-treatment the applicants have been compelled to endure and its physical and mental effects upon them, attain that minimum level of severity necessary to constitute a violation of s 15(1) of the Constitution. See *Ireland* v *United Kingdom* (1979-1980) 2 EHRR 25 at para 162; *Koskinen* v *Finland* (1994) 18 EHRR CD 146 at 158. In the result, I am quite unable to hold that the applicants are simply being made to suffer from the inevitable consequence of the operation and administration of a high security prison and the usual element of humiliation associated with detention on remand.

No explanation has been given by the second respondent for the refusal to permit the applicants to use and wear their own clothing at all times. That such a right is accorded to an awaiting trial prisoner is implicit in ss 78 and 80 of the Prisons Act, and is expressly spelt out in r 88(1) of the United Nations Standard Minimum Rules for the treatment of prisoners. The reason is obvious. An awaiting trial prisoner is presumed innocent. Hence, he should not be forced to wear clothing which imparts the appearance of guilt. To

create a situation in which an awaiting trial prisoner is by virtue of prison garb physically indistinguishable from prisoners who have been convicted is to debase and humiliate him in his own eyes; and lower him in the estimation of others. It connotes treatment which is calculated to, or in all probability will, adversely affect the status of the recipient. This inherently degrading requirement is, of course, lacking where the objection to the wearing of prison clothing emanates from a convicted prisoner. See *McFeeley* v *United Kingdom* (1981) 3 EHRR 161; *X* v *United Kingdom* (1983) 5 EHRR 162.

I did not understand counsel for the respondents to resist the submission that the applicants, as awaiting trial prisoners, were entitled to receive food at proper hours every day from private sources. Such a right is stipulated in ss 78 and 80 of the Prisons Act. See also r 87 of Standard Minimum Rules for the treatment of prisoners. However, it is not appropriate for this court to direct, as requested on the applicants' behalf, that the food supplied should not first be tasted by the person delivering it. The power to examine the food and the method employed is not the sort of administrative procedure that courts are inclined to interfere with. To do so would amount to an unnecessary intrusion into the sphere of those charged with and trained in the running of penal institutions. In any event, it can hardly be claimed that the practice of food tasting amounts to degrading punishment or treatment insofar as the applicants themselves are concerned. It causes them no humiliation. It does not affect their receipt of the food, provided

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the supplier is willing to comply with the tasting of it.

Finally, there remains the question of whether the refusal to permit the applicants possession of their wristwatches infringes s 15(1) of the Constitution. Here again, I do not consider that it behoves the court to interfere. The second respondent has deposed that:

> "Use of wristwatches by the applicants at any time whilst in prison custody constitutes a grave security risk. Valuable items like watches are a medium of exchange in shady deals and racketeering in prison and are prohibited and kept away from the inmates just like cash. Such items are capable of being used to conceal contrabands like dangerous drugs, which will make the watches subjected to routine searches and causing inevitable damage to them. Use of wristwatches by the applicants is opposed for security reasons and for the maintenance of law and order in prison. Should the applicants need to know the time, for whatever reason without ill intent, they are free like other inmates to ask the officers on duty round the clock."

It seems to me that this deprivation is reasonably related to legitimate penological interests. The practice of the prison officials in applying it must be afforded appropriate deference. See *Wolff* v *McDonnell* 418 US 539 (1974) at 555-556; *Rhodes* v *Chapman* 452 US 337 (1981) at 361.

Counsel for the applicants sought an order for costs on the higher scale of legal practitioner and client. He stressed that the practice of stripping a

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prisoner of his clothing and forcing him to remain naked from late afternoon until early morning had been resorted to in apparent contempt of the ruling in the *Conjwayo* case *supra* at 108G-H (ZLR) and 60D-E (SA), that had outlawed it. To make matters worse, such degrading treatment had been accompanied by the use of leg-irons. It had persisted for a period of about five weeks. Its ultimate cessation was without any expression of remorse or official acknowledgment of wrongdoing. Moreover, in breach of prison regulations, the applicants were not permitted to wear their own clothing and for some time were prevented from receiving food from outside sources.

To my mind, recourse to such unwarranted punitive measures gravely aggravated the condition of solitary confinement to which the applicants were subjected. As awaiting trial prisoners they were the victims of arbitrary harshness, with no regard taken of the trauma they had already suffered at the hands of the police.

As a mark of the court's disapproval of the treatment meted out to the applicants, the respondents deserve to be penalised by the payment of costs on the higher scale. Accordingly, costs are so ordered against the respondents, jointly and severally, the one paying the other to be absolved.

McNally JA: I agree.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Sandura JA: I agree.

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Stumbles & Rowe, applicants' legal practitioners

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

LEES IMPORT AND EXPORT (PVT) LTD *v* ZIMBANK 1999 (2) ZLR 36 (SC)

Citation	1999 (2) ZLR 36 (SC)
Case No	Judgment No. S-78-99
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA, Ebrahim JA, Muchechetere JA, Sandura JA
Heard	June 21, 1999
Judgment	July 12, 1999
Counsel	P Nherere, for the applicant (at the request of the court) A P de Bourbon SC, for the respondent B Patel, for the Attorney-General (intervening)
Annotations	None

Civil appeal

Flynote

Company - legal proceedings - representation of company in such proceedings - whether company must be represented by legal practitioner

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(1) and 18(9) - right to protection of the law - whether rule that company must be represented by legal practitioner violates right to protection of the law

Practice and procedure - parties - company - whether company must be represented by legal practitioner in superior courts

Headnote

The managing director of a company had sought to represent his company in proceedings in the High Court. The presiding judge expressed concern as to whether the rule that companies may only be represented in the superior courts by a legal practitioner offended against the provisions of s 18 of the Constitution. Counsel for the respondent, with the apparent approval of the managing director, requested that the question be referred to the Supreme Court in terms of s 24(2) of the Constitution. The constitutional issue that was referred to the Supreme Court was whether the rule of practice that only a legal practitioner can represent a company in the superior courts violates s 18(1) and (9) of the Constitution, which guarantee that a person is

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entitled to the protection of the law and to a fair hearing within a reasonable time by an independent and impartial court in the determination of his civil rights.

Counsel for the applicant argued that the rule seriously abridges the right of a company to the protection of the law and to a fair hearing. If the company cannot afford to engage a lawyer it is denied audience before the superior courts; or if it can afford legal representation it is deprived of the choice whether or not to engage a lawyer.

The respondent argued that the Supreme Court should decline to exercise its power under s 24(4) of the Constitution as the company had an adequate means of redress by way of applying to the High Court for it to exercise its inherent power to regulate its own proceedings in such a way as to allow the managing director to represent the company. The respondent argued that only if this application failed should the Supreme Court be approached on the constitutional issue.

Held, rejecting this argument, that the constitutional issue raised was whether the provisions of ss 18(1) and (9) confer upon a company an *absolute* right to appear before the High Court without being represented by a legal practitioner. The applicant had not sought, and was not now seeking, relief by way of the exercise of the High Court's discretionary power. Additionally, the determination of the question of the right of a company to be represented by a director or an officer would provide clarity for those other companies which either prefer to litigate without legal representation or are unable to afford the substantial cost thereof. Apart from these reasons, the proviso to s 24(4) of the Constitution gave the Supreme Court the discretion to determine a question referred to it even if adequate means of redress are available to it under any other law.

Held, further, that as regards the rule of practice laying down that a company could only be represented by a legal practitioner, s 9(2) of the Legal Practitioners Act [*Chapter 27:07*] prohibits anyone other than a legal practitioner from performing various forms of legal work, such as issuing out a summons or carrying on or defending any action or appearing as a legal practitioner on behalf of another in any action. The proviso to s 9(2) provides that nothing in the subsection shall prevent a director or officer in a company from doing these acts. The effect of this proviso is simply to allow authority to be given to a director or officer to do these things. This authority can be provided for in the rules of court. Therefore the provision in the Magistrates Court Rules authorising a director or officer to do these things in cases in the magistrates court are covered by the proviso and are not inconsistent with the prohibition in s 9(2). On the other hand, no such authority has been given in the High Court Rules for a company to be represented by a director or officer.

Held, further, that the rule that a company must be represented by a legal practitioner is a long standing rule in Zimbabwe and in other countries. Although some of the policy considerations upon which this rule is based may be thought to be insufficiently persuasive to warrant continued adherence to the rule, the rule is too well settled to allow its validity to be impugned on grounds other than constitutional grounds. The superior courts, however, have a residual power to regulate its proceedings unless fettered by legislation. In exercising this discretion and in the interests of justice the court may permit a person other than a legal practitioner to appear

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before it on behalf of a company but only in exceptional circumstances.

As regards the constitutionality of the rule of practice:

Held, that in terms of s 18(1) a person is entitled to protection of the law and in terms of s 18(9) a person is entitled to a fair trial in the determination of his civil rights. Section 113 of the Constitution provides that, unless the context otherwise requires, "person" includes individuals and bodies of persons whether corporate or unincorporated. The rights afforded by s 18(1) and (9) apply to corporations.

Held, further, that the *alter ego* doctrine and the organic theory recognise that in some situations the acts of certain persons are effectively the acts of the company. Such persons are the directing mind and will of the company and control what it does. They do not act for the company as its agents. Rather, they act, know and form intentions through the *persona* of the company.

Held, further, that when interpreting a fundamental rights provision of the Constitution the court will not interpret the provision narrowly and rigidly but will interpret it in a way that will serve the interests of the Constitution and best carry out its objects and promotes its purposes. Applying this approach, the common law rule that a company can only be represented in the superior courts by a practising legal practitioner offends against s 18(9) of the Constitution, certainly to the extent that it denies the duly authorised organ or *alter ego* of the company the right to appear in the person of the company. The

fundamental right to a fair hearing includes the right of a corporate body to appear through its *alter ego*.

Held, further, that this approach does not undermine the rule of practice; it merely provides an exception to it. This approach does not permit a company to appear before the superior courts through someone who is a mere director, officer, servant or agent. Companies which cannot be said to be the embodiment of any human body will not qualify under s 18(9) because no human being personifies the company in person. In general, small companies should be able to avail themselves of the exception.

Cases Considered

Cases cited:

Agramat (Pvt) Ltd v *Chisvo & Anor* 1991 (2) ZLR 185 (S)

Arbuthnot Leasing Intl Ltd v *Havelet Leasing Ltd & Ors* [1991] 1 All ER 592 (ChD)

Arma Carpet House (Johannesburg) (Pty) Ltd v *Domestic & Commercial Carpet Fittings (Pty) Ltd & Anor* 1977 (3) SA 448 (W)

A-G & Anor v *Antigua Times Ltd* [1975] 3 All ER 81 (PC)

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Bankorp v *California Spice & Marinade (Pty) Ltd & Ors* [1997] 4 All SA 317 (W)

Banque Nationale du Canada v *Atomic Slipper Co Ltd et al* (1991) 80 DLR (4th) 134 (SC)

Battle v *Irish Art Promotion Centre Ltd* 1968 IR 252 (SC)

Bay Marine (Pty) Ltd v *Clayton Country Properties (Pty) Ltd* (1986) 11 ACLC 326

B & B Hardware Distributors (Pty) Ltd v *Admin, Cape & Anor* 1989 (1) SA 957 (A)

Charles P Kinnell & Co Ltd v *Harding, Wace & Co* [1918-19] All ER Rep 594 (CA)

Chinamora v *Angwa Furnishers (Pvt) Ltd & Ors* 1996 (2) ZLR 664 (S)

Climax Floors (Pty) Ltd v *Y du Toit Construction Co (Pty) Ltd & Anor* 1980 (3) SA 731 (C)

CIR v *Richmond Ests (Pty) Ltd* 1956 (1) SA 602 (A)

Diana Farm (Pvt) Ltd v *Madondo NO & Anor* 1998 (2) ZLR 410 (H)

Dormehl's Garage (Pty) Ltd v *Magagula* 1964 (1) SA 203 (T)

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Floods of Queensferry Ltd v *Shand Construction Ltd & Ors* (1997) 54 Con LR 137 (QB)

Frinton & Walton UDC v *Walton & District Sand & Mineral Co Ltd & Anor* [1938] 1 All ER 649 (ChD)

GATX-Fuller (Pty) Ltd v *Trade & Project Mgmt Svcs (Pty) Ltd* 1984 (3) SA 38 (W)

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Hallows v *The Yacht "Sweet Waters"* 1995 (2) BCLR 172 (D); 1995 (2) SA 270 (D)

Harris v *Unihold (Pty) Ltd & Ors* 1981 (3) SA 144 (W)

Harrison v *Guardian Assurance Co Ltd* [1989] 1 NZLR 59 (HC)

HL Bolton (Eng) Co Ltd v *TJ Graham & Sons Ltd* [1956] 3 All ER 624 (CA)

Hubbard Assn of Scientologists Intl v *Anderson & Anor* [1972] VR 340

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Levy v *Central Mining & Invstm Corp Ltd* 1955 (1) SA 141 (A)

Manitoba Ltd et al v *Liquor Control Commission* (1996) 113 Man R (2d) 64

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Min of Home Affairs v *Bickle & Ors* 1983 (2) ZLR 400 (S); 1984 (2) SA 439 (ZS)

Newborne v *Sensolid (GB) Ltd* [1953] 1 All ER 708 (CA)

Pumpkin Construction (Pvt) Ltd v *Chikaka* 1997 (2) ZLR 430 (H)

Radford v *Freeway Classics Ltd* [1994] 1 BCLC 445 (CA)

Ramsey v *Fuchs Garage (Pty) Ltd* 1959 (3) SA 949 (C)

Retrofit (Pvt) Ltd v *PTC & Anor* 1995 (2) ZLR 199 (S); 1995 (9) BCLR 1262 (ZS)

Suid-Afrikaanse Sentrale Ko-op Graanmaatskappy v *Thandasaris* 1953 (2) SA 314 (W)

Tesco Supermarkets Ltd v *Nattrass* [1971] 2 All ER 127 (HL)

Tritonia Ltd v *Equity & Law Life Assurance Soc* [1943] 2 All ER 401 (HL)

Venrose Hldgs Ltd v *Pacific Press Ltd* (1978) 88 DLR 523 (S)

Yates Invstms (Pty) Ltd v *CIR* 1956 (1) SA 364 (A)

Zimbank v *Pindi Electrical & Hardware (Pvt) Ltd & Ors* 1998 (2) ZLR 210 (H)

Zinyemba v *Min of the Public Svc & Anor* 1989 (3) ZLR 351 (S)

Statutes Considered

Legislation considered:

Constitution of Zimbabwe 1980, s 18(1) and 18(9)

Legal Practitioners Act [*Chapter 27:07*], s 9(2)

Case Information

P Nherere, for the applicant (at the request of the court)

A P de Bourbon SC, for the respondent

B Patel, for the Attorney-General (intervening)

Judgment

Gubbay CJ:

I. INTRODUCTION

On 31 October 1997, the High Court granted the respondent judgment by default, with costs, against the applicants, Lever Jonasi Phiri and Sithembile Phiri, jointly and severally, the one paying the others to be absolved, in the sum of $132199.68, with interest thereon at 43 percent

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per annum from 1 September 1995 to date of payment. Three months later an application was brought by the three judgment debtors for the rescission of the judgment. It was signed by the applicant's managing director, Mr Phiri, who also deposed to the founding affidavit. The respondent opposed the application.

At the hearing on 10 September 1998, Mr Phiri sought to represent the applicant as well as himself. Mrs Phiri was also in attendance. Counsel for the respondent contended that it was not permissible for Mr Phiri to appear for the applicant. He submitted that the recent judgment to the contrary by Mubako J in *Zimbabwe Banking Corporation Ltd* v *Pindi Electrical and Hardware (Pvt) Ltd & Ors* 1998 (2) ZLR 210 (H) was wrong and in direct conflict with that of Smith and Gillespie JJ in *Pumpkin Construction (Pvt) Ltd* v *Chikaka* 1997 (2) ZLR 430 (H). The learned judge presiding expressed concern as to whether the rule, in terms of which companies may only be represented in the superior courts by a practising legal practitioner, offended against s 18 of the Constitution of Zimbabwe. Thereupon counsel for the respondent, with the apparent approval of Mr Phiri, requested that the question raised be referred to the Supreme Court pursuant to s 24(2) of the Constitution.

The learned judge formulated the question in these terms:

> "Whether the current rule of practice prevailing in the High Court and Supreme Court

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> whereby a company can only appear if it is represented by a practising legal practitioner is not in breach of s 18(1) and s 18(9) of the Constitution of Zimbabwe."

II. THE CONFLICTING HIGH COURT JUDGMENTS

The question referred need only be answered if *Zimbabwe Banking Corp Ltd* v *Pindi Electrical and Hardware (Pvt) Ltd & Ors supra* was wrongly decided.

In that case the Bank instituted proceedings against Pindi and three other defendants for payment of a sum outstanding on the company's overdraft which had been guaranteed by each of the remaining defendants. Appearance to defend was entered on Pindi's behalf by the second defendant. The Bank took the view that such an entry of appearance was invalid, that Pindi was barred and that, accordingly, default judgment should be entered against it. Mubako J declined the request on the ground that, assuming the second defendant was a director or officer of Pindi, he was entitled to enter appearance on its behalf. The learned judge considered that the decision in *Pumpkin Construction (Pvt) Ltd* v *Chikaka supra* overlooked that the rule that a company, being a legal abstraction, cannot conduct legal proceedings in person but is obliged to be represented by a legal practitioner, had been abrogated by the proviso to s 9(2) of the Legal Practitioners Act [*Chapter 27:07*] (see at 211D). He relied on a statement to that effect by Professor Christie in his acclaimed *Business Law in Zimbabwe* 2 ed at 415.

Section 9(2) of the Legal Practitioners Act provides, *inter alia*, that subject to any other law, no person other than a registered legal practitioner who is in possession of a valid practising certificate shall sue out any summons or process, or carry on or defend any action, suit or

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proceedings in any court in the name of any other person (para (a)); or appear, plead or act in the capacity of a legal practitioner for or on behalf of any other person in any action, suit or other proceedings in any court (para (c)). The proviso thereto reads:

> "nothing in this subsection contained shall prevent any director or officer in the sole employment of a corporation or any member of a partnership doing any such act as is mentioned in paragraph (a) in the name of such corporation or partnership."

Within two months of the judgment in the *Pindi* case being delivered, Smith J considered its reasoning in *Diana Farm (Pvt) Ltd* v *Madondo NO & Anor* 1998 (2) ZLR 410 (H). He strongly disapproved of the view that the effect of the proviso to s 9(2) of the Legal Practitioners Act permitted a company to be represented by a person other than a legal practitioner. He said at 417F-G that the proviso:

> "merely provides that subs (2)(a) shall not prevent such representation. Therefore, the Magistrates Court Rules, which authorise such representation, are not inconsistent with

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> s 9(2)(a) and so cannot be held to be *ultra vires*. As pointed out in the *Pumpkin Construction* case, *supra*, there is no equivalent provision in the High Court Rules. Until such time as a similar provision is inserted in the High Court Rules, a company cannot, in my opinion, be represented by a director or officer in proceedings before the High Court."

I respectfully agree with this interpretation. The proviso to s 9(2) is not constitutive of an otherwise non-existent right, power or entitlement. Its effect is simply to preserve from the impact of s 9(2) whatever rights of representation a director or other officer of a juristic person might have. See, for instance, Order IV r 1(e) of the Magistrate's Court Civil Rules 1980; s 13(1)(b) of the Administrative Court Act [*Chapter 7:01*]; s 5 of the Fiscal Appeal Court Act [*Chapter 23:05*]; and s 65(9) of the Income Tax Act [*Chapter 23:06*], *re* Special Court for Income Tax Appeals.

III. THE RULE THAT A LIMITED COMPANY HAS NO RIGHT TO BE REPRESENTED IN THE CONDUCT OF PROCEEDINGS IN COURT EXCEPT BY A PRACTISING LEGAL PRACTITIONER

The rule probably originated in early seventeenth century metaphysical reasoning that a company has no soul, is invisible and cannot do homage. This was explained by Swinfen Eady LJ in *Charles P Kinnell & Co Ltd* v *Harding, Wace & Co* [1918-1919] All ER Rep 594 (CA) at 597H-598B:

> "It is urged that there exists a rule of the common law that a corporation aggregate can only appear by attorney, and in support is quoted Co Litt. (66b) and other authorities. The passage cited from Co Litt. cited is as follows:
>
> > 'But no corporation aggregate of many persons capable, be the same ecclesiastical or temporal, can do homage as a dean and chapter, mayor and commonalty, and such like; albeit they be seised in fee of lands holden by homage, yet shall not they do homage. And the reason is because that homage must be done in person, and a corporation aggregate of many cannot appear in person; for albeit the bodies natural, whereupon the politic consists, may be seen, yet the body politic or corporate itself cannot be

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> seen, nor do any act but by attorney, and homage must ever be done in person, &c.'
>
> However true in Lord Cokes's time that the corporation then known to the law could not do any act (except as to small matters) but by attorney, it is not true now with regard to joint stock companies whose powers are regulated by statute. They engage in trade and manufacture, have clerks and workmen, give credit, and obtain credit in the same manner as trading firms and individuals. In my opinion, the ancient rule that a corporation can only act by attorney (which involved an appointment under the seal of the corporation) does not extend to prevent joint stock companies from issuing process in the county court as ordinary individuals can do, seeing that they are able to comply with all the requisite conditions provided for by the county court rules and without appointing any attorney under their common seal to do these acts for them."

The modern rationale for the rule has been justified in different ways. It has been said that the infirmity of the company that it cannot be represented in court proceedings by its managing director or other officer derives from its

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own very nature. The creation of the company is the act of its subscribers; the subscribers, in discharging their own *personae* for the *persona* of the company, do so for the advantages which incorporation offers to traders. The assets of the directors and shareholders are not at risk. That is a benefit bought at a price. Part of the price is that they thereby lose the right of audience which they would have as individuals; but the choice is their own. See *Radford* v *Freeway Classics Ltd* [1994] 1 BCLC 445 (CA) at 448g-h; *Manitoba Ltd et al* v *Liquor Control Commission* [1996] 113 Man R (2d) 64 at para 19; *Floods of Queensferry Ltd* v *Shand Construction Ltd & Ors* (1997) 54 Con LR 137 (QB) at 162.

Then it is claimed that the prohibition against audience ensures that the superior courts will be served by legal practitioners who observe the rules of their profession, who are subject to a disciplinary code and who are familiar with the methods and scope of advocacy which are followed in the presentation of argument. See *Tritonia Ltd* v *Equity & Law Life Assurance Society* [1943] 2 All ER 401 (HL) at 403C-D. Moreover, such a prohibition gives effect to the fact that an unqualified and inexperienced person may do more harm than good to the person he assists; if only because his ignorance of the law may support his opponent's cause. See *Mihaka* v *Police* [1981] 1 NZLR 54 (H) at 58.

Yet another observation is that, save for the rule, corporate officers could cause impecunious companies to litigate hopeless causes without fear of personal liability. See *Manitoba Ltd et al* v *Liquor Control Commission* *supra* at para 20. Litigants in person through lack of experience often pursue irrelevant matters *ad nauseum*, unduly prolong proceedings and require indulgences from the court and from their opponents to meet their non-professional approach. See Re *G J Mannix Ltd* [1984] 1 NZLR 309 (CA) at 315 lines 47-52.

Further, it is pointed out that whereas a litigant in person can make decisions as to whether factual admissions and denials are to be made, a company's agent, even if validly appointed to act on its behalf, from time to time would require to obtain authority to make decisions in the course of the proceedings. Litigation would be rendered very difficult if courts were concerned at every step as to the authority of the person conducting the case to make the relevant decision.

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See *Harrison* v *Guardian Assurance Co Ltd* [1989] 1 NZLR 59 (H) at 60 lines 25-35.

Some of these policy considerations may be thought not sufficiently persuasive as to warrant adherence to the rule. Certainly, the denial of the right of audience to persons who are organs of the company, as distinct from merely agents, is criticised somewhat cynically in Gower's *Modern Company Law* 4 ed at 212 as appearing to "achieve no useful purpose other than to protect the monopoly of barristers and solicitors".

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In my opinion, the rule is too well settled and entrenched in many jurisdictions to allow its validity to be impugned other than upon a contention that enforcement of it may infringe a constitutional right of access to the courts. Authorities establishing in other countries that a company has no common law right to be heard except through legal counsel include: In South Africa, *Yates Investments (Pty) Ltd* v *Commissioner for Inland Revenue* 1956 (1) SA 364 (A) at 365B-E; *Ramsey* v *Fuchs Garage (Pty) Ltd* 1959 (3) SA 949 (C) at 950E-G; *Dormehl's Garage (Pty) Ltd* v *Magagula* 1964 (1) SA 203 (T) at 205E-F; *Arma Carpet House (Johannesburg) (Pty) Ltd* v *Domestic & Commercial Carpet Fittings (Pty) Ltd & Anor* 1977 (3) SA 448 (W) at 449F-G; and In re *Bankorp* v *California Spice and Marinade (Pty) Ltd & Ors* [1997] 4 All SA 317 (W) at 325c-d. In England, *Frinton and Walton Urban District Council* v *Walton & District Sand & Mineral Co Ltd & Anor* [1938] 1 All ER 649 (ChD) at 649G-H; *Tritonia Ltd* v *Equity & Law Life Assurance Society supra* at 402E-F; *Arbuthnot Leasing International Ltd* v *Havelet Leasing Ltd & Ors* [1991] 1 All ER 591 (ChD) at 595c; and *Radford* v *Freeway Classics Ltd* [1994] 1 BCLC 445 (CA) at 447c. In the Republic of Ireland, *Battle* v *Irish Art Promotion Centre Ltd*; *Battle* v *Irish Art Promotion Centre Ltd* 1968 I.R. 252 (SC) at 253 *in fine*. In New Zealand, Re *G J Mannix Ltd supra* at 310 at lines 52-54. In Australian States, Re *Education Pty Ltd & the Companies Act* [1963] NSWR 1340 at 1341; *Hubbard Association of Scientologists International* v *Anderson & Anor* [1972] VR 340 at 341; and *Bay Marine (Pty) Ltd* v *Clayton Country Properties (Pty) Ltd* (1986) 11 ACLC 326 at 326-327. In Canada, *Banque Nationale du Canada* v *Atomic Slipper Co Ltd et al (*1991) 80 DLR (4th) 134 (S) at 141 *in fine*; and *Manitoba Ltd et al* v *Liquor Control Commission supra* at para 8.

Consistent with this recognised approach are the decisions of the High Court in *Pumpkin Construction (Pvt) Ltd* v *Chikaka supra* and *Diana Farm (Pvt) Ltd* v *Madondo NO & Anor supra*, as well as that of this court in *Agramac (Pvt) Ltd* v *Chisvo & Anor* 1991 (2) ZLR 185 (S) at 186D-F. Yet what, with respect, was overlooked was the caveat placed upon the rule, of the court's residual power to regulate its own proceedings unless fettered by legislation. And in doing so, in the exercise of a discretion and in the interests of justice, to permit a person other than a legal practitioner to appear before it on behalf of a company; but only if the exceptional circumstances of the case so warrant. See In re *Bankorp* v *California Spice and Marinade (Pvt) Ltd & Ors supra* at 336c-g (*contra Hallows* v *The Yacht "Sweet Waters"* 1995 (2) BCLR 172 (D) at 178C, 1995 (2) SA 270 (D) at 275F); *Arbuthnot Leasing International Finance Ltd* v *Havelet Leasing Ltd & Ors supra* at 595c-d; *Hubbard Association of Scientologists International* v *Anderson & Anor supra* at 341 *in fine*; *Harrison* v *Guardian Assurance Co Ltd supra* at 60 lines

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45-48; *Manitoba* v *Liquor Control Commission supra* at para 33; and *Venrose Hldgs Ltd* v *Pacific Press Ltd* (1978) 88 DLR (3d) 523 (S) at 529.

Section 51 of the High Court Act [*Chapter 7:06*] provides that:

> "Subject to s 50, rules of court *and any other law*, in all proceedings before the High Court the parties may appear in person or be represented and appear by any legal practitioner registered in terms of the Legal Practitioners Act [*Chapter 27:07*]" (my emphasis).

Subsection (4) of s 50 allows a person who does not appear himself or who is not legally represented to present his case and argument to the High Court in writing. (Sections 30 and 29(4) of the Supreme Court Act [*Chapter 7:13*] are worded identically). Rule 48 of the High Court Rules provides that entry of appearance to defend shall be effected by the defendant or his legal practitioner who shall record certain details and sign the entry made.

The phrase "subject to" is a simple expedient which subjects the provisions of the subject section to the control of a master enactment or the common law. See *Chinamora* v *Angwa Furnishers (Pvt) Ltd & Ors* 1996 (2) ZLR 664 (S) at 689D-F. It is a common law rule of practice in this jurisdiction that a company, when a party to proceedings before the superior courts, has no absolute right to appear without legal representation. Hence, ss 51 and 30 of the respective Acts, being subject thereto, do not inhibit the inherent power of the High Court and the Supreme Court to regulate their own proceedings.

Nor, in my view, does s 9(2) of the Legal Practitioners Act have that effect. It is concerned to criminalise the activities specified in paras (a), (b) and (c) if performed by a person other than a registered legal practitioner who is in possession of a valid practising certificate. Again, the provision is "subject to any other law" which includes both statute and common law. Under the latter regime, as already mentioned, the disability of a company to appear in proceedings by its officer may be lifted under the inherent power in superior courts to control their proceedings.

It has been necessary to decide whether the discretionary power discussed vests in the High Court, as it was the submission of counsel for the respondent that its existence renders inappropriate a determination of the constitutional question referred; that this court should decline to exercise its power under s 24(4) of the Constitution to deal with the referral since an adequate means of redress for the complaint raised by the applicant lay with the High Court. Expressed differently, that the existence of the remedy the applicant is seeking may be available to it under the power of the High Court to regulate its own proceedings; and only in the event of an adverse exercise of the discretion would the constitutional issue arise unprematurely. Reliance was placed on such cases as *Minister of Home Affairs* v *Bickle & Ors* 1983 (2) ZLR 400 (S) at 432D-F, 1984 (2) SA 439 (ZS) at 441G-H; and *Zinyemba* v *Minister of the Public Service & Anor* 1989 (3) ZLR 351 (S) at 355D-E.

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I am unable to agree. The *dicta* in the authorities cited concerned very different situations. The question asked of this court is whether ss 18(1) and (9) of the Constitution confer upon a company an *absolute* right to appear before the High Court unrepresented by a legal practitioner. Relief by virtue of the exercise of a discretionary power was not adverted to below, is not now sought by the applicant and its grant is speculative. Moreover, a determination of the question will provide clarity for those other companies which either prefer to litigate without legal representation or are unable to afford the substantial cost thereof. These reasons apart, the proviso to s 24(4) of the Constitution imparts a discretion upon this court to exercise its power to determine a question referred even if satisfied (which I am not) that adequate means of redress are or have been available under any other law. In the circumstances, I do not decline to determine the question referred by the High Court.

IV. THE CONSTITUTIONAL QUESTION

Subsection (1) of s 18 of the Constitution provides:

> "Subject to the provisions of this Constitution, every person is entitled to the protection of the law."

And subs (9) goes on to state:

> "Subject to the provisions of this Constitution, every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations."

Unless the context otherwise requires, the word "person" is defined in s 113 of the Constitution as meaning "any individual or any body of persons, whether corporate or unincorporated".

Counsel were agreed, and correctly so, that whereas certain rights and protections provided by the Constitution do not, by their very nature, apply to juristic persons (artificial legal persons), those under ss 18(1) and (9), and others as, for example, deprivation of property (s 16), arbitrary search or entry (s 17) and freedom of expression (s 20), are accorded to them as well as to natural persons. See *Retrofit (Pvt) Ltd* v *PTC & Anor* 1995 (2) ZLR 199 (S) at 208E-F, 1995 (9) BCLR 1262 (ZS) at 1270A-B; *Attorney-General & Anor* v *Antigua Times Ltd* [1975] 3 All ER 81 (PC) at 85h-86b.

The argument addressed on behalf of the applicant was that, as the right under s 18(9) of the Constitution to be afforded a fair hearing in the determination of the existence or extent of civil rights and obligations vests in *every* person, whether natural or artificial, to hold that a company may appear before the superior courts in proceedings instituted either by or

against it only if represented by a practising legal practitioner, amounts to an infringement of that right. It is to attach to it a condition which seriously abridges the right; and this notwithstanding that s 50(4) of the High Court Act and s 29(4) of the Supreme Court Act enable a juristic litigant to present its case and argument in writing, to which due consideration must be given. The inevitable consequence, so the argument went, is that a company which cannot afford the services of a legal practitioner is denied audience before these courts; and if it can

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afford legal representation, is deprived of the choice whether or not to engage it.

The position taken up by counsel for the respondent, on the other hand, was that as the right of audience is one incapable of being vested in a juristic person then, insofar as the right to a fair hearing under s 18(9) includes within its reach the right to stand up and speak before the superior courts, the term "person" must, of logical necessity, be confined to natural persons. To that extent s 18(9) is not one of the rights enshrined for companies. It was urged that this proposition derives support from the decision in *Hallows* v *The Yacht "Sweet Waters" supra*.

In that case a Mr Labuschagne, an employee of Hallows, a close corporation, unsuccessfully contended that as the corporation was unable, due to indigence, to procure the services of an advocate to represent it, a refusal to hear him would preclude the corporation from exercising its rights under the then s 22 of South Africa's Interim Constitution Act. This provision read:

> "Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum."

The following passage in the judgment of Hurt J at 180G (BCLR) and 278B-D (SA) was relied upon:

> "Although s 22 of the Constitution Act plainly includes, within its ambit, the right of the 'person' to stand up in court and argue his (or her) own case, this (as has been said in numerous judgments on the subject) is something which a juristic person is incapable of doing. It follows, in my view, that the right to present one's own case is a right which cannot vest in a juristic person, since it is, by nature, not a right which the juristic person can exercise. The consequence is that, in terms of s 7(3) of the Constitution Act, this is not one of the rights enshrined for juristic persons."

With due deference, I consider this rationale open to doubt. True, a juristic person, being a purely legal concept, is incapable of being physically present at any place and must always act through an agent. This is what the corporation Hallows sought to do through Mr Labuschagne. It would seem, however, that Hurt J regarded a juristic person as lacking the capacity to exercise the right to present its own case before him, even if it were to do so through an organ or *alter ego*. This, I think, was to confuse the content of the right with the manner of its exercise.

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If the premise is correct that where the *alter ego* of a company acts it is effectively the company itself which does so, the substantive point at issue is whether it may elect to exercise its right to a fair hearing under s 18(9) of the Constitution (including its rights of audience) either through the agency of a practising legal practitioner or by means of its *alter ego*.

The organic or *alter ego* doctrine recognises that in some situations the acts, intentions and knowledge of certain persons are the acts, intentions and knowledge of the company. This is because the company is not a visible person. It has no physical existence, no body parts or passion, no mind or will of its own. It has "no body to kick and no soul to damn and the only way of ascertaining its intentions is to find out what its directors acting as such intended" (*per* Centlivres CJ in *Commissioner for Inland Revenue* v *Richmond Estates (Pty) Ltd* 1956 (1) SA 602 (A) at 606G). Such persons therefore are the directing mind and will of the company and

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control what it does; the very ego and centre of its personality; its embodiment. They do not act or think on behalf of or for the company as its agents. Rather they act and know and form intentions through the *persona* of the company. See *HL Bolton (Engineering) Co Ltd* v *TJ Graham & Sons Ltd* [1956] 3 All ER 624 (CA) at 630D-F; *Tesco Supermarkets Ltd* v *Nattrass* [1971] 2 All ER 127 (HL) at 131h-j; *El Ajou* v *Dollar Land Holdings plc & Anor* [1994] 2 All ER 685 (CA) at 695g-696a; and, to the same effect, such South African authorities as *Levy* v *Central Mining & Investment Corp Ltd* 1955 (1) SA 141 (A) at 149H-150A; *Ensor NO* v *Syfret's Trust & Executor Company (Natal) Ltd* 1976 (3) SA 762 (N) at 763E-H; *Harris* v *Unihold (Pty) Ltd & Ors* 1981 (3) SA 144 (W) at 147D.

It is always necessary, therefore, to establish whether these natural persons have the status and authority which in law makes their acts, intentions and knowledge those of the company so that they are to be treated as the company itself. See *Tesco Supermarkets Ltd* v *Nattrass supra* at 146a-b. Servants or agents of the company who do not exercise the *de facto* control of what the company does - its day to day activities - cannot be said to represent its mind or will. It is a question of law whether, once the facts have been ascertained, the person so acting is to be regarded as the company or merely as its servant or agent. See the *Tesco* case *supra* at 131 *in fine*- 132a.

Thus, for example, it has been held that a company intended to occupy certain business premises when those persons controlling it had the requisite intention (see *HL Bolton (Engineering) Co Ltd* v *TJ Graham & Sons Ltd supra* at 630I); that a director or officer who signs an acknowledgement of debt in the company's name does not do so as agent but effects the company's own signature (see *Climax Floors (Pty) Ltd* v *Y du Toit Construction Co (Pty) Ltd & Anor* 1980 (3) SA 731 (C) at 737E-H; *GATX-Fuller (Pty) Ltd* v *Trade*

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& Project Management Services (Pty) Ltd 1984 (3) SA 38 (W) at 44I-45D); that when a director or other officer enters into a contract for the company acting in the company's name as an official of the company, his act is an act of the company itself and not of an agent acting on behalf of the company (see *Newborne* v *Sensolid (GB) Ltd* [1953] 1 All ER 708 (CA) at 710B-D; *Suid-Afrikaanse Sentrale Ko-op Graanmaatskappy* v *Thanasaris* 1953 (2) SA 314 (W) at 316C-E); and, that a company believes that a representation is true and acts in reliance upon it when its directors or officers hold that belief and so act (see *B & B Hardware Distributors (Pty) Ltd* v *Administrator, Cape & Anor* 1989 (1) SA 957 (A) at 965C-E).

It has to be acknowledged that courts have refused to apply the organic doctrine in relation to their own procedure. They have insisted, even in the case of a one-man company, that there is no *absolute* right to appear in person; though in the words of McMullin J in Re *G J Mannix Ltd supra* at 315 lines 25-28:

> "it may seem somewhat unrealistic and illogical to allow a private person a right of audience in a superior court as a party to proceedings but deny it to him when he is the governing or managing director of a small 'one man' company which is no more than his business alias."

See also the cautious reservation expressed by Cooke J (as he then was) at 310 lines 45-50,

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and the comment of Wunsh J in the *Bankorp* case *supra* at 325d that the rule "does not do full justice to the organic theory".

In none of the authorities I have alluded to, with the exception of *Hallows* v *The Yacht "Sweet Waters" supra*, was the court called upon to consider the prevailing rule in the light of a challenge to its validity against constitutional provisions guaranteeing to any body of persons, whether corporate or unincorporated, the right to appear and address the court from the floor.

This court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation. To be preferred is one which serves the interests of the Constitution and best carries out its objects and promotes its purposes.

An application of this interpretive approach, with the legal consequences of the organic doctrine in mind, persuades me that the common law rule offends against s 18(9) of the Constitution, certainly to the extent that it prohibits the duly authorised organ or *alter ego* of a company the right to appear in the person of the company before the High Court and the Supreme Court of this country. In short, the right given to "every person" under this constitutional mandate includes within its reach a corporate body appearing through its *alter ego*. In this sense, it is that body which is exercising the right.

This view does not undermine the rule of practice. It merely provides an

exception to it. For it does not permit a company to appear before the superior courts through someone who is a mere director, officer, servant or agent. The decision, therefore, in *Law Society of Zimbabwe* v *Lake* 1988 (1) ZLR 168 (S) still holds good. Companies, which cannot be said to be the embodiment of any human body, will not qualify under s 18(9) because no human being personifies the company "in person". In general, small companies should be able to avail themselves of the exception.

V. DISPOSITION

In the result, I would answer the question referred, specifically as it concerns the applicant, as follows:

> "Provided Mr Phiri is able to satisfy the High Court that he is the *alter ego* of the applicant with the requisite authority to appear, the applicant through him must be permitted to argue the application for rescission of the default judgment granted against it, since a denial of appearance will amount to a violation of the applicant's entitlement to the protection of the law and to be afforded a fair hearing as guaranteed by subss (1) and (9) of s 18 of the Constitution."

As agreed by the parties, there is to be no order as to costs.

Finally, the court would like to express its indebtedness to Mr *Nherere*, who appeared for the applicant at its request.

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McNally JA: I agree.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Sandura JA: I agree.

Gill, Godlonton & Gerrans, respondent's legal practitioners

CHIBANDA v MUSUMHIRI & ANOR 1999 (2) ZLR 50 (HC)

Citation	1999 (2) ZLR 50 (HC)
Case No	Judgment No. HH-134-99
Court	High Court, Harare
Judge	Mubako J
Heard	June 22, 1999
Judgment	July 14, 1999
Counsel	T D Muskwe, for the applicant M Sinyoro, for the respondant
Annotations	None

Civil application

Flynote

Landlord and tenant -lease -statutory tenant-eviction of-may not be ordered unless there is certificate from Rent Board - Rent Regulations 1982 - desirability of reviewing the regulations

Headnote

Part IV of the Rent Regulations 1982 (SI 626 of 1982) lays down restrictions on the ejectment of tenants who have become statutory tenants. Section 30(2) of the regulations provides that no eviction order may be ordered by a court so long as the lessee continues to pay the rent due within seven days of the due date and performs the other conditions of the lease.

Section 30(4) requires the lessor wishing to eject the lessee to apply for a certificate stating that it is fair and reasonable for the lessee to be evicted. The court thus may not order the eviction of a person who has become a statutory tenant unless a certificate has been obtained by the landlord from the rent board stating that it is fair and reasonable that the tenant be required to

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vacate. This ties the hands of the court and ousts its jurisdiction in this regard; the court cannot order the eviction of the lessee even if it considers that justice requires this course of action.

Per curiam: These regulations should be reviewed. They were passed at a time when there was a command economy and protectionism was the main government policy. In recent years, the Socio-economic situation had changed drastically and the free market policies were now being applied. The regulations allow the State to interfere in the relations between lessor and lessee and virtually exclude the courts from adjudicating on matters such as the eviction of the tenant. They interfere with freedom of parties to agree on the terms of contracts and disallow market forces to operate to control levels of rentals. The provisions of the regulations virtually compel the landlord to continue renting his property to a tenant he does not want and may well be in conflict with the constitutional right to utilise one's property as one chooses, subject to the rights of others.

In the present case, after the tenant had become a statutory tenant, it had failed to pay the rent timeously and had ceased to be a statutory tenant when it had failed to given the lessor written notice to renew the tenancy before the end of the period of twelve months. On this basis, the tenant was no longer entitled to remain in the premises and the court had jurisdiction to grant the applicant at lease part of the relief she was seeking.

Cases Considered

Cases cited:

Fletcher v Three Edmunds (Pvt) Ltd 1998 (1) ZLR 257 (S)

Statutes Considered

Legislation considered:

Rent Regulations 1982 (SI 626 of 1982), s 30

Case Information

T D Muskwe, for the applicant

M Sinyoro, for the respondent

Judgment

Mubako J: The applicant is the owner of a property known as No. 11 Waverley Close, Sentosa, Mabelreign, Harare. On 28 December 1996, she leased the property to a company (the second respondent) through its managing director (the first respondent). The lease commenced on 1 January 1997 at a rental of $4 500 per month and it was to end on 31 December 1997, unless renewed by the parties.

The lease was renewable at the option of the lessee, provided the lessee gave the lessor written notice of intention to renew at least one month before hand. The length of the new lease and the *new rental* would be matters of agreement between the parties.

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The agreement also contained a cancellation clause which reads as follows:

> "Should the Lessee fail to pay *any monthly rental on the day the same becomes due* or *at the latest within one week thereafter* or commit any breach of the terms or conditions of this Lease, *the Lessor shall have the right at once to cancel this Lease and to re-enter and take possession of the said premises* and dispose thereof as he may think fit anything to the contrary herein contained notwithstanding and without prejudice to any claim on the Lessor's part for arrears of rent, damages or otherwise" (my emphasis).

In view of the dispute that follows, it is apposite to stress that only the lessor is given a right to cancel the lease and to re-enter the property if the lessee is in arrears with his rent payment or commits any breach of the terms of the lease.

The first respondent occupied the house for ten months without any apparent differences between the landlady and her tenants. However, on 31 October 1997, the applicant wrote to the respondents, giving them two months' notice to vacate the property by 31 December 1997. She stated her ground for terminating the agreement in these terms: "I would like to use the house whilst attending my MBA classes at the University of Zimbabwe."

She ended by thanking her tenants for renting her house. Thus far there was no complaint about late payment of rent or arrears.

On 11 November, the respondent wrote back, categorically rejecting the notice to vacate. He emphasised that he had a right to renew the tenancy and he gave his notice to renew on 1 January 1998 for one year at the rental of $4 950 (10% higher).

Despite the applicant's numerous protestations and demands to be given vacant possession, the respondents refused to vacate and remain at the premises to this day. They claim that, absent a new lease, they became statutory tenants as from 1 January, 1998.

The applicant also claims that the parties had agreed orally that in case of renewal there would be anew rental escalated by 15% from the old rental. She

claims therefore that since the respondents remain in the house, albeit against her wishes, they have to pay the rental increased by 15%, at any rate for 1998.

Wherefore, the applicant claims against the defendants for:

(a) an order declaring the lease to have been cancelled;

(b) an order of ejectment against the defendants and all those claiming title and right of occupation through them;

(c) the sum of $5 175 per month as damages for holding over from 1 January 1998 to the date the defendants vacate the premises;

(d) interest on that sum at the prescribed rate from 1 January 1998 to the date of payment;

(e) judgement in the sum of $900, interest thereon at the prescribed rate from 1 January

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1998 to the date of full payment; and

(f) costs of suit.

The respondents' plea can be summed up as follows:

(a) they totally deny that there was any agreement that on renewal there would be an escalation in rental by 15%. They pointed to clause 1 of the lease agreement, which clearly left the question of the new rental to agreement by the parties. They argued, quite cogently, that had there been an agreement on 15% increase such an important item would have been written into the agreement;

(b) they stated that they put forward 10% as their own proposal for the agreement;

(c) they denied ever failing to pay their rent timeously, but argued that they were in fact two to three months ahead with their rentals;

(d) the letter of cancellation was not specific on the reason for cancellation;

(e) the applicant accepted the defendants' rentals after 31 December 1997. Therefore she is estopped from denying that they remain on the premises as statutory tenants;

(f) the respondents also claim that the summons issued by the applicant were fatally defective for non-compliance with Order 3 r 11 (c);

(g) that in any event this court cannot issue an order of ejectment without the applicant having obtained an enabling certificate from the Rent Board.

On the question whether the parties reached an agreement orally on a 15 % escalation of the rentals of the second year, I find myself in complete agreement with the respondents. The existence of such an agreement would render article 9 completely nugatory. Moreover, it would most probably have been included in the written lease agreement. I accept the assurance that the 10% was only a proposal from the respondents or an invitation to negotiation in terms of article 9. It certainly is no proof that any specific percentage was ever agreed. The respondents were entitled to propose 10% just as the applicant was entitled to reject it as she did. There was no escalation clause and hence the old rental remained. Moreover, any escalation could only take place if there was a renewed lease which the applicant strenuously denies. s the averment that the respondents persistently paid rent several days after the due date. The respondents on their part deny that they ever paid rent late and they ever fell into arrears. I have to say that for the period of the first 10 months the applicant did not give me any evidence to support the allegation of late payment of rent. The result is that the applicant has failed to ustify her letter of termination, the letter dated October 1997, on the ground that the lessee was in breach of the lease agreement. It means that the purported termination of the agreement on 31 December 1997 was without force or effect.

Therefore, the parties remained bound by the lease memorandum of agreement which they executed. In terms of article 9 of that agreement, the lessee *was entitled* to renew the lease for *a period to be agreed* and at a *rental to be agreed.* By their letter of 11 November 1997, the respondents exercised their option to renew the lease for another year at a monthly rental of $4

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950 (10% increase). The renewal was a competent unilateral decision. However, the respondents recognised that the length of the period, as well as the rental, are proposals which require an agreement to be effective. It means that the respondent remained on the property on the same terms as the original lease, ie for twelve months at a rental of $4 500 per month and subject to the same process of renewal unless and until different terms are agreed by the parties or by the court.

For the year starting 1 January 1998, we have to ask the same questions as for the previous year. Did the lessee ever fall into arrears with the payment of rentals? Did the lessee commit any other breach of the terms of the lease agreement? Did the lessor cancel the tenancy for any of those reasons for any other reason?

The applicant continues to demand that the respondents should be evicted. This time she gives three grounds for her claim:

(a) she complains that the respondents are occupying her property without any agreement and in defiance of her instructions. We have indicated above that this claim is false, and that the respondents have a right, as statutory tenants, to remain on the premises on the old conditions.

(b) she continues to accuse the respondents of rent defaults and delays and therefore "breach of the lease agreement as the respondents did not pay the July and December 1998".

(c) thirdly, the applicant repeats her original ground for wanting the respondents evicted. She wants the premises for her own use since she is attending lessons at the University of Zimbabwe and has to stay in hotels at great expense.

The respondents continue to deny that they ever defaulted or delayed payment of rent. They even alleged that they paid in advance. However, no proof of advance payment was shown. On the other hand, the applicant gave a record of payments into her account from June to November 1998. In terms of the lease agreement, rentals were to be made on the first of each month. But, the applicant's schedule of payments shows that no payment was made punctually during that period of seven months. Three payments were made on the 7th, and one on the 6th of the month. The August payment was made on the 10th of that month. No payment was made in July and the September payment was effected on 7 October. See Annexure 1. 1 have no reason to doubt the information provided herein. The record clearly shows that in 1998 the respondent has "consistently failed to effect timeous payment of rentals on the due date".

Contrary to article 10 of the agreement, on at least three occasions the lessee had "failed to pay the monthly rental on the date it was due or at the latest within one week thereafter". Therefore, the lessor had the entitlement to cancel the lease. The applicant had been calling for the termination of the lease throughout 1998 and therefore cannot be said to have acquiesced or waived her right to insist on the strict observance of the lease agreement. If there was any doubt about her state of mind, she repeated her demand for the termination of the lease by the letter to Muskwe and Associates of 8 December 1998. The applicant's demands were loud and clear.

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She wants this court to declare the respondents' tenancy terminated, on the grounds of breach of contract; she wants to regain possession of the house because she needs it for her own purposes.

The respondents resist ejectment by this court on the further ground that applicant has not complied with the requirements of s 30 of the Rent Regulations of 1982 (SI 626 of 1982). It was submitted that the respondents became statutory tenants on 1 January 1998 as we saw above, and that this court has no power to order the ejectment of a statutory tenant unless the applicant first obtains a certificate from the Rent Board in terms of s 30(2) and (4) of the regulations. *Fletcher v Three Edmunds (Pvt)* Ltd 1998 (1) ZLR 257 (S) was cited for authority.

For the applicant, M*r Muskwe* argued that these authorities did not bar the court from issuing an order of ejectment once it makes a finding that the respondent was in breach of the contractual obligations. He submitted as follows:

> "The correct position is that the Rent Regulations do not apply as in this case where the respondents are in breach of the lease agreement. This matter is best addressed by the common law position on breach of contract rules which has full application in this matter."

Is it possible to ignore the Rent Regulations simply because the respondent

is in breach of contract? The answer must be found in the regulations themselves. The relevant provisions in Part IV of the regulations are entitled "Restrictions Regarding Ejectment and Refusal To Lease". Section 30 in its relevant part reads as follows:

> " (2) Subject to the provisions of this section, no order for the recovery of possession of a dwelling or for the ejectment of a lessee therefrom, which is based on the fact of the lease having expired, either by affluxion of time or in consequence of notice duly given by the lessor, shall be made by *any court* so long as the lessee continues to pay the rent due within seven days of due date and performs the other conditions of the lease, unless, in addition-
>
> (a) the lessee has done, or is doing, material damage to the dwelling; or
>
> (b) the lessee has been guilty of conduct likely to cause material damage to the or material or substantial inconvenience to occupiers of neighbouring or adjoining property or to the lessor; or
>
> (c) the lessor has given the lessee not less than two months' written notice to vacat the dwelling on the ground that the dwelling is required-
>
> (i) by the owner; or
>
> (ii) where the lessee is a Sublessee, by the person letting the dwelling to the Sublessee;
>
> for his personal residential occupation or the personal occupation of his parent, child or employer; or
>
> (d) the lessor has given the lessee not less than two months' written notice to vacate the dwelling on the ground that the dwelling is required for the purpose of a reconstruction or rebuilding scheme, and the nature of such reconstruction or rebuilding would preclude human habitation; or
>
> (e) the appropriate board has issued a certificate to the effect that *the requirement that the lessee vacate* the dwelling *is fair and reasonable on some other ground* state therein and the date specified in the certificate for the vacation of the dwelling has passed.

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(3) No notice to vacate a dwelling given by a lessor for the purposes of

(a) paragraph (c) of subsection (2) shall be of any force or effect -

(i) if it does not specify the person for whose personal occupation the dwelling is required; and

(ii) if it is given by a person who is not the owner or lessee who sublets the dwelling unless the person giving such notice has previously been furnished with a request, in writing, to give such notice by the owner or lessee who sublets as the case may be;

(b) paragraph (d) of subsection (2) shall be of any force or effect unless it specifies the nature of the reconstruction or rebuilding scheme, the date by which it is proposed to commence the scheme and the date by which it is proposed to complete the scheme.

(4) *No order for the ejectment* of a lessee from a dwelling shall be made on the grounds referred to in paragraph (c) or (d) of section (2) unless the appropriate board has, on the application of the lessor, issued a certificate *to the effect that the requirement that the lessee* vacate *the dwelling is fair and reasonable, and* the date specified in the certificate for the vacation of the dwelling of the dwelling has passed" (my emphasis).

The opening clause of subs (2) is clearly a broad prohibition on the making of any order of ejectment of a lessee from a dwelling house, by any court on

the basis that the lease has expired or that the lessor gave the lessee proper notice to quit provided the lessee:

(a) continues to pay his rent within seven days of the due date, and

(b) observes any other conditions of the lease.

In my opinion the prohibition covers a situation where the lessor, as in this case, has given the lessee due notice to vacate because the lessee had breached the contract or indeed for any other reason. The prohibition may be disregarded only if one of the circumstances described in (a), (b), (c) and (d) has occurred. In the instant case, the most relevant possible exception is (c) (i) - that the lessor had given the lessee at least two months' written notice to vacate the dwelling house because she, the owner, required the property for her own use. The applicant in the case at hand can be said to have given such a notice.

However, the exception is further negated by s 30(4) which continues to fetter the court's hands relative to issuing an order of ejectment of a lessee.

The court can take no such action even where justice would otherwise require it to act except along the path allowed by the regulations.

Subsection (4) requires that the lessor must first apply to a rent board and obtain a certificate which says that it is *fair and reasonable* to require the lessee to vacate the dwelling. In respect of the case at hand Mr *Sinyoro* submitted that the obtaining of the certificate must precede the court order for eviction. He was perfectly correct. That is the natural construction which must be put on s 30(4), as supported by *Fletcher v Three Edmunds (Pvt) Ltd* 1998 (1) ZLR 257 (S). It was the clear intention of the Minister who enacted the regulations that the question whether, in any particular case, eviction was *fair and reasonable* should be the exclusive prerogative of the

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rent board. The court is left with no role to determine the justice or equities of an eviction; the court's role becomes only a clerical one - to issue the order. In my opinion, the subordination of the judicial function to an administrative discretion is one of the most objectionable features of the Rent Regulations.

Adjudicating on what is fair and equitable is the proper function of the courts of justice and not that of the executive. Yet, the regulations achieve the effective ouster of the jurisdiction of the courts in what appears to me to be a vital matter. In this case, a citizen of this country comes to the courts crying out for relief to be enabled to repossess her own property from an unsatisfactory tenant, However, the court is obliged to send her away empty handed and refer her to the rent board for her relief.

I find the regulations objectionable on a wider terrain, which would suggest that they require revisiting or possible a thorough-going revision by the appropriate authorities. The Rent Regulations 1982 were enacted in the heydays of protectionism and the command economy; days of transition

from racial discrimination by landlords who were mostly white on tenants who were mostly black and who moved into formerly exclusively white flats and suburbs.

Now, twenty years after independence, the Socio-economic scene has been vastly transformed. The government has embraced the philosophy of the free market economy. It no longer issues yearly decrees of minimum wages for all workers, nor does it any longer believe in state management of the economy. In the housing sector, the landlord tenant relations are not characterised by naked racism. Indeed, a white landlord who detests blacks would soon go out of business for there are not many white tenants left in the country. Moreover, many landlords are now black. All landowners are battered by the same economic forces - uncontrolled inflation, high interest rates and tight mortgage loans.

Against this changed landscape, the Rent Regulations stand out as an incongruous relic of abandoned policies of the distant past. The 1982 Regulations remain a rent controlling measure in an era of uncontrolled market driven economy. The Regulations provide that the State, and not the contracting parties, may decree the level of rent a landlord may charge for his property. They impose certain terms into the lease agreement between landlord and tenant; they constrict to suffocation point the right of a landlord to remove a tenant even after the lease between them has expired; and they provide for wide-ranging powers of State intervention through the Rent Board.

Some of the Regulations provision clash with well established principles of law such as the freedom to contract, the sanctity of contracts once concluded, as well as the right to use one's property as one likes to the exclusion of all other persons. They virtually exclude the courts adjudicating on matters of rent and eviction. Generally, they erect a formidable regime of direct State intervention in the relations between a landlord and his tenant.

It is now generally recognised that decontrolling urban transport has provided the answer to shortage of transport; and that decontrolling trade and prices has yielded an abundance of

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goods in our shops in place of the irksome shortages we used to experience. Yet, no one seems to have raised the issue of decontrolling rents in order to reduce our chronic housing backlog or to induce property owners to maintain their investments in tip top condition.

There has hitherto been no appreciation that market forces can control rents and evictions as efficiently as they regulate prices of goods in the shops or commuter omnibuses on the streets of our towns. If it is permissible for employers to have the right to hire and fire their workers, there cannot be a good reason for virtually prohibiting landlords to charge their tenants as they judge fit. If government has seen it fit to abandon wage control in favour of

free collective bargaining, there is no good reason for government to continue to dictate rent levels. Frequently, the tenant is not a poor worker but a company director or a highly paid expatriate executive employed by a multi-national corporation. Why should such a person use the provisions of the Rent Regulations to pay sub-economic rents? It makes no sense to compel our landowners to subsidise such tenants. On the contrary, the economy would stand to benefit if such tenants were made to pay economic rents dictated by market forces.

Cases have come before the courts in which tenants remained in premises against the wishes of the landlords many months after the original lease had expired and on rents which were no longer economic for the landlord. The courts may be unable to give any relief because s 30 of the Regulations says no order for the ejectment of the lessee or for the recovery of possession of a dwelling by the landlord on the basis of the expiry *of time agreed* upon or in consequence *of* a *notice duly given,* shall be made *by any court so* long as the tenant continues to pay the old rent on time. There follow some exceptions but they are all heavily loaded against the landlord who is required to justify why he wants to repossess his own house from a tenant who no longer has a contractor lease with him. Except in times of emergency, a person should not be forced to justify taking possession of his own property where there is no contractual obligation compelling him to part with it. The provisions of the present regulations are tantamount to compulsory letting and may well be in conflict with the constitutional right to utilise one's property as one chooses, subject of course to the rights of others. The regulations often interfere with the right of the landlord and tenant to conduct their relations as adults on the basis of contractual terms freely agreed between them.

Frequently, the jurisdiction of the courts is ousted when one is faced with a difference between a term of a lease and a clause of the Regulations,

The Regulations not only go against the time honoured principle of freedom of contract, the efficicacy of market focus, they also cut across some of the basic principles of our law. From all this, it would appear that a fundamental review of the Rent Regulations 1982 is long overdue.

Regulations ought to balance the rights and duties of the lessor over his/her property against the protection *of* the lessee from unfair evictions or harassment. This is best achieved when the law respects and enforces agreements freely entered into by lessor and lessee. Tenancy and rents should be based on the agreement or presumed agreement between landlord and tenant. Hence, the primacy of the leases agreement should be the guiding principle of sound regulations. The role of the regulations is to enforce the terms of the lease and to provide a

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framework to enable the settlement of disputes that may arise thereunder. The role of a Government board, if any,

should be not so much to decree what rent is payable but to settle tenancy disputes more informally and expeditiously than the normal judicial process. A tenancy board should complement and not displace the courts.

All this is cold comfort for a litigant like Irene Chibanda. The stark reality is that the present regulations govern the occupation of her property by the respondents against her will. She was perturbed that her tenant defied her notice to vacate being convinced "that a tenant cannot have greater rights (over the property) than the landlord"; she bemoans the fact that she is prevented from reoccupying the house for her own use and has to resort to expensive hotel accommodation instead; and she wonders whether the Rent Regulations permit the respondents to occupy her house in perpetuity against her will.

My findings above are to the effect that:

(a) the applicant had not effectively terminated the lease by her letter of October 1997;

(b) the respondents became a statutory tenant on I January 1998; and

(c) that as long as they remain statutory tenants in good standing this court was powerless to evict the respondents unless the applicant first obtains a certificate from the Rent Board.

The Rent Regulations only protect the respondents as long as he remains a *bona fide* statutory tenant. Section 30(2) states that no eviction order shall be made by any court -

> "so long as the lessee continues to pay the rent due within seven days of due date and *performs the other conditions of the lease."*

The applicant has amply demonstrated that the lessee in at least three months during the course of 1988 did not pay the rent within the period stipulated by the regulations as well as by paragraph 10 of the original lease.

Secondly, a statutory tenant must also comply with all other conditions of the original lease in addition to paying his rent timeously. We have stated that the respondents was entitled to renew the lease as from 1 January 1998 but that in the absence of an agreement with the applicant the respondents became statutory tenants on exactly the same terms as were provided in the lease. The duration of the statutory tenancy was therefore also for twelve months which could be renewed at the instance of the respondents provided they gave one month notice (lease agreement, para 9). There is no evidence that during the course of 1998 the respondents gave the lessor written notice, within the stated period, to renew his tenancy. For that reason, the respondent ceased to be a statutory tenant on 31 December 1998.

It appears that the respondents became uneasy about the status of their tenancy in 1999, for in March and again in June 1999 they made offers to vacate the property on certain conditions to

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be fulfilled by the applicant.

Those offers came to naught partly because of the applicant's insistence on a higher rental based on a 15% escalation. I have ruled that there was no such agreement. I notice that the respondents were prepared to pay an escalation of 10%. It is therefore, meet and just that, for the period of 1999 when they were no longer statutory tenants, there should be a rental increase by ten *per centum.*

For the reasons given above I am of the opinion that the respondents are no longer entitled to remain in the premises and that this court has jurisdiction to grant the applicant at least part of the relief which she prays for.

As no party has completely won or lost, I shall not award any costs.

It is therefore ordered as follows:

1. That from 1 January 1998 to 31 December 1998 the respondents were statutory tenants of the applicant in respect of the property known as No. 11 Waverley Close, Sentosa, Mabelreign, Harare at a rental of $4 500 per month.
2. That from 1 January 1999 to 15 August 1999, the respondents' rental shall be $4 950 ($4 500 + 10%) per month payable to the plaintiff. The arrears to be paid with interest at the prescribed rate.
3. That the respondents and all those who claim occupancy through them shall vacate the said premises on or before 15 August 1999.
4. In the event of failure to vacate as required by para 3, the Deputy Sheriff shall enforce the evacuation.
5. This order shall be executable in spite of the noting of an appeal.
6. Each party pays its own costs.

Muskwe & Associates, applicant's legal practitioners

Chihambakwe, Mutizwa &Partners, respondents' legal practitioners

AFRICAN GOLD (ZIMBABWE) (PVT) LTD *v* MODEST (PVT) LTD v MODEST (PVT) LTD 1999 (2) ZLR 61 (SC)

Citation 1999 (2) ZLR 61 (SC)

Case No Judgment No. S-79-99

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Court	Supreme Court, Harare
Judge	Gubbay CJ, Ebrahim JA, Muchechetere JA
Heard	July 8, 1999
Judgment	July 19, 1999
Counsel	A J Dyke, for the appellant A P de Bourbon, for the respondent
Annotations	None

Civil appeal

Flynote

Company - winding up - application for - requirement to serve notice on company itself - company's right to put forward grounds of opposition to application

Headnote

Where an application is made for the winding up of a company, notice must be served on the respondent company. The company has a right to put forward its opposition to the grant of an order for winding up. The change to the High Court Rules, removing procedure by way of petition, does not alter the requirement imposed by the Companies (Winding Up) Rules 1974 to serve a copy of the petition and the notice of set-down for hearing on the company.

Cases Considered

Cases cited:

Mackay v *Cahi* 1962 (4) SA 193 (O)

Smith NO Ex p: in re *Dodge Mineral Production Co (Pvt) Ltd* 1964 RLR 93 (H)

Walsh v *Kruger* 1965 (2) SA 756 (E)

Statutes Considered

Legislation considered:

Companies (Winding Up) Rules 1972 (RGN 841 of 1972), r 5(2)

High Court Rules 1971 (RGN 1047 of 1971), r 247(3)

Case Information

A J Dyke, for the appellant

A P de Bourbon, for the respondent

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Judgment

Gubbay CJ: On 30 April 1999, and pursuant to the lodging of a certificate of urgency, the respondent obtained from the High Court, at Bulawayo, an order for the provisional winding up of the appellant company. The order, which was directed to be published in both the *Daily News* and *Government Gazette*, was returnable on 18 June 1999. It was issued by the learned judge, notwithstanding that copies of the chamber application that gave rise to it, and the notice of set down, had not been served upon the appellant.

It was only on 12 May 1999 that these documents, together with the provisional order, were served by the Deputy Sheriff. Until that day, officers

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GUBBAY CJ

of the appellant were totally unaware that the company had been placed under provisional liquidation.

The appellant moved with admirable expedition. On 14 May 1999, it instituted an urgent chamber application in which was sought the setting aside, with costs, of the order made on 30 April 1999 on the ground that it had been improperly obtained. The application was opposed by the respondent. The contention advanced was that it is permissible under the provisions of r 247(3) of the Rules of the High Court, as read with Form No. 29D thereto, to obtain an order for the provisional winding up of a company without first affording that company the opportunity of being heard.

It was this argument that found favour with the learned judge. In dismissing the application with costs on the scale of legal practitioner and client (a punitive measure for which there was no justification whatsoever), he said:

> "The applicant company appears to have conveniently ignored the dictates of SI 120 of 1995 which introduced Form No. 29D. It also ignored the fact that procedure by way of petition (under r 5(2) of the Companies (Winding Up) Rules 1972, RGN 841 of 1972) was discontinued in this court for quite some time now. It completely disregarded the provisions of r 247(3) of the Rules of Court ... The respondent fully complied with the above provisions ... In the result, I am not at all persuaded that the provisional order was improperly obtained."

While it may be correct that the procedure by way of petition has been discontinued (see s 15(2) of the Interpretation Act [*Chapter 1:01*], which provides that any reference in an enactment to a petition to court shall be construed as a reference to an application), there can be no question of the applicability of r 247(3) to an application for the grant of a provisional winding up order. The rule is concerned solely with the form the provisional order is to take, the information required to be contained therein, and the manner of publication and service, once the order has been made by the High Court. It effectively enshrines a respondent company's right to be heard on the day specified for the confirmation of the provisional order. It has nothing to do with what procedure has to be followed in order to obtain a provisional winding up order. That procedure is to be found in r 5(2) of the Companies (Winding Up) Rules, which reads:

> "Except where the petition is presented by the company itself, a copy of the petition and the notice of set-down for hearing *shall be served upon the company* by delivery of such copy at its registered office or to an responsible

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person at its place of business, or, failing such service, to a director or secretary of the company or, if the company is in voluntary liquidation, to the liquidator. *An affidavit of service shall be filed with the petition*" (my emphasis).

Mr *de Bourbon*, who appeared for the respondent, candidly conceded that he was unable to justify the failure to observe r 5(2). In my view, compliance therewith is mandatory. There is good reason that it should be. A respondent

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company must not be deprived of the opportunity to put forward its opposition to the grant of an order which will have the effect of causing it to suffer an immediate diminution in personal status and a removal of control over all its assets. These manifestly serious consequences flow from the issue of a provisional winding up order. The provisional liquidator is almost invariably vested by the court with the wide powers set out in paras (a) to (h) of s 221(2) of the Companies Act [*Chapter 24:03*]. See the remarks of Hofmeyer J in *Mackay* v *Cahi* 1962 (4) SA 193 (O) at 203 G-H, which, though referring to sequestration proceedings, are nonetheless apposite; and *Walsh* v *Kruger* 1965 (2) SA 756 (E) at 760B.

The importance attaching to compliance with r 5(2) of the Companies (Winding Up) Rules was recognised by Beadle CJ in Ex p *Smith NO:* In re *Dodge Mineral Production Co (Pvt) Ltd* 1964 RLR 93 (H). In that case, although the petition applying for the provisional winding up order was served upon the company at its registered office, the managing director was out of town at the time and had no knowledge of the application until after the order was made. At the postponed return day the managing director applied for an order releasing sufficient funds to the company to enable it to appear by counsel to oppose the granting of a final order. In response, the learned Chief Justice observed at 94C-D:

> "Now it appears to me in circumstances such as this the respondent company has never had a proper opportunity of being heard as it would have had had the application for the provisional order been brought timeously to its notice. One of the fundamental rules of our system is that defendants and respondents should be given an opportunity of being heard in matters such as this and to make a final order now would be to deprive the respondent of any chance of putting its case before the court."

His Lordship therefore permitted the managing director to place affidavits before the court in reply to those of the petitioner so that the court might determine whether the respondent company had an arguable case. If satisfied in that regard, an order would be made releasing funds to the company for the purpose of funding its opposition. See also Christie *Business Law in Zimbabwe* 2 ed at 428; Nkala and Nyapadi on *Company Law in Zimbabwe* at 428.

A fortiori, so it seems to me, the present appellant being the victim of an inexcusable breach of procedure, the High Court ought to have afforded it the opportunity to oppose the application for the provisional order by the only means available, namely, by the setting aside of the order that had been improperly obtained.

The court was informed by counsel that affidavits in opposition to the confirmation of the provisional order had been filed and answered by the respondent. This was done as a precaution against the dismissal of this appeal. It has, however, the advantage that at the

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renewed hearing of the

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application for the grant of a provisional winding up order, which I now propose to direct, the appellant's opposition will be before the High Court. In the circumstances, there is no reason why the application should not be set down with the utmost expedition.

In the result, it is ordered as follows:

1. The appeal is allowed with costs.
2. The order of the court *a quo* is altered to read:

   "The application to set aside the provisional order of winding up is allowed with costs."
3. The chamber application for an order of provisional winding up, being case No. H-2028-99, is to be set down for rehearing before the High Court at Bulawayo, as a matter of urgency.
4. The affidavits filed in Case No. H-2028-99 are to be taken into account in the determination of whether a provisional winding up order should be made.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Y A Mukadam & Associates, appellant's legal practitioners

Webb, Low & Barry, respondent's legal practitioners

SCOTFIN LTD *v* HEWITT & ORS 1999 (2) ZLR 65 (HC)

Citation	1999 (2) ZLR 65 (HC)
Case No	Judgment No. HH-137-99
Court	High Court, Harare
Judge	Garwe J
Heard	July 6, 1999
Judgment	July 21, 1999
Counsel	A P de Bourbon SC, for the plaintiff Miss E Mushore, for the defendants
Annotations	None

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Civil action

Flynote

Practice and procedure - execution - stay of - pending determination of counter-claim - whether a separate action brought by defendant can be treated as a counter-claim for this purpose

Headnote

The plaintiff company brought an action against the defendants, seeking payment of a debt admittedly owed by the defendants. While agreeing that judgment would have to be entered against them, they argued that they could avoid the effect of the judgment since they had instituted a claim against the plaintiff for a greater amount than was being claimed by the plaintiff. The claim had been made in a separate action, and was not a counter-claim to the action brought by the plaintiff. In addition, the claim was brought as a result of a cession allegedly made to them by another company.

Held, that generally the attitude of the courts is that both claim and counter-claim should be adjudicated upon *pari passu*. Even where the claim is admitted, there should not be a separate judgment in respect of the claim in convention; this should wait until the counterclaim has been decided upon, in order to obviate the potential danger of conflicting findings if the case proceeds piecemeal.

Held, further, that in applications for summary judgment, where reciprocal claims between the parties exist, the proper course for a court to adopt, if the claim in convention is admitted and the counter-claim is unliquidated, is to enter judgment for the plaintiff in the sum admitted, but grant a stay of execution pending trial of the counterclaim. The question, therefore, was whether there was a counterclaim before the court.

Held, further, that a counter-claim, for these purposes, is a claim which the defendant could have instituted by way of a separate action, but it must be brought and filed by the defendants with the plea.

Held, further, that the action brought separately by the defendants was not a true counter-claim, since it formed the subject of a separate action which did not fall to be decided *pari passu*. This was not in itself decisive in determining whether a stay of execution should be granted. It would be open to the court to enter judgment for the plaintiff but grant a stay of execution pending the determination of the action brought by the defendants.

Held, further, however, that as the genuineness of the cession was open to question and itself had to be determined in the action brought by the defendants; as the defendants did not appear to be pursuing their claim with any degree of urgency; and as the plaintiff company was a well-established financial institution and the defendants would not be prejudiced if they succeeded in their claim against the plaintiff, this was not a case where a stay of execution should be granted.

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Cases Considered

Cases cited:

de Aguiar v *de Almeida* 1989 (2) ZLR 165 (H)

Mhlanga v *Green* S-92-94

Rhodesia Omnibus Co Ltd v *Modern Publicity Ltd (2)* 1955 SR 103; 1956 (1) SA 101 (SR)

Scotfin Ltd v *Ngomahuru (Pvt) Ltd* 1997 (2) ZLR 567 (H)

Super Sales & Upholsterers (Pvt) Ltd v *Lawton* 1974 (1) RLR 68 (G)

Statutes Considered

Legislation considered:

High Court Rules 1971 (RGN 1047 of 1971), r 121

Case Information

A P de Bourbon SC, for the plaintiff

Miss *E Mushore*, for the defendants

Judgment

Garwe J: In this action, the plaintiff, Scotfin Ltd, seeks payment of the sums of $776998.86 and $533799.39, together with interest thereon from 6 October 1994 to date of payment, and costs of suit on the higher scale. The amount arises out of a suretyship agreement entered into between the defendants and the plaintiff in respect of monies loaned and advanced by the plaintiff to a company known as Mukwa Milling Company.

Whilst admitting that they are indebted to the plaintiff, the defendants have raised two defences in their plea. The first is that the amount owed has not been correctly calculated. The second is that the first, second and third defendants have instituted proceedings in Bulawayo claiming damages in the sum of $33768277 against the plaintiff and two other financial institutions jointly and severally. For that reason, they argue that they are entitled to withhold payment of the amount outstanding pending determination of that action. It is common cause that the claim for damages was initially instituted under Bulawayo High Court Case No. 777/96 but was withdrawn. Subsequent proceedings were instituted under Case No. H-2106-97.

At a pre-trial conference held in February this year before Adam J, the parties agreed that the amount outstanding in respect of the two agreements, inclusive of interest, is $1383834.90. It was also agreed that interest has since run to the double and that it can only start accruing from the date of judgment. Three issues for determination at the trial were identified. These were: (a) whether the plaintiff is entitled to costs of suit on a higher scale in terms of the agreement; (b) whether the fourth defendant bound itself as a surety and co-principal debtor; and (c) whether

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the defendants are entitled to avoid judgment by virtue of the claim brought in Case No. HB-2106-97.

At the hearing of this matter, both parties advised that no evidence was to be adduced. It was agreed that the matter be determined on the papers. Two of the issues identified at the pre-trial conference were resolved. First, it was agreed that costs would be payable by the defendants on the higher scale as this is provided for in the agreement entered into by the parties. That this is

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permissible is not in dispute. See *Scotfin Ltd* v *Ngomahuru (Pvt) Ltd* 1997 (2) ZLR 567 (H) at 582A-C. The second was that the claim against fourth defendant was no longer being pursued. In the result, therefore, the only issue that remained for determination in terms of the pre-trial conference minute was whether the defendants are entitled to avoid judgment by virtue of the fact that they have instituted a claim against the plaintiff in Bulawayo. I must observe that the defendants' plea appears to reflect the issue differently. In terms of para 9.3 of the plea, the defendants claim that they are entitled to withhold payment of their admitted liability to plaintiff pending determination of the case in Bulawayo. They do not say they are entitled to avoid judgment.

Mr *de Bourbon*, for the plaintiff, submitted that that the so-called counterclaim is nothing more than a ruse to delay payment of the amount defendants admit is owing. He submitted that the counterclaim is a separate case before the High Court in Bulawayo. Although the plaintiff filed a plea in July 1998 in the case pending at Bulawayo, nothing further has happened. Moreover, no formal application for stay has been made. The issue, he submitted, is whether the defendants can avoid judgment before determination of their matter by the High Court, Bulawayo. He further submitted that this is not a case where the defendants have admitted the claim but seek stay of execution pending determination of their counterclaim in the same matter. He submitted that there is no authority for the proposition that judgment can be avoided by virtue of the claim brought in Bulawayo. The case pending in Bulawayo is a separate case which the defendants have irregularly included in their plea as a counterclaim. The reference made in the plea to that case does not make it a counterclaim. He further submitted that the court enjoys broad discretion to grant a stay. That discretion is premised on the consideration that all proceedings should be determined at the same time and, secondly, that a litigant should not get an unfair advantage over another merely because he issued summons first. In exercising its discretion, the court should take into account that the case in Bulawayo is a tactic employed by the defendants to avoid payment of the amount admitted by them to be owing. He queried why Timber Corporation of Zimbabwe ("TCZ"), having suffered damages, has not itself brought a claim. It was his submission that the cession by TCZ to the three defendants was effected merely to ensure that the defendants avoid liability to pay in the present case. On the cession itself, he drew the attention of the court to the fact that, in terms of clause 5 of the cession agreement, in the event that the defendants recover an amount greater than their total liability, the defendants will be obliged to pay back to TCZ an amount equal to TCZ's outstanding liability but not exceeding the excess. Further, in 1996 TCZ purported to cede one third of its damages

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to each defendant. But in June

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1997 it purported to cede the whole debt to all three defendants jointly and severally. He submitted that this is not a true cession since the defendants are obliged to pay back some money. It is a fraud on creditors and this court cannot therefore exercise its discretion in favour of staying execution in these circumstances. Moreover, the case in Bulawayo is far from being determined. Instead of counterclaiming in the present case, the defendants withdrew the original case and instituted another action in Bulawayo. He submitted that regard must be had to the fact that the plaintiff is a well established financial institution. If ordered to pay damages to the defendants, it will do so. There is therefore no prejudice to the defendants. On the other hand, the plaintiff will suffer prejudice if stay is granted, as it will not be able to execute.

Miss *Mushore*, for the defendants, submitted that the granting of judgment is in the discretion of the court. The defendants have no difficulty with the suggestion that judgment be entered. However, in such an event, stay of execution should be granted. She submitted that the defendants are entitled to have their claim in Bulawayo determined before execution takes place in the present matter. The case pending at Bulawayo is referred to in the plea. The claim in that case far exceeds the present claim. She conceded that the progress of the matter in Bulawayo has been slow but explained this was due to the fact that negotiations have been taking place with a view to settling the matter out of court. She submitted that this court cannot ignore the fact that there is a pending case in Bulawayo in which the defendants are claiming considerably more than the amount they admit is owing in the present case. The fact that it is a separate case is irrelevant. On the suggestion by plaintiff's counsel that the cession of TCZ's debts to three defendants is a fraud, it was her submission that this is a sweeping statement based on incomplete facts.

Both parties are agreed that judgment may be entered in this case in the sum of $1383834.90 together with interest thereon at the rate of 4% above the base lending rate and costs on a higher scale. The sum is admitted by the defendants. The only issue that arises is whether a stay of execution should be granted on account of the separate action instituted by the defendants in Bulawayo.

The position is now well established that a defendant who admits the main claim is entitled to raise an unliquidated counterclaim as a defence. But if the counterclaim is vague, unsubstantiated and lacking in quantification, it will not be allowed to defeat the application for judgment - *de Aguiar* v *de Almeida* 1989 (2) ZLR 165 (H) at 170 and 171. It does not matter that the relief sought in the counterclaim is unrelated to the monetary relief claimed by the plaintiff and admitted by the defendant. What is of importance is that there must be a *bona fide* claim by the defendant against the plaintiff, which claim, although unliquidated, lends itself to easy and speedy proof, or is

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quantifiable and thus capable of being set off against the plaintiff's claim or extinguishing it completely.

Generally, the attitude of the courts is that both claim and counterclaim should be adjudicated upon *pari passu* and that even where the claim is admitted there should not be a separate judgment in respect of the claim in convention but this should wait until the counterclaim has been decided upon. Such an approach is intended to obviate the potential danger of arriving at conflicting findings if the case proceeds piecemeal - van Winsen *Civil Practice of the Superior Courts of South Africa* 4 ed p 512. A counter claim has the same effect as a cross action, so as to enable the court to pronounce a final judgment in the same action both on the original claim and on the claim in reconvention - see r 120(1).

The law now seems settled that in summary judgment applications where reciprocal claims between parties exist, the proper course for a court to adopt, if the claim in convention is admitted and the counterclaim is unliquidated, is to enter judgment for the plaintiff in the sum admitted but grant a stay of execution pending trial of the counterclaim: *per* Korsah JA in *Mhlanga* v *Green* S-92-94 at pp 2 and 3 of the cyclostyled judgment. See also *Rhodesia Omnibus Co Ltd* v *Modern Publicity Ltd (2)* 1955 SR 103; 1956 (1) SA 101 (SR). The consideration is that if claims were to be considered piecemeal, a defendant who succeeded in the counterclaim might find it impossible to recover from the plaintiff what he had already paid under the claim.

The question in this case is whether there is a counterclaim before this court. It is not in dispute the claim for damages is the subject of a separate action instituted in the High Court in Bulawayo. What the defendants have simply done in the present case is refer to the Bulawayo case as a counterclaim and on that basis argue that a stay be granted pending determination of that matter.

A counterclaim is a claim which the defendant could have instituted by way of a separate action against the plaintiff and the fact that it has been brought as a counterclaim should not deprive the defendants of any rights which he would have had with regard to a claim in convention: *Civil Practice of the Supreme Court of South Africa* 4 ed p 509. In terms of our Rules, a counterclaim must be brought and filed by the defendants with the plea. See r 121.

Clearly, no counterclaim has been filed in this case. What we have is a separate action pending before the Bulawayo High Court which the defendants have referred to in their plea as a "counterclaim" and on the basis of which they say they are entitled to withhold payment to the plaintiff. The defendants had the opportunity to file a counterclaim in the present case, incorporating the damages claim before the High Court in Bulawayo. This has not been

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done. The result is that although the Bulawayo case is referred to as a counterclaim, the two claims do not fall to be determined *pari passu*. Moreover the defendants in this case, who are the plaintiffs in the Bulawayo case, have not even replicated to the plea, almost a year after its filing. Whilst it is clear that there is no counterclaim before this court, it is a fact that the

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defendants have instituted proceedings against the plaintiff in Bulawayo. This cannot be ignored. In *Super Sales & Upholsterers (Pvt) Ltd* v *Lawton* 1974 (1) RLR 68 (G), the court granted a stay of execution to enable the applicant in that case to institute a separate action in lieu of the claim in reconvention within a specified time. I am satisfied that whilst there is no counterclaim before me, that fact alone is not decisive in determining whether execution should be allowed in the present case.

That this court has discretion to grant a stay of execution in these circumstances is without doubt. In principle I see no reason why, in an appropriate case, a stay cannot be granted where it is known that the defendant has filed a separate claim against the plaintiff. Whether the power will be exercised remains a matter within the court's discretion, regard being had to all the relevant circumstances.

On the cession, it is plaintiff's submission that this is not genuine and therefore not a true cession. The law on cessions is clear. A cession that is effected *mala fide* and with the intention to defraud should be treated as an invalid cession as a *bona fide* intention is a requirement for a valid cession: Susan Scott *The Law of Cession* 2 ed p 201.

The attention of this court has been drawn to the Supreme Court decision in *Mukwa Milling Co (Pvt) Ltd* v *Stanbic Bank of Zimbabwe* S-55-97, the declaration filed in Case No. 2107/97 and the memorandum of agreement of cession entered into between the Timber Corporation of Zimbabwe and the three defendants. In *Mukwa Milling Co (Pvt) Ltd* v *Stanbic Bank Zimbabwe Ltd supra*, Stanbic had applied for the winding up of Mukwa Milling Company. The company had resisted the application on the basis that it had a counterclaim against Stanbic. That counterclaim is in essence similar to the claim by defendants in the matter pending at Bulawayo. The claim was that Stanbic had agreed to re-schedule debts in order to make a loan by the International Finance Corporation possible but Stanbic had reneged on the agreement, resulting in substantial prejudice to the company. Dismissing the appeal against an order winding up the company Ebrahim JA remarked that he was inclined:

> "to the view that the appellant's counter claim is simply a device to stifle Stanbic's action."

In the suit pending at Bulawayo, the defendants claim that the three financial institutions - Stanbic, UDC and Scotfin - entered into an agreement with Mukwa Milling (Pvt) Ltd and Timber Corporation of

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Zimbabwe in terms of which the institutions had: (a) entered into a security sharing agreement with the International Finance Corporation (IFC) to enable Mukwa Milling to borrow US$200000; and (b) agreed to reschedule the payment of the debt owed by Mukwa Milling and Timber Corporation of Zimbabwe. They claim that the financial institutions had reneged on the agreement, as a result of which Mukwa Milling and Timber Corporation of Zimbabwe were unable to borrow the US$200000. Consequently the two companies suffered damages in the sum of $33768276, being the estimated profits Timber Corporation of Zimbabwe would have derived from its operations. The declaration further states that the said Timber Corporation of Zimbabwe ceded to the defendants jointly and severally its claim for $33768276. Perusal of the

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cession agreement shows that it was entered into on 30 June 1997. The plaintiff's declaration in Case No. 2107/97 is dated 21 July 1997. In fact, it is on the basis of the cession that the defendants proceeded to sue the three institutions for $33768276. According to the papers, there had been another cession to each of the three defendants on 15 March 1996. This cession was made individually and not jointly and severally and formed the basis of the claim in Case No. 777/96.

Without making any findings of fact on the matter, it appears that the *bona fides* of the cession agreement between the defendants and Timber Corporation of Zimbabwe will be an issue before the High Court at Bulawayo. Certainly, the impression is created that TCZ ceded its claim to the defendants to enable the defendants to counterclaim against the financial institutions. In the present case, the three defendants had stood surety for the amounts advanced by plaintiff to Mukwa Milling. Paragraph 5 of the cession agreement provides that if the defendants recover from the financial institutions more than they owe then they shall pay to TCZ an amount equal to TCZ's outstanding liabilities. It is unclear why this should be so if the cession is a *bona fide* one. A cession should be a real and not a simulated act. The intention to cede should be a real and not a fictitious one:*The Law of Cession supra* p 85. I agree with Miss *Mushore*, however, that one cannot make any definite conclusion of facts on the basis of the limited detail available to the court in this case. There is room for suspicion that the cession may well not be a genuine one, but one cannot go beyond that.

Having considered all the facts of this case, I am not persuaded that this would not be a proper case for judgment to be entered and execution granted. The case in Bulawayo, although filed in 1997, has not gone beyond the defendant's plea. Although the defendants say the delay has been occasioned by negotiations to settle with the other two institutions, it is clear that the matter, in so far as it pertains to the plaintiff in this case, is not being given any urgency. Nothing has happened in the pleadings since the filing of the

plea a year ago. Moreover, there appears to have been a deliberate decision by the defendants not to include the damages claim in Bulawayo as a counterclaim in the present case. The defendants' plea to the plaintiff's claim in the present matter was filed in April 1997. Instead of filing a counterclaim in respect of their claim for damages, the defendants proceeded in July 1997 to file a separate action in Bulawayo. It is unknown how long it will take for the matter in Bulawayo to be determined. The *bona fides* of the agreement of cession will in all probability be an issue. Most importantly, however, Scotfin is a well-established and well-known financial institution. There is no question of the defendants being prejudiced in the event that they succeed in their claim against the institution. This case is different from other cases coming before the courts where the person at whose instance judgment is being executed might not be in a position to satisfy the judgment of the court in the event that the counterclaim succeeds. Considering all these factors together, the balance of convenience would seem to favour the plaintiff. I am of the view that execution should not be stayed pending determination of the defendants' claim in Bulawayo.

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Accordingly, it be and is hereby ordered as follows:

"That judgment be and is hereby entered in the sum of $1383834.90 together with interest thereon at the rate of 4% above the base lending rate from today's date to date of payment and costs on the legal practitioner and client scale."

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

Coghlan & Welsh, Bulawayo (c/o *Atherstone & Cook*, Harare),
defendants' legal practitioners

S *v* MUTERO & ORS 1999 (2) ZLR 73 (HC)

Citation	1999 (2) ZLR 73 (HC)
Case No	Judgment No. HH-138-99
Court	High Court, Harare
Judge	Garwe J
Heard	July 21, 1999
Judgment	July 21, 1999
Annotations	None

Criminal review

Flynote

Criminal procedure - charge - wrong charge preferred - charge of contravening s 12 of Miscellaneous Offences Act - facts showing that theft had been committed - on plea of guilty magistrate canvassing essential elements of theft - whether conviction should be upheld

Headnote

The accused were charged with contravening s 12 of the Miscellaneous Offences Act [*Chapter 9:15*], namely, that they were in possession of property in circumstances giving rise to a reasonable suspicion that the property was stolen and were unable to give a satisfactory account of their possession. They pleaded guilty, but the magistrate, instead of canvassing the essential elements of this statutory offence, canvassed the essential elements of theft. He then proceeded to convict the accused of contravening s 12 of the Miscellaneous Offences Act. The trial magistrate sought to justify his actions by saying that although the accused should more properly have been charged with theft, he had convicted the accused of contravening s 12 as

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this offence was a competent verdict on a charge of theft.

Held, that the trial magistrate had seriously misdirected himself. Although, on a charge of theft, a contravention of s 12 is a competent verdict, theft is not a competent verdict on a charge of contravening s 12 and the penalties which may be imposed for these two offences can be different.

Held, further, that where there is certain knowledge that the goods were stolen, it is not proper to charge the offence of contravening s 12.

Held, further, that although on the facts the accused should have been charged with theft, the conviction for contravening s 12 should be upheld, relying on s 224 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] which provision allows the court to convict the accused of another offence than the one with which he has been charged, provided that the latter offence forms a constituent part of the crime charged.

Cases Considered

Cases cited:

S v *Chitsinde* 1982 (2) ZLR 91 (S)

Judgment

Garwe J: The accused persons in this case were charged with contravening s 12 of the Miscellaneous Offences Act [*Chapter 9:15*]. It was alleged that they had been found in possession of six bags of green mealie cobs in circumstances which gave rise at the time of such possession to a reasonable suspicion that the maize cobs had been stolen and were unable to give a satisfactory account of such possession.

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The facts of this case are that the accused persons proceeded to a maize field near Ridgeview suburb. They found other persons in the act of stealing green mealie cobs from the field. Pretending to be owners of the field, they chased these persons away. They came back to the field and helped themselves to the mealie cobs that had been plucked off. They took these and some more cobs until they filled a total of six bags. On their way, they were arrested by the police and the maize was recovered.

In canvassing, the essential elements of the offence, the trial magistrate put the following questions:

" Q. Do you agree with the facts?

A. Yes (all).

Q. Anything to add?

A. No (all).

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Q. Admit that on the day in question you were in Ridgeview?

A. Yes (all).

Q. You admit that you took maize without the consent of the owner?

A. Yes (all).

Q. You admit that you had the intention to steal the maize?

A. Yes (all).

Q. You also admit you had the intention to permanently deprive the owner of his property?

A. Yes (all).

Q. And that it was unlawful?

A. Yes (all).

Q. Any lawful right?

A. No (all).

Q. Any defence to offer?

A. No (all).

Verdict: All three Guilty as charged."

It is clear from the above exchange that the trial magistrate canvassed the essential elements of the crime of theft and not of contravening s 12 of the Miscellaneous Offences Act [*Chapter 9:15*]. When asked by the scrutinizing regional magistrate whether the accused had been properly convicted the trial magistrate acknowledged that the essential elements canvassed were for theft. He further accepted that accused persons should more properly have been charged with theft, but went on to explain that he convicted the accused persons of the offence of contravening s 12 of the Miscellaneous Offences Act "in view of the fact that it is a competent verdict for the offence of theft and sentences imposed are similar".

There can be no doubt that the trial magistrate has seriously misdirected himself in this regard. It is true that a conviction for contravening s 12(2) of the Act is a competent verdict to a charge of theft - see s 218 of the Criminal Code. It is also correct that in terms of s 12(3) of the Miscellaneous Offences

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Act a person convicted of contravening that section is liable to the penalties which may be imposed on a conviction for receiving stolen property knowing it to have been stolen. It is, however, not correct that the penalties imposable for contravening s 12(2) of the Miscellaneous Offences Act are the same as for the crime of theft. Under the old Miscellaneous Offices Act [*Chapter 68* of 1974], provision was made under s 14(1) for any person convicted of this type of offence to be liable to the penalties which may be imposed on a conviction for theft. By Act 29 of

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1975, that provision was removed. A person charged with contravening s 12(2) of the Act is therefore liable to a penalty which the court considers appropriate in the circumstances and not necessarily to one imposed on a conviction for theft.

Whilst it is correct that a conviction for contravening s 12(2) of the Miscellaneous Offences Act is a competent verdict to a charge of theft, it must, however, be stressed that theft is NOT a competent verdict to a charge of contravening s 12 of the Miscellaneous Offences Act. Therefore, on a charge of contravening s 12(2) of the Act, the trial magistrate should not have approached the matter on the basis that because the statutory offence is a competent verdict to theft, canvassing the essential elements of the crime of theft would be sufficient to establish the guilt of the accused on the charge preferred against him of contravening s 12(2) of the Act. Such reasoning is fallacious and untenable.

The facts of this case disclosed the offence of theft. The accused was charged with contravening s 12(2) of the Act. The undesirability of preferring a charge of contravening s 12(2) of the Miscellaneous Offences Act in circumstances where the accused would have committed theft has been stressed in a number of review cases. In *S* v *Chitsinde* 1982 (2) ZLR 91 (S) at 99, Georges JA had occasion to remark:

> "It appears to me as a matter of interpretation that the terms of the section cannot apply where the property found in the possession of the accused person is proved to have been stolen. It is difficult to assert in the words of the section that a person has been in possession 'of goods of any description in circumstances which give rise, either at the time of the possession or at any time thereafter, to a reasonable suspicion that at the time of such possession the goods were stolen' when it is known shortly after the person has been found in possession of the goods that they were in fact stolen. The certain knowledge that the goods are stolen replaces reasonable suspicion which, as has been said, is a basis for the application of the section ..."

The charge preferred against the accused was, therefore, not proper. It is clear that they should have been charged with and convicted of theft. The facts admitted by the accused, however, also justify a conviction for contravening s 12 of the Act, which is a lesser offence. The conviction must be allowed to stand. I am fortified in this conclusion by s 224 of the Criminal Code which provides that:

GARWE J

> "If on the trial of a person charged with an offence the evidence established that he is guilty of another offence of such a nature that, upon an indictment, summons or charge alleging that he committed that other offence, he might have been convicted of the offence with which he is actually charged, he may be convicted of the offence with which he is so charged."

The above section may be invoked when the evidence shows that the crime charged has been committed, even though the evidence also proves the commission of a more comprehensive offence of which the crime charged forms a constituent part. The section is intended to provide for what might be called a "competent verdict in reverse". Where, for example, the accused is charged with indecent assault and the evidence discloses a rape, the accused is not entitled to be acquitted but may nevertheless be convicted of indecent assault: *Criminal Procedure in Zimbabwe* by John Reid-Rowland, 24-5.

Since the accused should more properly have been convicted of theft, I find myself unable to

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certify the proceedings as being in accordance with real and substantial justice.

Chinhengo J agrees.

BHP MINERALS ZIMBABWE (PVT) LTD *v* TAKAWIRA 1999 (2) ZLR 77 (SC)

Citation	1999 (2) ZLR 77 (SC)
Case No	Judgment No. S-81-99
Court	Supreme Court, Harare
Judge	McNally JA, Muchechetere JA, Sandura JA
Heard	July 22, 1999
Judgment	July 30, 1999
Counsel	R Y Phillips, for the appellant Respondent in person
Annotations	None

Civil Appeal

Flynote

Employment - contract - termination - remedies for wrongful termination - employer must pay back wages and either reinstate employee or pay him damages - employee not entitled to reject genuine offer of reinstatement and then claim damages instead

Headnote

The respondent had been wrongfully dismissed by the appellant, his employer. The appellant agreed to pay the respondent his wages for the period from the time of his wrongful dismissal to the date of his reinstatement and to reinstate him. The respondent, however, refused to accept reinstatement and proceeded to claim, as damages, the amount that he would have earned over the remaining years of his working life.

Held, that s 96 of the Labour Relations Act [*Chapter 28:01*] provides that any determination as to reinstatement must specify an amount of damages to be awarded to the employee as an alternative to his reinstatement. This provision gives the employer the option to choose to pay damages, rather than offering to reinstate the employee. It cannot be interpreted to mean that the employee can choose, without justifying his choice in any way, to refuse reinstatement and demand instead the payment of money. If the employee refuses a genuine offer of reinstatement, he abandons his claim for damages in respect of the period after the reinstatement was supposed to commence. However, if the employee can prove that the offer to

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reinstate him is false, he may be entitled to damages in lieu of reinstatement.

Cases Considered

Cases cited:

Ambali v *Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S)

Ferodo (Pty) Ltd v *de Ruiter* (1993) 14 ILJ 974 (LAC)

Gauntlet Security Svcs (Pvt) Ltd v *Leonard* 1997 (1) ZLR 583 (S)

Zupco v *Chisvo* 1999 (1) ZLR 67 (S)

Statutes Considered

Legislation considered:

Labour Relations Act [*Chapter 28:01*], s 96

Case Information

R Y Phillips, for the appellant

Respondent in person

Judgment

McNally JA: The appellant, which I will call BHP, wrongfully dismissed the respondent, Mr Takawira, on 25 July 1996. That was the finding of the Labour Relations Tribunal in a judgment handed down on 6 February 1998.

The Tribunal ordered that:

Mc NALLY JA

1. He is entitled to be reinstated with full benefits if he so wishes;

2. Should the remedy of reinstatement not be acceptable to either or both parties, then the matter will have to be set down for assessment of damages by the Tribunal as an alternative to reinstatement.

BHP did not appeal against the order. It accepted defeat. It paid Mr Takawira a sum of money in respect of his wages and benefits from 25 July 1996 to 6 February 1998. In its letter to his lawyers dated 8 July 1998, it described this payment as being "in full and final settlement of the amounts due up to and including the date of reinstatement". The sum was apparently accepted on that basis.

Total victory, one would have thought, for Mr Takawira. But he then rejected the offer of reinstatement, not once but twice. He says the offer was not made "properly". It is true that

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there is no evidence that it was made in writing. He says a driver was sent to notify him of his right to return. He made no move to return. Instead he brought the matter back to the Tribunal on 4 June 1998.

At that hearing, the issues were divided into two parts. By consent, it was ordered that BHP should pay the "back pay" element, i.e. the amount due in respect of the period 25 July 1996 to 6 February 1998. This amount, as we have seen, was paid on 8 July 1998. (I note that no element of interest was included, but that issue was not raised before us or, apparently, by Mr Takawira's lawyer).

Meanwhile, written submissions were to be filed in regard to the issue of what was called "future earnings". At all times, BHP took the stance that there was no basis for any award over and above the amount agreed and paid on 8 July 1998. Once they had paid him in respect of the period from wrongful dismissal to the date on which he was offered reinstatement, he had been fully compensated for his loss. If he chose not to be reinstated, that was his right. But he could not, without reason, reject the offer of reinstatement and claim damages. Those damages flowed from his own action in rejecting the offer of reinstatement. They were no longer damages flowing from BHP's wrongful dismissal.

The Tribunal did not accept this contention. Nor did it accept the opposite contention that Mr Takawira was entitled to claim a lump sum equivalent to what he would have earned over the remaining thirteen years of his working life. It concluded that he was entitled to compensation "to mitigate the hardship emanating from loss of employment." It estimated that compensation to be three years' net salary based on the salary he would have been entitled to as at February 1998.

Against that award BHP appeals, alleging, in essence, that it was an error of law to hold that any damages were payable after the offer of reinstatement had been rejected.

Mc NALLY JA

We are concerned here with a very simple situation. A man has been wrongfully dismissed. It has been so determined in terms of s 96 of the Labour Relations Act. He is entitled to have the wrong put right. Common sense indicates that there are two elements in the putting right of that wrong:

1. He should be paid his earnings for the period when he was wrongfully denied them, which will normally be from the date of dismissal to the date of reinstatement in his post;

2. He should be reinstated.

This is precisely what is provided for in s 96(1)(a) and (c) of the Act.

But the latter subsection goes on to provide something more. It provides that:

> "any such determination (as to reinstatement) shall specify an amount of damages to be awarded to the employee concerned as an alternative to his reinstatement."

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Up to the present, it has always been assumed that this proviso was one in favour of the employer. In other words, that it is designed to deal with a situation in which the employer says "I'm sorry, but I cannot work with the man after all that we have been through. I would rather pay him damages in lieu of reinstatement".

Now, for the first time, it is being said that the employee can choose, without justifying his choice in any way, to refuse reinstatement and demand instead a payment in money. I do not think that is a valid or viable interpretation of the statutory provision.

It is instructive to look at what the learned Chief Justice said in *Gauntlet Security Services (Pvt) Ltd* v *Leonard* 1997 (1) ZLR 583 (S) at 585C. In that case, the employee was, as a result of injury, incapable of resuming his previous duties. For this reason, the Tribunal did not order reinstatement. It merely specified an amount of damages to be awarded. Said the Chief Justice:

> "Yet, even though reinstatement did not appear to be a viable option, I think the proper order to make was 'reinstatement or employment in a job, or the payment of $ x as damages' - thereby affording the appellant (employer) the choice."

Those last words are the nub of the matter. The employer is given the opportunity to, as it were, buy his way out of his obligation. It makes no sense to allow the employee to claim money in place of reinstatement. The money is damages. Damages for what? Once he is paid, the arrears and offered his job back, his damages are settled.

One must, of course, guard against generalisation. One can imagine situations in which, as I said in *Zupco* v *Chisvo* 1999 (1) ZLR 67 (S), the employee does not want reinstatement, or is unable to accept it for health or other reasons. But even in such cases there may be some reason why the employee would be better off by accepting reinstatement. He may wish to

accept it and immediately tender his resignation. That may be advantageous from a pension point of view. The order should always be for reinstatement, with an alternative of damages.

The point to be made is that an employee who refuses reinstatement abandons any claim for damages in respect of the period subsequent to the date of the order reinstating him. His damages will normally be limited to what is called in s 96(1)(a) "back pay" from the date of wrongful dismissal. Even that, as indicated in *Ambali* v *Bata Shoe Co Ltd* 1999 (1) ZLR 417 (S), may be limited if the Tribunal finds that the employee could reasonably have found alternative employment while the case was pending. And see generally the criteria set out in *Ferodo (Pty) Ltd* v *De Ruiter* (1993) 14 ILJ 974 (LAC) at 981D-G.

Finally, it must be said that there may be cases where the agreement by the employer to reinstate is shown not to be genuine. In such a case, if the employee can discharge the onus of proving that the apparent willingness to reinstate is false, he may be entitled to damages in lieu of reinstatement. But that will not be because the employee has opted for damages instead of reinstatement. It will be because the employer will be held not to have opted genuinely for reinstatement.

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I conclude, therefore, that the Tribunal erred in law in concluding that the respondent was entitled to what it called "future damages". It had no power to offer him the choice of reinstatement or damages. Once he refused reinstatement, any loss he suffered thereafter was self-inflicted. It was not a loss flowing from the wrongful action of BHP.

Accordingly, the appeal must succeed. Normally, costs would follow the event. However, I am concerned that BHP has not treated the respondent fairly with regard to interest on his "back pay". The matter is not before us and we cannot therefore make an order. But in the circumstances I would decline to make any order as to the costs of the appeal.

The appeal is allowed, with no order as to costs. The order of the Tribunal awarding the respondent "prospective damages equivalent to his net salary per month inclusive of annual salary increases as at 7 February 1998, being the date from when he was entitled to reinstatement, for a period of three (3) years" is set aside.

Muchechetere JA: I agree.

Sandura JA: I agree.

Stumbles & Rowe, appellant's legal practitioners

MANYONDA & ORS *v* POSTS & TELECOMMUNICATIONS CORPORATION 1999 (2) ZLR 81 (HC)

Citation	1999 (2) ZLR 81 (HC)
Case No	Judgment No. HH-155-99
Court	High Court, Harare
Judge	Adam J
Heard	June 17, 1999
Judgment	August 4, 1999
Counsel	W T Manase, for the applicants A P de Bourbon SC, with him P Nherere, for the respondents
Annotations	None

Civil application

Flynote

Administrative law - review - application for - domestic remedies available under relevant legislation - such

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remedies should be exhausted before applying to court, unless special circumstances exist

Headnote

The applicants were all employees of the respondent Corporation. They had taken part in a series of strikes which had occurred over a period of seven months. Regulations had then been enacted in terms of the Presidential Powers (Temporary Measures) Act. Acting in terms of these regulations, the respondent summarily discharged the applicants. The regulations allowed an employer to dismiss summarily on the grounds that an employee had taken part in unlawful collective job action, and to do so without seeking the approval that would otherwise be required under the labour legislation. The regulations provided that aggrieved employees could seek redress from a labour relations officer or, if the contract had been terminated under a registered code of conduct, from the Labour Relations Tribunal. Instead they brought an application for common law review. They also argued that the respondent should have complied with the provisions of the relevant code of conduct. The respondent argued that the applicants should have exhausted their remedies under the regulations before seeking review.

Held, that the regulations gave an employer two options: one was to dismiss summarily; the other was to apply the provisions of the code of conduct.

Held, further, that where domestic remedies provide redress and the unlawfulness alleged has not been undermined by the domestic remedies, the applicants should exhaust the remedies unless there are good reasons or special circumstances for applying to the court. The unlawfulness alleged by the applicants was not undermined by the domestic remedies and there were no special reasons in this case for applying to the court for review.

Cases Considered

Cases cited:

Chisipite School Trust v *Clarke* HH-139-99

Girjac Svcs (Pvt) Ltd v *Mudzingwa* 1999 (1) ZLR 243 (S)

Lawson v *Cape Town Municipality* 1982 (4) SA 1 (C)

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

Case Information

W T Manase, for the applicants

A P de Bourbon SC, with him *P Nherere*, for the respondents

Judgment

Adam J: The first applicant and another 237 with supporting affidavits (Annexure A1 to A43; A45 to A170 and A188 to A255) seek an order setting aside their dismissal and reinstatement from the date of such dismissal with no loss of salary and benefits together with costs.

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Collective job action occurred in April 1998, recurred in September 1998, again on 16-21 December 1998, 28 January to 12 February 1999 and on 27 April 1999. Thereafter, on different dates after 30 April 1999, all the applicants received a form letter indicating that the respondent, acting in terms of s 8(1) and (2) of the Presidential Powers (Temporary Measures) (Labour Relations) Regulations 1998 SI 368A of 1998 (hereinafter referred to as SI 368A of 1998), had summarily discharged each of them from employment effective from 30 April 1999. The grounds of discharge were that each of them (as a member of the PTC Engineers and Technicians Workers' Committee) organised, sanctioned and participated in an unlawful collective job action which culminated in acts of sabotage and vandalism to some of the respondent's telecommunication installations countrywide. They were all reminded that they were well aware and had been formally advised on a number of occasions, both by the respondent and by the Department of Labour, that they are a part of an essential service and as such precluded from partaking in any form of collective job action.

The court application gave the grounds for review as follows: (a) the decision to dismiss was fraught with gross irregularities and illegal, in that the respondent did not comply with the procedures laid down in the registered employment code of conduct in dismissing each of the applicants; (b) additionally and alternatively, the principles of natural justice, and particularly the *audi alteram partem* principle, had been violated in relation to each of the applicants, in that the purported dismissal had been carried out without giving each of the applicants the right to present their own case; and (c) further, alternatively and in addition to the other grounds, the decision to dismiss each of the applicants from their employment had been so outrageous in its defiance of logic and accepted standards that no reasonable person who had applied their mind to it would have made or come up with such a decision. Accordingly, the decision had been irrational or grossly unreasonable. The applicants assert that s 8(1) of SI 368A of 1998 only gives the power of summary dismissal to an employer if there is no applicable registered code of conduct.

SI 368A of 1998 defines "unlawful collective action" and makes reference to s 104(3) of the Labour Relations Act [*Chapter 28:01*]. Section 104(3)(a) of that Act provides that no job action may be threatened, recommended or engaged in by any employees, workers committee or trade union if the employees are engaged in an essential service.

ADAM J

Section 8(1) of SI 368A of 1998 provides that an employer may dismiss or otherwise terminate the contract of employment of an employee on the ground that the employee has engaged in unlawful collective action. Section 8(2) makes it unnecessary for an employer to obtain the necessary approval before terminating the contract of an employee in terms of s 2 of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985, SI 371 of 1985 (hereinafter referred to as "SI 371 of 1985"). Section 1A of SI 371 of 1985 indicates that ss 2 and 3 of SI 371 of 1985 shall not apply to employees to whom the provisions of registered employment code of conduct apply.

Section 8(3) of SI 368A of 1998 specifies that, for the avoidance of doubt, it is declared that an employee who is aggrieved by the termination of his contract in terms of s 8(1) may either (a)

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apply to the labour relations officer for the redress of his grievance in terms of s93 of the Labour Relations Act; or (b) appeal to the Labour Relations Tribunal, when his contract has been terminated under a registered code of conduct, as the case may be.

In its opposing affidavit, the respondent avers that the applicants have not exhausted their existing statutory remedies. The respondent accepts that its code of conduct deals with illegal strikes but it was given another avenue by SI 368A of 1998 to achieve the same objective and so was entitled to proceed by either route. In the answering affidavit, the applicants aver that the respondent should not have dismissed them in terms of s 8(1) of SI 368A of 1998 but should have proceeded and utilised the respondent's registered code of conduct and in terms of s 106 of the Labour Relations Act applied to the Minister of Labour for a show cause order.

In its heads of argument, the respondent raises a point *in limine* that the applicants should have exhausted the statutory remedies provided for in SI368A of 1998 as read with s 93 of the Labour Relations Act.

In *Girjac Services (Pvt) Ltd* v *Mudzingwa* 1999 (1) ZLR 243 (S), the respondent was employed by the appellant from 1 August 1995 as a supervisor electrician. On 5 October 1995, a security guarded recovered certain items of property belonging to the appellant hidden under the seat of the respondent's car. The respondent was arrested; he appeared before the magistrate's court on a theft charge and was remanded out of custody on his own recognisance. He did not report for work either on 7 October or any subsequent day in October 1995. His legal practitioner on 23 October 1995 wrote to the appellant informing them that his trial was set for 28 December 1995 and that he had been instructed to request that the appellant allow the respondent to continue with his employment pending finalisation of his criminal trial. The appellant responded at once declining the request made of it. Nothing further transpired until his legal practitioner wrote on 23 July 1996 advising the

ADAM J

appellant that on 18 July 1996 the respondent had been acquitted of the charge of theft, asking if the respondent could resume his duties and demanding payment of his wages from the date of his arrest. In its reply, the appellant pointed out that it had been justified in terminating the respondent's employment by reason of his absence from the workplace. Thereafter, the respondent brought an application before the High Court seeking reinstatement in employment and payment of salary with effect from 31 October 1995. The appellant in its opposing affidavit relied on the respondent's absence from the workplace as a repudiation of his contract under the common law. It also raised the issue that the respondent had adopted the wrong procedure in applying to the High Court before exhausting domestic procedures. The High Court did not consider this aspect at all. In his judgment, Gubbay CJ referred to *Tutani* v *Minister of Labour & Ors* 1987 (2) ZLR 88 (H). In that case, Mtambanengwe J set out the provisions of the Labour Relations Act 1985 and SI 371 of 1985 to emphasise that domestic remedies were provided which would have led to a proper determination of the matter. He cited *Lawson* v *Cape Town Municipality* 1982 (4) SA 1 (C) where Comrie AJ said at 6H-7A:

> "In considering the question whether, on the proper construction of a statute, judicial review is excluded or

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> deferred, courts have regard to a number of factors. Among these are: the subject matter of the statute (transport, trading licences, town planning and so on); the body or person who makes the initial decision and the bases on which it is to be made; the body or person who exercise appellate jurisdiction; the manner in which that jurisdiction is to be exercised, including the ambit of any 're-hearing' on appeal; the powers of the appellate tribunal, including its power to redress or 'cure' wrongs of a reviewable character; and whether the tribunal, its procedures and powers are suited to redress the particular wrong of which an applicant complains."

Mtambanengwe J found that the domestic remedies provided by the legislation mentioned by him were capable of providing effective redress in respect of the complaint.

In *Girjac Services supra*, Gubbay CJ found that the appellant's code of conduct specified a list of offences which included theft and absence from work for five or more consecutive days without permission or reasonable excuse and contained the grievance procedure to be followed. He held that the appellant should have followed the grievance procedure, since the common law right to accept the respondent's repudiation of his contract was no longer open to it. He regarded the termination as unlawful. He also observed at pp 9-10:

> "In *Tutani* v *Minister of Labour & Ors* 1987 (2) ZLR 88 (H), Mtambanengwe J at 95D observed that where domestic remedies are capable of providing effect 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

ADAM J

> before approaching the courts unless there are good reasons for not doing so ... I respectfully endorse it.
>
> In this matter, the procedure under s6 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 domestic remedies available to him under 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 relief sought by the respondent - namely, reinstatement and back pay - ought not to have been granted by the learned judge."

It is accepted that SI 368A of 1998 permits the provisions of s 8(1) to apply, as well as the provisions in a registered code of conduct as they relate to unlawful collective job action.

The applicants, in their heads of argument, submit that s 8(2) of SI 368A of 1998 excludes only s 2(2) of SI 371 of 1985 and does not mention s 1A. This means that when an employer who seeks to terminate a contract of employment it is obliged to comply with the provisions of the applicable registered code of conduct.

The respondent, in its heads of argument, maintained that s 8(1) restores to an employer in respect of employees involved in unlawful collective job action the common law right of summary dismissal by the insertion of s 8(2) which has made the provisions of s 2 of SI 371 of 1985 inapplicable. Further, s 8(1) was clearly intended to override registered codes of conduct since it was the employer who may dismiss, whereas in terms of a registered code of conduct it

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was a disciplinary committee and not the employer who would determine on the issue of dismissal for unlawful collective job action. It was also submitted on behalf of the respondent that s 104(3)(a) of the Labour Relations Act indicates that no collective job action may be engaged in by any employer if those employees are engaged in an essential service. "Essential service" according to s 102(f) means any communications services. Further, it was submitted on behalf of the respondent that s 5 of the Presidential Powers Act [*Chapter 10:20*] provides that Regulations made under that Act shall, to the extent of any inconsistency, prevail over any other law to the contrary. Accordingly, to the extent that any law could be so interpreted as requiring employees who have engaged in unlawful collective job action to be dealt with under registered codes of conduct, that law is inconsistent with SI 368 of 1998 and is to the extent of such inconsistency, invalid.

It is common cause that the applicants were dismissed in terms of s 8(1) of SI 368A of 1998. It is also clear that s 8(3) declares that employees aggrieved

ADAM J

by the termination of their contracts of employment in terms of s 8(1) may: (a) apply to a labour relations officer for the redress of their grievances in terms of s 93 of the Labour Relations Act; or (b) appeal to the Labour Relations Tribunal where their contracts have been terminated under a registered code of conduct, as the case may be.

The respondent was correct in stating in its opposing affidavit that SI 368A of 1998 recognised two routes open to an employer with a registered code of conduct when dealing with an alleged unlawful job action on the part of its employees which is either to apply the provisions of s 8(1) of SI 368A of 1998 or to apply the provisions of the registered code of conduct dealing with unlawful collective job action.

The respondent's registered code of conduct, in clause 8, under category 4 offences ("gross misconduct") included "instigating and/or taking part in an included unlawful job action" which was to be handled in terms of the Labour Relations Act. This means that Part Xlll of the Labour Relations Act was brought into play and so the Minister of Labour, in terms of s 106(1), upon the application of the respondent, may issue a show cause order. In terms of s 107(1) on the return day the appropriate authority (the labour relations officer) shall inquire into the matter and shall afford the parties concerned an opportunity of making representations and in terms of s 107(2) may issue a disposal order. In terms of s 110, any person aggrieved by a show cause order or a disposal order may appeal to the Labour Relations Tribunal.

In *Chisipite School Trust* v *Clarke* HH-139-99, this court held that the Labour Relations Act defined the word "dispute" widely as meaning a dispute relating to any matter concerning employment which is governed by that Act and that s 93(1)(b) of that Act allowed a labour relations officer, upon reference to him by any person of a dispute, after giving both parties an opportunity to be heard, to make such determination in regard to the dispute as may be just in the circumstances.

Where domestic remedies provide effective redress in respect of the complaint and where the

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unlawfulness alleged has not been undermined by the domestic remedies themselves, the applicants should exhaust such remedies unless there are good reasons or special circumstances for applying to this court.

The applicants have not shown in their affidavits that the procedure laid down in s 8(3) of SI 368A of 1998 which provided for a labour relations officer in terms of s 93 of the Labour Relations Act to redress their grievances, was not capable of affording the applicants effective redress. Section 97 of that Act makes provision for an appeal to the Labour Relations Tribunal. The unlawfulness alleged by the applicants cannot be said to have been undermined by such a remedy. I should point out that the procedure the

ADAM J

applicants have advocated that the respondent should have adopted would, in terms of s 107(1) of that Act required the labour relations officer to inquire into the matter and with approval from such an officer to the Labour Relations Tribunal. Furthermore, no good reasons or special circumstances have been advanced by the applicants for applying to this court.

It follows that this application cannot succeed. As for costs, it has not been shown by the respondent that the issues raised in this application were of such a nature or complexity which required the services of two legal practitioners.

Accordingly, the application is dismissed with costs for one legal practitioner to be paid by the applicants, jointly and severally, one paying the others to be absolved.

Manase & Manase, applicants' legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

SILVER TRUCKS (PVT) LTD & ANOR *v* DIRECTOR OF CUSTOMS & EXCISE (2) 1999 (2) ZLR 88 (HC)

Citation	1999 (2) ZLR 88 (HC)
Case No	Judgment No. HH-162-99
Court	High Court, Harare
Judge	Smith J
Heard	July 30, 1999
Judgment	August 6, 1999
Counsel	D Mhiribidi, for the applicants Mrs J Zindi, for the respondent

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Annotations None

Civil application

Flynote

Administrative law - review - on grounds of unreasonableness - Director of Customs & Excise assessing duty and imposing a fine - duty being reduced after representations - failure to reduce fine proportionately grossly unreasonable

Customs and excise - fine imposed by Director for importation of goods without payment of proper customs duties - whether level of fine excessive

Headnote

Goods had been seized by the Department of Customs and Excise in respect of unpaid customs duty. The amount of duty owing had been assessed by the Director and a penalty had also been imposed, equivalent to 80% of the duty. The duty payable had subsequently been re-assessed and had been reduced to some 35% of the original figure, but the penalty had not been reduced proportionately to the duty now payable. The applicants applied to the court to set aside the Director's determination of the amount of the fine.

Held, that the court could set aside the Director's determination of the penalty fine if it were shown that the Director acted *mala fide* or out of ulterior motives or that he came to a decision which is outrageous in its defiance of logic or accepted moral standards.

Held, further, that the decision to retain the fine at the original level after the Director had been compelled to reduce the duty claimed from the applicants to the extent he had amounted to a decision which was outrageous in its defiance of logic or accepted moral standards. There was also substantial evidence tending to show that officials in the Department of Customs had not been impartial and unbiased in their dealings with the applicants. Justice and transparency required that the court order a reduction of the fine proportionately.

Held, further, that having regard to the circumstances surrounding this matter, it was appropriate that the court should grant the application for leave to execute the court order, notwithstanding any appeal that may be lodged by the Director.

Cases Considered

Cases cited:

Affretair (Pvt) Ltd & Anor v *MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S)

Chiroodza v *Chitungwiza Town Council & Anor* 1992 (1) ZLR 77 (H)

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Econet (Pvt) Ltd v *Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (H)

Tenesi v *PSC* 1996 (1) ZLR 196 (H)

Case Information

D Mhiribidi, for the applicants

Mrs *J Zindi*, for the respondent

Judgment

Smith J: This is the third application that the applicants have brought against the respondent (hereinafter referred to as "the Director") in the last two months. The first application (case No. H-6456-99) concerned the agreement which the applicants reached with officials in the Department of Customs and Excise (hereinafter called "the Department") over the payment of an amount of $2218 396.70 in respect of unpaid duty and a penalty for goods that had been imported in 1997 without payment of the proper duties. Clearly, the applicants contravened the law. They could have been prosecuted but instead officials in the Department used their powers under the Customs and Excise Act [*Chapter 23:02*] (hereinafter referred to as "Chapter 23:02") to punish them. The Director obviously was not happy with the decision of his officials because they reneged on the agreement. They demanded that the applicants should pay that full amount, forthwith, and then a direction was sent out, in the name of the Director, to all collectors of customs to seize all goods imported by the applicants and hold them as a lien for the payment of the abovementioned amount. The facts and issues in that case are set out in my judgment HH-98-99.

The order that was issued in that case required the Director to assess the duty that was payable by the applicants, and any penalties, within 7 days of the date of the order (which was 9 June 1999). The Director did not comply with that order, which necessitated the second application. Thereafter, the Director assessed the duty payable on the goods that had been seized or embargoed as amounting to $6225684.75 and then imposed a fine of $5million. The applicants wrote to the Director objecting to the amount of duties claimed. As a result, the Director reduced the demand for duties from $6225684.74 to $2486083.86, but refused to reduce the fine. When the applicants appealed, the Director rejected the appeal. He pointed out that in terms of s 206 of [*Chapter 23:02*] he could impose a fine not exceeding treble the duty-paid value of the goods; in this case the duty-paid value was just over $19million yet the fine he had imposed was less than half that.

The applicants have complained in their earlier applications that the Director is biased against them and has harassed them persistently. They claim that the Director is obviously trying to close them down. They have brought this application to review the decision of the Director in relation to the fine that he imposed. Their claim is as follows. When the Director assessed the duty that was payable as being $6225684.75, he invited the

SMITH J

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applicants to pay a fine of $5million, which amounted to 80% of the duty payable. When he reduced the claim for duty to $2486083.86, he should have also reduced the fine proportionately. That would mean that the fine should have been reduced to $1988867.09. They seek an order reducing the fine to that level, being 80% of the duty payable. The Director opposes the application. His submissions are as follows. Import tax is payable on all imported goods in terms of the Sales Tax Act [*Chapter 23:08*] but is deferred and then becomes payable after the goods have been sold. The reduced amount of $2486083.86 was therefore arrived at as a result of this deferment. It is not entirely correct for the applicants to say that they are not obliged to pay the import tax or sales tax. In terms of s 200, as read with s 206, of [*Chapter 23:02*], the Director may impose a fine not exceeding treble the duty paid. In this case the duty paid value of the goods is just over $19million. The fine of $5 million is just 26% of the duty paid value and cannot be said to be unreasonable because the offence committed is of a serious nature. The applicants had smuggled goods into the country and the total revenue prejudice to the State is $6225684.75. Had officers of the Department not carried out a thorough investigation into the activities of the applicants, the State would have lost this revenue. The level of the fine was influenced by the seriousness of the offence committed.

The three applications in this case have all been brought as matters of urgency. The applicants allege that the seizure and detention for so long a period by the Director of the goods they have imported this year has crippled their business and may well result in them closing down and 67 employees losing their jobs. Those allegations have not been denied by the Director. The first application was filed on 10 May, with the opposing papers being filed on 18 May, and the matter was heard on 20 May. My judgment and order was handed down on 9 June - HH-98-99. It required the Director to assess the duty payable on the goods and any penalty within 7 days of the date of the order. That meant he should have done so by 18 June. Although it was recorded on the Motion Roll of 9 June that the judgment was being handed down, the Director was not aware of the order that was issued until 15 June. The applicants' legal adviser sent him a letter dated 21 June demanding the release of the goods. The Director did not bother to approach the court to explain what had happened and to purge his default. Instead, he decided that he would assess the duty and penalty as ordered within 7 days from 21 June. He should have sought the leave of the court to do so and not have arbitrarily fixed a date selected by him. He then assessed the duty and arrived at a figure of $6225684.75. When this was queried by the applicants, the amount was reduced to $2486083.86. The Director explains that that was because "the correct position as regards import tax" is that it is deferred and then becomes

payable after the goods are sold. It is clear from the papers that the applicants have been importing goods for some time and so are well known to officials of the Department. That being the case, why did the officials not ensure that "the correct position" was followed in this case from the very beginning? Why attempt to collect the additional $3.2 million when it was not due? Furthermore, the Director is only partly correct when he says, in his opposing affidavit, that the reduced amount was arrived at as a result of the deferment. The applicants were advised, by letter dated 25 June, of the duty and "sales tax" they were required to pay. The import tax was queried, as was the duty, because the engines that were seized were identical but despite that

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different values were used for the lots that were seized. In the letter from the Department dated 2 July 1999, which was addressed to the first respondent, it was said by a Mr Sibanda, who signed the letter, "After making a physical check, I have established that 29 of the engines are type DHT 825 and four are DRX type. I have revalued the engines in line with their different types and also taken note of the fact that you have a Tax Registered Operation number". After stating that the duties previously advised had been amended to reflect those changes and the fact that "income tax (*sic*) is now deferred", he said that the duty payable was $2486083.86. Thus there was a reduction in the amount of duty claimed of approximately $570000, in addition to the reduction by $3171903.19 because payment of import tax was not due. Considering that the goods have been in the possession of the Department for many months, most of them having been seized in January and February and some in March, it seems strange that the officials had not inspected the goods and valued them properly before assessing the duty payable. The chapter of woes faced by the applicants in their dealings with the Department has extended to this application. The Director's opposing affidavit was, for some unexplained reason, served on a firm of legal practitioners which is not the firm retained by the applicants. That caused an unnecessary delay of three days.

In his opposing affidavit, the Director claims that because the applicants had smuggled goods into the country the total revenue prejudice to the State is $6225684.75. That statement is based on the assumption that because the applicants had not paid the customs duty, they would not have paid sales tax on the goods when they were sold. He has not given any basis for this assumption. With regard to the *bona fides* of the officials in the Department, I could point out that in the first application (H-6456-99) the Director and Mr Sibanda claimed that the applicant's goods were seized because they had not been lawfully imported and yet, before they were seized, a memorandum, purporting to be issued by the Director, had been sent to all collectors of customs requiring them to hold, as a lien, all imports by the applicants.

SMITH J

I agree with the submission by Mr *Mhiribidi* that the court should set aside the Director's determination of the fine if it is shown that the Director acted *male fide* or out of ulterior motives or came to a decision which is outrageous in its defiance of logic or accepted moral standards - see *Tenesi* v *Public Service Commission* 1996 (1) ZLR 196 (H). See too, in this regard, *Affretair (Pvt) Ltd & Anor* v *M K Airlines (Pvt) Ltd* 1996 (2) ZLR 15 (S) and *Chiroodza* v *Chitungwiza Town Council & Anor* 1992 (1) ZLR 77 (H). In the *Affretair* case, at p 21, McNally JA said:

> "It seems to me, to put it in simple terms, that the role of the court in reviewing administrative decisions is to act as an umpire to ensure fairness and transparency. 'Fair' was Lord Denning's favourite word in his decisions on administrative matters. 'Transparency' is a more modern but equally valuable word which, I venture to suggest, could usefully be used in such decisions to connote openness, frankness, honesty and the absence of bias, collusion, favouritism, bribery and corruption, and underhand dealings and considerations of any sort.
>
> The duty of the courts is not to dismiss the authority and take over its functions, but to ensure, as far as humanly possible, that it carries out its functions fairly and transparently. If we are satisfied it has done that, we cannot interfere just because we do not approve of its conclusion. But at the other end of the scale, if the conclusion is hopelessly wrong, the courts may say that it could only have been arrived at by reference to improper considerations or by failure to refer to proper considerations. In these cases we reason backwards from the effect to the cause. We say 'the result is so bizarre that the process by which it was reached must have been unfair or

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lacking in transparency'."

In my view, the decision of the Director to retain the fine at a level of $5million after he has been compelled to reduce the duty claimed from the applicants to the extent that he has in this case, can, at best for the Director, be said to be too outrageous in its defiance of logic or accepted moral standards. There is also substantial evidence which tends to show that officials in the Department have not been impartial and unbiased in their dealings with the applicants. I consider that justice and transparency require that the fine should also have been reduced when the amount of duty demanded was reduced. A fine of $2million would be appropriate in the circumstances.

The applicants have applied for an order that they be given leave to execute any order I may grant notwithstanding any appeal that may be lodged by the Director. The circumstances in which such an order should be granted are set out in *Econet* v *Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (H). Having regard to the fact that the Director decided to appeal against the order granted in the first application before even reading the judgment and also to the history of the dealings between the applicants and officials of the Department, the fears that the Director will do the same in this case are not unreasonable. I consider that the preponderance of equities in this case favour the grant of the order sought.

SMITH J

It is ordered that -

1. The fine of $5million imposed by the Director on the applicants is set aside and a fine of $2million is substituted;
2. If the duty of $2486083.86 plus the fine of $2million is paid by the applicants by 15 August 1999, the Director shall forthwith release the goods which have been seized or embargoed.
3. This order shall remain effective notwithstanding any appeal that may be lodged by the Director.
4. The respondent shall pay the applicants' costs.

Mhiribidi, Ngarava & Moyo, applicants' legal practitioners

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

MASANGA & ANOR *v* ZITA & ANOR 1999 (2) ZLR 94 (HC)

Citation 1999 (2) ZLR 94 (HC)

Case No Judgment No. HH-167-99

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Court	High Court, Harare
Judge	Gillespie J
Heard	October 9, 1998; January 12, 1999; February 15, 1999; February 16, 1999
Judgment	August 18, 1999
Counsel	V Chaponda, for the plaintiffs P C Paul, for the defendants
Annotations	None

Civil action

Flynote

Legal practitioner - conduct and ethics - practitioner acting in forma pauperis - duties - may not withdraw from case without leave of court - duty to act with professionalism and courtesy

Headnote

A lawyer who represents a client *in forma pauperis* is expected to act with professionalism and courtesy to client, court and fellow practitioner. He is not allowed to withdraw from the case without the leave of the court. He is expected to appear in court on the dates on which the case has been set down, unless excused by the court, on prior application. Where he fails to appear, the wasted costs may be borne by him *de bonis propriis*.

Cases Considered

Cases cited:

Chiremba v *Barkhuizen* 1998 (1) ZLR 200 (H)

Case Information

V Chaponda, for the plaintiffs

P C Paul, for the defendants

Judgment

Gillespie J: One of the disadvantages of the system of legal representation *in forma pauperis* is this horrifying spectre. A litigant whose impecuniosity is matched only by her litigiousness in the absence of good cause, represented by a lawyer whose lack of remuneration is exceeded by far by his lack of motivation and competence, harrying through court a defendant, the strength of whose case is outweighed by his lack of expectation of recovery of costs. The law does, provide a system of safeguards against this abuse. 1(1) In many cases, however, as in this, no-one thinks to resort to them.

The merits of the dispute between the parties are quite readily disposed of. The first plaintiff

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acquired a mill in July 1991. She installed it at her communal home and ran it virtually day in and day out, earning an income from milling the grain of local producers. By the end of 1992, the machine

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was becoming unreliable. Sometime in 1993, the first plaintiff requested the services of the second defendant to repair the machine.

By May 1993, the machine was overhauled. Its return was tendered to the first plaintiff against payment of the second defendant's invoice for $6199.33. The first plaintiff protested the charges. She consulted the manufacturers of the machine for an opinion on the reasonableness and correctness of the invoice. She complained to the Consumer Council of Zimbabwe; the Citizens' Advice Bureau; and the Ministry of Industry and Commerce. All intervened in one way or another.

The second defendant produced its invoice to these various organizations. It produced its job cards and supplier's invoices. It defended its position and enforced a lien on the mill pending payment of its invoice. It showed a willingness to negotiate. Through the intervention of an official of the Ministry it compromised its claim with the plaintiff. The first plaintiff did not abide by the compromise.

Instead she chose to make application to this court for an order of the return to her of the machine. She claimed that there was never any contract between the parties for the overhaul of the machine. She claimed that the defendant quoted a fixed price of $1000 to do certain limited work on the machine. She claimed that the defendant had not done the work it claimed; that its invoice was in part, if not largely, fictitious; and there even if it were genuine the charges were excessive. A "scattergun" allegation. The application was converted to a trial action. The second plaintiff is the husband of the first. The first defendant is the proprietor of the second.

[*His Lordship analysed the evidence and continued:*]

The second defendant has not sought any relief of substance. It has moved only the dismissal of the claim. The first defendant has similarly moved, on the additional ground that he is not vulnerable in his personal capacity. It seems to be unanswerable that no claim lies against the first defendant. In addition, in view of my foregoing finding, the claim against the second defendant, for delivery of the machine, is untenable.

I have, however, given thought to ordering alternative relief to the plaintiffs. It seems to me, that instead of simply dismissing the claim, I can in justice order delivery of the machine as against payment of the amount due to the second defendant. Although neither party has prayed this relief, I consider such an order would be in the interests of justice for the following reasons.

The plaintiffs, suing as paupers, were appallingly badly represented. Simply to abort the claim by dismissing it, leaving no finality between the

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GILLESPIE J

parties, would compound the injustice to her wrought by her legal adviser. The second defendant, too, would prefer the finality of a finding as to the amount due to it, rather than a bland decision dismissing the existing claim, which leaves it in the position where it must sue afresh to establish the amount due to it. The second defendant, therefore, although having made no claim in reconvention, has, as I understand Mr *Paul*, consented to my ordering alternative relief, providing for the return to the plaintiff of the machine as against payment by the plaintiff of such amount as may be found to be owing. Such an order would be justified as alternative relief on the plaintiff's pleading. Rule 110 of the High Court Rules provides that:

> "it shall not be necessary to ask for general or other relief which may always be given as the court may think just as if it had been asked for." 2(2)

The alternative relief which I propose making is fairly made out on the affidavits, which stand as pleadings in this converted application. It is lesser relief to that prayed, rather than a totally different cause of action for the plaintiff. I therefore consider granting it to be well within the court's discretion.

Granting this alternate relief is also in the interest of justice. It brings finality and certainty to the dispute. It does not conduce to further litigation. In the event of the plaintiff's failure to pay the amount due, in terms of the order, the defendant will be entitled to execute the judgment, by due process, and to attach the machine for sale in execution. The plaintiff, likewise, will be able to enforce delivery of the machine as against payment of the amount due.

I have found that the second defendant did extensive work on the machine. It did that work, however, in the absence of a contract. I have no doubt it did the work believing it to have been requested and to be necessary. Equally, however, it would seem that the first plaintiff believed she had to authorise major work. In those circumstances, the second defendant is entitled to a lien for compensation for his expenditure in improving the machine, and to that compensation. 3(3) The plaintiff's claim for return of the machine must be subject to those rights.

[*His Lordship then calculated the amounts and continued:*]

Before I conclude the judgments, however, some animadversions on the

GILLESPIE J

conduct of Mr *Chaponda* are required. The following aspects of apparent incompetence and unprofessional behaviour in the conduct of this litigation must be identified.

1. It was the sheerest folly in the first place to permit the plaintiffs to sue on the basis they did rather than at least securing for them the return of the machine by payment, under protest, of the amount claimed. Even without the benefit of hindsight, the course adopted was calculated to deprive the plaintiffs of the use of the machine for the duration of the litigation. This duration was, in the event, five years. The loss of profitable employment of

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the machine is a very severe loss and, *prima facie*, is due to inadequate consideration given by the plaintiff's lawyer.

2. The choice of application procedure was completely inappropriate in the face of the clear factual dispute, and served only to extend litigation and increase expense or loss connected with that delay.

3. This was first drawn to the applicant's attention by Ziyambi J on 15 November 1995, on the first set down of the matter as an application, and the matter was then postponed.

4. Mr *Chaponda* then, without seeking any directions as to proceedings, simply pretended to request a pre-trial conference and had to be told by a judge (Robinson J) to obtain the appropriate order on application.

5. Having secured such an order from Mubako J on 21 May 1997, *Chaponda* again simply requested a pre-trial conference and had once again to be told by a judge of the then requirement for prior discovery.

6. Having muddled his way through proceedings thus far, *Chaponda* finally found himself with a set down date on my continuous roll for 19 October 1998. He did not appear. His reason? He had renounced agency sometime beforehand. Since there were other complications, I did not hear the matter and simply took the opportunity of indicating privately to *Chaponda*, in chambers, of the duties required of a lawyer appointed to represent a litigant *in forma pauperis* and of the inability of such an one to renounce agency without leave of court. I expressly informed him that the next set down would be some months away and that unless he were excused by the court, on his prior application, I would expect his attendance at a future court hearing.

7. The next hearing was set for 12 January 1999. The registrar mistakenly sent the notice to the plaintiff, rather than her lawyer, being misled by the renunciation of agency still on file. The plaintiff nevertheless took the notice to *Chaponda*, who responded, less than week before the trial, with an application for his withdrawal, which application

was not drawn to my attention. When the matter was called, *Chaponda*, despite the fact that no order had been given in his application, simply failed to attend. For this, I rebuked him once again, and in open court, after he presented himself at my direction. I required him to give reasons why he should not be committed for contempt or referred to the Law Society. He sought to deflect the blame onto a Mr Matizanadzo of Coghlan, Welsh & Guest. Mr Matizanadzo's involvement was peripheral. He has assisted *Chaponda* as an accommodation (*Chaponda* being a country attorney) at an early stage and had ceased to have anything further to do with the matter after it was converted to a trial. *Chaponda* sought, much to Mr Matizanadzo's righteous indignation (I called him too to my chambers, after the court proceedings), to suggest that Mr Matizanadzo had withdrawn unlawfully and should have been expected to conduct the litigation. Once again I was obliged to remind *Chaponda* of his duties of professionalism and courtesy to client, court and fellow legal

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practitioner. Since the errant attorney was unprepared, I postponed the matter ordering *Chaponda* to pay wasted costs *de boniis propriis,* taking no more drastic action than that. Mr *Paul*, it should be mentioned, in a display of professional courtesy which should have put *Chaponda* to shame, undertook to raise no charge for his own wasted time.

8. When the matter was set down for 15 February 1999, I received an anxious embassy, the week beforehand, from Mr Matizanadzo. He had just been given to understand by *Chaponda* that *Chaponda* expected him to undertake the trial but had not previously asked Matizandazo to accommodate him nor had he instructed him properly. I instructed both my clerk and Mr Matizanadzo to convey to *Chaponda* - who had not persisted in any application for his withdrawal - that unless he presented himself when the matter was called, ready to proceed, he would have to face the consequences. Only thus threatened was this man finally induced to do his duty.

9. But not to persevere to the end. At the end of the first day, and the plaintiffs' case, both parties indicated a desire for rapprochement and, to this end, an examination of the machine in each other's presence. I adjourned proceedings to the following morning with the direction that in the event of settlement an order by consent would be moved immediately, but failing compromise I would proceed forthwith to the defendant's case. The following morning, for the third time out of four, *Chaponda* failed to appear without explanation or excuse. His clients, too, were in default. On Mr *Paul*'s assurance that no compromise had

been reached, I recorded the plaintiff as in default and heard the evidence for the defendants and reserved judgment.

10. His conscience must have pricked him, because three months later *Chaponda* pretended to file a "report". I have disregarded this as evidence but mention it only as an indication that from its contents, *Chaponda* well knew that, after initial apparent agreement, a settlement had broken down and that *Chaponda* had caused a message to that effect to be communicated to Mr *Paul*. There is, therefore, no excuse whatsoever, nor even explanation, far less apology, for the default.

Chaponda has shown the grossest discourtesy and unprofessionalism. He has done so despite specific warning concerning his unacceptable behaviour and the consequences of contempt. I do not know whether he reported to the Law Society, as was his duty, the adverse order of costs I originally made. In any event, I consider that the only way to deal with this man is now to refer his conduct to the Law Society. I do so by ordering that this judgment be placed before the secretary of that organisation.

Finally, as to costs. It emerged from Mr *Paul*'s cross-examination of the first plaintiff that the plaintiffs are probably not indigent in the sense required to qualify them for legal assistance. Even if they are, a litigant's status as pauper is not necessarily a protection against an adverse order of costs. In my view, costs must follow the incidence of substantial success. The plaintiffs

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have not achieved substantial success since they cannot recover the machine without payment. The first defendant should never have been joined (this may well have been another of *Chaponda*'s misjudgements) and in being exonerated is entitled to his personal costs, if any. The second defendant has achieved mixed success, having resisted the claim for recovery of the machine but not having proven its case to its full extent. It had also benefited by a finding on its dues without the need for further litigation. My sense of justice, therefore, directs me to an order that the plaintiffs and the second defendant pay their own costs, save for the wasted costs already ordered in second defendant's favour.

It is therefore ordered that:

1. The claim against the first defendant is dismissed with costs.

2. The second defendant shall return to the first plaintiff the diesel mill engine repaired by it as against payment by the first plaintiff of the sum of $3 977.89 together with interest thereon from the date of judgment; provided that in the event that tender of payment is not made within three months hereof the second defendant shall be entitled to sue out a writ of execution on this judgment for payment of the said sum with accrued interest.

3. The plaintiffs and the second defendant shall pay their own costs,

GILLESPIE J

provided that this order shall not be understood as detracting from paragraph 1 hereof nor from the exemplary order of costs made against Mr *Chaponda* on 12 January 1999.

4. The registrar shall deliver a copy of this judgment to the Secretary of the Law Society.

Mhaka & Associates, plaintiffs' legal practitioners

Wintertons Holmes & Hill, defendants' legal practitioners

TEMISA HLDGS (PVT) LTD & ORS *v* REGISTRAR, PENSION & PROVIDENT FUNDS & ORS 1999 (2) ZLR 101 (HC)

Citation	1999 (2) ZLR 101 (HC)
Case No	Judgment No. HH-168-99
Court	High Court, Harare
Judge	Chinhengo J
Heard	July 14, 1999
Judgment	August 18, 1999

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Counsel W Ncube, for the applicants
R Y Phillips, for the respondents

Annotations None

Civil application

Flynote

Company - scheme of arrangement with creditors - scheme sanctioned by court - effect - not an order of court - effect is that of a contract between the parties to the scheme - party - who is party to scheme - person on whom whole scheme depends - even if not a party, is bound by scheme

Headnote

The first applicant, a company, agreed to an arrangement whereby it was to inject capital into another, ailing company, in return for the shares in that other company. On the strength of this, the other company entered into a scheme of arrangement with its creditors; this scheme was sanctioned by the High Court. Before the applicant company had carried out its undertaking to inject capital, the directors of the ailing company agreed that the company's pension fund should be dissolved and made the necessary application to the Registrar, who authorised the winding up of the pension fund. The first applicant sought to set aside the Registrar's order, on the grounds that the directors were no longer empowered to act on behalf of the ailing company.

Held, that the fact that the court had sanctioned the scheme of arrangement did not mean that the scheme became an order of court. The scheme was a contract; the parties to it were bound by its terms and expected to meet their obligations under it.

Held, further, that as the whole scheme depended on the undertakings made by the first applicant, the first applicant was bound by the scheme, even though it was not specifically mentioned in the court's order sanctioning the scheme of arrangement.

Held, further, that as the first applicant had not met its obligations under the scheme of arrangement before the directors decided to wind up the pension fund, the directors were entitled to act as they did. The dissolution of the pension fund was properly sought and approved.

Cases Considered

Cases cited:

Cohen NO v *Neil & Anor* 1975 (3) SA 963 (W)

Cyrildene Heights (Pty) Ltd Ex p 1966 (1) SA 307 (SWA)

de Wet NO Ex p: in re *Mackville Motors (Pty) Ltd (in liq)* 1971 (1) SA 256 (W)

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Parker v *W G Kinsey & Co (Pvt) Ltd* 1987 (1) ZLR 188 (S); 1988 (1) SA 42 (ZS)

Case Information

W Ncube, for the applicants

R Y Phillips, for the respondents

Judgment

Chinhengo J: On 29 October 1998, Chatikobo J issued a provisional order in the following terms:

> "That the respondents show cause to this Honourable Court why a final order should not be made in the following terms:
>
> 1. That the first respondent's decision to authorise/approve the dissolution of the Industrial Steel and Pipe Staff Pension Fund ("the Pension Fund") be and is hereby set aside.
> 2. That it be and is hereby declared that the second and third respondents are no longer Trustees of the Pension Fund.
> 3. That second and third respondents be and are hereby ordered to hand over all records, files and books of the Pension Fund to the second applicant of the new Trustees.
> 4. That failing compliance with paragraph 3 above, the Deputy Sheriff be and is hereby authorised and directed to seize the records from the second and third respondents and hand them over to the second applicant.
> 5. That the first, second and third respondents shall pay the costs of this application.
>
> INTERIM RELIEF GRANTED
>
> 1. Pending the final determination of this matter the first, second, third and fourth respondents be and are hereby interdicted from doing anything towards the dissolution of the Pension Fund.
> 2. That the Provisional Order together with all supporting documents shall be served upon each respondent."

The matter now comes before me for the confirmation of the provisional order.

The applicants' founding affidavit is deposed to by Mr Leo Mugabe, who states that he was the Chairman and Chief Executive of the first and second applicants and Chairman of the Board of Trustees of the third applicant with effect from 16 April 1998 when a scheme of arrangement concerning the second applicant was sanctioned by this court. The first respondent is the Registrar of Pension and Provident Funds ("the Registrar"). He approved the dissolution of the third applicant, the Industrial Steel and Pipe Staff Pension Fund ("the Pension Fund"). He has not opposed the confirmation of the provisional order and has undertaken to abide by the decision of this court. The second and third respondents were trustees of the Pension Fund, having been appointed by the second applicant before the scheme of arrangement was proposed or sanctioned by this court. The fourth respondent ("the administrator") is the administrator of the Pension Fund.

The situation that has given rise to this application is that during the period 1993 to 1997 the

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second applicant suffered certain financial problems. As at March 1997, the second applicant was technically insolvent, with accumulated losses standing at $60 million. It had either to go into voluntary liquidation or find an equity investor. Its financial position was so bad that from November 1996, the second applicant was unable to pay the employer's

CHINHENGO J

contribution to the Pension Fund. The Pension Fund was incurring administrative costs which were not matched by any contributions. Because of all these difficulties, the second applicant considered a scheme of arrangement with its creditors. The first such scheme was attempted with a company known as Profeeder (Pvt) Ltd but the scheme collapsed. In October 1997, the first applicant made an acceptable offer and a scheme of arrangement with it was approved by the creditors. It was sanctioned by Gillespie J by order dated 30 March 1998. The order provides that:

" 1. The scheme of arrangement, filed of record as Annexure "A" in Case No. H-11615-97, be and is hereby sanctioned by this Honourable Court in accordance with the provisions of s 191(2) of the Companies Act [*Chapter 24:03*].

2. A copy of this order, together with the scheme of arrangement, shall be served upon the Registrar of Companies.

IT IS DECLARED THAT with effect from the date of service of a copy of this order in accordance with the provisions of paragraph 2 above, the scheme of arrangement, shall be binding on all the creditors and members of the Applicant and on the applicant itself."

A copy of the order, together with the scheme of arrangement, was served upon the Registrar of Companies on 16 April 1998. In terms of the order, therefore, the scheme of arrangement became binding on the creditors, members of the second applicant and the second applicant itself with effect from that date.

The second applicant was owned by Industrial Steel and Pipe Employees Trust Limited as sole shareholder. It had a board of directors whose chairman was Mr Cephas G Msipa. The second applicant had its own board of directors, also chaired by Mr Cephas G Msipa. The second applicant had set up the Pension Fund whose trustees were appointed by it and by employee members of the Pension Fund in terms of the fund's rules. The second and third respondents were appointed by the second applicant and together with other trustees appointed in terms of the rules of the Pension Fund, they comprised the board of trustees of the Pension Fund before the scheme of arrangement. I shall refer to each of these three boards, individually or collectively as the context requires, as the old board of directors or the old boards of directors.

In terms of the scheme of arrangement, the first applicant was to buy the shares in the second applicant for a nominal consideration of $10. The shares were 16 million in number and of 50 cents each. Of this number, 15 139 034 shares were issued and fully paid up. The only secured creditor, Climax Investments (Pvt) Ltd, which was owed about $23000 000, agreed to reschedule the debt on certain terms. The creditors who would be classed as preferrent creditors, eg the Commissioner of Taxes was owed in excess of $16 000 000. They agreed to certain repayment terms. Concurrent creditors whose claims amounted to about $22 000 000

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agreed to share *pro rata* the

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amount available for distribution to them in the sum of $1.5 million which translated to a cash divided of 5 cents in the Zimbabwe dollar to be paid within 180 days of the sanctioning of the scheme of arrangement. In addition to the cash payment, the concurrent creditors were to be allotted 860 966 deferred shares of a nominal value of 5 cents each *pro rata* to the balance of their claims. The first applicant was to inject over $18 million into the second applicant and continue to operate all its divisions under a new company known as Stewart and Lloyds (Pvt) Ltd. There are other details of the scheme of arrangement which are not relevant to the dispute concerned in these proceedings.

With the scheme of arrangement having been sanctioned by this court, a certain amount of confusion seems to have set in. Before all the arrangements were in place, the second and third respondents, who believed that they were the lawful trustees of the Pension Fund and that the old Board of Directors of the second applicant and the old Board of Trustees of the Pension Fund were, despite the scheme of arrangement, entitled to act for the second applicant and the Pension Fund, caused the second applicant and the Pension Fund to pass resolutions in terms of which they sought the dissolution of the Pension Fund by the Registrar. In the meantime, the first applicant and its directors believed that, the scheme of arrangement having been approved, the old Board of Directors of the second applicant and the old Board of Trustees of the Pension Fund were no longer entitled to act on behalf of the second applicant and the Pension Fund but that they were themselves so entitled. Thus, according to Mr Mugabe, he verbally advised the second and third respondents that they were no longer trustees of the Pension Fund. In pursuance of such verbal advice, he wrote a letter to them on 24 July 1998, advising them that they were no longer trustees of the Pension Fund as from 16 April 1998. He held a meeting with them on 29 July 1998 and again advised them to the same effect. He avers that he also advised them of a new nomination of one of the Trustees by employees and that the second applicant would in due course appoint other new Trustees. Mr Mugabe states that at the meeting of 29 July 1998 the participants agreed to reconvene on 7 October 1998. In the meantime, says Mr Mugabe, the first applicant paid $60 000 for the employer's arrears on the Pension Fund but that cheque was returned by the administrator pending resolution of the question of new Trustees. On 6 October, he received a letter from the administrator informing him that the Pension Fund had been dissolved by the Registrar. He later received a copy of the Registrar's letter. The letter from the administrator to him reads:

> "Industrial Steel and Pipe Staff Pension Fund:
>
> Further to our discussion of 24 September 1998 at your offices where we agreed to convene

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> a Trustees meeting as at 7 October 1998, we write to advise that we have now received a formal determination from the Registrar of Pensions on this issue.

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The Registrar advises that he has approved the dissolution of this fund in terms of Rule 47 of the Fund. He further advises that the new employer should establish a new fund for employees currently employed.

The implication of this determination is that employees currently employed by Industrial Steel and Pipe who have been on the fund will have to elect to either purchase a deferred annuity with a Life Office or alternatively transfer their actuarial reserves to the new fund set up.

In view of this development, we are proposing to cancel the meeting scheduled for tomorrow i.e. 7th October 1998."

The Registrar's letter, which was addressed to the administrator reads:

"Industrial Steel and Pipe Pension Fund : Dissolution

We refer to previous correspondence and in particular to the telecommunication between Mrs Mutero of your office and Mrs Fambisayi on 23 September 1998 regarding the above issue.

Please be advised that this office has approved that the above-named fund be dissolved in terms of Rule 47 of the Fund. It is our opinion that the new employer establish a new pension fund for the employees currently employed by Industrial Steel and Pipe.

We hope that this letter will enable yourself to finalise the issue in a manner beneficial to the fund members."

It is Mr Mugabe's contention that the second and third respondents did not have the power either to dissolve the Pension Fund or to recommend to the Registrar its dissolution - they had no capacity to act for the second applicant after the scheme of arrangement was approved. He also argues that the Registrar had no legal basis upon which to approve the dissolution of the Pension Fund. Further, he argues that even if the second and third respondents had the power to act, the Registrar should not have accepted the recommendation. To him, the Registrar's decision is therefore unreasonable and unconscionable. It is unreasonable and unconscionable because it is prejudicial to the remaining members of the Pension Fund and to the second applicant, who would have to set up a new fund. He argues that the second applicant continued as a legal *persona* - it was not wound up. As such there is no basis for the Pension Fund to be dissolved. *A fortiori* there is no basis for the second and third respondents' refusal to hand over to the new Trustees the files, records and books of the Pension Fund.

In his averments, Mr Mugabe is supported by Mr Patrick Zhuwao and Mr Rongedzai Mapaike. The latter avers that the dissolution of the Pension Fund is not in the interest of its members. He states that sixty five persons are still members of the fund, that one hundred and thirty-three have either retired or died and their beneficiaries are receiving benefits from the fund and five have resigned and elected to defer their pensions.

The second and third respondents oppose the application. Despite the

length of their affidavits which match those of the applicants in that respect, the basis of their opposition is straightforward. They aver in separate opposing affidavits that the applicant became entitled to the shares in the second applicant on 16 October 1998 when first applicant met its obligations in terms of the scheme of arrangement. They therefore dispute that the second applicant was taken over by the first applicant on 16 April 1998 when the copy of the

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order sanctioning the scheme was served upon the Registrar of Companies. They dispute the averment that the old Board of Directors of the second applicant or the old Board of Trustees of the Pension Fund were disentitled to act as from 16 April 1998.

It is their case that the second applicant had from November 1996 been unable to pay the employer's contribution to the Pension Fund. When the scheme of arrangement was approved, but before the first applicant met all its obligations in terms of the scheme of arrangement, they and the old Boards were entitled to act for the second applicant and they did so act, with the result that on 9 September 1998 the Board of Industrial Steel and Pipe Employees Trust (Pvt) Ltd, the beneficial holder of shares in second applicant and the second applicant, itself each passed a resolution that:

> "the company gives written notice in terms of s 48 of the Pension Fund Rules to the Trustees of the Industrial Steel and Pipe Pension Fund to terminate the Fund."

The Board of Trustees of the Pension Fund had earlier on, on 13 July 1998, passed a resolution that:

> "At a special meeting held on 13 July 1998, the Trustees considered the current status of the fund, where the fund has not received contributions for the last 9 months. The Trustees found it in the best interests of its members to resolve as follows:
>
> 1. Should all contribution arrears for all members, including those on the retrenchment list not be paid by 27 July 1998, the Fund will be wound up immediately.
>
> 2. The Trustees empower and instruct Minet Insurance Brokers to sign all documents and do all those things necessary to give effect to this resolution."

After the resolutions of the second applicant's Board of Directors and the Industrial Steel and Pipe Employees' Trustee (Pvt) Ltd had been passed, the Board of Trustees of the Pension Fund passed yet another resolution on 15 September 1998, reiterating their resolution of 13 July 1998 relative to the dissolution of the Fund in terms of r 47. The resolution was submitted to the Registrar who then approved the dissolution of the Pension Fund.

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

Various issues are raised in the bulky papers filed by the parties to this application. In my view, however, the important issues can be narrowed to just a few. The issues are whether the order of this court sanctioning the

scheme of arrangement, after its service upon the Registrar of Companies, created rights of ownership for the first applicant over the second applicant. Did the payment for the shares in June 1998 and the fact that the receiver had in his possession the share certificates as at 7 July 1998 confer on first applicant the right of ownership of the second applicant? If the answers to both these questions are in the positive then it would appear that the old Boards of the second applicant and the Pension Fund and *a fortiori* the Trustees did not have the authority to act on this matter and to recommend to the Registrar the dissolution of the Pension Fund. But if it is

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found that they had the authority to act, the question also arises if, in view of the scheme of arrangement, they acted properly in all the circumstances in passing a resolution without any reference to or agreement of the prospective shareholder of the second applicant under the scheme of arrangement. Broadly speaking, the question for decision is whether the old boards were still empowered to act in respect of the Pension Fund after the scheme of arrangement was sanctioned.

The effect of a scheme of arrangement is not made clear by the provisions of the Companies Act. One has to look to case law for guidance. The legal practitioners who argued this case did not draw my attention to any case authorities and I had to embark on my own research to obtain any guidance. Legal practitioners should be reminded that in terms of Order 32 r 238(2) of the Rules of this court they are enjoined to outline in their heads of argument the submissions on which they will rely and set out the authorities, "if any", which they intend to cite. *In casu*, the legal practitioners failed or neglected to cite any authorities, although such authorities exist to help the court in reaching a decision. This is regrettable.

When a scheme of arrangement is sanctioned by the court in terms of s 191(2) of the Companies Act, it creates a contract binding on the parties to the Scheme. See *Henochsberg on the Companies Act* Vol 1 at pp 628 and 629. In Ex p *de Wet NO:* In re *Mackville Motors (Pty) Ltd (in liquidation)* 1971 (1) SA 256 (W) the question arose as to whether the sanctioning of a scheme of arrangement and its registration under the equivalent provisions of the South African Companies Act was sufficient to discharge the company from liquidation. Hiemstra J said (at 258) that it did not and that:

> "To sanction the compromise does not mean that its terms become an order of court. It means that the parties to the arrangement are authorised to go ahead with it and they are bound to it."

In *Cohen NO* v *Neil & Anor* 1975 (3) SA 963 (W) at 969E it was stated:

> "I have come to the conclusion that having regard to the approach of our courts to a sanctioned compromise, ie that it is a contract binding on all concerned, it is not permissible but essential to have regard to all its terms (*cf* on this point *Penkin & Anor* v *Roeland Shoes (Pty) Ltd & Ors* 1972 (1) SA 513 (C) at pp 518E-F and 520D)."

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The proposition that a sanctioned compromise creates a contract binding on the parties was accepted by our courts in *Parker* v *W G Kinsey & Co (Pvt) Ltd* 1987 (1) ZLR 188 (S); 1988 (1) SA 42 (ZS). Gubbay JA (as he then was) at 194 (ZLR); 47D-H (SALR) said that:

> "To my mind, it is of fundamental importance to have regard to the effect of the sanctioning of a compromise or arrangement, subject, of course, to registration of the order pursuant to s 167(3) of the Act. I comprehend it to be this: that sanction is not an order of court *ad factum praestandum*, a contravention of which is punishable by contempt of court. It merely gives to the compromise or arrangement contractual force as between those bound by it, deriving such force, not from their actual consent, but by operation of law. The rights and obligations of the parties bound are determined by the terms of the compromise or arrangement, express or implied. They are not to be sought outside the confines sanctioned by the court. Questions relating to validity and interpretation follow normal contractual principles, for the act of sanction does not convert the compromise or arrangement into an order of court. The court has no greater power over it than in any other sort of contract. It cannot judicially

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condone a default in performance, nor can it relieve a party bound by it from the consequences of its operation."

He cites a number of case authorities in support of this statement. That a sanctioned compromise or arrangement creates a binding contract for the parties bound by it is clearly supported by the authorities I have referred to above. It being a contract, the parties to it are required to implement the terms of the compromise or arrangement. The compromise or arrangement itself must have a terminal date which, to my mind, must be the date by which the parties thereto have complied with the major and decisive obligations contained therein. The fact that a party to a sanctionedcompromise or arrangement may approach the court to set aside the compromise or arrangement, which is the *gravamen* of the decision in *Parker*'s case *supra*, is indicative of the proposition that, after it has been sanctioned, the compromise or arrangement has a period of life during which the parties, as is the case with any other contract, are expected to meet their obligations under it. The scheme of compromise or arrangement will therefore "terminate upon the fulfilment of its very object, or where for any reason whatsoever, whether justified or not, the requisite body of creditors at any time decide to put an end to it. It is their contractual right to do so". See *Parker*'s case at p 50G where the learned Judge of Appeal interpreted a clause of the scheme of compromise relevant in that case.

The parties to the scheme of arrangement in the present case are clearly identified by the order of 30 March 1998. They are the creditors, the members of the second applicant and the second applicant itself. The question which I think is relevant to consider here is whether the first applicant became a party to the scheme of arrangement. If the first applicant was a party to the scheme of arrangement, then it was contractually bound by its terms. If the

first applicant was not a party to the scheme then, it would appear, it was not bound by its terms.

The scheme of arrangement in this case involved a third party - the first applicant. It was, in effect, the first applicant which made an offer to purchase the shareholding in second applicant and to pay the secured creditors all moneys due to them over a five year period subject to the payment to them of 20% of the proceeds from the disposal of buildings and structures on stand 550 Kwekwe. It was the first applicant which made the offer to pay, within 180 days of the approval of the scheme of arrangement, a cash dividend of $1.5 million to all unsecured creditors, with an additional issuance to them of not more than 15% deferred ordinary shares in the second applicant at a total price equal to 65% of their claims against the second applicant. They made certain other provisions in respect of other unsecured creditors, including the Commissioner of Taxes.

The whole scheme of arrangement depended on the undertakings made by the first applicant. Thus, when the creditors accepted the scheme of arrangement they were, in effect, accepting the proposal made by the first applicant to purchase the shareholding of the second applicant by the first applicant and its proposal for the second applicant to compromise with its creditors. This raises the incidental question whether in fact the offer by the first applicant constituted an arrangement contemplated by s 191(1) of the Companies Act.

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> "'Arrangement' is however a word of wide import and its meaning under the section is not to be limited to something analogous to a compromise ..."

(*per* Trollip J in Ex p *Cyrildene Heights (Pty) Ltd* 1966 (1) SA 307 (SWA) at 308H-309B. See also *Cilliers and Benade's Company Law* 4 ed at p 416 para 26:13.)

In Ex p *Cyrildene Heights (Pty) Ltd supra*, the shares in the applicant company were held by B and his wife. When B became insolvent, his trustee and B's wife entered into an agreement with one F in regard to the sale of the shares. The shareholders undertook to sell their shares to F for a consideration, F undertaking to pay the company a certain amount and to pay the secured and concurrent creditors. Neither F nor the company was a party to such an arrangement. It was a condition that this so called offer of "compromise" should receive the sanction of court under the South African equivalent of s191 of the Companies Act. In an application for an order authorising meetings of secured creditors and the concurrent creditors to consider this "compromise", the court held that the so-called "compromise" was not a compromise or arrangement within the meaning of the section and, further, that until F and the company became parties to the compromise the court could not order it to be submitted to creditors for consideration. The papers

were suitably amended by an addendum in terms of which F became a party to the offer of compromise or arrangement and an amendment to the petition was made to enable the agreement between F and B and the trustee to be submitted to creditors. With these amendments the learned judge was able to say at 310D-G that:

> "It seems to me, therefore, that if the company could be made a party to the agreement between the shareholders and F, and F be made a party to the offer of compromise, that it would be in the interest of both the company and the creditors, and if that were done it seems to me that the two arrangements would together constitute an 'arrangement' within the meaning of and fit to be dealt with under s 103. I informed counsel of my *prima facie* view and Mr *Lawrence* has consequently handed in to court an additional affidavit by Mrs B attaching thereto an addendum to the offer of compromise and arrangement in terms of which F becomes a party to it. In addition, the petition has now been amended in order, not only to enable the amended offer of compromise to be submitted to creditors, but also to enable the agreement between shareholders and F to be submitted to the shareholders and creditors, so that if it is approved by the shareholders, both these transactions could formally be declared by the court to be binding on the shareholders, the company and F and the creditors. A compromise or arrangement can be rendered binding under s 103 on an outside person - see In re *Boerebank Bpk supra* at pp 812-3; Ex p *Lick NO:* In re *Crown Furniture Manufacturers* 1963 (2) SA 271 (W)."

In the present case, it could be asked whether without the first applicant being a party to the scheme of arrangement and apparently not being bound by it, the scheme of arrangement was an "arrangement" within the meaning of s 191 of the Companies Act. The first applicant was not specifically mentioned in the order of 30 March as one of the parties to be bound by the scheme of arrangement. However, other facts would indicate otherwise. It was the first applicant that made an offer on the basis on which the whole arrangement was entered into. The second applicant, the creditors and the first applicant conducted themselves as if the first applicant was bound by the arrangement. The second applicant and the creditors expected the first applicant to fulfil the terms of the arrangement. This court sanctioned the arrangement, thereby authorising the parties to go ahead with it and logically the first applicant was one of, if not the

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most important party of the parties to the arrangement. I am satisfied that, on these facts, the first applicant was bound by the terms of the scheme of arrangement and was therefore a party to it.

With this finding I will proceed to consider the position of the parties *vis-à-vis* the second applicant during the period before the first applicant fulfilled all its obligations in terms of the scheme of arrangement. But perhaps before proceeding thus, I must state that, in my respectful view, the scheme of arrangement involved in this case should have been approved in terms of s193 of the Companies Act, whose provisions are more amenable to the handling of the issues that arose in this case. The second applicant would

have been regarded as the "transferor company" and the first applicant or the new Stewarts and Lloyds (Pvt) Ltd the "transferee company". Ideally, therefore, the court should have, in its order of 30 March 1998, made provision for some or all the matters specified in subss (1)(a)-(f) and (2) of s 193. The problem which has arisen in this case would not have arisen for, in terms of the definition of "property" in subs (5), rights and powers of any description would have been transferred and vested in the first applicant.

The result of the aforegoing analysis is that to this scheme of arrangement there were, therefore, the following parties: the first applicant, the second applicant, the creditors and the members of the second applicant - parties which individually would have had an interest in seeing to it that the terms of the scheme of arrangement were fulfilled. The order of court did not vest the "property" as defined in s 193(5) in the first applicant and, as such, the powers or authority to act on behalf of the second applicant remained vested in the old boards until such time as the first applicant met all or at least the significant obligations in terms of the Scheme or the Scheme's object was fulfilled.

Two of the scheme's major objects which were fulfilled were the payment of $1.5 million to the unsecured creditors, which the Receiver determined to have entitled the first applicant to the transfer of shares as at 16 October 1998 and the making of acceptable proposals to discharge the second applicant's indebtedness to the secured creditors. The resolutions of the Boards of Directors of Industrial Steel and Pipe Employees Trust (Pvt) Ltd, the second applicant and the Pension Fund acting through the old boards were validly and competently made in so far as the authority to make them was concerned. The scheme of arrangement did not empower the first applicant to exercise any powers over the second applicant and its subsidiary organs until, at the very least, the scheme's major objects were fulfilled and the transfer of shares to the first applicant was done. These important milestones in the implementation of the scheme were achieved by 16 October 1998. In my view, until such time as the Receiver was in a position to acquit the scheme of arrangement as having been implemented, the old boards were quite entitled to take decisions on behalf of the second applicant and the Pension Fund. To take a different view would deprive the arrangement of one of the parties which must remain interested in the faithful implementation of the terms of the arrangement.

A scheme of arrangement, being a contract between the parties concerned, is not an event. It is

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a process which, depending on the order sanctioning it, may mean that in the period before certain major obligations assumed by the offeror, in this case, the first applicant, are complied with, the old structures remain intact and the company's board as constituted before the sanctioning

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of the scheme of arrangement continues to act for the company concerned. If there is a major breach of the terms of the scheme of arrangement, then one or other of the parties can approach the court for the setting aside of the scheme. If the effect of the order sanctioning the scheme was to automatically exclude the old board, (unless the order of court provides accordingly), then the company concerned may not be in a position to apply to court to set aside the scheme. The provisions of s 193 of the Companies Act are, to my mind, designed to provide for the interim period. An order sanctioning a buy out, as in the present case, should ideally make provision for the matters mentioned in s 193(1)(a)-(f). Companies have a lot of freedom in designing schemes of arrangements to suit their particular needs and the procedures under ss 191 and 193 will be used for a great variety of transactions. See *Cilliers and Benade op cit* at p 416 para 26:14. The court must therefore be quite careful in regard to the orders which they are called upon to make in such circumstances. In this regard, I have a lot of sympathy for the applicant's contention that the old boards should not have acted without the concurrence of the first applicant in view of the scheme of arrangement. However, there seems to me to have been a considerable dispute between the parties as to who of the first applicant's appointees and the old boards was entitled, in the interim, to act for the Pension Fund. Unfortunately for the applicant, the order sanctioning the scheme of arrangement left it quite open for the old boards to continue to represent the second applicant and the pension fund until the first applicant became entitled to a transfer of shares on 16 October 1998 as certified by the Receiver.

The power to dissolve the Pension Fund is found in the Pension Fund Rules (Annexure D to the founding affidavit). In terms of r 47(3):

> "If all the employers amalgamate with, or if the control of all employers is transferred to or sold to a company not associated with the Fund, the employers may elect -
>
> (a) that the interest of each member and beneficiary, as determined by the actuary, shall be transferred to a retirement annuity fund or a new or existing pension fund for his benefit;
>
> (b) to continue the fund in respect of existing members and beneficiaries in which event the fund shall not be affected;
>
> (c) to withdraw wholly from the Fund, in which event the Fund shall be terminated in accordance with s (1)."

Rule 47(1) details in general terms what should happen upon the termination of the Pension Fund. Rule 48 provides as follows:

> "Notwithstanding anything in these rules, the Company may, on giving written notice to the Trustees, terminate the Fund, in which case the provisions of s (1) or para (a) of s (3) of r 47 shall apply *mutatis mutandis*; provided that if s (1) of r 47 applies, and two thirds of the members present at a duly constituted meeting called by the Trustees for the purpose elect to continue the Fund without the employer's contribution, the rules shall be amended on the

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advice of the actuary and the fund shall be continued."

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"The company" is defined in these Rules to mean the second applicant.

The second and third respondents stated that the second applicant and the Industrial Steel and Pipe Employees Trust (Pvt) Ltd acted in terms of rr 47 and 48 of the Pension Fund Rules. These rules, in my reading of them, Sempowered the second applicant to terminate the Fund. There is ample evidence on the papers that, contrary to the proviso in r 48 above, the majority of the members of the Fund expressed the desire to have the fund terminated. It is apparent from the papers that the old board of the second applicant was of the view that the interest of the members were best served, and saved, by the termination, rather than a continuation, of the Pension Fund. So also was the old board of Industrial Steel and Pipe Employees Trust (Pvt) Ltd and the board of Trustees of the Pension Fund.

The Registrar has power to dissolve a pension fund. In terms of s 10(1) of the Pension and Provident Funds Act [*Chapter 24:09*], a pension fund may be dissolved in accordance with its rules or if so directed by the Registrar. The letter by the Registrar indicates that the Registrar acted in terms of s 10(1)(a) - dissolution in terms of its rules and not in terms of s 10(1)(b) - dissolution on the direction of the Registrar in terms of s 19. It states clearly that the Registrar "has approved that the abovementioned Fund be dissolved in terms of r 47 of the Fund". It seems to me that the Registrar was concerned here with the procedure to be adopted in dissolving the fund and not the basis of the exercise of his power to approve the dissolution. I am also of the view that the dispute between the parties is not about the exercise of the power vested in him by the Registrar but the exercise by the old boards of the power, in the period before the scheme of arrangement was substantially implemented, to dissolve the Pension Fund in terms of its Rules. The decision of the Registrar is therefore, in substance, not the matter to be reviewed.

The conclusion to which I come in this case is that the first applicant did not take over control of the second applicant until after 16 October 1998; that in the period between the sanctioning of the scheme of arrangement and 16 October 1998 the persons lawfully authorised to act on behalf of the second applicant in so far as the Pension Fund was concerned were the existing Board, and not the new Board appointed by the first applicant. I am satisfied that the dissolution of the Pension Fund was properly sought and approved. The new Stewarts and Lloyds (Pvt) Ltd was a new entity which should have established its own pension fund and not sought to perpetuate the Pension Fund when its membership, in the majority of them, were no longer associated with the new company.

The conclusion I have reached is supported by the provisions of the scheme of arrangement with respect to the Receiver. In terms thereof, the Receiver was "to ensure independent implementation, management and

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administration of the scheme of arrangement". A receiver is a creature of contract appointed under the schemeof compromise or arrangement. He has no power outside those conferred upon him by the contract. In the exercise of the powers conferred upon him, the receiver determined the date on which the first applicant became entitled to the transfer of shares in second applicant. The court can safely accept his determination on this point. Its effect is that prior to the transfer of shares, the first applicant or anybody nominated by him, had no power, as against the old boards, to act on behalf of the second applicant and the Pension Fund in respect of the Pension Fund untilafter16October1998.Theprovisionalordermustthereforebe discharged. It is appropriate that an order of costs be made against the first applicant only. It is the dominant party to the application and has, in my judgment, not been successful.

It is accordingly ordered that the provisional order issued by this court on 29 October 1998 be and is hereby discharged. The first applicant shall pay the costs of this application.

Gula-Ndebele & Partners, applicants' legal practitioners

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

Wintertons, second and third respondents' legal practitioners

Atherstone & Cook, fourth respondent's legal practitioners

MHUTE *v* CHIFAMBA 1999 (2) ZLR 115 (SC)

Citation	1999 (2) ZLR 115 (SC)
Case No	Judgment No. S-89-99
Court	Supreme Court, Harare
Judge	McNally JA, Muchechetere JA, Sandura JA
Heard	July 19, 1999
Judgment	August 18, 1999
Counsel	Miss E Mushore, for the appellant N Banda, for the respondent
Annotations	None

Civil appeal

Flynote

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Contract - formation - verbal contract of sale - whether contract was intended only to be legally binding when reduced to writing

Headnote

A contract of sale may be made orally, without it being put in writing. The parties may agree, however, that the oral contract will not be legally binding until it is drawn up in a written agreement. Where the parties to an oral agreement mention that the contract should be reduced to writing, the question is whether the parties intended that the contract would not be binding until the written agreement had been signed or simply that the contract should be binding immediately but should subsequently be put in writing to facilitate proof of the terms of the contract. The onus of proof is on the party who asserts that an oral contract was not intended to be binding until reduced to writing and signed. In the present case it was clear that the parties had intended the oral contract to be binding and its reduction to writing was intended only to aid the proof of the terms of the contract.

Cases Considered

Case cited:

Woods v *Walters* 1921 AD 303

Case Information

Miss *E Mushore*, for the appellant

N Banda, for the respondent

Judgment

Sandura JA: This is an appeal against a judgment of the High Court in terms of which the appellant was ordered to transfer to the respondent the ownership of a certain immovable property in Gweru District ("the property").

The background facts are as follows. At the relevant time the appellant was the owner of the property in question. Before the present dispute arose he registered a first mortgage bond over the property in favour of the Central African Building Society ("CABS"). When he failed to pay the mortgage bond instalments CABS issued a summons against him and, in April 1993, obtained a judgment for the payment of the sum of $244063.92 together with costs.

Subsequently, a writ of execution was issued and on 6 August 1993 the property was attached by the Deputy Sheriff. Thereafter, arrangements were made to sell the property by public auction on 17 December 1993.

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However, shortly after the attachment the appellant approached Trevor Dollar, an estate agent, in August or September 1993, and instructed him to sell the property, but did not disclose to him that the property was under judicial attachment. Trevor Dollar tasked his employee,

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Wasara, to carry out the appellant's instructions.

In due course, the respondent received the information that the property was on sale. He approached Wasara on 29 September 1993 and, after viewing the property, indicated that he was interested in purchasing it. He offered to purchase it for $250000, but Wasara indicated that it would be necessary for the appellant and the respondent to meet and discuss the purchase price. That meeting took place at the property on 11 December 1993. It was attended by the appellant, the respondent and Wasara. What was agreed upon at the meeting was not common cause.

However, after the meeting Wasara prepared an agreement of sale which the respondent signed, but which the appellant refused to sign.

According to the appellant, what happened at the meeting was as follows. The parties discussed the purchase price of the property. The price of $290000 was mentioned and discussed, but no agreement was concluded because the purchase price was to include the price of the potato crop which he had planted on the property on the day on which the meeting was held, and he had not yet ascertained the price of the crop. He undertook to ascertain the price of the crop and advise Wasara who would then draft an agreement of sale to be signed by both parties. Before the meeting ended, it was agreed that the verbal agreement would not be binding until it was reduced to writing and was signed by both parties.

However, according to the respondent, the parties agreed as follows. The purchase price of the property was $290000. The required deposit was $270000, and this was to be paid by him into the Trevor Dollar Trust Account by 15 January 1994, and the balance of $20000 was payable over a period of twelve months thereafter. He was to take occupation of the property on 3 January 1994 and was to pay a rental of $2000 per month pending the transfer of the property into his name. Wasara was to reduce the verbal agreement to writing and forward it to both parties for signature. The main reason for the written agreement was the necessity to keep an accurate and complete record of the verbal agreement concluded at the meeting on 11 December 1993. That agreement was valid and binding on the parties before it was reduced to writing, and there was no agreement to the contrary. The sale agreement had nothing to do with the potato crop, which remained the appellant's.

After signing the sale agreement prepared by Wasara, the respondent took occupation of the property and subsequently paid the full purchase price of $290000 in terms of the sale agreement. He refused to pay the

additional sum of $50000 which the appellant alleged was the price of the potato crop.

The learned judge in the court *a quo*, after hearing counsel for both parties, granted the respondent's application with costs, and ordered that the property be transferred into the respondent's name. The appellant now appeals against that decision.

Basically, there are two issues to be determined in this appeal. The first is whether an

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agreement of sale was concluded at the meeting held on 11 December 1993, as alleged by the respondent; and the second is whether the parties agreed that the verbal agreement would not be binding on them until it was reduced to writing and was signed by both of them, as alleged by the appellant.

With regard to the first issue, the respondent's version of what transpired at the meeting was corroborated by the averments made in their affidavits by Trevor Dollar, the estate agent who was instructed by the appellant to sell the property, Wasara, the estate agent's employee who attended the meeting, Patrick Vanasiyo ("Vanasiyo"), the appellant's gardener who looked after the potato crop, and Gillian Sibanda ("Sibanda") a foreclosure clerk employed by Messrs Wilmot and Bennet, the legal practitioners acting for CABS.

In his affidavit, Trevor Dollar averred as follows:

> "My instructions never mentioned nor included the potato crop that seems to be the main issue in the Application.
>
> Nowhere, in the affidavits does the respondent (ie the appellant) point out that he advised me of the potato crop. My instructions were to sell the property as quickly as possible as the respondent (ie the appellant) was having financial problems.
>
> The purchase price given to me was $300000 plus or minus $10000 either way.
>
> Christopher Wasara, acting on my instructions, sold the property for $290000 ..."

These averments support the respondent in his contention that the property was sold for $290000 and that the sale did not include the potato crop.

Wasara, Trevor Dollar's employee, who was instructed to carry out the appellant's instructions and who attended the meeting held on 11 December 1993, averred as follows in his affidavit:

> "It is correct that the respondent (ie the appellant) telephoned Mr Dollar and gave him an instruction that this property be sold by ourselves. I was instructed by Mr Dollar to find a buyer on behalf of the respondent (ie the appellant). I did that and found the applicant in this matter (ie the respondent). I introduced the applicant in this matter (ie the respondent) to the respondent (ie the appellant) ...
>
> The respondent (ie the appellant) accepted the purchase price when the applicant (ie the respondent) went to inspect (the property).
>
> A verbal agreement was entered into which verbal agreement I was then asked to reduce into writing purely to record what the parties had agreed to ..."

These averments corroborate the respondent in his contention that at the

meeting in question a verbal agreement was concluded by the parties and that the said agreement was to be reduced to writing for record purposes only. The averments do not support the appellant's contention that he undertook to ascertain the price of the potato crop and then communicate it to Wasara who would thereafter draft the agreement of sale. Had the appellant made such an undertaking Wasara would certainly have remembered that.

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Vanasiyo, the appellant's gardener who looked after the potato crop until it was harvested, averred as follows in his affidavit:

> "Sometime towards the middle of December 1993 my employer made me ... believe that he had finally secured a buyer ... for the premises in question. However, due to the fact that we had planted a potato crop on two acres on the Plot I was asked to stay at the Plot until the potato crop was harvested or alternatively if my Employer managed to sell the potato crop to the new person coming onto the premises then I would leave. I remained on the premises from December ... until the beginning of February 1994 when the applicant (ie the respondent) in respect of this matter moved to the premises and indicated that he had bought the property in question. He ordered me to bundle the respondent's (ie the appellant's) remaining belongings, which I did, and store them in a storeroom.
>
> I contacted the respondent (ie the appellant) who advised me to house the tools and garden implements in a shed until we had harvested the potato crop. I was instructed to attend to the day to day caring for the potato crop.
>
> I did this until the crop was harvested in May 1994 ..."

These averments clearly support the respondent's contention that the sale agreement had nothing to do with the potato crop, and that the crop remained the appellant's.

In her affidavit Sibanda, who at the relevant time was employed as a foreclosure clerk and secretary by Messrs Wilmot and Bennet, the legal practitioners acting for CABS, averred as follows:

> "The property in question was due to be sold by Public Auction in terms of the Sheriff's letter attached hereto on 17 December 1993.
>
> I further confirm that the sale was only stopped due to Mr Christopher Wasara's intervention and (he) indicated to our offices that the respondent in this matter (ie the appellant) had sold the property in question for $290000 to the applicant (ie the respondent) and that if we insisted on the sale going through the respondent (ie the appellant) stood to lose a lot of money and would most likely fail to pay CABS because that property would not realise more than $70000 at a Public Auction in Gweru.
>
> Mr Wasara's position was so reasonable that it was decided to remove the property from the Public Auction on condition that transfer of that property would be handled by Messrs Wilmot and Bennet to enable them to first deduct and pay the full CABS judgment (debt) before accounting to the respondent ..."

Again, these averments corroborate the respondent's contention that a sale agreement was concluded at the meeting in question and that the agreed purchase price of the property was $290000. I can see no reason why Sibanda said that Wasara told her that the property had been sold for $290000 if that were not true, and none was suggested by the appellant.

SANDURA JA

In addition to the averments set out above, there is the fact that the appellant bought fifty bags of seed potato for $4268.60 on 11 December 1993, the day on which the meeting in question was held. Even if it were accepted that when the meeting took place on 11 December 1993, the potatoes had already been planted, they were certainly not worth $50000 at that stage. It does appear, therefore, that the appellant was merely trying to increase the price of the property.

In the circumstances, I am satisfied that there was, before the learned judge in the court *a quo*, overwhelming evidence indicating that at the meeting held on 11 December 1993 a sale

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agreement was concluded and that the agreed purchase price of the property was $290000. The evidence also established that the sale did not include the potato crop, which remained the appellant's. The learned judge was, therefore, correct in the conclusion which he reached in this regard.

I now go on to deal with the second question posed earlier, ie whether at the meeting held on 11 December 1993 the parties agreed that the verbal agreement would not be valid and effectual until it was reduced to writing and was signed by both of them.

The law on this issue is clearly set out by Christie in *The Law of Contract in South Africa* 3 ed, at p 116 as follows:

> "It often happens that during the negotiations leading to the formation of a contract, or in the terms of an informal contract itself, mention is made of a written document or of the reduction of the terms of the contract to writing. This immediately raises the question whether the informal contract is binding, and the written document only intended for purposes of proof of the terms of the contract, or whether there is to be no contract until the written document has been drawn up and executed. *Grotius* 3.14.26 gives clear directions for the answering of this question:
>
> > 'The contract of sale may be made in writing or without writing. A written sale is not considered to be complete until the writing has been fully executed. But with us, although there is mention of writing, this is understood not to be with a view to a written contract, but merely for the purpose of reducing to writing the terms agreed upon for better remembrance and proof, unless there is clear evidence of a contrary intention'."

It is clear from what Grotius says that the burden of proof rests on the party who asserts that a verbal contract was not intended to be binding until it is reduced to writing and signed. The principle has been accepted in a number of cases. For example, in *Woods* v *Walters* 1921 AD 303 at 305-306 Innes CJ said:

> "It follows of course that where the parties are shown to have been *ad idem* as to the material conditions of the contract, the onus of proving an agreement that legal validity should be postponed until the due execution of a written document, lies upon the party who alleges it."

In the present case, that burden rests upon the appellant. The question

SANDURA JA

which now arises is whether the appellant discharged that burden. I do not think so.

He did not produce any evidence to support his version of what happened. On the other hand, the respondent's version was supported by Wasara who attended the meeting and was instructed to draft the agreement of sale. According to him, the written agreement of sale was required for record purposes only.

In any event, the respondent's version was more probable than the appellant's. The appellant was experiencing serious financial difficulties. His property had been attached by the Deputy Sheriff and was due to be sold by public auction on 17 December 1993. When he attended the meeting on 11 December 1993 he had only six days within which to stop the auction sale. In my view, he must have been desperate to conclude the sale agreement and could hardly have

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afforded the luxury of postponing finality in the conclusion of the sale agreement.

I am, therefore, satisfied that the verbal agreement concluded on 11 December 1993 was valid and effectual, and that the written agreement was required for record purposes only.

In the circumstances, the appeal is dismissed with costs.

McNally JA: I agree.

Muchechetere JA: I agree.

Gula, Ndebele & Mhuruyengwe, appellant's legal practitioners

Wilmot & Bennet (Kwekwe), *Honey & Blanckenberg* (Harare), respondent's legal practitioners

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JENGWA *v* JENGWA 1999 (2) ZLR 121 (HC)

Citation	1999 (2) ZLR 121(HC)
Case No	Judgment No. HH-152-99
Court	High Court, Harare
Judge	Gillespie J, Kamocha J
Heard	August 18, 1999
Judgment	August 18, 1999
Counsel	P Nherere, for the appellant O Mutero, for the respondent
Annotations	None

Civil appeal

Flynote

Customary law - marriage - polygamous marriage - divorce - property rights of wife being divorced - right of wife to claim share in marital property

Human rights - discrimination against women - application of United Nations Convention on the Elimination of All Forms of Discrimination Against Women - application to division of property on dissolution of customary law union

Headnote

The respondent and the appellant were married in an informal customary law union. They had

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several children from this union. The respondent had also married other women in customary law unions and had other children with these women. Only one of these other unions had been solemnised. After many years of marriage, and just before they separated, the marriage of the appellant and respondent was solemnised under the then African Marriages Act (now the Customary Marriages Act). Thereafter they were divorced according to customary law. The appellant claimed money and property from the respondent, including a fifty per cent share in the marital home.

Held, that as the customary union between the appellant and the respondent was solemnised the general law applies. In terms of the Matrimonial Causes Act [*Chapter 5:13*] the applicant is entitled to a division of the marital property on divorce.

Held, that as regards a customary law union that has not been solemnised, it may be problematic to use the concept of a tacit universal partnership to achieve an equitable division of property on divorce, especially where there is more than one wife. A finding of such a partnership must be based on the factual probability that both parties gave their actual, though unspoken, assent to the creation of the mutual rights and obligations forming a partnership. There is a danger of imposing upon the husband a state of mind which he did not have. Where a man has more than one wife, various questions arise, such as with which wife or wives such a tacit universal partnership was formed. Wherever immovable property is involved, a finding might be made that the general law applies, since custom, as it is presently understood, recognises no ownership of immovable property. (Where other types of property are involved the choice of law is to be made on other grounds, although the need to prevent gender discrimination may lead the court to decline to apply customary law to all forms of property.) It is unjust and promotes discrimination against a certain class of women to deny rights to immovable property to women in customary unions that are not solemnised. This is also contrary to Article 16 of the Convention on the

Elimination of All Forms of Discrimination Against Women, which obliges member states to take all appropriate measures to eliminate discrimination against women in matters relating to marriage and to bring about equality between spouses in relation to matters such as ownership, enjoyment and disposition of property. The concept of unjust enrichment can be used as the basis for awarding the wife an equitable share in the immovable property where the wife has contributed to the marital weal, either by making financial contributions towards the acquisition of property or by suppressing her income-earning capacity in favour of home-making and relieving her husband to accumulate capital. The wife's contribution impoverishes her in favour of communal enrichment and she risks future impoverishment in the event of divorce. Such a spouse also has an expectation of solemnisation of the marriage and a future claim under the Matrimonial Causes Act.

Held, further, that co-wives whose marriages are solemnised have unequivocal rights under the Matrimonial Causes Act and co-wives whose marriages are not solemnised have an interest capable of being protected where one wife seeks division of the property. The interest of the latter spouse may be based on tacit universal partnership, unjust enrichment or on an expectation of the solemnisation of their marriages. Thus, the potential rights of the other

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spouses must be taken into account where one wife seeks a division of property in which others expect to share.

Held, further, that the weight to be attached to the rights of the other spouses must vary from case to case. In some cases, it may be possible to identify a precise share attributable to a non-litigant spouse. In other cases, it might be impracticable to do other than modify the share of a litigant wife, reducing it from what a wife in monogamy might have expected, in order to protect the interest of the other wives. In some, it might even be proper to disregard the position of other wives on the basis that their rights are insubstantial in the circumstances. But in all cases, the competing interests of the non-litigant spouse or spouses must be considered. Although it is not necessary to join all wives in such proceedings, whenever a husband and one wife in a polygamous marriage dispute a division of marital property in a divorce, it is sound practice to serve process on the other wives.

Held, further, that in the original property division by the magistrate no account was taken of the existence of other wives with potential claims. Taking this into account and taking into account the contribution of the appellant to the household, but also factors such as the longstanding estrangement of the applicant and respondent prior to divorce, a fair apportionment would be to award the appellant a share of one third of the present value of the immovable property.

Cases Considered

Cases cited:

Chapendama v *Chapendama* 1998 (2) ZLR 18 (S)

Chiromo v *Katsidzira* 1981 ZLR 418 (A)

Deputy Sheriff, Harare v *Mafakidze & Anor* 1997 (2) ZLR 274 (H)

Dokotera v *The Master & Ors* 1957 R & N 697 (SR)

Fink v *Fink & Anor* 1945 WLD 266

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

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

Jirira v *Jirira & Anor* 1976 RLR 7 (G)

Mashingaidze v *Mazomba* HH-3-99

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

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

Muganga v *Sakupwanya* 1996 (1) ZLR 217 (S)

Muzanenhumo v *Katanga & Ors* 1991 (1) ZLR 182 (S)

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

Case Information

P Nherere, for the appellant

O *Mutero*, for the respondent

Judgment

Gillespie J: The appellant was married to the respondent, initially by an informal customary union, in 1972. The marriage was solemnised under the then African Marriages Act 1(4) in November 1987. This formalisation of the union was exceedingly timely from the appellant's point of view since, in February 1990, the parties separated. There are five children born of the marriage. Their names and years of birth are: Monica, 1973; Richard, 1976; Robert, 1978; Shingirai, 1987; and Izack, 1989.

The history of the marriage was set out by the parties in partisan fashion. It was presented by the legal practitioners at trial (not counsel in this court) in a haphazard and disorganised fashion; and was not analysed by the assistant magistrate who heard the trial nor by the provincial magistrate who sat on appeal. It is therefore, exceedingly difficult to give a positive and confident factual recitation. My best efforts, however, persuade me to the following view.

While it lasted, the marriage was, as far as the respondent was concerned, by no means a faithful and monogamous compact. From the inception of the marriage, circumstances found the parties living apart. While the respondent sought to keep salaried employment in the city the appellant strove to maintain a house in the rural area. There is dispute as to whether she lived at her parents' house or tilled fields at the respondent's family home. It seems most unlikely that she would have been raising the respondent's children at her father's home and there is no reason to believe that the appellant was doing anything other than caring for their children and cultivating their crops, at the respondent's communal home and occasionally staying with her husband in Mufakose.

The parties were no strangers to the strains imposed by this lifestyle. For a time between 1973 and 1975 the respondent was out of work and living with the appellant at the rural home. The lack of income, however, forced him back to the city and by 1976 he had another job. He also had a child by another woman, apparently named Maggie. Another spell of non-employment followed, but by 1977 the respondent was again back at work in Harare and trying to study to improve his grade within the company.

In 1978, or by 1979, things between the parties had reached the stage where the one handed to the other the customary token of divorce. Each spouse

claims to have been the rejected one and it is not possible to see beyond their words and into their hearts, where the truth lies.

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In June 1979, the respondent took another wife, a woman apparently named Pauline. 2(5) This too was an informal customary relationship. He seems also to have acquired a house first in Glen View, possibly on a lease to buy scheme, and later in Chitungwiza. The first appellant in the meantime found her own place to live, originally as a tenant and eventually in terms of a lease to buy scheme, in Seke. The appellant claims that these two properties were acquired prior to the separation but that, knowing the policy of high density township administration, seems unlikely. In any event, thus the parties lived for the next few years. The children remained with the appellant, save for a period when Robert was with his father. She maintained herself and them working, apparently as a saleswoman.

In 1980, it seems, the respondent put aside the woman, Pauline. He installed in her place a new young person he had employed to mind his children, a woman seemingly named Phoebe. This relationship ended tragically in 1981 when Phoebe killed herself. The appellant claims that from then she and the respondent were reconciled and he visited her frequently at the Seke house. The respondent asserts that reconciliation dated only from 1986.

Certainly, between 1981 and 1986 the parties were still living separately. The respondent in fact took yet more women as his wives. One was Eugenia who bore the respondent two children. She too, however, seems not to have lasted. The other, Simba, was the younger sister of Phoebe and was apparently given to the respondent as Chigadza Mapfiwa. This woman's marriage to the respondent was formalized in 1983. Since she was the first to enjoy this vesting of legality she, ironically, bears the proud title, "first wife".

By 1984, the respondent's circumstances were changed much for the better. He sold the Chitungwiza house and rented a house in Hatfield where he installed Simba, Eugenia and six children. In 1986, the respondent and Eugenia parted and, on his own admission, he reconciled with the appellant.

Having reconciled with the appellant, the respondent started living with her. He caused more children to be brought into the world by her. He formalised his marriage with her. He acquired a large property in Borrowdale and in 1987 built a house on it. He financed the building, it seems, largely by sub-dividing the stand and selling plots. The appellant claims to have contributed much in the way of money to this endeavour. There is a grudging admission of certain relatively insignificant amounts received from her by

the respondent, but firm denial of any concrete contribution of substance. To finish the story it seems as though both the appellant and Simba moved into the Borrowdale house - although the respondent denies the appellant's presence there. Heated enmity seems to have existed between the two women. The appellant claims to have been chased out of the house. It seems that despite the appellant's claim of discord and even litigation (based on alleged adultery by Simba) between Simba and the respondent, those two are still together.

The appellant claims a divorce, custody of the minor children and certain other relief, and a 50 percent share in what was referred to as the Borrowdale property. The award in her favour was

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the sum of $70000; an amount of $2500 (being the value of a motor cycle of the appellant's which she sold, giving the proceeds to the respondent avowedly towards the Borrowdale project); and certain items of furniture. An order for custody was also made at the appellant's instance. In this appeal, the appellant claims only "50% of the matrimonial property being Stands 185 and 199 of Borrowdale Township of 4 Mon Abri of Borrowdale".

This claim requires consideration of a problem never previously enunciated. It is the question of the degree of account, if any, to be taken of the claims of other wives, when considering a division of property between a husband and a wife in a polygamous marriage.

Prior to the promulgation of the Matrimonial Causes Act, 3(6) the position of a wife, even a wife in a civil monogamous marriage, was under-protected as regards the division of the property accumulated during the marriage. Unless she could prove ownership, she had no claim to property. In the absence of such proprietary interest, her only course was to attempt the very difficult task, in practice, of proving a tacit partnership in respect of certain, or all, property. 4(7) This was a task difficult enough for a white wife.

The black woman, despite her civil monogamous marriage, remained shackled to customary property rights unless she could surmount a further obstacle. The then African Marriages Act 5(8) provided in its s 13 that:

> "The solemnisation of a marriage between Africans in terms of the Marriages Act shall not affect the property of the spouses, which shall be held, may be disposed of and, unless disposed of by will, shall devolve according to African law and custom."

This provision appeared to impose a complete bar against any proprietary interest being enjoyed by the wife other than her customary entitlement. This

customary entitlement was narrow indeed. She could not inherit property. 6(9) She could acquire and hold property with the proceeds of the sale of stock and produce not required by the family, or of beer or medications prepared by her. 7(10) But she could not sell any such property without her husband's consent. 8(11) She held too the *mombe yeumai* and its progeny - but these were held as property of the maternal ancestral spirits and their disposal was taboo. 9(12)

The court has always striven, where it is just, to ameliorate this disability and hence inroads in the provision were created by judicial decision. Thus it has been held that since customary law recognises no concept of ownership of immovable property, the provision was to be construed as referring only to movable property. 10(13) Thereafter, it was suggested that in any event a statutory exception exists. This exception was supposed to flow from a provision in the then African Law and Tribal Courts Act. 11(14) This legislation, by its s 3, permitted the application of customary law in a case involving an "African"; so that customary law was deemed to be applicable (unless the justice of the case otherwise required) in a number of instances, including:

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> "a marriage between Africans contracted under customary law." 12(15)

Conversely, it was deemed that "the law of Rhodesia" was to be applied in any other case.

In *Jirira* v *Jirira & Anor,* 13(16) where black persons were married under a civil marriage, Newham J expressed agreement with the submission that:

> "the parties' way of living and the nature of the transactions between them are so removed from the incidents and customary way of life of the African people, that in principle it would be contrary to the justice of the case to apply African law and custom to the solution of the property disputes of the parties."

Although the learned judge did not make this a *ratio decidendi*, the expression of views did acquire the status of a persuasive *obiter dictum*.

The black woman married according to customary law was in an even more disabled position as regards property rights. She did not even have this possible route to recovery open to her and would have been restricted to a claim for her own property, if she held any, and to her customary entitlement. She had no claim against a husband's property or property not in her name.

The reforming Matrimonial Causes Act, s 7 of which supplies the cause of

action for a division of matrimonial property based on equitable principles, was devised largely, albeit not exclusively, with the monogamous marriage in mind. At its promulgation, the discretionary relief it extended was vested by definition in the High Court, the court with sole jurisdiction to dissolve a civil marriage. It applied in its terms to the civil marriage. The only exception to this was an extension of the remedy, as if as an afterthought, to what were then known as African marriages, by an amendment of the then African Marriages Act. This amendment effectively permitted the court dissolving a duly solemnised African marriage to exercise the powers provided in the Matrimonial Causes Act, even though the marriage was not a civil marriage. 14(17)

The Matrimonial Causes Act was, shortly after its promulgation, amended so as to accord somewhat greater dignity to the polygamous marriage. It accomplished this by defining marriage to include a marriage solemnised under the Customary Marriages Act. It also defined the "appropriate court", vested with the jurisdiction to dissolve a marriage and make a property division order, as the High Court, in the case of a civil marriage, and the magistrates court, in the case of a customary marriage, duly solemnised.

In addition, the African Law and Tribal Courts Act has itself been repealed and replaced. 15(18) The current law now provides for the applicability of customary law in any civil case where the parties have expressly so agreed or where, having regard to the nature of the case and its surrounding circumstances, they appear so to have agreed or it is just so to apply customary law. In all other cases, the general law applies. 16(19)

In the result, it is now regarded as settled that the choice of law provision in the Customary Law

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and Primary Courts Act, and its successors, permit a court to avoid the provisions of s 13 of the Customary Marriages Act, 17(20) despite earlier suggestion to the contrary. 18(21) Surprisingly, this same s 13, which provided such a notional obstacle to black women in a civil marriage enjoying the same rights as white women, was only repealed in 1997. 19(22) There is therefore now no impediment whatsoever to the application of the

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Matrimonial Causes Act to divorce and property claims by black women in civil marriages or solemnisedcustomary marriages.

The position of the wife in the informal customary relationship, however, is highly questionable. The inception of any inquiry into her status must be the provision, surely anomalous if not undesirable, that her choice of marriage regime, although sustained by tradition and custom; graced by social acceptance; and favoured by the majority of people in the country, is not a valid marriage. 20(23) The courts, imaginatively applying certain statutory exceptions to this legislated invalidity, have nevertheless extended certain rights and protections to women in such a marriage, that are the attributes of a valid marriage. As an example, the courts give to such a woman the right to the dependant's action for the death of a breadwinner. 21(24) To extend this recognition so as to provide a cause of action for a division of property on the dissolution of the customary union is, however, an exercise fraught with jurisprudential difficulty.

The first such difficulty relates to the question of the law to be applied. The choice of law is governed by the Customary Law and Civil Courts Act. 22(25) If in terms of this choice it is shown that customary law applies, then it is not possible to extend any relief to the woman beyond her traditional entitlements and her personally held property. 23(26) A judicial finding that the customary law has changed to permit an equitable division of marital property may be unattainable, depending on the juridical status of customary law. If its exigencies are regarded as a question of fact, being immutable *mores* discovered by expert evidence, then a court cannot purport to develop customary law. If it be regarded as a living system of law, changing with the changing times, then judical development of its principles may be appropriate. That, however, is beyond the scope of this judgment.

If it be found that the general law is applicable, the next difficulty relates to the identification of a cause of action. A cause lying in an unjust enrichment has been rejected. 24(27) The allegation of a tacit universal partnership is theoretically available, but the limitations of that remedy have been emphasised. 25(28)

There remains nevertheless a reforming impetus discernible in judgments of this court. In particular, the decisions of Chinhengo J in *Chapendama,* 26(29)

GILLESPIE J

Kuzera v *Mudondo* 27(30) and *Chapeyama* v *Matende & Anor* 28(31) and of Gwaunza J in *Mashingaidze* v *Mazomba* 29(32) reveal a willingness to exploit the concept of a tacit universal

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partnership to provide a discretionary broad relief or even to discover a new common law discretionary relief analogous to the statutory remedy in the Matrimonial Causes Act. 30(33)

Whether this initiative will survive the scrutiny of the Supreme Court is open to question. The issue here is remarkably reminiscent of the intellectual tension between the late Lord Denning's Court of Appeal and the House of Lords on the same subject of a spouse's equitable share in family assets. 31(34) An area of inequity has been encountered by the court and it is striving to address it. It is doing so in a way that might satisfy those wishing to uphold fairness and gender equality but which can be expected to find disfavour with those taking a legalist and conservative view of the law and a traditional (dare one say chauvinist?) view of custom.

In the first place, although in each case the learned judges acknowledge the earlier remarks of Robinson J pertaining to the strict requirements of establishing a tacit universal partnership, 32(35) the finding of such a partnership, in each decision where such a finding was made, might well be thought, with respect, to be open to doubt. Where such a finding is made it must be based on the factual probability (as in any tacit contract) that both parties gave their actual, though unspoken, assent to the creation of the mutual rights and obligations forming a partnership in respect of the property. It is not a sufficient basis for such a finding that it is the only fair finding for a wife. It was precisely this severe limitation on the concept of the tacit universal partnership which led to the call for the legislation, which eventually followed in the Matrimonial Causes Act. 33(36)

The possible danger of such a finding being an imposition upon the husband of a state of mind which never was his may be thought to be starkly illustrated in *Chapendama's* case. The union there was polygamous. 34(37) Can it really be thought that the husband in that case voluntarily assented to sharing with the plaintiff, or any or all of his wives, the rights in, rather than the use of, the accumulated property? And if he made the plaintiff his partner, did he not also thus vest his other wives? And if he did so, how could the

partnership, involving, as it must, all of them, be dissolved without their being joined?

If a result which works the justice which these decisions seek to achieve can be attained by judicial innovation rather than legislation, it is perhaps preferable to do so without distorting existing legal concepts. The road to an equitable division of marital property in a customary union might take this route. Wherever immovable property is involved, a finding might be made that the general law applies, since custom, as it is presently understood, recognizes no ownership in immovables. In other cases, the choice of law is to be made on other grounds. Whenever the general law applies to a relationship and a wife has contributed to the marital weal, either by her financial contributions or by suppressing her income-earning capacity in favour of home-making and relieving her husband to accumulate capital, it should be recognised that she did so in order to promote the family's wealth and with a view to sharing in it. By her selflessness, she incurs personal impoverishment in favour of communal enrichment. She risks future impoverishment in the event of divorce. That she does so without any contractual protection or exigency merely highlights, rather than excuses, the injustice of

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denying her a share in that wealth when the family is sundered by divorce. To permit such an injustice to remain is offensive. It promotes a discrimination against a certain class of woman on the basis of gender. It treats various classes of women differently, denying some women rights in property which others enjoy. It wreaks unfairness between a husband and wife. The existing remedies of a claim for a tacit universal partnership, or based on individual proprietary rights, are inadequate. The pre-Matrimonial Causes Act court felt unable to address this injustice. The law as it then existed, however, did not recognize a general enrichment action.

Bartlett J, in *Industrial Equity* v *Walker* 35(38) has given the law precisely that general action for which jurists in Southern Africa have been pressing. It is surprising that his decision seems to have been unnoticed in South Africa. 36(39) The elements of that action, as the learned judge defined them, seem to be apposite to the case of the wife at customary law, to whose property rights the general law applies. Where she has made a contribution that impoverishes her and will leave the husband enriched at her expense under the existing law, then I would suggest that there be extended to her an action based upon that unjust enrichment.

The general law does not forbid any such relief. Far from it: although the relationship is, technically, not a valid marriage, nevertheless, in any civil

case, by the express authority of statute, it is to be treated as valid for all civil purposes to the extent it is recognised by customary law. 37(40) This section provides for the recognition of the marriage, not the choice of law or principle of law to be applied. It constitutes an incentive to the recognition of the relationship between the parties without providing any bar to the development of legal principles in the general law to govern that relationship - provided the general law and not customary law applies.

Although Gwaunza J felt unable to take this step, 38(41) her finding on the point is not binding since an action on alternative grounds was nevertheless extended to the wife in question. In addition, with due brotherly reverence to the learned judge, her reason for denying an action in enrichment is perhaps erroneous. Her decision was based on the perceived inability to restore to a wife services rendered. It seems to me, with respect, that this misapprehends the nature of the enrichment action. It seeks to remedy an unjust enrichment, not on the narrow basis of restoring an object alienated, but on the general rationale of redressing impoverishment incurred.

There is a further factor tending to suggest that such a development is to be encouraged and regarded as conforming to the national will. Zimbabwe has acceded to the United Nations Convention on the Elimination of All Forms of Discrimination against Women. This includes the obligation on member states to:

> "take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular [to] ensure on the basis of equality between men and women:
>
> ...
>
> (h) the same rights for both spouses in respect of the ownership, acquisition, management, administration,

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enjoyment and disposition of property ..." 39(42)

In the face of this national desideratum, it would scarcely be appropriate for the court not to subvent the wife suffering gender discrimination. Indeed, a future court might even be persuaded that this rationale compels in all cases a choice of law that declines to apply customary law to marital property rights at all, specifically to avoid discrimination.

The main purpose of the foregoing review has been to attempt to discover the existing rights of women in polygamous marriages in order to decide the primary question in this case. This question, I repeat, is the extent to which, if at all, any such rights should be taken into account in an action for division

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of property under the Matrimonial Causes Act involving the wife in a polygamous marriage.

The foregoing examination shows that those co-wives whose marriages are solemnised have unequivocal rights under the Act in the event of a divorce. It follows that those potential rights must be taken into account where one wife seeks a division of property in which others expect to share. They have a proprietary interest to protect where a husband seeks, to their prejudice, to dispose of property. 40(43) They have the same interest to protect where one of them seeks a division of the common property.

As for the wife whose "marriage" is unsolemnized and remains solely customary, she too has some expectation. At the very least, she has a contentious claim to a partnership. If I am correct in my suggested advance, she has a claim based on unjust enrichment. She has also a *spes* of solemnisation of the marriage and a future claim under the Matrimonial Causes Act. In either event, she has an interest capable of being protected where one wife seeks a division of the property.

The weight to be attached to such a third party claim must vary from case to case. In some, it may be possible to identify a precise share attributable to a non-litigant spouse. In other cases it might be impracticable to do other than modify the share to a litigant wife, reducing it from that which a wife in monogamy might have expected, in order to protect the interest of other wives. In some, it might even be proper to disregard the position of other wives on the basis that their rights are insubstantial in the circumstances. For example, where the estate has been built up by the first wife of many years, who cannot reconcile herself to the intrusion of a younger woman who has made no contribution to the property being divided. In no case is it proper to fail to consider such a competing interest. The Act provides that the court, making a property distribution order, shall have regard to all the circumstances of the case. 41(44) This is simply one circumstance that has not been defined but that is unarguably relevant. Such is the potential importance of the third party claim that steps ought to be taken at the commencement of litigation to protect that interest. I do not say that is necessary in every marital dispute in a polygamous marriage to join all wives. I would, however, suggest that whenever a husband and one wife in a polygamous marriage dispute a division of marital property in a divorce, it would be a sound practice to serve process on the other wives.

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In this case, the general law is applicable, the marriage having been solemnised. In the property division order, however, no account has been

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taken at first instance of the existence of other wives with potential claims. No such wives have been formally advised of the proceedings. No evidence has been placed before the court such as would permit the court to assess the likely weight and extent of any prospective right enjoyed by other wives. Nevertheless, I am satisfied that I can determine the matter on the record without any remittal for further evidence or involvement of other parties.

The reason for this is twofold. Primarily, the appellant's claim, at least on appeal, is such as makes this unnecessary. She, no doubt advisedly, has limited her claim to a half share in the existing Borrowdale house. This is substantially more modest than might theoretically have been available in other circumstances. Thus, no accounting is claimed for the gain realised by the respondent, which on the record was princely, on the disposal of portions of the Borrowdale land. There is no claim for movable property or maintenance for herself. True, she has not brought to account her Seke house, but neither has the respondent claimed any portion of that property. I consider that the appellant's diffidence in pressing a claim for the proceeds of these alienated stands more than compensates for her failure to bring to account her own modest dwelling and leaves undivided substantial wealth that might be regarded as sufficient to provide for other potential marital claims.

Secondly, any such other claim is likely to come only from one party, the wife Simba, whose marriage is solemnised. The other surviving former wives, whose marriages were at best of the informal customary regime, appear to be divorced in the traditional way with no further recourse available. Particularly after such a lapse of time as has now occurred.

A further misdirection has occurred at first instance. It is the magistrate's order awarding a specific sum to the appellant. A specific sum can only be determined and awarded after a positive finding of the value of property in dispute. That finding must then lead to a discretionary award of a proportion of that value. The sum awarded would then represent that specific percentage of the proven value. Even then the award of a specific sum should be avoided where the value of the property being divided may yet change. In the absence of such evidence and reasoning, the award of a specific sum bears no relation to any ascertainable property or value in dispute. In this case, no evidence was given of the value of the house under dispute. The award made by the magistrate was entirely arbitrary and bore no relation to the value of any asset or of any contribution by the appellant. 42(45)

Normally the appellant, with a marriage of such long-standing, would be reasonably confident of achieving a substantial apportionment. The birth and upbringing of children, the home-making, the income-producing endeavours,

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would entitle her to expect something close to parity with the husband. That expectation suffers in this case. It suffers from the long-standing estrangement. It suffers from the polygamous way of life and the contributions and expectations of other women and children. The diminution in expectation, still, is mitigated by the subsequent reconciliation and birth of children. The effect of the estrangement is diminished by the late solemnisation of the marriage. The claim to an apportionment is reinforced by the respondent's reliance upon the wife for a house to live in, and for some financial assistance, while the new house was being built. The expectations of other wives are at least partially, if not wholly, catered for by the existence of an acknowledged windfall forming no part of the apportionment.

In my view, the proper apportionment to be afforded this wife, in respect of this restricted part of the marital estate, is one-third. In the notice of appeal, the appellant has not sought to retain the magistrate's award of individual amounts or items relating to individual contributions made by her to the respondent in the latter period of the marriage. These are properly to be regarded as contributions to the capital accumulation rather than as individual loans. It was a misdirection of the magistrate to order their piecemeal repayment and thus pretend to eliminate any question of capital contribution.

In my judgment, therefore, the appeal is allowed and the order of the assistant magistrate is altered to read:

" 1. That a decree of divorce does hereby issue;

2 That the respondent shall pay to the appellant an amount equivalent to thirty three *per centum* of the present value of the immovable property known as Stands 199 and 185 of Borrowdale Township of 4 Mon Abri of Borrowdale, subject to the following provisions:

(a) Within fourteen days of the date hereof, the parties shall agree to the appointment of a valuer for the purpose of determining the present value of the property;

(b) Failing agreement, either party may, within thirty days hereof, make chamber application, on the existing papers, supported by a letter of consent by a valuer to his appointment, for the appointment of a valuer for the said purpose;

(c) The valuer shall submit his valuation within fourteen days of his appointment;

(d) In the event, that the property, or portion thereof has already been sold, then:

(i) the respondent shall account to the appellant for proceeds of the sale of any such property within thirty days hereof;

(ii) Failing compliance herewith a valuer shall be appointed as provided in paragraphs (a) and (b) hereof to value the property as at the date of its sale by the respondent.

(e) The respondent shall pay to the appellant an amount equivalent to thirty three *per centum* of the value so established, or the proceeds as accounted for, as the case may be, within three months thereof.

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2. The respondent shall pay the costs of the appeal, and each party shall pay his or her own costs in all

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lower proceedings hithertofore."

Kamocha J: I agree.

Ziumbe & Mtambanengwe, appellant's legal practitioners

Sawyer & Mkushi, respondent's legal practitioners

MUNAMATO MINING SYNDICATE *v* MINING 1999 (2) ZLR 136 (HC)

Citation	1999 (2) ZLR 136 (HC)
Case No	Judgment No. HH-176-99
Court	High Court, Harare
Judge	Smith J
Heard	July 29, 1999
Judgment	August 25, 1999
Counsel	A P de Bourbon SC, for the applicant J C Andersen SC, for the third respondent
Annotations	None

Civil application

Flynote

Mines and minerals - mining location - title to - acquisition of - rights of later pegger of claim subordinate to those of earlier pegger - what must be done to acquire title - physical act required - mere application to register claim not enough

Headnote

The rights as between peggers of mining locations are determined by priority of acquisition of title, the rights of a later pegger being subordinate to those of an earlier one. Title to a mining claim is acquired by the due performance of the first physical action required to be done under the Mines and Minerals Act, that is, by visiting the mining location and doing something such as pegging a claim. Merely filing an application is not a "physical" act as envisaged by the Act.

Statutes Considered

Legislation considered:

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Mines and Minerals Act [*Chapter 21:05*], s 177

Case Information

A P de Bourbon SC, for the applicant

J C Andersen SC, for the third respondent

Judgment

Smith J: This is a dispute over the ownership of 5 mining claims for black granite in the Mount Darwin area. The applicant (hereinafter referred to as "M M Syndicate") is seeking an order that the first respondent (hereinafter referred to as "the Mining Commissioner") register the claims in its name. The third respondent (hereinafter referred to as "Nesh Trading") claims that it is the rightful owner of the claims. The facts that are relevant to this dispute are not in issue. They are as follows. In 1996, the area in which the claims are situated was covered by an exclusive prospecting order (EPO 937). On 6 June 1996, M M Syndicate received permission from the holder of EPO 937 to peg and register the five claims. Thereafter, it applied to the Mining Commissioner for certificates of registration entitling it to mine black granite on the claims. When inquiries were made by it in August 1996 as to how the registration procedures were proceeding, it was informed that Nesh Trading had been granted certificates of registration of the five claims. M M Syndicate then

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made an application to this court for an order that the Mining Commissioner register the five claims in the name of M M Syndicate and that the registration certificates issued to Nesh Trading be set aside. Because the application could not be determined on the papers, the matter was set down for trial. After hearing evidence from the parties, Devittie J ordered that the registration certificates granted to Nesh Trading be cancelled because of the irregularities that had occurred : firstly, it had not obtained the consent of the holder of EPO 937 to prospect in the area; secondly, the registration was effected at a time when M M Syndicate's claims were pending consideration. The learned judge also held that he could not order the Mining Commissioner to register M M Syndicate's claims because, if he did so, he would be usurping the powers conferred on the Minister by the Mines and Minerals Act [*Chapter 21:05*] (hereinafter referred to as "*Chapter 21:05*").

The judgment of Devittie J was handed down on 4 December 1998. On that same date, M M Syndicate made a further application to prospect within the area covered by EPO 937. The application was approved on 9 December 1998. On 21 December 1998, EPO 937 expired. Nesh Trading then pegged the five claims; it alleges that the pegging was done on 29, 30 and 31 December whereas M M Syndicate alleges that it was done on 22 December. However, M M Syndicate does not provide any corroboration of its allegations or deny the allegations by Nesh Trading, and so it must be accepted that the claims were pegged by Nesh Trading on the dates it alleges. On 13 January 1999, the second respondent (hereinafter referred to as "the Minister") approved the application by M M Syndicate. On 14 January, Nesh Trading applied to the Mining Commissioner for the registration of the claims it had pegged at the end of

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December 1998. M M Syndicate was advised on 20 January that the Minister had approved its application. However it was subsequently advised, by letter dated 29 January, that the permit issued to it to peg within EPO 937 was of no effect, since EPO 937 had lapsed in December 1998, and that it was free to go and re-peg the same claims if the area was still open to prospecting and pegging. On 9 February, M M Syndicate sought to re-peg the claims and on the following day it submitted its application for registration of the claims. The application was rejected as Nesh Trading had already submitted an application in respect of the claims.

Mr *Andersen* submitted that Nesh Trading obtained valid title to the mining claims on 14 January 1999, having pegged them at the end of December 1998 when they were open to prospecting and thereafter having applied for a certificate of registration in terms of s 48 of *Chapter 21:05*. The certificate of registration conferred a real right. The land in question was open to prospecting since EPO 937 had lapsed. Although M M Syndicate had pegged the claims in February 1999, by that time it was no longer open to prospecting.

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Mr *de Bourbon's* argument was that M M Syndicate had priority of title to the claims by virtue of s 177(3) of *Chapter 21:05*. That subsection provides that priority of acquisition of title to any mining location shall, in every case, determine the rights as between the various peggers of mining locations and in all cases of dispute the rule shall be followed that, in the event of the rights of any subsequent pegger conflicting with the rights of a prior pegger, then, to the extent to which such rights conflict, the rights of the former shall be subordinated to those of the latter. Subsections (1) and (2) of s 177 contain two definitions which are applicable in the interpretation of subs (3). In subs (1), "pegger" is defined as meaning the person in whose name or on whose behalf a mining location was registered. In subs (2), the term "acquisition of title" is defined as being taken to mean the due performance of the first physical act required to be done under the Act in order to acquire any exclusive rights in respect of any mining location. Mr *de Bourbon* argued that the filing of the application by M M Syndicate on 8 May 1996 was the first physical act required to be done under *Chapter 21:05* in order to acquire exclusive rights in respect of the mining claims in question. That application was still pending; the fact that it was pending in relation an EPO was irrelevant. The rights of M M Syndicate flowed from that application.

In my opinion, the argument propounded by Mr *de Bourbon* cannot be sustained. Firstly, I consider that the reference in subs (2) of s 177 to the "first physical act" means something more than merely making an application. In the *Shorter Oxford English Dictionary*, "physical" is defined as meaning of, or pertaining to, material nature; pertaining or connected with matter; material; as opposed to physical, mental or spiritual. In the context of s 177, I consider that it means an act such as visiting the mining location and doing something such as pegging a claim. Secondly, even if I am wrong as to my interpretation of what is meant by a physical act, subs (3) of s 177 of *Chapter 21:05* provides that priority of acquisition of title determines the rights as between the various peggers of mining locations. M M Syndicate is not a pegger as defined in subs (1) of s 177 because the mining locations in respect of which it has made application have not been registered in its name.

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In the founding affidavit, there are allegations that the Mining Commissioner was biased towards Nesh Trading and that he has an interest in the matter because he has sought, at every turn, to frustrate the application by M M Syndicate. It is also alleged that he acted in an unprofessional manner. Nesh Trading disputed the allegations. However, the Mining Commissioner did not file an affidavit denying the allegations. It is most unfortunate that he did not do so. One is left with the impression that either he cannot deny

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the allegations or else he is so uninterested in maintaining his reputation that he could not be bothered to respond. Whichever is the case, it does not leave one with a good impression.

For the reasons set out above, the application is dismissed with costs.

Honey & Blanckenberg, applicant's legal practitioners

Gollop & Blank, third respondent's legal practitioners

MUTARE CITY COUNCIL *v* MUDZIME & ORS 1999 (2) ZLR 140 (SC)

Citation	1999 (2) ZLR 140 (SC)
Case No	Judgment No. S-91-99
Court	Supreme Court, Harare
Judge	Ebrahim JA, Muchechetere JA, Sandura JA
Heard	June 15, 1999
Judgment	September 2, 1999
Counsel	L T Biti, for the appellant V G Guni, for the respondents
Annotations	None

Flynote

Civil appeal

Employment - contract - termination - on notice - employees of urban council - whether permission of Minister of Labour required

Interpretation of statutes - regulations - effect of - whether can override provisions of statute - repugnance -

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implied repeal - later statute inconsistent with earlier one - implied repeal of inconsistent provisions

Local authority - urban council - employee - dismissal - on notice - permission of Minister of Labour not required

Practice and procedure - review - application - application made out of time - need to apply for condonation - failure to do so will result in dismissal of application

Headnote

The respondents were all former employees of the appellant council. They had been suspended and dismissed at various times in 1996. A labour relations officer instructed that they be reinstated, but the council did not do so. The respondents brought the matter on review in the High Court, which ordered their reinstatement. The council appealed, arguing that as the application had been brought well after the 8 week period stipulated in the High Court Rules, and as there had been no application for condonation, the application for review should have been dismissed. It also argued that an urban council was not obliged to seek ministerial approval to dismiss its employees if it followed the provisions of the Urban Councils Act [*Chapter 29:15*].

Held, that the application for review was lodged well out of time and there was no application for condonation. The application was therefore not properly before the court and should have been dismissed.

Held, further, that although the respondents were ordinary employees of the council, s 141 of the Urban Councils Act, which allowed dismissal on notice, prevailed over the labour regulations requiring the approval of the Minister of Labour, both because an Act would prevail over regulations and because the Act, being later in time than the regulations, impliedly repealed the regulations.

Cases Considered

Cases cited:

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

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

Kwete v *Africa Community & Publishing Trust & Ors* HH-216-98

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

Mayi v *National Supplies & Anor* S-86-90

Min of Labour & Ors v *PEN Tpt (Pvt) Ltd* 1989 (1) ZLR 293 (S)

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

Mutare City Council v *Matamisa* 1998 (1) ZLR 512 (S)

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Mutare City Council v *Ncube & Ors* HH-139-87

Statutes Considered

Legislation considered:

Urban Councils Act [*Chapter 29:15*], s 141

Case Information

L T Biti, for the appellant

V G Guni, for the respondents

Judgment

Muchechetere JA: This is an appeal against the judgment of the High Court, Harare, on 30 September 1998 in which the dismissals and suspensions of the respondents were held to be unlawful and invalid and the appellant was ordered to reinstate without loss of benefits the first, second, fourth, fifth, sixth, seventh and ninth respondents to the positions and grades they occupied as the appellant's employees at the time of their suspension or dismissal, and to pay the first, second, fourth, fifth, sixth, seventh and ninth respondents their salaries and wages for their period of suspension or dismissal up to the date of reinstatement.

The facts in the matter are that the respondents were employees of the appellant. They were suspended and dismissed by the appellant at various times between 11 April 1996 and 24 December 1996. In connection with all the respondents, the appellant sought, on various occasions, authority from the labour relations office to dismiss them but authority was not granted on the ground that the applications were out of time. The appellant was advised to reinstate the respondents but did not do so. The appellant opposed the application for reinstatement in the court *a quo.*

The appellant's opposition in the court *a quo* was based on three grounds. The first ground was that the application was not properly before the court, as it purported to join nine different applicants with nine different cases, circumstances and causes of action in one matter. The second ground was that the application before the court *a quo* was one for review and that, in view of the fact that the respondents had not complied with Order 33 of the High Court Rules, the application ought to be dismissed on that ground without even going into the merits. The third and more substantive ground was whether an urban council is obliged to comply with the Labour Relations (General Conditions) (Termination of Employment) Regulations 1985 SI 371 of 1985 ("the Regulations") when terminating the contracts of

ordinary employees. In this court, the appellant only raised the second and third grounds in its heads of argument. I will, however, deal with both the second and third grounds. The third ground is an important issue in urban councils' labour laws.

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In connection with the second ground, Mr *Biti*'s submissions were to the effect that the application before the court *a quo* was a review in that it was directed at the procedure that the appellant had taken in terminating the respondents' contracts of employment. It was contended by the respondents that the appellant was obliged to seek ministerial approval in terms of the said Regulations and that to the extent that such approval was not given the appellant's actions ought to be set aside and *a fortiori* reinstatement ought to follow. He went on to argue that his view was fortified by the nature of the draft order sought by the respondents, which sought reinstatement of the respondents. Mr *Biti* also argued that the court *a quo*, although it made no appropriate finding on the issue, made observations which indicate that it was reviewing the appellant's actions. For at pp 8-9 of the cyclostyled judgment (HH-162-98), the learned judge stated the following:

> "The respondent purported to summarily dismiss some of its workers in breach of the provisions of the SI 371/85. The dismissals were null and void. Also of no force or effect were the purported suspensions followed by subsequent dismissals of the rest of the applicants ...
>
> In the light of the foregoing, I hold that the purported dismissals or suspensions were unlawful and invalid and are hereby set aside and that the applicants be reinstated with full benefits."

In the heads of arguments for the respondents, it is submitted that the respondents in the application sought a declaratory order and in this connection reliance is placed on *Musara* v *Zinatha* 1992 (1) ZLR 9 (H). However, as was pointed out by Mr *Biti*, it is significant that in that judgment the learned judge at p 14 of the judgment indicated that there was:

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

I do not consider that this case falls within this special category as there is, in my view, no sufficient information for the court to have considered it as one seeking a declaratory order. As already pointed out, the order prayed for was not a declaration.

In this connection, see *Kwete* v *Africa Community & Publishing Trust & Ors* HH-216-98 where Smith J said at p 3 of the cyclostyled judgment:

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> "It seems to me, with all due respect, that in deciding whether or not, in an application for damages or reinstatement arising from alleged wrongful dismissal from employment, the provisions of r 259 of the High Court Rules 1971 should be complied with, one should look at the grounds on which the application is based, rather than the order sought. In many cases it has been held that compliance with the requirements of Order 33 of the High Court Rules 1971, including r 259, is mandatory in the case for applications for review - see *Matsambire* v *Gweru City Council* S-183-95, *Maketo* v *Chairman, PSC & Ors* S-164-97 and *Masuka* v *Chitungwiza Town Council & Anor* HH-165-97. It seems to me anomalous that one should be permitted to file an application for review well out of time, without seeking condonation, as long as a declaratory order is sought. A declaratory order is, after all, merely one species of relief available on review. One can imagine the case of a litigant who institutes an application for review and reinstatement well out of time. He applies for condonation, which is refused. All then he

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> has to do is to institute a fresh application for review but instead of seeking reinstatement, he wants a declaratory order. Should he be able to get round the provisions of Order 33 of the High Court Rules 1971 that easily? I think not."

See also *Minister of Labour & Ors* v *PEN Transport (Pvt) Ltd* 1989 (1) ZLR 293 (S) and *Mayi* v *National Supplies & Anor* S-86-90.

I agree with the above sentiments and the submissions of Mr *Biti*. The application before the court *a quo* was one for review. There was therefore need for it to be lodged within eight weeks from the date of the dismissals in compliance with the requirements of Order 33 of the said Rules. Failure to do so would have entailed an application for condonation. The application was not lodged within the eight weeks and there was no application for condonation before the court *a quo* or before this court. In such circumstances, the court has no discretion. It will simply dismiss the application. See *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S) at 260C-E where the Chief Justice stated the following:

> "I entertain no doubt that absent an application, it was erroneous for the learned judge to condone what was, on the face of it, a grave non-compliance with r 259. For it is the making of the application that triggers the discretion to extend the time. In *Matsambire* v *Gweru City Council* S-183-95 (not reported), this court held that where proceedings by way of review were not instituted within the specified eight week period and condonation of the breach of r 259 was not sought the matter was not properly before the court. I can conceive of no reason to depart from that ruling ..."

I would therefore allow the appeal on this ground.

In connection with the third ground, it is common cause that all the respondents were ordinary council employees, that is, that they were neither town clerks nor senior officials. The termination of their contracts of employment is regulated in terms of s 141 of the Urban Councils Act [*Chapter 29:15*] ("the said Act"). It is now settled law that for council town clerks and senior officials Ministerial approval for the termination of their contracts of employment in terms of the said Regulations is no longer required. See *Mutare City Council* v *Matamisa* 1998 (1) ZLR 512 (S).

MUCHECHETERE JA

The question to answer in this case is whether an urban council, after exhausting the provisions of s 141 of the said Act - there was full compliance with the provisions of the section in this case - still needs to comply with the provisions of the said Regulations. Subsections (2) and (3) of s 141 of the said Act read:

" (2) Subject to the conditions of service of the employee concerned, a council or, in the case of a municipal council, the executive committee of the council, may at any time discharge an employee other than a senior official -

(a) upon notice of not less than three months; or

(b) summarily on the ground of misconduct, dishonesty, negligence or any other ground that would in law justify discharge without notice.

(3) An executive committee of a council shall not discharge an employee, other than a senior official, unless

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the council has approved the discharge:

Provided that the discharge of a health inspector *shall in addition* be subject to the approval of the Minister responsible for health in terms of section 11 of the Public Health Act [*Chapter 15:09*]" (my emphasis).

Mr *Biti's* submission was to the effect that the above provisions are not overridden by the provisions of the said Regulations. He argued, firstly, that the provisions of the said Regulations, being subsidiary legislation, cannot override the provisions of a statute - subss (2) and (3) of s 141 of the said Act - which are in the nature of primary legislation. See *Mutare City Council* v *Ncube & Ors* HH-139-87 at pp 6-7 of the cyclostyled judgment.

The second argument by Mr *Biti* was the principle of *lex posterior derogat priori*. This is a general rule of statutory interpretation to the effect that where two general statutes are irreconcilably in conflict with one another, the latter statute is deemed to be the superior one on the basis of implied repeal. This is because it is presumed that when the legislature passes the latter Act it is presumed to have knowledge of the earlier Act. This view was accepted and applied by Reynolds J in *Mutare City Council* v *Ncube supra* at pp 6-7 of the cyclostyled judgment. There he said:

"Secondly, it seems to me that s 17(2) of the Labour Relations Act, 16 of 1985, provides merely that regulations made by the Minister under the enabling s 17(1) 'shall prevail over the provisions of any other statutory instrument ...', and no reference is made in these regulations, or in the Act itself to their application over any other *enactment*. Although s 3 of this statute provides that 'this Act shall apply to all employers and all employees ...', nowhere in the Act itself is any provision made regulating the discharge of employees which would apply in the instant case. *The regulations that were made in terms of s 17(1) of this Act would, therefore, in my view, have no force or effect in regard to the Urban Councils Act* [Chapter 214]. *I am fortified in this view by the fact that the legislature, when passing the latter enactment, and being fully aware of the provisions of the Labour Relations Act 16 of 1985, did not find it necessary to stipulate that the control of matters of employment would vest in the Minister of Labour, Manpower Planning and Social Welfare*" (my emphasis).

MUCHECHETERE JA

The above view was accepted by Smith J in *Masasi* v *PTC* 1991 (2) ZLR 73 (H) at 80-81. It was therefore argued that because of the above principle, the provisions of the said Regulations were overridden by the provisions of subss (2) and (3) of s 141 of the said Act.

I agree with the submissions and arguments of Mr *Biti*. These are fortified by the proviso at the end of subs (3) of s 141. The implication here is that the legislature had excluded the requirement of any ministerial approval to dismissals except in the case of an inspector of health. It is inconceivable that further ministerial approval would be required in the case of a health inspector after the approval of the Minister of Health. The same applies to the other employees. The legislature would have stated that further ministerial approval would be required if that was the intention. This is the view which was properly taken by the Chief Justice in *Mutare City Council* v *Matamisa supra* at pp 517H-518B, where he said:

"Had the intent been other than to give the final say with respect to the discharge of a town clerk to the Local Government Board (in the present case it is the council's executive committee), the legislature would have added a proviso to that effect to s 139(2). The provisos to ss 140(2) and 141(3) deal specifically with the discharge of a medical officer of health and a health inspector. In each, the discharge is subject not only to the approval of the Local Government Board but in addition to the approval of the Minister responsible for health in terms of s 11 of

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> the Public Health Act [*Chapter 15:09*]. It is significant that with a medical officer of health, who is a senior official, and a *health inspector, who is an ordinary employee, the provisos do not include the necessity to obtain the approval of the Minister of Labour*" (my emphasis).

The respondents merely relied on the cases of *Gumbo* v *Norton-Selous Rural Council* 1992 (2) ZLR 403 (S) and *Masasi* v *PTC supra*. In this connection, I again agree with Mr *Biti's* submission that the case of *Gumbo supra* is irrelevant in this case. It dealt with a now repealed provision - s 63(2) of the then Rural Councils Act. On this, see *Matimisa's* case *supra* at 513-514. The case of *Masasi* v *PTC supra* is equally irrelevant. It is, however, worthy of note that the learned judge's *obiter dictum* in that case is consistent with the decision in *Matamisa's* case *supra*.

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:

> "The application is dismissed with costs."

Ebrahim JA: I agree.

Sandura JA: I agree.

Bere Brothers, Mutare, appellant's legal practitioners

Midzi, Ziweni & Partners, respondents' legal practitioners

MPUMELA *v* BERGER PAINTS (PVT) LTD 1999 (2) ZLR 146 (SC)

Citation	1999 (2) ZLR 146 (SC)
Case No	Judgment No. S-133-99
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA, Sandura JA
Heard	September 6, 1999
Judgment	September 6, 1999
Counsel	I E G Musimbe, for the appellant W B Chirambasukwa, for the respondent
Annotations	None

Civil appeal

Flynote

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Employment - appeal under labour legislation - decision of Labour Relations Tribunal - appeal only on question of law - question of law - what is - question of lawfulness of order issued to employee a question of law

Headnote

A bookkeeper was ordered by his manager to wear appropriate clothes to work, including a jacket and tie. He refused to comply with this order and continued to wear casual clothes. On application, a labour relations officer granted an order for the dismissal of the employee on the ground that he had wilfully disobeyed a lawful order. The employee unsuccessfully appealed against this determination to a senior labour relations officer and then to the Labour Relations Tribunal. The employee finally appealed to the Supreme Court against the decision of the Labour Relations Tribunal. The main issue in the appeal was whether the order issued by the manager was a lawful one.

Held, that s 92(2) of the Labour Relations Act [*Chapter 28:01*] provides that an appeal from the decision of the Labour Relations Tribunal lies to the Supreme Court on a question of law only.

Held, further that the issue of whether the order is lawful is a question of law, in the sense that it raised a question of what the law is on a certain matter.

Held, further, that the order was a lawful one as it properly appertained to the character of the employee's contract. It did not matter that the contract itself did not lay down what clothing the employee had to wear to work. The employee was employed as a bookkeeper and the manager was quite entitled to instruct him to wear appropriate clothing for this job.

Cases Considered

Cases cited:

Matereke v *C T Bowring & Associates (Pvt) Ltd* 1987 (1) ZLR 206 (S)

Media Workers' Assn of SA & Ors v *Press Corp of SA Ltd* 1992 (4) SA 791 (A)

Muchakata v *Netherburn Mine* 1996 (1) ZLR 153 (S)

Muzuva v *United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S)

Zimbabwe United Omnibus Co v *Mabande & Anor* 1998 (2) ZLR 150 (S)

Statutes Considered

Legislation considered:

Labour Relations Act [*Chapter 28:01*], s 92(2)

Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985 (SI 371 of 1985), s 3(1)

Case Information

I E G Musimbe, for the appellant

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W B Chirambasukwa, for the respondent

Judgment

Sandura JA: This is an appeal against the decision of the Labour Relations Tribunal ("the Tribunal") which dismissed 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 labour relations officer's determination which authorised the appellant's dismissal by the respondent.

After hearing both counsel, we dismissed the appeal with costs and indicated that our reasons would be handed down in due course. I now set them out.

The following facts were common cause. The appellant was employed by the respondent as a bookkeeper. On 19 October 1992, he went to work dressed in casual clothes. The Administration Manager ("the Manager") warned him not to wear such clothes when coming to work as he was expected to wear appropriate clothes, including a tie and a jacket. The appellant did not accept that. He argued that as the letter of appointment did not set out what clothes he should wear when going to work he was free to wear whatever clothes he wanted to wear. He added that nobody should tell him what to wear and that on the following day he would come to work wearing shorts. He was, however, warned that if he did that he would be given a written warning.

On the following day, 20 October 1992, the appellant came to work wearing casual trousers and a half-buttoned shirt. The Manager then issued to him a written warning on which he required him to sign his name. He did not accept the document and, therefore, did not read it or append his signature to it as he was required to do.

Two days later, the Manager issued another written warning to the appellant on the ground that on 20 October 1992, the appellant had refused to accept, read or sign the written warning issued to him. The appellant again refused to accept the document and did not read it or append his signature to it as he was required to do.

On the following day, 23 October 1992, the Manager instructed him to hand over the petty cash box to another employee, but the appellant refused to do so unless the instruction was in writing. Later that day the Manager informed him that he was suspended from duty with immediate effect and gave him the letter of suspension which he refused to accept. The Manager also instructed him to surrender the company property in his possession, which included cheque books and the petty cash box, but the appellant refused to do so.

The police were then called and when they arrived the appellant became violent and abusive against the Manager. He made various threats and indicated that whilst he would not challenge his suspension he intended

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leaving the company "in style". He later struck the Manager's hand with a carpenter's ruler before leaving the premises.

Subsequently, the Manager, acting on behalf of the respondent, made an application to the labour relations officer for an order terminating the appellant's contract of employment. He relied upon the provisions of s3(1)(a) and (b) of the Labour Relations (General Conditions of Employment)(Termination of Employment) Regulations 1985 SI 371 of 1985 ("the Regulations") which read 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) ...
>
> 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."

The labour relations officer who heard the matter found the appellant guilty of wilful disobedience to a lawful order given by his employer in that, contrary to the instructions given to him by the Manager, the appellant persisted in wearing casual clothes at work. Accordingly, the labour relations officer authorised the appellant's dismissal by the respondent.

Thereafter, the appellant appealed to the senior labour relations officer who subsequently dismissed the appeal. A further appeal to the Tribunal was also unsuccessful. Aggrieved by the result, the appellant appealed to this court.

At the hearing of the appeal, counsel for the respondent took a point in limine and submitted that the appeal should not be entertained because it did not raise any question of law. He relied upon s92(2) of the Labour Relations Act [*Chapter 28:01*] which provides that an appeal from the decision of the Tribunal lies to this court on a question of law only.

Before determining the point *in limine* raised by counsel for the respondent, it is necessary to state the main issue raised by the appellant in this appeal. Whilst the appellant admitted that he wilfully disobeyed the order that he should wear appropriate clothes, including a tie and a jacket, he disputed the contention that the order was lawful. The main issue in this appeal, therefore, is whether the order issued by the respondent's Manager was a lawful one.

I now proceed to determine whether that issue raises a question of law.

Whether an issue raises a question of law or a question of fact has been considered by this court in previous cases, cases in which the meaning of the phrase "question of law" has been examined.

In *Muzuva* v *United Bottlers (Pvt) Ltd* 1994 (1) ZLR 217 (S), Gubbay CJ

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SANDURA JA

considered the meaning of the phrase "question of law" and said the following at 220D-G:

> "The twin concepts, questions of law and questions of fact, were considered in depth by Grosskopf JA in *Media Workers' Association of South Africa & Ors* v *Press Corporation of South Africa Ltd ("Perskor")* 1992 (4) SA 791 (A). Approving the discussion of the topic in Salmond on *Jurisprudence* 12 ed at 65-75, the learned Judge of Appeal pointed out at 795D-G that the term 'question of law' is used in three distinct though related senses. First, it means 'a question which the law itself has authoritatively answered to the exclusion of the right of the court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter'. Second, it means 'a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter'. And third, any question which is within the province of the judge instead of the jury is called a question of law. This division of judicial function arises in this country in a criminal trial presided over by a judge and assessors.
>
> I respectfully adopt this classification, although the third sense is of no relevance to a matter such as this."

In that case, the learned Chief Justice was dealing with a submission made by counsel, similar to the one made in the present case, that the appeal from the Tribunal, which was before him, did not raise any question of law.

I find myself in agreement with the learned Chief Justice that the meanings of the phrase "question of law" are as set out by the learned Judge of Appeal in the *Media Workers* case, *supra.* Bearing in mind the fact that the main issue to be determined in this appeal is whether the order issued by the respondent's Manager was lawful, I am satisfied that that issue raises a question of law in the sense of the second meaning of that phrase as set out above.

I find support for this conclusion in what Korsah JA said in *Muchakata* v *Netherburn Mine* 1996 (1) ZLR 153 (S) at 155B where the learned Judge of Appeal said:

> "To my mind, whether or not an order is lawful is clearly a question of law, the determination of which, when appealed, falls within the purview of this court."

The same view was expressed by this court in the recent case of *Zimbabwe United Omnibus Co* v *Mabande & Anor* 1998 (2) ZLR 150 (S) at 151C.

In the circumstances, this court does have the jurisdiction to entertain the appeal. The point *in limine* cannot, therefore, succeed.

I now wish to deal with the question whether the order issued by the respondent's Manager was a lawful one. If it was not lawful, the appeal must be allowed.

On behalf of the appellant, it was submitted that the order was unlawful because the appellant's contract of employment did not mention what type of clothes the appellant was required to wear at work. More specifically, it was submitted that there was nothing in his contract of employment which

SANDURA JA

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required him to wear a jacket and a tie. In the circumstances, it was argued that he was entitled to go to work dressed in casual clothes.

The expression "lawful order" has been considered by this court in a number of cases. In *Matereke* v *CT Bowring & Associates (Pvt) Ltd* 1987 (1) ZLR 206 (S) Gubbay JA (as he then was), considered the phrase and had this to say at 212E-F:

> "The second requirement, that the disobedience be directed at 'a lawful order', means simply that the employee is not bound to obey an order to do something not properly appertaining to the character or capacity of his contract of employment. An order which involves a reasonable apprehension of immediate danger to the employee's life or injury to his person, not reasonably contemplated at the time he entered the employment, is unlawful and he is justified in refusing to obey it."

In that case, the learned Judge of Appeal was dealing with the case of an employee who had left the office assigned to him by his employer and occupied another office on the employer's premises without the employer's authority. When he was ordered to vacate the office he persistently refused to do so, notwithstanding several warnings given to him. He only left the office after a policeman arrived and requested him to accompany him to the police station. On those facts, the learned Judge of Appeal confirmed the Tribunal's finding that the order issued to the employee was a lawful one and that the employee was guilty of wilfully disobeying it.

Subsequently, in *Muchakata* v *Netherburn Min supra*, Korsah JA considered the phrase "lawful order" and had this to say at 158B:

> "I take the meaning of 'lawful' from Vol 3 of *Words and Phrases Judicially Defined* to be:
>
> > '... what is in conformity with (or frequently not opposed to) the principles or spirit of the law whether moral or judicial'."

Applying the principles which emerge from the cases previously decided by this court, I am satisfied that in the present case the order issued by the respondent's Manager was an order properly appertaining to the character of the appellant's contract of employment and was lawful. It cannot cogently be argued that as the contract of employment did not mention what type of clothes the appellant was required to wear, the respondent's Manager could not order him to wear appropriate clothes. In my view, there is certainly no substance in the argument that the appellant was entitled to wear whatever clothes he wanted to wear. If that were the case, the appellant would have been entitled to go to work wearing a jogging suit or a track suit, which could hardly have been within the contemplation of the parties at the time the contract of employment was concluded, bearing in mind the fact that the appellant was employed as a bookkeeper.

As mentioned earlier, the appellant admitted that he wilfully disobeyed the order issued by the Manager. That disobedience was persisted

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SANDURA JA

in notwithstanding the warnings given to him. In my view, the disobedience was sufficiently grave as to go to the root of the contract of employment. The appellant's dismissal was,

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therefore, justified.

In the circumstances, the appeal had to be dismissed with costs.

Gubbay CJ: I agree.

McNally JA: I agree.

I E G Musimbe & Partners, appellant's legal practitioners

Chirambasukwa, Gwati & Partners, respondent's legal practitioners

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TEERA v ZUMBIKA 1999 (2) ZLR 152 (HC)

Citation	1999 (2) ZLR 152 (HC)
Case No	Judgment No. HH-187-99
Court	High Court, Harare
Judge	Chatikobo J, Gwaunza J
Heard	July 29, 1999
Judgment	September 8, 1999
Counsel	C Hungwe, for the appellant T Tirivangani, for the respondant
Annotations	None

Civil Appeal

Flynote

Family law -child -paternity -denial by alleged father-power and duty of court to make enquiry -marriage -relevance of when allegedfather denies paternity

Headnote

Where paternity is in issue, a maintenance court has not only the power but the duty to conduct an enquiry into the matter, calling such witnesses at it deems fit. If necessary, the court should see the child. If the alleged father shows that the woman was married to another man, this does not end the matter. If he has admitted intercourse, he is presumed to be the father unless he proves that he cannot be the father.

Cases Considered

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Cases cited:

Gate v Ngoreta & Anor S-57-88

Green v Shirto 1974 (2) RLR *13 (A)*

Moyo v Sifelani S-13-88

P v C 1978 RLR *80 (A)*

S v Swart 1965 (3) SA 454 (A)

S v T 1988 (2) ZLR 103 (S)

X v Y 1973 (1) RLR t 92 (A); 1973 (3) SA 118 (RA)

Case Information

C Hungwe, for the appellant

T Tirivangani, for the respondent

Judgment

Gwaunza J: The appellant in 1998 sued the respondent for maintenance for one minor child, in an amount of $2 500 per month. The magistrate who heard the matter at Rusape dismissed the application, with costs. The appellant now appeals against that judgment.

At the hearing of the appeal, the respondent applied successfully for condonation of the late filing of his heads of argument.

The pertinent facts of this matter are that the appellant and the respondent commenced a sexual relationship in July 1997. The relationship lasted until after the child was born in April 1998. The respondent, who admits to having helped the applicant with clothes for the baby, later denied paternity thereof and terminated the relationship. The appellant, in frustration, visited both the

respondent's home and workplace, threatening to cause trouble if he did not contribute to the child's maintenance. At one time, she dumped the child on him at his workplace. Because of the trouble the appellant was causing, the respondent filed an application with the magistrate's court in Harare for a peace order. In his supporting affidavit, the respondent deposed as follows in para (1):

> "I know the respondent as my ex-girlfriend and that we have one minor child together. However, I terminated the affair since October 1998."

The appellant averred she bad informed the respondent that she had been married according to customary law to a man of Indian origin. The respondent, on the other, had averred she had told him she was married but that her husband would not be bothered by their affair,

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He asserted as follows in his evidence in chief.

> "When applicant gave birth, I told her that we could not continue for fear of adultery damages. I could also not have fathered the child because the hair could be such that the child is of mixed blood - African and Indian (the husband)."

While not denying having deposed to the affidavit in which he admitted to being the father of the child, the respondent averred that he had sworn the affidavit underduress, given the trouble the appellant was causing both at his home (where she at one time was assaulted by his wife) and at his workplace.

The basis of the magistrate's finding that the respondent was not responsible for maintaining the child is summarised in the following extract from his judgment, delivered on 4 February 1998.

> "The issue to be determined here first is one of paternity. The child was shown to the court by consent of both parties. I would not want to rely on the features of the child lest I mislead myself. I would rather rely on what the law is like in such matters. Was the applicant legally married at the time of the relationship? If she was, is it not trite law that a presumption of paternity of a woman's child operated against the husband of such child. Further, if the applicant is divorced and not on separation could she not just produce proof (sic) such as a divorce certificate to rebut the assertion that she was still legally married. I would want to believe that since the respondent states the applicant is still legally married, the burden of proof shifts to the applicant to prove she was no longer married at the time of the relationship."

The appellant gives the following as her grounds of appeal:

1. that the magistrate misdirected himself when he made a finding of fact that the appellant was still legally married at the time she had an intimate relationship with the respondent;

2. that the magistrate erred by failing to consider the evidence of the appellant to the effect that she had been divorced from her husband, as confirmed in para 10 of the "consent paper" in Case No. 959/96, dated 6 November 1996 (Annexure "A") which states clearly that the appellant and one Khaled had terminated their relationship on 6 November 1996;

3. that consequently the magistrate erred in law in finding that the appellant had not discharged the onus that she was not legally married at the time she had the intimate relationship with the respondent; and

4. that the magistrate incorrectly decided not to rely on the features of the child where in this case the divorced husband is of Indian origin and the alleged father a black Zimbabwean; and

5. that the magistrate erred in law in deciding that the affidavit made by the respondent admitting paternity had been made under duress and this not admissible (Annexure "B").

I find there is substantial merit in the grounds relied upon. Having correctly asserted that the first issue for determination in this matter was one of paternity, the magistrate, in my view, misdirected himself by then failing to conduct the enquiry that it behoved him to conduct. Such

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an inquiry would have elicited the evidence necessary to support his finding on the issue of paternity.

The power of the court to hold an enquiry on the issue of paternity is stressed in the following words by the learned author W Ncube in Family Law in Zimbabwe at p 49:

> "It should be noted however, that as a result of the effects of the Maintenance Act [Chapter 45] now Chapter 5:09], a paternity dispute takes the form of an inquisitorial investigation. Section 13(b) of the Maintenance Act gives the maintenance court power, at is own initiative, to 'call such witnesses as it deems fit for the purposes of determinig the case'."

"in X v Y, 1(46) Lewis AJP commented on this power as follows:

> 'That section contains a special provision enabling the court itself to call such witnesses as it deems necessary for the purpose of arriving at the truth in the enquiry. It will be seen, of course, that this is a special power in the court itself; which does not exist in an ordinary civil action, where it is entirely up to the parties themselves to call their witnesses and the court itself has no right *mero motu* to call witnesses'."

An additional but no less important consideration relates to the best interests of the child. The policy of the law is not only to compel those that bring children into the world to maintain such children, but also to regard the interests of such children as paramount. Failure to conduct a proper enquiry into the issue of paternity does not serve the interests of the child in question, as its entitlement to maintenance is in danger of being improperly dismissed.

The importance of the need for the court to call for any evidence it deems necessary in order to enable it to reach an informed decision on the issue of paternity can thus not be over-emphasised.

The magistrate in the Courts *a quo* reached the decision that the appellant had failed to discharge the "onus" of proving she was not married at the time she

had the relationship with the respondent, as she had not produced proof of any divorce. As the magistrate did not elicit evidence on or seek proof regarding:

(a) the type of marriage, if any, the appellant had with her alleged former husband;

(b) the details of the divorce, if divorce had indeed taken place;

there is little to justify such a decision.

Had the magistrate made this inquiry, which would have involved no more than putting the question to the appellant, he would have realised:

(a) that despite the appellant referring to a "husband" she could not have been legally married to the man Khaled, who is of Indian origin, according to customary law; 2(47)

(b) that as further evidence of the non-existence of such a marriage, the appellant was in a position to tender Annexure "A" to the appeal papers, which is in the form of a "consent paper" granted in the same court, and whose effect was to formalise the termination of

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the relationship between the appellant and her former Indian boyfriend; and

(c) more importantly, that this relationship ended in November 1996, some 8 months before the parties *in casu* commenced their relationship.

Even had the magistrate established that the appellant, separated or not, was indeed married at the time she had the relationship with the respondent, the enquiry into the question of paternity should not have ended there. The law on paternity has been reiterated in countless Zimbabwean and South African authorities. 3(48) If a man admits having had sexual intercourse with the woman at any time, he is immediately presumed to be the father of the child in question until he proves, on a balance of probabilities, that he cannot possibly be the father of the child. 4(49) A man may disprove paternity by proving:

(i) non-access to the woman at the material time;

(ii) impotence on his part; or

(iii) from the results of blood tests, that he cannot possibly be the father of the child.

The respondent did not deny the fact that he had sexual intercourse with the appellant at the relevant time. He therefore had access to the appellant at the time she could have fallen pregnant. He has not asserted that he was impotent, nor has he produced the results of blood tests (which he does not seem to have

undergone), showing he could not possibly be the child's father. In short, he has not relied on any of the accepted defences for disproving paternity.

On his own testimony, the respondent continued to see the appellant for some months after the birth of the child; he even bought some clothes for the baby and, more importantly, swore an affidavit to the effect that he was the father of the child. I have no hesitation in dismissing the respondent's assertion that he swore the affidavit under duress. Not only has it not been established that he deposed to the affidavit in circumstances where it was, as it were, a matter of life or death, there was no need, in an affidavit supporting an application for a peace order, to volunteer the information that although she was an ex-girlfriend, the appellant had a child by him. Not unless he believed it was so.

While these facts may not of themselves be decisive in establishing that the respondent was the father of the child, they nevertheless indicate the respondent was aware he was the father of the child. The following dictum in the case of S v T 5(50) in which the respondent similarly illustrated his acknowledgment of the child, is particularly apposite:

> "While these pieces of evidence are not *indiciae* by which paternity may be established, taken together with the appellant's admission of intercourse with the respondent at the relevant period, they tend to support the assertion by the respondent that the appellant is aware he is the father of J ... "

S v T is almost on all fours with the case at hand. The appellant in that case had a sexual relationship with the respondent during a period when she (respondent) was estranged from her husband at customary law. When the affair ended the respondent immediately reconciled

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with her husband and some months later, gave birth to a child. Had the child been fathered by the respondent's husband, its birth date would have made it eight weeks premature. However, in respect of the appellant's association with the respondent, the birth date corresponded with a full term child. The respondent obtained an order that the appellant pay maintenance in respect of the child and the appellant appealed against that order. The Supreme Court's finding, which led to its dismissal of the appeal, are summarised as follows: 6(51)

> "[There] were two competing presumptions of law, the one was against illegitimacy, that is, a presumption that the husband is the father of any child born to the wife during the subsistence of the marriage. There is no requirement that the woman seeking to rebut this presumption be corroborated; the standard of proof required is that which is acceptable in all civil cases, a preponderance of probabilities. Even weak evidence against legitimacy must prevail if there is no other evidence to counterbalance it. Here, evidence regarding

> the date of birth and the fact that the child was carried to full-term tended to show that it was more probable than not that the child was not the offspring of the respondent's marriage. The second presumption is that if a man admits intercourse he is presumed to be the father of the child born thereafter. The onus is on him to show he could not possibly be the father, and the appellant has failed to discharge this onus."

On the authority of *S v T*, the existence of the presumption, where it is property established, that the husband of the woman is the father of the child does not automatically rule out consideration of any other competing presumption that the evidence may point to. When this is applied to the facts of this case, it is evident the court a quo erred, after making a finding to the effect that the appellant was still legally married to her former husband, by not proceeding to consider other pertinent factors like facial features of the child, the time it was born in relation to the period of the relationship between the parties and, most importantly, the presumption of paternity operating against the respondent.

Other authorities also underline the risks taken by a man who has illicit sexual intercourse with a married woman. Ncube emphasises this point in the following terms: 7(52)

> "A careful reading of the Roman-Dutch authorities shows that the presumption of paternity (in the case of married women) arises out of an admission of illicit extra marital sexual intercourse.
>
> As van den Heever puts it: 'It follows that juridically the claim (for maintenance) is based not on paternity but on illicit sexual intercourse...' The policy of the law is that those who engage in illicit sexual intercourse do so at the risk of children being fathered upon them and they should not, therefore, complain when they are called upon to contribute to the maintenance of those children."

And so it is with the respondent in this case. He averred he knew the appellant was married but had told him her husband would not be bothered by their affair. Assuming she had indeed been so married, the respondent, by proceeding to have such a relationship with the appellant under those terms, F would have been engaging in illicit sex and running the risk, which in the event became a reality, of the child being foisted on him.

The trial magistrate asserted in his judgment that the appellant had failed to produce proof of her "divorce" from her alleged former husband. Quite apart from the fact that the magistrate had not requested such proof, the evidence of the appellant to the effect that she was not married needed no G corroboration. As KORSAH JA stated in S v T, there is no requirement that the woman seeking to rebut the presumption that her ex-husband was the father of the child, be

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corroborated, the standard of proof required simply being a preponderance of probabilities. There was thus no shifting of the onus,

which still rested on the respondent to disprove paternity. This he clearl failed to do.

In cross-examining the appellant in the court *a quo,* the respondent also attempted to foist the child on other men he suspected the appellant of having had affairs with. Lest he should feel that he rebutted the presumption of paternity by making such allegations, the law on that too, is quite clear, an is categorically stated as follows in *Green v Shirto:* 8(53)

> "The mere fact that other men were having intercourse with the respondent at about the same time is not sufficient evidence to discharge that onus. He must show ... that it was not possible for him to be the father of the child."

This defence thus does not help the respondent in his determination to shirk his responsibility for maintaining the child.

One other issue is worthy of note. The court a *quo* had occasion to see th child. While the court is generally not qualified to determine the issue o paternity by facial looks, there is nothing wrong in the court making it, observation on the matter. In this case, the allegation was that the child coul possibly have had Indian features. That was indeed the whole point in having the child brought to court. In my view, the trial magistrate misdirecte himself by not making a comment, one way or the other, on the features of the child. His explanation that he chose not to do so in case he "misled himself" is both cryptic and unhelpful. However, given the weight of othe evidence in this case, and in light of what such evidence suggests, th magistrate's failure to comment on the features of the child is of itself not fatal to the appellant's case.

I am satisfied the facts of this case, *vis-á-vis* the law on paternity, establish in all respects that the respondent is the father of the child. He has clearly failed to discharge the onus to prove that he cannot possibly be the father of the child.

The respondent is therefore a responsible person within the meaning of s 6 of the Maintenance Act [*Chapter 5:07*]. He is not only able to contribute to the maintenance of the child (being employed as a general manager by the Grain Marketing Board), he has neglected to do so. The court has the authority to order him to provide reasonable maintenance for the child. As this court has not been provided with details pertaining to the parties' income and expenses, it thus does not have the information necessary for it to assess what would be an appropriate maintenance order. That is a task which the court a quo should undertake. However, in consideration of the fact that the process of having the matter re-heard and determined in the magistrates count is likely to take some time, and also in view of the time that has passed since

the ruling in the court *a quo* was made, an order for the payment of interim maintenance shall be made.

In the premises, it is ordered as follows:

(a) the appeal succeeds to the extent that the respondent is ruled to be the father of the child in

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question, and therefore legally obliged to maintain it;

(b) the matter is remitted to the magistrates court, Rusape, for an enquiry into, and a determination of, the quantum of maintenance to be paid by the respondent in respect of the child in question;

(c) pending the determination of the magistrates court in terms of (b) above, the respondent is ordered to pay $1000 per month as maintenance for the child; the respondent shall pay the costs of this appeal.

Chathatikobo J: I agree.

Kazanza & Co, appellant's legal practitioners

Tifivangani & Associates, respondent's legal practitioners

COMMAF HOLDINGS (PVT) LTD v GENERAL CHEMICALS (PVT) LTD & ANOR 1999 (2) ZLR 160 (HC)

Citation	1999 (2) ZLR 160 (HC)
Case No	Judgment No. HH-188-99
Court	High Court, Harare
Judge	Gillespie J
Heard	September 8, 1999
Judgment	September 8, 1999
Annotations	None

Chamber applications

Flynote

Practice and procedure - parties - company - when individual may represent company in legal proceedings - individual must make chamber application for directions

Headnote

A company does not have an absolute right to appear in the superior courts without legal representation. Such a right may be enjoyed only by an individual who is the sole controlling authority and who is the sole directing mind of the company. The court may, on good cause shown, extend recognition of this status to any such individual or may, in its discretion, grant

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audience to any other individual to represent the company.

Any attempt by a company to secure a right to representation by its *alter ego*, or by its officer, must be preceded by a chamber application for directions as to who may sign pleadings or advance argument, address for service and other relevant procedural requirements. This application should be made in the name of the individual seeking to represent the company and the application should be accompanied by an affidavit showing the individual's good cause to act and containing a resolution of the company authorising that individual to act. It was recommended that the Rules of Court be altered so as to make express provision to this effect

Cases Considered

Cases cited:

Lees Import and Export (Pvt) Ltd v *Zimbank* 1999 (2) ZLR 36 (S)

Pumpkin Construction (Pvt) Ltd v *Chikaka* 1997 (2) ZLR 430 (S)

Zimbank v *Pindi Electrical Hardware (Pvt) Ltd* 1998 (2) ZLR 210 (H)

Judgment

Gillespie J: Commaf Holdings (Pvt) Ltd has instituted these two actions, both of which were undefended. They came before me in chambers as applications for default judgment. In each case, the summons is signed by an individual. The signatures are not legible but it is obvious that different persons signed each summons. The signatories do not purport to be legal practitioners. They do not sign over the name of the company nor do they claim to act for the company. They are unidentified individuals.

That they purport to represent the company is clear from the declarations in each action. These are both signed by the same individuals, who signed the

accompanying summons in each matter. On the declarations, however, their signatures appear over the printed name of the company yet there is still no indication of the identity or capacity to sign of each individual signatory.

The accompanying applications for default judgment are, in each case, signed by different individuals. The signatures, as indecipherable as those on the summonses and declarations, are clearly those of a third and a forth person respectively, who have signed, in each case, over the printed name of the company. There is still no identification of the signatories or of the capacities in which they signed.

The summons were both issued out of this court on 21 July 1999. It is therefore an alluring inference that those signing had read, and also understood, the recent decision of the Supreme Court in *Lees Import and Export (Pvt) Ltd* v *Zimbank Ltd*. 1(54) That decision addressed a

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difference of opinion emerging in this court.

In *Pumpkin Construction (Pvt) Ltd* v *Chikaka*, 2(55) Smith J and I restated the general principle that:

> "a company, being an artificial person, cannot appear in person in court and must be represented by a legal practitioner. Similarly, since the signing of a summons or plea is part of the legal process a summons or plea must be signed by a legal practitioner as must an appearance to defend." 3(56)

The principle was affirmed as one of the grounds relied upon in allowing an exception to a summons prepared and signed by an employee of a debt collecting agency purporting to sue in the name of the creditor, Pumpkin Construction (Pvt) Ltd. In a short judgment given a year later, Mubako J stated that the right of self-acting by corporations or partnerships "had been given by Parliament". The learned judge obliquely criticised the decision in *Pumpkin Construction* as an attempt to "amend or nullify a right granted by Act of Parliament". 4(57)

The Supreme Court upheld the correctness in principle of the decision in *Pumpkin Construction*. It also enunciated the existence of an exception to the principle flowing from the inherent jurisdiction of the court to regulate its own proceedings to prevent abuse or injustice. 5(58)

In addition, the Supreme Court found that a blanket rule, permitting of no exceptions, which would in all circumstances prevent the "alter ego" of a

company from appearing "in person" for the company, would offend against the constitutional protection to a fair hearing of disputes. This view, it was expressly stated,

> "does not undermine the rule of practice. It merely provides an exception to it." 6(59)

In the result, the Supreme Court, in *Lees*' case, *supra*, answered the question of law:

> "whether the current rule of practice prevailing in the High Court and Supreme Court whereby a company can only appear if it is represented by a practising legal practitioner is not in breach of s 18(1) and s 18(9) of the Constitution of Zimbabwe." 7(60)

in these terms:

> "Provided [the individual] is able to satisfy the High Court that he is the *alter ego* of the [company] with requisite authority to appear, the [company] through him must be permitted to argue the [litigation] since a denial of appearance will amount to a violation of the applicant's entitlement to the protection of the law and to be afforded a fair hearing ..." 8(61)

The effect of this decision, therefore, may be stated as follows. There is no absolute right permitting a company to appear in the superior courts without legal representation. Such a right may be enjoyed only by an individual who is the sole controlling authority and who is the sole directing mind and will of the company. The court may, on good cause being shown, extend recognition of this status to any such individual or may, in its discretion, grant audience to any other individual to represent a company. I would add that, it may, in case, give appropriate directions pertaining to the conduct of litigation by such an individual on behalf of the company.

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Such directions might include, in an appropriate case, directions as to who may sign pleadings; directions as to who may advance argument; directions as to an address for service; directions as to security for costs or any other relevant procedural requirement or safeguard.

It must follow, in consequence, that any attempt by a company to secure a right to representation by its *alter ego*, or by an officer, must be preceded by the appropriate application for directions. That application, I would suggest, should be in the name of the individual concerned who should, in his affidavit, show the good cause relied upon and, by the attached resolution of the company, show his authorisation to act. It should be accompanied by a draft of the process to be issued and a draft order setting out the directions required and should be served upon the opposing party. The application would generally properly be a chamber application.

I would recommend that the Rules of Court be altered so as to make express

provision to this effect. Until such time, however, the foregoing procedure could conveniently and properly be adopted.

In these cases, none of the requirements in *Lees*' case, *supra*, have been satisfied. There is no basis upon which to hold that an *alter ego* is acting; indeed there is a multiplicity of personalities, in some disorder, purporting to act. There is no ground shown for extending audience as an indulgence or discretion; nor any attempt to do so.

Indeed, these two applications provide an object example of one of the disadvantages, mentioned by the Chief Justice in *Lees supra*, of extending audience to unqualified persons. In each case, the claim is based upon the alleged failure of the defendants to pay rentals for, or to return to the plaintiff, telephone equipment. The typing is poor and the amounts unclear, more importantly, the cases are not made out. A lump sum is claimed, stated in one matter is $4193163 and in other as $20-93-96. It is impossible to know what these figures mean. It is even less clear as to how they are calculated. No amount of rental is stated. No period of rental is given. No arrears are calculated. It is not even stated that figures are arrears of rental rather than damages on some individual cause.

All in all, the papers do not in any event justify the giving if judgment. They highlight the need for a prior application, disclosing the cause of action on affidavit, with draft pleadings and process, and showing good cause for extending audience. In the circumstances, I am obliged to hold that the proceedings are irregular and to dismiss the claims on that ground. It is, of course, open to the plaintiff to proceed on fresh process, and if he so wishes, to make the preliminary application for special audience and directions in accordance with my recommendations above.

Tizirai-Chapwanya & Partners, defendant's legal practitioners

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S *v* DOKO 1999 (2) ZLR 164 (HC)

Citation	1999 (2) ZLR 164 (HC)
Case No	Judgment No. HH-189-99
Court	High Court, Harare
Judge	Gillespie J
Heard	September 8, 1999
Judgment	September 8, 1999
Annotations	None

Criminal review

Flynote

Criminal law - statutory offences - Criminal Law Amendment Act [Chapter 9:05] - s 3(d) - sexual relations with female idiot or imbecile - meaning of these terms - what medical evidence is required to prove idiocy or imbecility

Criminal procedure (sentence) - statutory offences - Criminal Law Amendment Act [Chapter 9:05] - s 3(d) - sexual relations with female idiot or imbecile - rape in all but name - irrelevant that force not used

Headnote

It is not necessary in every case where a male is charged with having sexual relations with a female "idiot or imbecile" that expert psychiatric evidence be led. The expert evidence of a doctor may be quite adequate.

In the context of s 3(d) of the Criminal Law Amendment Act [*Chapter 9:05*] , an "idiot" is a person who because of her mental deficiency is unable to give informed consent, while an "imbecile" is a person with a degree of mental retardation exceeding mere feeblemindedness and deserving of protection.

The sexual exploitation of a girl is rape when her retardation is so severe that her acquiescence is meaningless. It is not mitigatory that no force was used.

Cases Considered

Cases cited:

S v *Chaka* HH-84-97

S v *Chamukwanda* 1990 (1) ZLR 172 (H)

Statutes Considered

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Legislation considered:

Criminal Law Amendment Act [*Chapter 9:05*], s 3(d)

Judgment

Gillespie J: The accused was convicted by a magistrate of contravening s 3(d) of the Criminal Law Amendment Act [*Chapter 9:05*] - the offence of unlawfully engaging in sexual intercourse with a female imbecile or idiot. The victim of this offence is a young girl of about 16 years. The parents of the girl caught the accused *in flagrante delicto* with her in his bedroom.

He pleaded guilty to the offence. That plea was accepted. The procedure was in terms of s 27(2)(b) of the Criminal Procedure and Evidence Act

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GILLESPIE J

[*Chapter 9:07*]. The accused's understanding and admission of the essential elements of the offence were tested by the magistrate who put, *inter alia,* the following questions:

"Ct - Do you admit that complainant is under 16 years and mentally weak, that is to say a female idiot or imbecile?

A - Yes I know.

Ct - Are you aware that it is an offence to have sex with an imbecile or girl under 16 years?

A - Yes."

The accused also consented to the production of medical report and admitted its contents. That report, primarily of a physical examination of the girl, also adduces evidence of her mental state. It does so by entries under given headings on a *pro forma* affidavit as follows:

> "Physical condition - small head (Microcephaly). Severely mentally retarded. Mental state - no orientation as to time, place, events."

The accused was convicted and sentenced to a fine of $500 or 2 months' imprisonment and, in addition, to 3 months' imprisonment wholly suspended for 5 years on condition of good behaviour. That sentences was queried by a scrutinising regional magistrate who wrote:

> "The attitude of the courts to those who ravish mentally sound under aged girls is firm and I believe the same or even more ought to be done to those who knowingly ravish an imbecile or idiot."

The trial magistrate responded curiously to this. He acknowledged the inadequacy of the sentence but purported to point to an error in conviction. Citing authority, he suggested that conviction to be improper because of the absence of expert medical evidence medical as to the victim's imbecility.

The regional magistrate's reaction was even curiouser. His instincts, so sound on the question of sentences, failed him in the face of this suggested technicality He has found the conviction to be unsound and has asked this court to set it aside. I must decline.

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It is true that in *S* v *Chamukwanda* 1990 (1) ZLR 172 (H) (one of the authorities cited by the magistrate) a conviction was overturned because of the absence of medical evidence of imbecility or idiocy. In that case, a medical report, in the same form as the present one, did say under the head, mental state, "known to be mentally subnormal and epileptic, on treatment". That was clearly inadequate because the degree of sub-normality was not stated. It may not have amounted to "imbecility" or "idiocy". Similarly, epilepsy would have no bearing on the issue.

I considered the meaning of these terms in *S* v *Chaka* HH-84-97 (a judgment evidently not considered reportable by those responsible). I wrote:

GILLESPIE J

> "The offence here charged is designed to extend protection from sexual exploitation to mentally retarded women,who may not suffer so severe a degree of deficiency as to be incapable of giving consent. The words 'idiot' and 'imbecile' in the definition are not mere colloquialisms but have definite meanings. An idiot is -
>
> > 'a person who is so deficient in mind as to be permanently incapable of rational conduct.'
>
> (The Concise Oxford Dictionary, *sub voice* 'idiot'). An idiot is one who would not be able to give effective consentto the sexual act. The imbecile is applied to a person with a less deficient development and usually with some capacity for improvement. An imbecile may be able to have sexual instincts and perhaps even to consent to the sexual act but is regarded as vulnerable and suggestible. See *R* v *K* 1951 (4) SA 49 (O) at 52A-54B. In the absence of this enactment, therefore, the possibility exists of non-criminal exploitation of a woman who, while technically capable of giving consent, is nevertheless (like a girl under 16) peculiarly open to abuse of her innocence. It is this evil which the Act seeks to remedy. Even with this legislation it remains possible that a feeble-minded woman, who cannot be called an imbecile, but is nevertheless mentally deficient, could be held to her consent to sexual intercourse. Such a woman enjoys no special protection. The difficulty in determining whether a person ought to be regarded as imbecile or merely feeble-minded, is an obvious drawback to this enactment."

Plainly, the report in *Chamukwanda's* case did not serve to prove whether the alleged victim was an idiot or imbecile as those terms are to be understood. The judgment should not, however, be taken as requiring expert psychiatric evidence in every case. The standard form of reporting in cases of suspected sexual offences may not be designed for a comment on the feeblemindedness or otherwise of the victim ("mental state" here usually elicits the comments "upset" or "frightened" and the like) but, where a conscientious doctor comments on the rationality of a victim, that is nevertheless expert evidence to be due weight.

I have no doubt in this case that the observations of the doctor, while they may not prove "idiocy" - ie inability to give informed consent - nevertheless prove "imbecility" - ie a degree of mental retardation exceeding mere feeblemindedness and deserving of protection. That, coupled with the accused's admissions, more than suffice for a conviction. True, the questions by the magistrate could have been better framed. He should have explained (in the terms given in *Chaka*'s case) the meaning of the words. Nevertheless, I am satisfied that the conviction was sound.

The sentence is another matter. I have every sympathy with the initial view of the regional magistrate. The sexual exploitation of a retarded girl is rape where her retardation is so severe

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that her acquiescence is meaningless. It is rape in all but name where that retardation is at least of the lesser degree qualifying for protection under the Act. It is not mitigatory that no force was used: that is no more an absence of a further circumstance of aggravation. The meagre fine and meaningless suspended sentence in this case send the

GILLESPIE J

wrong message to the community as to the determination of the administration of justice to protect the mentally the disabled from sexual predation.

I uphold the conviction but am unable to certify the proceedings as being in accordance with justice.

S *v* BLANCHARD & ORS 1999 (2) ZLR 168 (HC)

Citation	1999 (2) ZLR 168 (HC)
Case No	Judgment No. HH-224-99
Court	High Court, Harare
Judge	Adam J & Assessors
Heard	September 10, 1999
Judgment	September 13, 1999
Annotations	None

Criminal trial

Flynote

Criminal law (statutory offences) - Aircraft (Offences) Act [Chapter 9:01] - s 7(1)(a) - attempting to place dangerous goods on an aircraft without lawful excuse - meaning of "lawful excuse" - onus on accused to show existence of lawful excuse - Law and Order (Maintenance)Act [Chapter 11:07] - s 37(3) - possession of arms of war "without lawful authority or reasonable excuse" - meaning - onus on accused

Criminal procedure (sentence) - statutory offences - Law and Order (Maintenance) Act [Chapter 11:07] - s 37(3) - possession of arms of war - "special circumstances" for not imposing mandatory minimum sentence - includes torture and other ill-treatment at hands of authorities

Headnote

The accused were arrested at Harare Airport after various firearms, which had been dismantled,

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were found in the baggage they had checked in for a flight to a destination outside Zimbabwe. In a truck which they had left in a parking garage was found a large assortment of firearms, ammunition and related material. These items had been brought into the country by the accuscd, who had not declared them when they entered the country. The accused were charged with (1) attempting, without lawful excuse, to place dangerous goods on an aircraft; and (2) possessing arms of war without reasonable excuse. In respect of the weapons found in the vehicle, they said that they had been working as missionaries in the Congo and because of the unstable situation there, the weapons had been acquired. Their work was finished in the Congo and they were returning the weapons to the United States.

Held, in respect of the first charge, that what the accused had attempted to place on the aircraft were firearms, despite the fact that the items had been dismantled, and thus fell within the definition of "dangerous goods".

Held, in respect of both offences, that once the State had discharged the onus of showing that the accused had done the acts they were charged with doing, the onus was on them to show that they had "lawful authority" or "reasonable excuse". These phrases had different meanings. The latter was wider in meaning than the former, and meant "not unlawfully" in the wide sense.

Held, further, that the accused had not discharged the onus on them.

Held, further. that the ill-treatment and torture the accused had received at the hands of the police while they were in custody constituted special circumstances for not imposing the mandatory minimum sentence that would normally be imposed for possessing arms of war.

1999 (2) ZLR p169

Cases Considered

Cases cited:

Attorney-General, Hong Kong v *Lee Kwong Kut* [1993] 3 All ER 939 (PC)

Blanchard & Ors v *Min of Justice & Anor* 1999 (2) ZLR 24 (S)

Emperor v *Harpal Rat* [1902] Indian LR 24

R v *Blom* 1939 AD 188

S v *Bhulwana*; *S* v *Gwadiso* 1996 (1) SA 388 (CC)

S v *Chogugudza* 1996 (1) ZLR 28 (S)

S v *Coetzee* 1997 (3) SA 527 (CC)

S v *Harrington* 1988 (2) ZLR 344 (S)

S v *Janyure* 1988 (2) ZLR 470 (S)

R v *Jessie* 1964 RLR 412

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S v *Julies* 1996 (4) SA 313 (CC)

S v *Kinfe* S-60-98

R v *Mackay* 1964 R&N 51; 1964 (3) SA 176 (FS)

S v *Masson* 1982 (1) ZLR 216 (S)

S v *Mbatha* 1996 (2) SA 464 (CC)

S v *Michael* S-59-98

R v *Parker* 1966 RLR 15 (A)

Sambasivan v *Public Prosecutor, Federation of Malaya* [1950] AC 458

Sanjay Dutt v *State* [1996] 1 LRC 467

Thakur & Ors v *State of Maharashtra & Ors* [1994] 4 SCC 602

Wong Pooh Yin v *Public Prosecutor* [1954] 3 All ER 31 (PC)

Statutes Considered

Legislation considered:

Aircraft (Offences) Act [*Chapter 9:01*], s 7

Law and Order (Maintenance) Act [*Chapter 11:07*], s 37(3)

Case Information

J Musakwa, for the State

J C Andersen SC, for the accused

Judgment

Adam J: The three accused were charged in an indictment, as amended, of crimes under two counts. Firstly, contravening s 7(1)(a) of the Aircraft (Offences) Act [*Chapter 9:01*] in contravention of section 360(1) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], in that on 17 March 1999, the accused persons or one or more of them, unlawfully and without lawful excuse, the proof of which lies on them attempted to place aboard an aircraft dangerous goods, namely various revolvers, pistols, rifles, knives and ammunitions as fully set out in a schedule. Secondly, contravening s37(3) of the Law and Order (Maintenance) Act [*Chapter 11:07*], in that on 17 March 1999, the accused person, or one or more of them, unlawfully and without lawful authority or reasonable excuse, the proof of which lies on them, had in their possession offensive materials and weapons, including arms of war, namely, a variety of ammunition, pistols, revolvers, rifles, firearms, accessories, knives, teargas and electric shock devices as fully set out in a schedule.

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The three accused persons, according to Mr *Andersen*, their counsel, were

ADAM J

well aware of the charges and understood them. Through Mr *Andersen*, all three entered a plea of guilty to both counts.

In the outline tendered by the State as well as in the addendum to the summary of the State case, on which were listed some 20 persons that were to called as witnesses on behalf of the prosecution was the summary of the evidence that each of them was to give. However, the State sought certain admissions from the accused persons and as a result the summary of evidence of the persons that was to be given was admitted by Mr *Andersen* on behalf of the accused persons as follows.

Philbert Jumbe leased to Jonathan Wallace a hourse in Harare which was used by the three accused persons. Itayi Jimu, an Immigration Officer at Kariba Border Post who on 5 March 1999 caused the three accused to pay for visas and issued them with relevant receipts. Young Shutu, a security officer at the Harare International Airport, on 7 March 1999 rushed to the sorting hall upon receipt of a call to attend there where he observed two suitcases that had been opened, containing what he described as firearms and, on asking for permits for them from the accused persons, was told that they had none and that they had not declared the firearms to the Customs officials and on arrival of the Swiss Airline's manager, the accused persons pleaded with him to let them go. Todd Nyamhunge, a Senior Immigration Officer, on 7 March 1999 without any interference took over a GMC Sierra truck, registration number SH 7421E, that had been in the possession of the accused persons at the Harare International Airport and drove it from that location at Park Safe at the Harare International Airport to the Central Police Station in Harare. Insp Rwafa, the duty officer at Harare Central Police Station on 7 March 1999 placed Constable Kandoro to guard the GMC Truck. Cst Kandoro on 7 March 1999 stood guard at that vehicle without being interfered with in any way until 10.30 pm when he was relieved by Sgt Marara who on 7 March took over guard duties from Cst Kandoro without the vehicle having been interfered with in any way stood throughout till the next morning when Detective Inspector Matema took over.

Also the State tendered in evidence the warned and cautioned statements made to the police by each of the accused persons by consent. The first statement to the police was made was by the first accused, Garry Blanchard, concerning inquiries being made into possession of the offensive weapons and materials in contravention of s 37(1)(c) and (d) of the Law and Order (Maintenance) Act [*Chapter 11:07*] which was said to have been completed on 11 March 1999 at 14.14 hours. This statement reads as follows:

> "I do not agree with the Statements found in s 37(1)(c) stating that I was carrying grenades, missiles, bombs or materials for bombs. I agree that we were in possession of firearms, both at the airport and in our vehicle parked at the storage at the airport which is 37(d)."

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ADAM J

The statement was recorded by Detective Inspector Matema, and signed in the presence of Chief Superintendent Makwara.

The next statement recorded was from the second accused, Joseph Pettijohn, which was given on the same day concerning similar inquiries and the statement was said to have been completed at 14.55 hours on 11 March 1999 and which reads as follows:

> "I Joseph Pettijohn deny that we had any grenades, missiles or any type of explosive devices in our possession, that at the Harare International Airport or in our truck found at airport storage. I agree with 37(1)(d) with the understanding that his statute applies to rifles, handguns and shotguns."

The third statement made was by the third accused person, John Dixon, on the same day concerning similar inquiries and the statement was said to have been completed at 15.50 hours on 11 March 1999 and which reads as follows:

> "I John Dixon was found in possession of handguns and rifles at the Harare International Airport on the said date in this document, however, in statute 37(c), it states that it covers bombs, grenades or any other like missiles or devices whether capable of use with firearms or not including any fuse, detonator, or timing device. We did not possess any such device or equipment for bombs or missiles whatsoever. At the time of our arrest, we were boarding a flight to America. Mr Blanchard and Mr Pettijohn were with me and our objective was to return these items to America from D.R. Congo."

The next set of statements tendered were made on 5 March 1999 in the presence of their legal practitioner, Mr Callow, who witnessed all three being made. These concerned inquiries being made into attempts to place dangerous goods on an aircraft in contravention of s 7(1)(a) of the Aircraft (Offences) Act [*Chapter 9:01*]. All three statements are in identical terms and the first accused completed his statement at 12.14 hours, the second accused person completed his statement at 12.19 hours and the third accused person completed his statement at 12.40 hours on 5 May 1999.

The statement read as follows:

> "I deny the charge. We were returning the firearms mostly the property of Bob Banks a member of our Ministry to the United States. The firearms had been dismantled and the constituent parts packed into separate suitcases rendering them unserviceable. No ammunition was packed into the suitcases. When checking in at the airport, the suitcases were to be loaded into the hold of the aeroplane destined for Zurich and which were booked through to Georgia, USA. Had we known of the prohibition against loading firearms into the hold of an aeroplane, we would have applied for authority for the firearms to be so loaded. Our defence is one of lawful excuse the further details which will be furnished once were are called upon to plead to the charge in court."

In addition to those warned and cautioned statements, the State tendered by consent the affidavit of Superintendent Charles Haley, a member of the Zimbabwe Republic Police with the Forensic Firearms Identification Section for the past 18 years. He is familiar with firearms and ammunition and

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qualified to give evidence in that field. I should indicate Superintendent Haley has given expert evidence on many occasions before the High Court. In his affidavit, he swore that, on 21 April

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1999, he received from Criminal Investigations Division, Law and Order Section, an assortment of weapons. In addition, he attended and gave evidence in this court. In his affidavit, he said he had examined these arms. I will deal with this affidavit when I deal with his evidence later on.

Also, the State tendered by consent a certified copy of the temporary import permit for visitor's vehicle for the GMC truck registration SH 7421E issued to the first accused, as well as the certified copies of the immigration declaration forms completed by each of the accused persons on 5 March 1999 in which on the form, the first and second accused gave their occupation as missionary and the third accused as a borehole technician. Also the State tendered by consent their three passports.

The State called 11 witnesses in all at the trial. The first witness for the prosecution was John Nyamuzuwe of Park Safe at the Harare International Airport, who identified all the accused persons he knew and who had come to their parking lot. He said that on 8 December 1998, the second accused came alone, stating that they were missionaries from the Democratic Republic of Congo (DRC) who wanted to store their vehicle as they were going home, so he wanted to reserve a place for that vehicle for 12 December 1998. The witness produced parking invoices as a custodian of them and made in the name of Mr Banks for a vehicle with registration number SH 7421E brought in on 13 December 1998 and that is according to that invoice and for vehicle with registration number SH 7618E also brought in on 13 December 1998. He also produced parking invoices for the vehicle with registration number SH 7421E and for SH 7618E that were to be taken out on 26 February 1999. He testified that he saw all the three accused on 26 February 1999 when they told him that they had come from the United States of America and they inquired from him about storing their goods. At that time, he advised that they only kept vehicles at Park Safe Parking Lot, at which stage the first accused then made a reservation for two vehicles for 7 March 1999. He was cross-examined by Mr *Andersen* and indicated in his evidence that their parking lot was secure.

The second witness for the prosecution, Amos Matasva, also from Park Safe, stated he knew the three accused persons who came on 6 March 1999 to make a reservation to bring the vehicle on 7 March which was made in the name of the first accused person. On 7 March 1999, the second and third person brought the vehicle and when he asked about the first accused person he learnt that he was at the airport terminal building. So the witness rushed over to see the first accused so that the first accused could sign the parking

papers. He indicated on his evidence that the vehicle was parked near the fence. He also was cross-examined by Mr *Andersen* and testified that their parking lot was safe.

The third witness was Michael Maira, the customs officer at Kariba. He testified that, apart from the vehicle, nothing else was declared. The fourth witness was Superintendent Charles Chirisa, who said he received a report and arrived at the Harare International Airport at 7 pm in the evening on 7 March 1999 where he found Constable Masendu who made a report to him concerning the arrest of the three accused persons. His evidence related to what was found in the various suitcases and the making of an inventory. I should indicate that this evidence of

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Constable Masendu varied on that aspect. When I deal with the evidence of Constable Masendu, I will relate the evidence of Superintendent Chirisa. Suffice to say that we were not satisfied with the evidence of Superintendent Charles Chirisa as far as the question of the making of the inventory is concerned, more particularly with regard to the contents of that inventory and with regard to the manner in which the inventory was compiled, particularly in light of his evidence to the effect that the weapons were in a dismantled state in the suitcases. Yet the inventory which was tendered as an exhibit disclosed various items as being completed weapons that were found in each of the suitcases. In addition to that aspect of his evidence, it is clear that that inventory in fact contradicts the indictment, in that it does not reflect (as the indictment states) that the 6 federal hollow nose cartridges were listed in the bag with the name tag of the accused person John Dixon, whereas the inventory list provided to this court in exhibit 12 shows that the 6 hollow nose cartridges were supposed to be in the bag of Joseph Pettijohn. In addition, a photograph which was tendered showed that the so-called cartridges were in Gary Blanchard's bag. From those discrepancies, we are not satisfied that the inventory was compiled as testified by Superintendent Charles Chirisa on the date that he indicated, nor in the manner he said it was compiled. Suffice to say that it was admitted on behalf of the accused persons that these bags did contain the various items reflected in the indictment, save the 6 federal hollow nose cartridges.

The fifth witness called by the State was Kennedy Manjengwa, a security officer at the Harare International Airport working the X-ray machines. He testified that two bags came first, then two others and then one, all booked to Zurich. On examination, he was not satisfied about them and had them put through the X-ray once again. He said that two bags had the name tags of Dixon on them and one had the name tag of Blanchard. Two others had the name tags, but he had not checked them. He called for the accused persons and the accused persons arrived. Dixon opened a bag with his name tag on it and the witness found in them dismantled guns which were not in complete

units. He testified that Dixon called this firearm a Remington and he also testified that Dixon later produced from the bag what he described as an AK 47 rifle. He said he asked Blanchard to open another bag with his name tag where he discovered pistols inside the bag. Under cross-examination, he testified that he saw more than 15 pistols in that bag. He also testified that they told him that they did not have firearms certificates for these weapons.

The sixth witness was Constable Masendu, attached to the Harare International Airport police post. On 7 March 1999, he was phoned by the Civil Aviation Authority persons who made a report to him. As a result, he instructed them to bring the three accused persons who were then brought with their luggage, along with the small bags. He said he started checking what was contained in the luggage, along with the small bags. He asked for firearms certificates and was advised by them that they did not have any. He said that the weapons, including the AK 47 rifle, were in a dismantled state. His evidence clearly conflicted with the evidence given by Superintendent Chirisa, in the sense that Superintendent Chirisa maintained that the AK 47 rifle was not dismantled. Under further questioning, Constable Masendu indicated that the AK rifle

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had the butt removed. But it is clear from the exhibits tendered in this court that the AK 47 rifle did not even have a butt. We are satisfied on the evidence given by Constable Masendu, as he testified initially, that the AK rifle was also in a dismantled state.

The seventh witness was Inspector Matema, who took over guard duties at 1 am on 11 March 1999 pertaining to the GMC truck. He testified that he was present when the truck was unloaded. He said in his evidence that from the luggage was recovered a flash powder cook book, a book with the initials S.O.P. which was Standing Operational Procedures, 6 plastic bags, and 6 plastic containers which contained an assortment of ammunition, 1 carton with 20 boxes of ammunition and 9 canisters. He said that both Blanchard and Pettijohn, when questioned about the body work of the GMC truck (particularly the two sides), indicated to him that the body was a normal body and did not volunteer to him that it was in fact a panel containing items. When the panels were unscrewed, he said he found in the panel assorted weapons which included 10 rifles, 9 shotguns, 7 revolvers, 13 pistols, 5 telescopic sights, 3 electric stun devices, 6 long action rifle magazines, 5 silencers, 38 pistol magazines, 9 AK 47 magazines, 2 sight sets, 2 bi-pods, 4 shotgun magazines, 3 cocking handles, 2 target selectors, 11 infra-red touches or flares, 1 bottle of potassium permanganate and 13 packs of camouflage cream. He also testified that he recorded the warned and cautioned statements from the accused persons. This evidence of his was not disputed by the accused persons, as far as him being cross-examined on them. He also testified about the diagram that was supposed to have been found in possession of the

accused persons. In his evidence, he indicated that the diagram did not show the State House, but showed how to get to the State House, which was contrary to what he had initially testified. We find his evidence on that aspect to be suspect. Otherwise, we accept the evidence given by him pertaining to what was found in the truck.

The next witness called by the State was Corporal Sithole, who was with the bomb disposal unit of the Zimbabwe National Army. He testified that he approached the GMC truck at the Harare Central Police Station and was responsible for opening the truck after Blanchard opened the doors.

The ninth witness was Chief Superintendent Makwara, who went to the DRC and testified about what was found in the kitchen through a cupboard where a hole had been made in the wall and a pit dug in which various firearms, camouflage clothing and other items were found. He tendered in photographs which became exhibits as well as having found in one of the rooms a book described as "Survival, Evasion and Escape" which on the head of the book states, "Department of the Army Field Manual", and is shown at Headquarters Department of the Army and March 1969. After a brief adjournment and after inter-position of other witnesses, particularly Chief Superintendent Haley, he was recalled and we were shown a video about the search that took place in the DRC. Most of the evidence in that video is not disputed and we do not intend to go through the evidence that was given pertaining to what was found there. Suffice to say we were satisfied that from the photographs tendered and from the video that the clothing with camouflage markings were definitely found there and these clothings did not in our view

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indicate that these were supposed to be clothes for infants or juveniles or young persons and there were more than two sets of uniforms. Some of them had on them in the name Grubb as well as another with the name M.C. Gurer, which indicated that these were for adults and not for some young persons.

We were also satisfied from the evidence given that in the pit were recovered all the items listed in exhibit 43 tendered in the court as well as the weapons that were found there. This, I should indicate, was not a large quantity. In fact, if I recall, there were only about 3 shotguns that were found.

Coming to the evidence of Chief Superintendent Haley, it is clear from his affidavit and from his evidence in this court, which we accept, that the weapons that were found both in the suitcases and in the truck was well described by him as being a hotchpotch of weapons which he said was the type of weapons which would not be used by special forces. We accept his evidence on that aspect and also accept his evidence as amplified by him in his affidavit. There is no doubt in our minds from his evidence that some of the weapons found among them could have been used by members of the armed forces. It is also clear from his evidence that those very same weapons

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could have been acquired commercially in the United States of America. However. he also indicated that these weapons that he described were not available in this country commercially.

Now, I also should say that the next witness after Chief Superintendent Haley was Major Duncan, who was with the Zimbabwean National Army, who went to the DRC. His evidence was not challenged in any way under cross-examination and we accept his evidence as to what transpired there and what was found there.

Coming to the evidence given by the accused persons, it is not my intention to go through their evidence in any great deal. Suffice to say that the first accused testified to the effect that they belonged to the Harvestfield Ministries and that prior to joining the Harvestfield Ministries, he had worked in various place. At one state, he indicated he was the procurement and purchasing manager with Intel Corporation in California. He then said he then worked in Colorado running a window cleaning business in Denver and that he became involved in Christianity in 1992. He met Jonathan Wallace in 1995 when Jonathan Wallace came to California. He said he began to financially support the Harvestfield Ministries, that in 1995 he was in Oregon. In 1997, he came with the Harvestfield Ministries outreach to what he described as Zaire, which is now the Democratic Republic of Congo, to spread the Gospel of Jesus Christ to what he described as unbelieving people as well as to Christians. He said that this preaching or praying was for the sick. He was aware that Wallace had travelled as a missionary and so had Robert Banks and that they had travelled and visited many countries like Romania, Britain and other countries and that at one stage Jonathan Wallace had been with the Speaking Face Ministries. Blanchard became involved with the Ministry in 1997. With his own funds he went with John Dixon, Jonathan Wallace and Robert Banks to the DRC in February/March of 1997. He indicated they flew into Harare where Robert Banks had good relationship with a person

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known as Jerry Roussel, who he said ran an orphanage and he and John Dixon and Wallace preached there. He testified that they purchased an old Peugeot. In due course, their wives joined them in December 1997 and they went to the DRC through Zambia. They rented a house in January 1998 in the DRC. There were 30 of them so they needed a large house which they upgraded. They indicated that the container with two four wheel drive vehicles and household furniture arrived through Durban and by rail and by road to Lubumbashi. He also testified that Pettijohn's wife became pregnant. In addition, he gave evidence with regard to the question of the currency and how the currency in the DRC had been changed because of the new currency that was issued and the exchange rate worked in favour of the DRC making the exchange rate around four hundred percent less in terms of the US

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currency. In other words, they have got less with the US currency in terms of the new Congolese currency.

He also testified about what they had heard from the Fishers before moving to the Congo. The Fishers were what he described as medical missionaries. In 1995, they had been attacked by what he described as soldiers belonging to Mobutu and so had left Zaire. In September prior to going to the DRC, they all had - including the three accused, Wallace and Banks - discussed the threat to them in the DRC. As a result of this, they decided to bring along with them weapons for self-protection as well as to go hunting when the opportunity arose. He indicated that he owned personally a shotgun, Renco hunting rifle, and a .300 Winchester Magnum weapon and another handgun. He said the vast majority of the weapons were owned by Robert Banks. He then testified about how a hole was dug in the kitchen. He also testified about the security persons in Lubumbashi who came when they observed antennae and threatened to come back again. As a result of that they decided to hide the weapons. It was clear from the cross-examination that he was well aware, prior to the arrival of the weapons in the DRC, that there was a large amount of weapons being sent because he was one of the persons who helped to load them onto the truck, although he did not know all the specific types of weapons but he had a general idea as to what type they were. He also testified quite clearly that it was their intention, should the situation deteriorate to that extent, that they were going to fight their way out of the Congo. His description reminded me of what is normally shown in Western movies of gunslingers fighting their way out and seem to be an unrealistic situation for persons who call themselves missionaries to find themselves in. He also testified about the S.O.P. notebook which he said belonged to Robert Banks. He also testified about Robert Banks having been expelled from the military training school or college after two months. He also testified that he had no association with the military and that he did not have any training in the Army. He also testified that he learnt how to use the weapon but going with his father hunting. He also testified about the various items tendered by him particularly the newsletter and various other publications pertaining to religious matters. He also referred to a specific book called "Total Cleansing".

I do not intend to go through a great deal of the evidence given by the other two accused persons, suffice to say their evidence was of a similar nature as far as the association with the

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Harvestfield Ministries was concerned and with regard to the question of the firearms.

I should indicate that it was clear from the evidence given by Pettijohn, as well as by Dixon, that the 6 federal hollow nose bullets or cartridges were not in the baggage that was attempted to be placed in the aircraft which was destined for Zurich.

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Now, in his address on behalf of the State, Mr *Musakwa* submitted that as far as the first count was concerned,the question this court had to determine was: did the three accused persons have a lawful excuse? He said the accused could have sought permission to place the firearms on board the aircraft which they had in their suitcases. The evidence in this court had not shown that they had a lawful excuse for not complying with the Aircraft (Offences) Act. He maintained that this court should accept the evidence given by Constable Chirisa with regard to the AK 47 as not being dismantled. He accepted that the fact that the firearms were dismantled was not relevant as far as this charge was concerned and furthermore, he submitted that this court should apply the definition of firearm as provided for in the Firearms Act.

As for the second count, he submitted the question that this court has to determine was whether the three accused persons had "lawful authority" or "reasonable excuse" for possession of the firearm. He cited *R* v *Mackay* 1964 R&N 51; 1964 (3) SA 176 (FS) where Clayden FCJ considered the definitions of the expressions "without lawful authority", "without lawful excuse", "without just cause", "without just excuse", and "without reasonable excuse" and indicated that an endeavour must be made to give to the different phrases used by the legislature in the legislation different meanings. He then dealt with the phrase "without lawful authority", which I understand Mr *Musakwa* is asking this court to adopt, particularly the difference between "lawful authority", that is the right by law to do what seems to be an offence, and "lawful excuse" a person for not complying with the law. As pointed out by Lord Macdermott in *Wong Pooh Yin* v *Public Prosecutor* [1954] 3 All ER 31 (PC) at 34,

> "it is the excuse or exculpatory reason put forward by the accused, rather than the carrying ... of the firearm that must be shown to be lawful."

Mr *Musakwa* indicated for this purpose the nationality, occupation, route of travel, mode of self protection, religion and religious affiliation was not relevant as far as that wad concerned. He then referred to the case of *S* v *Masson* 1982 (1) ZLR 216 (S), a judgment which dealt with s 37(1) of the Law and Order (Maintenance) Act (then *Chapter 65*) and submitted to this court that we should follow that judgment.

Mr *Andersen*, in his address on behalf of the three accused persons, submitted that it was to disputed that the three accused persons are missionaries who administered to people over a period of time, that was not disputed that the three accused persons were not trained in the use of firearms, that it had not been suggested by the prosecution through evidence led in this court that the accused persons had been associated with a small group or with special forces. It was suggested that any back up had been available for that purposes.

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He also submitted that they were equipped with hotchpotch of weapons not expected of specialised forces, astestified by Superintendent Haley and that it was not disputed that the DRC was not stable, that it was not disputed that the weapons had been acquired and transported from the USA. He also stated that it had not been suggested that the accused had used these weapons. He indicated that with the type of the silencers (and he produced one silencer to demonstrate to the court) and a shotgun (which he also produced from the exhibits) tendered in this court that they were not the type of weapons of commandos would use.

He also submitted that where the defence evidence was in conflict with the evidence called by the prosecution the evidence of the defence should be accepted.

He also submitted that as far as the quantity of arms were concerned that there were not that many weapons and not sufficient weapons to draw any inferences from them.

I should at this stage indicate that, with regard to the question of the firearms, Blanchard under cross-examination did indicate that in retrospect, it was possible that they had more arms than was necessary for their self-protection.

Mr *Andersen* also submitted that, in drawing inferences from evidence, this court should follow the decision in *R* v *Blom* 1939 AD 188, which provided that as far as conviction based on inferences was concerned not only must the inference that is to be drawn be consistent with all the proved facts, but it must be impossible on the proved facts reasonably to draw any other inference other than that of guilt.

He then made a submission with regard to the question of reverse onus. He referred to *S* v *Chogugudza* 1996 (1) ZLR 28 (S) at 33. He indicated that this court was bound by the guidelines laid down in that judgment. He also referred to a number of other cases, particularly *S* v *Julies* 1996 (4) SA 313 (CC); *S* v *Coetzee* 1997 (3) SA 527 (CC) and *S* v *Mbatha* 1996 (2) SA 464 (CC). In *S* v *Julies supra*, reference was made to *S* v *Bhulwana*; *S* v *Gwadiso* 1996 (1) SA 388 (CC) and followed. It was Mr *Andersen*'s submission that this court should adopt the reasoning of the South African Constitutional Court and hold that a provision which imposes a reverse onus upon an accused and so relieves the prosecution of the burden of proof, was a legal presumption that was in breach of the presumption of innocence as it could result in the conviction of an accused despite the existence of a reasonable doubt as to his guilt.

Reference was made in *Chogugudza's case supra*, to s 18(3) of our Constitution which provides - "Every person who is charge with a criminal offence (a) shall be presumed to be innocent until he is proved or had pleaded

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guilty", and to s 18(13) which provides - "Nothing contained in or done under the authority of any law shall be held to be in contravention of ... subsection (3)(a) to the extent that the law in

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question imposes upon any person charged with a criminal offences, the burden of approving particular facts". Gubbay CJ at 33 said:

> "The immediate questions that arise are: How far does this provision go? What particular facts are involved? What proportion of the facts could the accused be expected to prove? No indication is given to where the line should be drawn. Yet what is clear is that, read in the context of the presumption of innocence, s 18(13)(b) cannot be construed as holding valid a statute provision that in actuality imposes upon the accused person the burden of proving his innocence or disproving his guilt.

In the resolution of these questions, I have examined many cases dealing with the extent to which it is permissible for legislation to create presumptions commonly referred to as 'reverse onus provisions' against an accused. From them, the following guidelines emerge:

1. The presumption must not place the entire onus onto the accused. There is always an onus on the State to bring the accused within the general framework of a statute of regulation before any onus can be thrust upon him to prove his defence ...

2. The presumption may relate to a state of mind, that is, an intention, where the element of the crime is fact exclusively or particularly within the knowledge of the accused ...

3. A presumption will be regarded as reasonable if it places an onus upon the accused where proof by prosecution of such a specific fact is a matter of impossibility or of difficulty, whereas such fact is well known to the accused ...

4. The presumption must not be unrebuttable."

In that case, s 4(a) of the Prevention of Corruption Act made it an offence for a public officer in the course of employment to do anything contrary to or inconsistent with his duty for the purpose of showing favour or disfavour to any person. Section 15(2)(e) of that Act provided that if it is proved that a public officer in breach of his duty as such did anything to the favour or disfavour of any person, it shall be presumed unless the contrary is proved, that he did the thing for the purpose of showing favour to that person.

It was the expression "it shall be presumed unless the contrary is proved" that was being challenged as being not consistent with the presumption of innocence in the Constitution. Gubbay CJ held that such provision in the Prevention of Corruption Act did not violate the Constitution. He also referred to the case of *S* v *Bhulwana*; *S* v *Gwadiso supra* as well as to the judgment of the Privy Council in *Attorney-General of Hong Kong* v *Lee Kwong Kut* [1993] 3 All ER 939 (PC) which considered reverse onus provisions. He came to the conclusion that s 18(13)(b) did not more than codify or carry forward what was allowed under the common law, that is, that a reverse onus may be place on the accused. It permitted the legislature to enact reverse onus provisions in conformity with the guidelines developed by the common law.

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I am satisfied, having gone through the various judgments submitted to me by Mr *Andersen*, as well as the replyon behalf of the State, that I should follow the decision in *S* v *Chogugudza supra*, and that the approach adopted by the majority in *S* v *Coetzee supra*, which considered two provision - s245 and 332(5) of the Criminal Procedure Act - should not be followed. I should indicate that I was not persuaded by the reasoning of the majority and was more inclined to favour the dissenting opinion of Kentridge AJ where he thoroughly examined the scope of what

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he described as exceptions and excuses which are provided in the legislation that imposed upon accused persons a certain onus in s 332(5) which he found as not offending the South African Constitution.

Accordingly, I am not persuaded that I should extend the ambit of *S* v *Chogugudza supra* in the manner suggest by Mr *Andersen*. The onus was for the accused person in that case to prove to the contrary, whereas in this case, the accused persons are merely asked to provide an excuse, which to me seems a lesser burden that in *S* v *Chogugudza supra*, which is imposed upon the accused persons, particularly in the light of the fact that such matter was within their own knowledge and was not something that could be expected to be proved by the prosecution. Suffice to say that, as was indicated in *S* v *Chogugudza supra*, the essential elements of the offence have to be established by the State beyond a reasonable doubt.

Now, in this case taking the first count, the State was required to prove certain things. I will read out the charge in terms of the provision of the Aircraft (Offences) Act and then indicate what the essential elements are that the State had to prove.

Section 7(1) reads as follows:

> "Subject to subsection (2), any person who, without lawful excuse the proof whereof lies on him -
>
> (a) carries, places or causes to be placed any dangerous goods aboard an aircraft;
>
> (b) deliver dangerous goods to a person for the purpose of there being placed aboard an aircraft; or
>
> (c) has dangerous goods in his possession aboard an aircraft;
>
> shall be guilty of an offence and liable to imprisonment for a period not exceeding seven years."

Section 7(2) provides -

> "Subsection (1) shall not apply in relation to dangerous goods carried, placed, caused to be placed, delivered for the purpose of being placed or possessed on board an aircraft -
>
> (a) with the consent of the owner or operator of the aircraft given with the knowledge of the nature of the goods;
>
> (b) in accordance with the Aviation Act [*Chapter 13:03*] or any regulation made thereunder; or
>
> (c) which is a State or military aircraft and which is not being used at the time for

> commercial transport purposes, by a person in the course of his duties for the State or the Army, Airforce or Police Force of Zimbabwe."

Now, it is clear from that section that what is required for the State to prove is firstly, the accused person had, with actual knowledge, dangerous goods which, secondly, he carried, placed or caused it to be placed aboard an aircraft.

Mr *Andersen* also submitted, with regard to that provision as well as with regard to the second count, that, in addition to proving possession, the State also had to prove that the possession or

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placing on board must also be with a further intent which is with the intent either to use it or for a sinister motive. He cited a number of cases and these were judgments from India. Photocopies of them were provided to me. These judgments dealt with Indian legislation - the Arms Act and the Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA).

The Arms Act of 1878 was dealt with in the judgment of the *Emperor* v *Harpal Rai* [1902] Indian Law Reports 24 A 454. The facts were that a Mr Nicholas owned a pistol which needed repairs. He gave the pistol to the son of his employee so that he might take it to the neighbouring town to have it repaired. The son of the employee gave it to his father who was taking it to this neighbouring town when he was arrested. He was then charged under s 19 of the Arms Act. It was held that his temporary possession without a licence did not create an offence within the meaning of s 19 of the Arms Act.

The two judgments referred to by Mr *Andersen* which arose under TADA where "terrorist act" was assigned the meaning given to it s 3(1) of TADA and that terrorist must be construed accordingly. Section 5 of TADA provided that, where any person is in possession of any arms and ammunition specified in column 2 and 3 of category I or category III(a) of Schedule 1 to the Arms Rules 1962 or bombs, dynamite or other explosive substance unauthorised in a notified area, he shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a terms which shall not be less than five years, but which may extend to imprisonment for life and shall also be liable to a fine.

It is clear from the cases submitted to me by Mr *Andersen*, particularly in the two judgments - *Hitendra Thakur & Ors* v *State of Maharashtra & Ors* [1994] 4 SCC 602 and *Sanjay Durr* v *State* [1996] 1 LRC 467. Both these cases were concerned with s 5 of TADA and it is clear from these judgment, that it dealt with a strict liability offence. It is also clear to me that what was indicated in these judgments was that, before a person could be found guilty under s 5, the State had to prove that he had actual knowledge of what he possessed. In other words, that he knew he was carrying the arms and ammunition or a bomb or dynamite or other explosive substance. The State

had to prove the requisite knowledge on his part of possession. These judgments did not indicate to me that, in addition to proving that he had such possession, the State had also to prove that he intended to use them or that he had a sinister motive.

What was said in these cases was that, although this was a strict liability or absolute liability offence, it was open to the defendant to lead evidence to show that he did not intend to use the arms for terrorist activities or purposes. I am satisfied that these judgments are not relevant to the provisions in this case which I am asked to consider. It does not support the submission put forward by Mr *Andersen* as far as what the State has to prove in this case. In fact, it was stated in the judgment in *Sambasivam* v *Public Prosecutor, Federation of Malaya* [1950] AC 458 (PC), where the Privy Council accepted that knowledge of what is carried, controlled or possessed is an ingredient of the offence. Lord Macdermott said at 469-470:

"Another submission on behalf of the appellant, which may be conveniently considered now, was directed to the

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nature of the offence or carrying a firearm of which the appellant was convicted. It was contended that an intent to use the firearm in question as an offensive weapon or to have it so used, was an essential ingredient of this offence and that the evidence fell short of establishing such intent. Several decisions of Indian courts were cited in support of this argument, but they relate to different enactments and their Lordships do not find them of assistance in determining the present post which must depend on the true construction on reg. 4, sub-reg. I, of the Emergency Regulations. The material words are: 'Any person who carries ... any firearm not being a firearm which he is duly licenced to carry ... shall be guilty of an offence ...' It was conceded on behalf of the Crown - and rightly in the Lordships' opinion - that 'carries' here means 'carries to his knowledge' and that the carrying of a firearm by a person who did not know what he carried would not constitute an offence under the provision. But the regulation says nothing of any special intent, and their Lordships are unable to find any ground on which such an intent should, as a matter of implication, be regarded as an element of the offence. The Emergency Regulations form a drastic code designed to meet a state of grave disorder and their Lordships see no reason to suppose that reg. 4, sub-reg. I, was not intended to strike at carrying of firearms *simpliciter*, if engaged in knowingly and without lawful authority."

So it is clear from that judgment there is no necessity for the State to prove in this case that persons who possessed those arms was with the intent to use them or for some sinister motive.

I now come to the second count that the accused are charged with, but I will also deal with the first count when I deal with the question of "lawful authority" because the submissions made to me pertain to the expressions "lawful excuse", "lawful authority" and "reasonable excuse". I intend to deal with the authorities at the same time.

Section 37(2) of the Law and Order (Maintenance Act) is the offence with which the accused have been charged. Section 37(2) provides as follows:

"Any persons who, without lawful authority or reasonable excuse, the proof whereof lies

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on him, has in his possession or in or upon any premises occupied by him, any offensive weapon or any offensive material shall be guilty of an offence."

Section 37(2) provides that:

"In this section -

'offensive material' means -

(a) any inflammable, dangerous, noxious, deleterious or offensive substance, material or thing ...;

(b) any other substance material within declared by the Minister, by notice in a statutory instrument, to be an offensive material for the purposes of this section."

"Offensive weapon" is defined as

"including any article made or adapted for use for causing injury to the person or intended by the person having it with them for such use by him, and any stone."

Again, the onus on the State is to prove in terms of s 37(2) that a person firstly had, with actual knowledge, in his possession and, secondly, an offensive material or an offensive weapon.

Once the State has discharged the onus, both in counts 1 and 2, in the manner I have

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described, then it was for the accused to show that they had, in the case of s 7(1) of the Aircraft (Offences) Act a "lawful excuse", and in the case of s 37(2) of the Law and Order (Maintenance) Act that they had "lawful authority" or "reasonable excuse" for possession of offensive weapons or offensive materials.

Now, "dangerous goods" is defined under s 1 of the Aircraft (Offences) Act as meaning (a) firearms, ammunitions, weapons and explosive substances, and (b) substances and things which, by reason of their or condition may endanger the safety of an aircraft or persons on board an aircraft.

It is common cause that what was in the various suitcases fall within the definition of "dangerous goods". I will come to the question of firearms later, but there is little doubt in my mind that the 53 knives that were found in the suitcase fall within the definition of "dangerous goods" because these are weapons. A weapon is defined in the Concise Oxford Dictionary as meaning "a thing designed or used or usable as an instrument for effecting bodily harm". Various examples are given.

Furthermore, the items that were found in the suitcases were firearms, despite Mr *Andersen*'s effort to show that there were just objects which were not firearms because they were in a dismantled condition and despite his argument that I should not give them the meaning as described in the Firearms Act. Quite clearly, I am satisfied that the definition in the Firearms Act cannot apply to the Aircraft (Offences) Act. But by applying the ordinary meaning to the word "firearm", I am satisfied that what was placed in the suitcases were firearms, even in their dismantled condition. I am fortified in this view by the fact that in ordinary language, the word "firearm" conveys

to a person what was in these suitcases by referring to an example. Those who are familiar with sporting or entertainment events know that, particularly when a person goes clay pigeon shooting, he normally carries with him his weapon, which is dismantled, in his shotgun case. Nobody would say, when the person is asked "What have you placed in the trunk or boot of your car?" that he has placed pieces of metal. He would answer "I have placed my shotgun". So I am satisfied that my analogy that what was placed or attempted to be placed in the hold of the aircraft were in fact firearms.

Now, Mr *Andersen* also submitted and agreed with the submission made on behalf of the State that I should refer to the case of *R* v *Mackay supra* in determining what constitutes "lawful excuse".

Now, in that judgment it was indicated by Clayden FCJ when dealing with the various words, I have already mentioned. He said at 182.

> "Endeavour must I think be made to give to the different phrases used by the legislature a different meaning. These are 'without lawful authority', 'without reasonable excuse'. The first and the last of these phrases are I think the only ones which do not cause difficulty. There is great difficulty in seeing the difference between 'lawful

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excuse' and 'just excuse' or between 'just cause' and 'just excuse'.

In the High Court, reference was made by Hathorn ACJ to his own decision in *R* v *Madanhe* 1963 R&N 393. In that case, in regard to s 24, it was held that the words meant 'not lawfully' in the wide sense of 'not contrary to law'. In *R* v *Muchira* 1963 R&N 389 that decision was followed in regard to s 34(2) in *Malianga*'s case 1963 R&N 504 at pp 531-514. In *Madanhe*'s case, reference was made to the Privy Council case, *Wong Pooh Yin* v *Public Prosecutor* [1954] 3 All ER 31 and to South African cases. In the present case, the learned judge considered that the meaning under s 24 of the phrase was not necessarily the meaning wherever it was used, and that to give the phrase wide meaning under s 17(2) might defeat the object of the legislature, and so he equated the phrase in s 17(2) to 'without lawful authority'. It is a principle in is the construction of statutes that normally the same word or phrase bears the same meaning throughout the Act ..., but the context may show that a different meaning was intended.

If the phrase 'without lawful authority' had not elsewhere been used in this Act, it might, I think, have been legitimate in one section to say that 'without lawful excuse' meant that, but as that phrase has been used, to construe 'without lawful authority' as meaning the same involves not only giving 'without lawful excuse' different meanings but also giving these words a meaning for which the legislature itself has elsewhere used more apt words. If it wanted s 17(2) to mean, 'without lawful authority' it would, it seems to me, have used the other phrases, as it did in s 33(1).

In *Wong Pooh Yin*'s case *supra*, it was an offence 'without lawful excuse ... to carry ... any firearm without lawful authority therefor'. It was held that a terrorist on his way to surrender who took with him his revolver which he would give up might have been carrying the revolver in compliance with the surrender instruction and so might have been held to have had a lawful excuse. The case well emphases the difference between 'lawful authority', the right by law to do what seems to be an offence, and 'lawful excuse', a reason for not complying with the law. As pointed out by Lord Macdermott at p 34,

'... it is the excuse or exculpatory reason put forward by the accused rather than the carrying ... of the firearm ... that must be shown to be lawful.'

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In *Madanhe*'s case, the excuse was that a polite request, which the appellant was entitled to make, was used. In *Muchina*'s case, the legitimate criticism of the police might have brought them into disesteem and the same was the position in *Malianga*'s case. In these cases, the appellants did what was forbidden, they could not show direct authority to do what they did, but they could show an excuse for doing what they did which was in compliance with the law. I think on further consideration that *Madanhe*'s case goes too far in saying that the excuse need only be 'not lawful'; I would rather say that the excuse should be in accordance with law. In a strict sense, it was 'not unlawful' at common law to do many of the acts penalised by the Law and Order (Maintenance) Act, but the phrase 'without lawful excuse' cannot, I think, mean that an apparent offender can escape by saying that there was nothing in any other law to stop doing what he did. He must have an 'excuse' for contravening the law, some other reason which made him do it, and it is in regard to that reason that lawfulness is considered ...

In this case, the appellant had two reasons for keeping publications known to him to be prohibited, two excuses for contravening the Act. One was that he wanted the publication for accounting purposes. That would perhaps be a 'reasonable excuse', if those had been the words used, but there was nothing lawful, in accordance with law, about it. The other was that he thought that the law required a publisher to keep a copy of all the publication for seven years. There is no such law. Again, I think that the excuse was reasonable, having regard to his view of the law, but the excuse cannot be shown to be in any way in accordance with the law."

Now, I am satisfied that as far as the expression "lawful authority" as used in the Law and Order (Maintenance) Act and "lawful excuse" as used in the Aircraft (Offences) Act are concerned do not have the same meaning. I am so satisfied on the various authorities cited, particularly *S* v *Janyure* 1988 (2) ZLR 470 (S) where the expression "reasonable cause" was considered.

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McNally JA referred to *R* v *Mackay supra*, and dealt with the phrase "reasonable cause" and said that "reasonable excuse" may be something less than a "lawful excuse" and "reasonable cause" may be something less than "lawful cause". He referred to *R* v *Parker* 1966 RLR 15 at 16 where Quènet JP said:

> "It is not easy however to draw a clear line between such words as 'sufficient', 'reasonable' and 'just' - they would of course include a 'lawful excuse' but not necessarily so ... I am of the opinion there is a difference between 'lawful excuse' and 'just excuse'."

In that case, Macdonald JA (as he then was) said at 18:

> "... it is possible even in a trial on excusem amounting to a 'just' excuse, but falling show of a 'lawful' excuse might be offered ... Whether an excuse is 'just' is to be determined not by the strict application of law to the problem but by the application of the principles of natural justice. The difference between 'a lawful excuse' and 'a just excuse' is the difference which existed in England between law and equity."

Similarly, coming to the case of *R* v *Jessie* 1964 RLR 412, again cited by Mr *Andersen*, where Beadle CJ again dealt with the Law and Order (Maintenance) Act and with the phrase "without lawful excuse", and said at 414-417:

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> "Whether the words 'without lawful excuse' are an essential averment in a charge of contravening s 26 presents a difficult legal problem ... A number of examples of these innocent and innocuous acts are given in *R* v *Madanhe* at pp 386 and 387 and in *R* v *Wilson* at p 126. The legislature could never have intended these acts to be offences. If, however, the words 'without lawful excuse' are given a very wide and benevolent meaning, these innocuous acts, although falling fairly and squarely within the literal meaning of para 30(d) and (e), become excusable because the accused could always escape conviction by showing lawful excuse. This was the approach originally adopted by the courts in this country. The leading case was *R* v *Madanhe*, which laid down that paras (d) and (e) must be construed, literally and that the words 'lawful excuse' must be construed as meaning nothing more than 'not unlawfully' in the wide sense 'of not contrary to law'. The court in *Madanhe*'s case thus construed the section as meaning that any person who 'unlawfully' does any one of the prescribed acts, commits an offence but proof of the fact that he has not acted unlawfully is on him. I expressed the same idea in *R* v *Wilson*, at p 127, by saying that the section does little more than alter the normal rules of onus of proof. This interpretation of the words 'lawful excuse' was specifically approved by the Federal Supreme Court in *Malianga* v *R* at p 153 where the learned Chief Justice said:
>
> 'I entirely agree with those case in which it was held that "without lawful excuse" means "not unlawfully" in a wide sense.'
>
> It is clear that what the Chief Justice really meant to say was that the words 'lawful excuse' means 'not unlawfully'. The words 'without lawful excuse' thus means simply 'unlawfully' and this was the meaning he put on them by Hathorn J in *Madanhe*'s case. On the authority of *Malianga*'s case, therefore, the words 'without lawful excuse' mean nothing more than 'unlawfully' and, if they mean that, they would be an essential feature of this offence and it would be necessary to allege this in the charge, The Federal Supreme Court, however, in *R* v *Mackay*, as I understand its judgment, decided that in approving the definition of 'lawful excuse' in *Madanhe*'s case it had gone too far ...
>
> With respect, it seems to me that the later judgment of the Federal Supreme Court is the better statement of the law on the interpretation to be place on the word 'without lawful excuse'. If this narrow meaning is placed on the words 'without lawful excuse' the meaning place on paras (d) and (e) of s 26 by *Madanhe*'s case, and *Wilson*'s case, must be reconsidered as many of the innocent and innocuous acts mentioned in those cases would become offences because the accused would no longer be able to escape conviction by showing 'lawful excuse' since he

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will not be able to show that his acts were in accordance with any law. The simple grammatical meaning of these paragraphs can no longer be considered to be their meaning ... On this new interpretation of the meaning 'without lawful excuse' ... it is clear that the section prohibits certain acts but provides that the accused can escape conviction if he shows that what, he did, he did in accordance with law. On this interpretation the words, 'without lawful excuse, the proof whereof lies on him' provides nothing more than a special excuse for doing what are otherwise unlawful acts."

I am satisfied that as far as the expression "without lawful excuse" is concerned, it means what is indicated in *Mackay*'s case which is that the accused can escape conviction if they show that what they did they did it in accordance with the law.

I am satisfied on all the evidence submitted as far as the second count is concerned that the accused have not shown that what they did was in accordance with the law. Therefore, they did not have a lawful excuse.

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Now, coming to the question whether they had reasonable excuse for doing what they did as far as the second count is concerned, Mr *Andersen* referred to *S* v *Masson supra*. I find that an interesting case for purposes of this case because the facts, although not identical, come very close to the facts in this case. The facts as shown in the agreed statements of facts that were place before the trial court in *S* v *Masson supra* were as follows and reported at 217-218:

" (1) The first appellant was a Safari Operator. In September and October 1981, he was living in a house at Benholm Ranch, a farm in Kwekwe area owned by his mother. Until September 1981, the farm manager, one Rawson, lived in a closely adjoining house, and in that month he left Zimbabwe for a holiday in America.

(2) In October 1981, in undisclosed circumstances, the first appellant found a suitcase under Rawson's bed containing the assorted collection of arms. He was frightened to hand in the weapons to the police because he feared his explanation of how he had come into possession of them might not be believed. He therefore instructed a senior employee, Raphael, to conceal the suitcase at a nearby farm, Mary Ann Farm, which he owned.

(3) The suitcase was concealed by covering it with grass in a little gully about 50 yards from one of the first appellant's game lodges on that farm. It is unclear whether the first appellant saw where the suitcase was concealed or how. He said in his evidence that this was done as a temporary measure so that the arms would not be discovered if the house should be searched by the police.

(4) The first appellant must have, however, been told where the arms were hidden because in January 1982, he removed them to a new place. The contents were removed from the suitcase and put between two long rocks. The gaps were plugged with rocks and presumably these were put on top of the arms as well. Unfortunately, there was no description of exactly how the arms were concealed when the police found them on 5 February 1982.

(5) The first appellant said that his intention in disposing of the arms on the second occasion was to prevent any animals finding them and possibly being injured, adding later that he also intended to conceal them from any inquisitive person.

(6) The second appellant, the brother of the first appellant, is aged about 19 years and is a University student. His only involvement was helping his brother in January 1982 when the weapons were concealed for the second time. He said that he feared that if employees knew where the arms were concealed they would

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not be safe from anyone and that was why he and his brother acted as they did."

It was also accepted in that case and was common cause that the weapons were not going to be used by the appellant at all. Now, the charge against the accused persons was an identical charge to the charge that these accused are facing in this case. In fact, in that case, it was unlawful possession of arms, ammunition, just as in this case, and it was held by the Supreme Court, upholding the judgment of the lower court, that the accused persons must be found guilty. Now, there it was said by Fieldsend CJ at 218:

"The nub of the question to be decided is whether the words 'has in his possession' to be read in their ordinary everyday sense, or whether they are to be read as meaning that the

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possession must be legal possession. The legislation is concerned with the maintenance of law and order and to that end penalises in s 27(1) anyone who has a weapon. It is not concerned with the niceties of whether the holder has juristic or any other type of legal possession. It is the holder of the arms at whom the section is directed."

He held that the appellant had possession and had been properly convicted and all other elements that were found in that case were taken into account on the question of sentence. Reasonable excuses were not established in that case.

I am satisfied on the authority of that case (*S* v *Masson supra*) that the accused have not shown that they had a reasonable excuse for having these various weapons. Accordingly, on all the facts before this court which we have considered, we find them guilty on the second count.

As far as the first count is concerned, it has not been shown that they had any lawful authority for possession of these weapons which they attempted to put on board the aircraft and s 7(2) indicates how they could have obtained the necessary lawful authority. We are satisfied that, on this count, they have not also discharged the onus placed upon them and accordingly they will be found guilty on the first count as well.

I have considered the question of sentence in light of all the authorities both counsel have cited to me. This court convicted the three persons on the first count on the basis that they had not established that they had any lawful excuse in attempting to place on board the aircraft dangerous goods, as outlined in the indictment, and on the second count on the basis that they had not established that they had any lawful authority or reasonable excuse for being in possession of offensive materials and weapons including arms of war. I have taken into account the submissions made on behalf of each of the accused persons by Mr *Andersen* and I have also take into account what submitted by the State. Quite clearly, it has been conceded by the State and the accused persons have treated inhumanely. The State contested the submissions made on behalf of the accused persons that they had been tortured by the police from the time of their arrest until they were remanded in custody. The State made the submission that the examination carried out by doctors did not confirm this, that is, the two doctors that the State had arranged to examine the accused persons. I have gone through the record of proceedings in the magistrates court and it is clear from exhibit 47 (the record of proceedings), which has been tendered by consent that the accused persons made certain allegations about being

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tortured and as a result of which the accused were asked to be examined by medical doctors. That order was made at the first instance by the magistrate on 13 March 1999 and subsequently a further order was made as a result of the fact that the accused wanted to be examined by a doctor of their choice. Accordingly, a further order was made

on 18 March 1999 that a private doctor be allowed to examine the accused persons. The three medical reports that were compiled on each of the accused persons by the various medical officers clearly indicate that the accused persons had some sort of injuries from those examinations. It is clear from the examination carried out on 13 March 1999 by Dr Madhombiro on the first accused, who was complaining about pain on the trunk and bruises on both feet. According to his examination, he found that on the trunk there was bruising on the lateral right side of it and on the feet, he found bruising on the dorsum part of both feet. Similarly, his complaining of pain of the left thigh, abdominal pain and bruises showed that there was on the limbs bruises about 20 cm in diameter on the left lateral aspect of the thigh above the knees area, no swelling and that there was on the feet bruising on the toes and on the planter aspect of the foot and tenderness to palpation. The abdomen was soft, no hepatomegaly, no splenomegaly, no masses or fluid in the abdomen. As for his examination, he also found, as far as the third accused was concerned - he was complaining of sore feet, a swollen head, and bruises on the feet - that there were bruises on the right upper arm, scratch marks on the dorsum of the right foot, with small healing area and tender to palpation, and on the head no swelling on right parietal area.

The examination carried out by Mr Harid on 15 March 1999, disclosed that on the first accused person - complaining of pain to the lower portion of feet and heel - he found no tenderness elicited on the plandar aspect of both feet. On the third accused - complaining of some pain on right parietal area - he found that there was bruising, on the right biceps area about 3 cm in length, on the upper arm; on the right foot there were small scratch marks, as well as on the dorsum of feet with small healing area. No tenderness was elicited. On the second accused - complaining of pain on both feet and lateral aspect of the thigh above the knee joint for 3 days - he found that there were on the limbs bruises 20 cm in diameter in the left lateral aspect of the thigh above the knee area. There was no swelling at this time and on the feet no tenderness was elicited. The accused had athlete's foot between the fourth and the fifth phalanges.

According to the medical report, from Dr Freemantle about allegations of torture, 11 days prior to his examination. His report is dated 19 March 1999. Dr Freemantle's report is in far greater detail. He found on the second accused: (a) small resolving haematoma over the posterior aspect of the right elbow; (b) two bilateral and symmetrical abrasions over the sacral region of the lower back; (c) an area of bruising over the lateral aspect of the right thigh measuring approximately 10 x 6 cm; (d) multiple small bruises over the medical and lateral aspects of the left thigh; and (e) bruising over the medical arches of both feet. The soles of feet were tender to palpation. There was an

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abrasion of the right second toe. With regard to the first accused, he found: (a) bruising of the left buttock measuring approximately 5 x 3 cm; (b) bruising over the posterior region of the left acromiaclavicular joint measuring 2 x 2 cm; (c) a large bruise over the anterior aspect of the left elbow and left forearm measuring approximately 12 x 4 cm; (d) bruising of the medical aspect of the left calf measuring 2 x 2 cm; and (e) bruising of the medical arches of both feet. The soles of feet were tender to palpation. On the third accused, he found: (a) bruising of the lateral border of the right deltoid muscle measuring 3 x 3 cm; (b) bilateral and symetrical abrasions of the lateral border of both wrists; (c) abrasion of the dorsal aspect of both feet with bruising; (d) bruising below the medical aspect of the left ankle joint; (e) superficial abrasion of the second and forth toes of the right foot; and (f) bruising over the medical arches of the soles of both feet, which were tender to palpation. He was unable to pass an opinion as to who carried out the alleged assault. However, it is his opinion that the clinical findings are consistent with trauma inflicted by assault using a blunt instrument.

I am satisfied on all the evidence led before the magistrates court through the medical reports that clearly some form of assault was perpetrated on the three accused persons while in police custody.

It is also not disputed, and it is borne out by the affidavits filed before the Supreme Court in the Supreme Court's judgment in *Blanchard & Ors* v *Min of Justice & Anor* S-88-99,*(62) that the accused persons had while in remand custody, been subjected to inhuman treatment which is described in that judgment.

Furthermore, it is also clear from the proceedings in the remand court that a detailed complaint in writing was submitted to the regional magistrate, with copies to the Attorney-General, outlining the allegations of torture that was supposed to have been perpetrated on the accused persons. These were initially submitted to the magistrate on 29 March 1999 and subsequently a further copy, which was corrected, was given to him as well.

It is clear from the evidence given by Insp Matema, although he denied in his evidence that he perpetrated any torture upon the accused persons, that the State had been investigating those complaints. Now, some four months later, there has been nothing to indicate as to how far they have proceeded with their investigations. Quite clearly, the only conclusion this court can come to is either nothing is being done about the complaints or if something is being done, clearly incompetence seems to be the situation, because it does not take four months to come up with a completed investigation about this, in which it has been alleged some twenty different persons were involved. The

procedures in place are available for scrutiny as to when they were taken out from police custody It would be amatter of simple examination of the book kept at each holding cell at the police stations concerned to find out who were responsible for any alleged torture, assault or intimidation or an inhuman treatment that may have been perpetrated on the accused persons.

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I am satisfied that the accused have shown that they in fact were maltreated and in fact were tortured as alleged by them in police custody. The State has been given ample opportunity to contradict this and has not done so the satisfaction, either of the Supreme Court or this court or in fact the magistrate who remanded them, particularly taking into account the fact that they were only remanded to stand trial on an indictment in May of this year.

This is a factor which weights very heavily in the accused persons' favour and it is a very strong mitigatory factor. In fact, it has been held by the Supreme Court in a number of judgments starting with the *S* v *Harrington* 1988 (2) ZLR 344 (S) and then confirmed subsequently in the case of *S* v *Michael* S-59-98 and *S* v *Kinfe* S-60-98. In both these judgments, the Supreme Court held that such treatment constituted special circumstances which a sentencing court must take into account.

Accordingly, I am satisfied that special circumstances have been established in this case.

Now, in the case of the *S* v *Masson supra*, which I have already referred to in the judgment, it was established - and I am bound by the judgment in that case - that if there are special circumstances, a sentence which would normally be no less than 5 years for a conviction under s 37 of the Law and Order (Maintenance) Act could be reduced from 5 years to a lesser period of time. It has not been suggested in this court that the offence under the first count is an extremely serious offence, requiring this court to impose the maximum sentence provided under that Act. In any case, the circumstances here do not indicate that it is an offence which requires this court to impose the maximum sentence.

It is clear from all the evidence and accepted by the State that the firearms that were found in the suitcases were not in a condition in which they could have been used immediately and therefore did not pose an immediate danger to anyone, although they had a potential danger to persons.

Accordingly, the court takes that into account. I also have to take into account, particularly in light of the provisions in the Law and Order (Maintenance) Act pertaining to the question of forfeiture, that I have to consider that aspect when I look at the question of sentence that I impose upon the accused persons.

Now, it is clear from the decisions of the Supreme Court in *S* v *Michael supra* and *S* v *Kinfe supra*, in which the accused persons were charged with

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contravening s 37(1) as read with s 27(2)(a) of the Law and Order (Maintenance) Act. In *Michael*'s case, the accused had in his possession a submachine gun fitted with a silencer, and a pistol also fitted with a silencer and ammunition. He was in fact found near the home of the former President of Ethiopia in suspicious circumstances where there was an allegation of an exchange of fire, after which he was arrested having been shot and having suffered serious injury and also having received various forms of ill-treatment while in custody. These were taken into account by the Supreme Court as special circumstances. A sentence of 5 years' imprisonment with labour imposed upon him for this offence was reduced by the Supreme Court

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to a sentence of 2 years' imprisonment with labour, and the court said that it took into account the period of almost one year the accused person had been in custody. In *Kinfe*'s case, as a result of the information obtained from Michael, the appellant was found with two machine guns both fitted with silencers, two pistols, also fitted with silencers, and one Star pistol. Again, he too was subject to ill-treatment in custody and the sentence imposed upon him of ten years' imprisonment with labour was, on the basis of the Supreme Court having found special circumstances akin to *Michael*'s case, reduced to a similar sentence that was imposed in *Michael*'s case, which was 2 years' imprisonment with labour.

It is quite clear that this court must be mindful of the sentences that have been imposed upon accused persons for contravening s 37 of the Law and Order (Maintenance) Act as to what type of sentences that have bee passed taking into account the seriousness of the offence. Quite clearly, the weapons found in the possession of the accused persons, which in total numbered 39 made up of 10 rifles including an AK rifle, 9 shotguns, 13 pistols and 8 revolvers, were not said to have been used or intended to be used in Zimbabwe. No evidence has been led to that effect. Quite clearly, it has been established by authority that weapons that are used or may be used, makes that offence a more serious offence than one in which weapons have just been found in possession although potentially capable of being used.

It has been urged on behalf of the State that the court should take into account the fact that there were also aggravating circumstances. I am mindful of the fact that there are certain aspects of this case which leaves a great deal of suspicion, particularly the quantity of arms, not that they constitute an arsenal as depicted by the State, nor do they constitute a small amount of arms as maintained by the defence, but certainly the amount of arms that were found in possession of the accused persons cannot be described as something that missionaries would in their normal vocational exercise carry with them. It is clear to me, and was quite candidly conceded by the first accused, that in retrospect they had more than the necessary amount or arms for the purpose

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of self protection and undoubtedly from the evidence far in excess of what would be required to go hunt animals. There are certain suspicious aspects of the evidence led in this court, particularly from the exhibit shown through the videos in the pit in Lubumbashi in a residence occupied by them, in which close to 9 000 rounds of assorted ammunition were found and various other items particularly of a camouflage type, a jacket bearing the name "M.C. Gurer" and having a US Army label on it, as well as another jacket of US Airforce bearing the name "Grubb". Quite clearly, from the evidence that this court has accepted, there were a number of uniforms which were in excess of two, and described in exhibit 43 as being much more than that quantity. So what these types of clothing, particularly the numbers of balaclavas that were found there, doing the DRC with missionaries has not been satisfactorily explained to this court. It could not be a credible explanation that a person has taken everything he owned and that is why it was in the DRC. Quite clearly, these persons were not people who had no experience of Africa. Two of them had made various trips for a number of years - that is Bob Banks, a person who was the oldest among them, and Jonathan Wallace. They had been to Africa well before

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that time. The three accused persons had been to this country, as well as the DRC, before those weapons and all those other things were taken there. Quite clearly, they knew that it was not an everyday occurrence for people to go about walking around in camouflage gear. If that may be the position in the United State of America, clearly, it was not the position in this country or in the DRC. At least, no evidence has been led to that effect and that is what clothing people walking around in the DRC were wearing normally. Furthermore, there is also the question of the various night vision sights and infra-red torches that were found. Quite clearly, these are not the type of things that one normally associates with missionaries, and that is why quite clearly a satisfactory explanation was not forthcoming as to how these were found with the accused persons. I take into account, not to the extent that the State wishes the court to take into account and draw inferences from them, that they were part of a special force. As I said, quite clearly it casts suspicion about their possession. Now, also a submission was made with regard to certain of the arms being collector's items. I have gone through the evidence and the only items that Insp Haley talked about as being collector's items was the Uberti revolver which he said was an exclusively collector's piece. As far as the SK rifles were concerned, he said would be of interest to collectors of military rifles. The 7.62 mm Nironco NHM 91 rifle and the AK rifle would also be of interest to collectors who specialised in military rifles. Clearly, I have no evidence to indicate to me that there is anybody who it was said was specialising in collecting military rifles, other than the fact that Bob Banks was a collector of guns.

ADAM J

I am satisfied that justice of the case would be met with a sentence of less that the 5 years mentioned by the Supreme Court in the case of *S* v *Masson supra*, for the reasons I have given. I also have taken into account the period spent by the accused persons in custody, which is just a few days over six months.

On the first count, the accuseds are sentenced to 6 months' imprisonment with labour. On the second count, the accuseds are sentence to 21 months' imprisonment with labour, of which 9 months with labour is suspended for a period of 5 years on condition the accused persons to not during that period commit any offence concerning any firearms or dangerous weapons for which on conviction they are sentence to imprisonment without an option of a fine. Six months' imprisonment with labour of this sentence will run concurrently with the 6 months' imprisonment with labour imposed on the first count. Also the sentences are to run from the date the accused persons have been in custody, that is from 7 March 1999.

Stumbles & Rowe, accused's legal practitioners

NATIONAL INSURANCE CO OF ZIMBABWE *v* DLAMINI 1999 (2) ZLR 196 (HC)

Citation 1999 (2) ZLR 196 (HC)

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Case No	Judgment No. HH-194-99
Court	High Court, Harare
Judge	Bartlett J
Heard	September 15, 1999
Judgment	September 15, 1999
Annotations	None

Application for civil imprisonment

Flynote

Practice and procedure - civil imprisonment - application for - default judgment previously granted - where judgment obtained on default basis, court must be satisfied that judgment was properly entered - summons for damages for negligence not a claim for a debt or a liquidated claim - default judgment inappropriate - application refused

Headnote

The plaintiff secured a default judgment against the defendant in respect of damages he had claimed for repairs to his vehicle arising from a motor vehicle accident. When the defendant failed to pay damages awarded by default, the plaintiff applied for an order of civil imprisonment.

Held, that civil imprisonment is a drastic remedy. A judge will ordinarily presume that the judgment debt in respect of which civil imprisonment is sought is properly entered. The judge, however, should always be satisfied, particularly when the judgment is obtained on a default basis, that the judgment was properly entered. Where the judge is not so satisfied then it is within the discretion of the judge dealing with the civil imprisonment summons to refuse to order civil imprisonment or to give appropriate directions before so ordering.

Held, further, that when the plaintiff had applied for default judgment the way in which he had attempted to set out his cause of action was wholly inadequate. As this was an illiquid claim, there should have been a declaration. This declaration should have contained these details: the nature of the cause of action, the circumstances of the accident, the nature of the negligence alleged, and an allegation that the amount claimed represented the reasonable costs of the repairs to the vehicle. In the present case there was no such declaration and none of the required details had been clearly specified. The judge hearing this matter should have required a proper summons or declaration to be filed. Additionally, as this was a claim for damages and a not a claim for a debt or liquidated demand, the application for default judgment should not have been dealt with as a chamber application but should have been made on the unopposed motion roll supported by an affidavit. A further factor was that the defendant entered a belated appearance to defend and requested further particulars. In these circumstances, the default judgment should not have been granted. The execution under such a judgment should accordingly not be allowed to proceed until the defendant had been given an opportunity to seek rescission and the plaintiff had provided satisfactory details of the negligence and had

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provided proof of reasonable cost of repairs to his motor vehicle.

Cases Considered

Cases cited:

Founders Bldg Soc v *Dalib (Pvt) Ltd & Ors* 1998 (1) ZLR 526 (H)

Mavheya v *Mutangiri* 1997 (2) ZLR 462 (H)

Judgment

Bartlett J: This matter is a civil imprisonment application which has come before me on the unopposed motion roll.

A civil imprisonment summons was served on Elington Dlamini. It required him to appear before the High Court on 15 September 1999 to show cause why an order should not be made for his imprisonment on account of his failure to pay a judgment debt. The judgment debt arises from a default judgment issued by the High Court under Case No. HC-2725-99 on 3 May 1999. The learned judge entered judgment against Elington Dlamini in favour of the National Insurance Company of Zimbabwe Limited in the sum of $176788.65 together with costs and interest at the rate of 25% *per annum* from 28 January 1998.

Civil imprisonment for debt is, it goes without saying, a drastic remedy. Personal service of a civil imprisonment summons is (in the absence of unusual circumstances) a necessity. There has been personal service in this matter. A judge will also only commit a debtor appearing before him to imprisonment for debt if he is satisfied that the debtor is unwilling, as opposed to unable, to pay his debt. A judge will ordinarily presume that the judgment debt in respect of which civil imprisonment is sought is properly entered. A judge, however, should always be satisfied, particularly where the judgment is obtained on a default basis, that the judgment was properly entered. Where a judge is not so satisfied then it is within the discretion of the judge dealing with a civil imprisonment summons to refuse to order civil imprisonment or to give appropriate directions before so ordering. Such a course is appropriate even where - as in this case - the respondent is in default at the civil imprisonment hearing. This is because it is fundamental to any civil imprisonment order that a judgment has been properly entered against the respondent.

In this matter, the plaintiff's cause of action is set out in the particulars of claim on the face of the summons as follows:

" 1. Payment of a total sum of $176788.65 in respect of monies spent on the repairs towards Plaintiff's insured's vehicle namely a Mazda B2200 Registration No. 669-381N on 28 January 1998, as a result of the accident occasioned by your sole negligence.

2. Interest thereon at 25% *per annum* from 16th day of March, when demand was made, to date of full payment.

3. Costs of suit."

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This is a wholly inadequate manner of attempting to set out the plaintiff's cause of action. The claim is an illiquid one for damages and required a

BARTLETT J

declaration. Such declaration should clearly set out the nature of the plaintiff's cause of action. It should specify the time, place and circumstances of the accident which led to the damage to the plaintiff's vehicle, necessitating the repair. It should clearly specify the nature of the negligence alleged on the part of the defendant. It should then allege that the amount claimed represents the reasonable costs of the necessary repairs to the plaintiff's vehicle. As to what should be properly contained in a particulars of claim or declaration, see *Mavheya* v *Mutangiri* 1997 (2) ZLR 462 (H) at 465C-467C.

But in this matter there was no declaration filed and none of the matters which should have been clearly specified in a declaration are clearly specified in the particulars of claim. One is left with no idea of where, when or how it is alleged the accident occurred. No particulars of negligence are specified. It is not alleged that the cost of the repairs effected were necessary or reasonable. It is not even clear why the proceedings are in the name of the plaintiff, as opposed to that of the owner of the insured vehicle.

The claim for interest is also very poorly drafted. Interest is claimed "from 16 March when demand was made". The year is not specified and if demand is the criterion for the date, then the date of receipt (or presumed receipt) of the letter of demand should be particularised. Though in view of the nature of the claim in question, interest should have been claimed from the date the repairs alleged had been paid for. The learned judge, however, awarded interest from 28 January 1998 - a date earlier than that claimed in the particulars of claim!

It is not even clear from the plaintiff's particulars of claim, when attempting to read them grammatically, that the claim is being made against the defendant - as there is no reference to the defendant in the wording of the particulars of claim.

In my view, for all the reasons I have specified, it would have only been appropriate for the judge, on perusing the particulars of claim, to require a proper summons or declaration to be filed, properly alleging a cause of action. I, for my part, would also have disallowed the legal practitioner from recovering any fees from the client for such inadequate and unprofessional work.

If, however, the summons and particulars of claim were to be regarded as adequate, the claim was clearly one for damages to a motor vehicle resulting from an accident. It was not a claim for a debt or liquidated demand. An application for default judgment accordingly needed to be made on the unopposed motion roll supported by an affidavit proving the amount of damages claimed - see High Court Rules Order 9 rr 58-60. It should not have been dealt with as a chamber application, with judgment being entered without any affidavit proving the damages claimed.

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BARTLETT J

A further factor is that the defendant did enter appearance to defend - albeit several days out of time - and filed a request for further particulars. The fair and appropriate procedure in such circumstances is, I believe, properly set out by Gillespie J in *Founders Building Society* v *Dalib (Pvt) Ltd & Ors* 1998 (1) ZLR 526 (H) at 534B-G where the learned judge stated:

> "In any action, where the plaintiff's legal practitioner contemplates an application for default judgment, but is aware of some proceeding taken by the defendant, being an attempt at opposition, which does not constitute due and regular entry of appearance to defend, he ought to address to the defendant or his legal practitioner due warning of the irregularity of the offending procedural step. Having done so, he may then choose between an application for default judgment or an application, on notice to the defendant, to strike out the irregular proceeding - which latter application may be conjoined with an application for default judgment.
>
> If he opts for the former course, then he must, in his application, and in fulfilment of the well-recognised duty of full disclosure in *ex parte* proceedings, inform the court (or the judge) of the relevant irregularity and give reasons as to why the court's discretion should be exercised in favour of the plaintiff. The fuller, and more preferable, course is an application on notice to strike out conjoined with a prayer for default judgment. This will never be regarded as an unnecessary proceeding, particularly where there has been a prior warning given of an intention so to proceed.
>
> Conversely, the party who proceeds to claim default judgment in circumstances where he may be accused of snatching at a judgment may well be held accountable for unnecessary proceedings generated by his deviousness or pigheadedness. Where the plaintiff is unaware of an irregular opposition which exists on file when he claims default judgment, then this may well be drawn to his attention, either by the registrar or by the judge before whom the matter is placed, and he may expect a direction to cause any such irregular proceeding to be struck out:"

In this matter, the plaintiff's legal practitioner was not required to take any of these steps by the learned judge before default judgment was entered. The plaintiff's legal practitioner had written to the respondent's legal practitioners informing them that appearance had been filed late and that he had proceeded to apply for default judgment. This letter was not, however, copied to the Registrar or filed of record. It was only handed in during the civil imprisonment application on 15 September 1999. It constitutes a starting point towards meeting the first requirement as laid by Gillespie J - but no more than that.

It is apparent that there are a substantial number of reasons why I would not have entered default judgment if the original application had been placed before me. I consider these reasons individually and collectively to be matters of substance. I do not, however, have the power to rescind a default judgment entered by another judge in the absence of an application by the party against whom the judgment has been entered.

It is however, I believe, within my discretion not to allow execution under such a judgment to proceed until the defaulting party has been given the opportunity to make the appropriate condonation and rescission applications.

BARTLETT J

I consider that the aspects of the matter I have detailed make it necessary and appropriate for me to make such an order. I also propose to give directions as to what needs to be done before

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execution and civil imprisonment can be proceeded with.

I accordingly, direct that execution under the default judgment obtained in Case No: HC-2725-99 is suspended until the applicant fulfils the following conditions:

(1) That it serves a copy of this judgment on the respondent's legal practitioners and on the respondent personally;

(2) That it serves with this judgment a notice to the respondent that should he wish to apply for rescission of the default judgment entered against him on 3 May 1999 in Case No: HC-2725-99, he should file and serve the necessary condonation for late application for rescission and a rescission application, at the High Court within l0 days;

(3) That should the respondent not file the applications referred to in para (2) above, the applicant may proceed with execution once it has provided the court with satisfactory details of the nature of the negligence alleged against the respondent and proof of the reasonable and necessary costs of the repairs constituting the damages claimed.

Tizirai-Chapwanya & Partners, plaintiff's legal practitioners

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PRESTON *v* CHARUMA BLASTING & EARTHMOVING SERVICES (PVT) LTD & ANOR 1999 (2) ZLR 201 (SC)

Citation	1999 (2) ZLR 201 (SC)
Case No	Judgment No. S-135-99
Court	Supreme Court, Harare
Judge	Ebrahim JA, Muchechetere JA, Sandura JA
Heard	September 16, 1999
Judgment	September 16, 1999
Counsel	H Zhou, for the appellant C Hungwe, for the first respondent No appearance for the second respondent
Annotations	None

Civil appeal

Flynote

Contract - instalment sale - cancellation by seller for failure to pay instalwent - notice of - period of notice

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required interms of Contractual Penalties Act

Headnote

If the buyer of land under an instalment sale breaches the contract by non-payment of instalments, the seller is obliged by s 8(1) of the Contractual Penalties Act [*Chapter 8:04*] to give the buyer thirty days' written notice of his intention to terminate the sale unless the breach of contract is remedied by the buyer or, if a period of notice is specified in the contract and this period is longer than thirty days, the longer period of notice must be given.

In the present case, the period of notice specified in the contract was fourteen days, so the seller of land under an instalment sale was obliged to give the buyer thirty days' notice of this intention to terminate the contract unless the breach was remedied. Section 11 of the Contractual Penalties Act provides that any waiver of this entitlement to notice is of no force or effect.

Case Information

H Zhou, for the appellant

C Hungwe, for the first respondent

No appearance for the second respondent

Judgment

Sandura JA: This is an appeal against a judgment of the High Court which set aside the purported cancellation of an agreement of sale by the appellant. After hearing both counsel, we dismissed the appeal with costs and indicated that our reasons would be handed down in due course. I now set them out.

The facts are as follows. On 16 July 1998, the appellant and the first respondent (the respondent) concluded an agreement of sale in terms of which the respondent purchased from the appellant a piece of land at Ruwa ("the property"). The agreed purchase price was $2500 000. It was agreed that the respondent would pay a deposit of $500000 to Tony West Real Estate (Pvt) Ltd ("the estate agent") on or before 22 July 1998, and that the balance of $2000000 would be paid to the estate agent in four monthly instalments of $500000, the first instalment being payable on or before 5

SANDURA JA

August 1998. Subsequent instalments were to be paid on or before the fifth day of each month, and the transfer of the property to the respondent was to be effected after the purchase price had been paid in full.

It was further agreed that if the respondent failed to pay any instalment by the due date, the appellant was entitled to give to the respondent notice in writing requiring it to pay the instalment within fourteen days, and that if it failed to pay the instalment within that period, the

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appellant was entitled to cancel the sale and repossess the property, or claim payment of the whole balance of the purchase price.

Following the signing of the agreement, the respondent paid the deposit of $500000, not on or before 22 July 1998 as agreed, but on 6 August 1998. Thereafter, the first instalment, which was supposed to be paid on or before 5 August 1998, was paid on 13 August 1998.

Subsequently, when the second instalment was not paid by 5 September 1998, the estate agent wrote to the respondent as follows:

> "In terms of Clause 1 of the above Agreement of Sale, you entered into with Mr T Preston, you are required to pay $500000 (Five hundred thousand dollars) by 5 September 1998. The money has not been received.
>
> It therefore stands to reason that the Seller is being prejudiced.
>
> You are therefore advised that you are in breach of the Agreement of Sale in terms of Clause 7 of the Agreement. You therefore have fourteen (14) days from the date hereof to pay the full outstanding amount inclusive of interest.
>
> You are urged to give this matter your utmost URGENT attention."

When there was no response to that letter, the estate agent wrote to the respondent as follows:

> "Further to our Notice of 5 September 1998 to you requiring you to pay the full outstanding amount inclusive of interest within 14 days, we have not received payment. This sale is therefore cancelled in terms of Clause 7 of the above Agreement of Sale."

The purported cancellation of the sale agreement provoked an immediate reply from the respondent's legal practitioner, who informed the estate agent that the cancellation was invalid because the respondent had not been given thirty days' notice of the proposed cancellation. The notice of thirty days' duration was required in terms of s 8(1) of the Contractual Penalties Act [*Chapter 8:04*] ("the Act"). Nevertheless, the estate agent appeared unconcerned by the issue raised by the respondent's legal practitioner.

Consequently, the respondent filed an urgent chamber application in the High Court seeking an order setting aside the purported cancellation of the sale agreement. The application was granted on 2 March 1999. Aggrieved by that result, the appellant appealed to this court.

The main issue to be determined in this appeal is whether the notice given to the respondent by the estate agent satisfied the requirements of s 8(1), as read with s 8(2), of the Act.

SANDURA JA

Section 8(1) of the Act reads as follows:

> "No seller under an instalment sale of land may, on account of any breach of contract by the purchaser -
>
> (a) enforce a penalty stipulation or a provision for the accelerated payment of the purchase price; or
>
> (b) terminate the contract; or
>
> (c) institute any proceedings for damages;

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unless he has given notice in terms of subsection (2) and the period of the notice has expired without the breach being remedied, rectified or discontinued, as the case may be."

Subsection (2) of s 8 of the Act reads as follows:

"Notice for the purposes of subsection (1) shall -

(a) be given in writing to the purchaser; and

(b) advise the purchaser of the breach concerned; and

(c) call upon the purchaser to remedy, rectify or desist from continuing, as the case may be, the breach concerned within a reasonable period specified in the notice, which period shall not be less than -

(i) the period fixed for the purpose in the instalment sale of the land concerned;

(ii) thirty days;

whichever is the longer period."

The provisions of the Act set out above apply to an instalment sale of land which, in s 2 of the Act, is defined as follows:

"'Instalment sale' of land means a contract for the sale of land whereby payment is required to be made -

(a) in three or more instalments; or

(b) by way of a deposit and two or more instalments;

and ownership of the land is not transferred until payment is completed."

I now proceed to determine whether the sale agreement concluded by the appellant and the respondent was an instalment sale of land.

I am satisfied that it was. Firstly, it was an agreement for the sale of land. Secondly, the agreement provided that payment of the purchase price was to be made by way of a deposit of $500000 and four monthly instalments of $500000. And thirdly, it provided that the property would only be transferred to the respondent after the purchase price had been paid in full. The sale agreement was, therefore, an instalment sale of land as defined in s 2 of the Act.

In the circumstances, before terminating the sale agreement the appellant was obliged to comply with the provisions of subss (1) and (2) of s 8 of the Act. In terms of those provisions, he was obliged to call upon the respondent to pay the instalment within thirty days, and would have been entitled to terminate the agreement only if the respondent failed to pay the instalment within that period.

Although the parties had agreed that if the respondent failed to pay any instalment by the due date it would be given fourteen days within which to remedy the breach before the agreement could be terminated, the period of

SANDURA JA

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fourteen days agreed upon is irrelevant. That is so because, in terms of s8(2)(c) of the Act, if the period agreed upon is shorter than thirty days, the purchaser should be given thirty days within which to remedy the breach, before the agreement can be terminated. On the other hand, if the period agreed upon is longer than thirty days, the purchaser should be called upon to remedy the breach within the period agreed upon, before the agreement is terminated for breach of contract.

In case it may be thought that by agreeing to a period of fourteen days the respondent waived any rights or benefits conferred on it by the Act, it is pertinent to note that in terms of s 11 of the Act any such waiver would be of no force or effect. The section reads as follows:

> "No waiver of any right or benefit conferred by this Act shall be of any force or effect."

In the circumstances, the learned judge in the court *a quo* correctly decided the matter, and the appeal had to be dismissed with costs.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Kantor & Immerman, appellant's legal practitioners

V S Nyangulu & Associates, first respondent's legal practitioners

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KUNEDZIMWE *v* MUSARIRI 1999 (2) ZLR 205 (HC)

Citation	1999 (2) ZLR 205 (HC)
Case No	Judgment No. HH-191-99
Court	High Court, Harare
Judge	Garwe J, Chinhengo J
Heard	September 9, 1999
Judgment	September 22, 1999
Counsel	Appellant in person H Mukonoweshuro for respondent
Annotations	None

Civil appeal

Flynote

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Practice and procedure - summons - claim for delivery of goods - no alternative claim for monetary value of goods - whether court entitled to order payment of monetary value of goods instead of specific performance

Headnote

The respondent had entered into a registered customary law marriage with the daughter of the appellant. The respondent had failed to pay part of the agreed *roora* or marriage consideration to the appellant, namely, seven head of cattle. At the time, this agreement had been made, the sort of cattle which the parties had in mind were worth $350 per head. Some sixteen years later, these cattle had still not been handed over to the appellant, so he instituted an action in the magistrates court, claiming the delivery of the seven head of cattle. By this time, the value per head had increased considerably. The appellant did not claim the value of the cattle in the alternative. The respondent admitted liability to deliver the cattle. The magistrate ruled that he did not have jurisdiction to order specific performance and ordered instead that the respondent should pay the appellant $350 per head of cattle for the seven cattle.

Held, that the magistrate did have jurisdiction to award specific performance. In terms of s14(1)(d) of the Magistrates Court Act [*Chapter 7:10*], a magistrate has jurisdiction to entertain a claim for the delivery of specific items, provided that the value of the items is within his monetary jurisdiction. The total value of the cattle fell within his monetary jurisdiction.

Held, further, that as the sole remedy sought was specific performance, there was no basis for denying the specific relief he had sought. It did not matter that the respondent would now have to pay far more than $350 per head to purchase these cattle to hand over to the appellant. This was an obligation under customary law and it must have been within the contemplation of the parties that if the cattle were only going to be purchased and handed over years later than the agreed date, the value of cattle per head would have gone up.

Cases Considered

Cases cited:

Salisbury Municipality v *Macmuldrow* 1916 AD 252

Case Information

Appellant in person

H Mukonoweshuro for respondent

Judgment

Chinhengo J: On 8 January 1997, the appellant sued the respondent for

CHINHENGO J

payment of outstanding *roora* or bride price. The summons was issued out of the court of the provincial magistrate at Masvingo. The particulars of claim read:

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"To pay seven head of cattle (value seven thousand dollars) balance of lobola for my daughter Joyce Kunedzimwe now known as Joyce Musariri. This lobola was due in November 1980 per agreement signed on 08.01.1980."

The defendant pleaded in the following terms:

" 1. The defendant denies owing the plaintiff seven head of cattle and or seven thousand dollars.

2. The defendant however, admits owing the plaintiff at the agreed (*sic*) 6 head of cattle at the agreed value of $300 per beast totalling $1800.

3. Where (*sic*) the defendant prays that the plaintiff's claim be dismissed to the extent it exceeds the amount admitted."

At the pre-trial conference the respondent admitted that he owed the appellant "7 head of cattle at $350 per beast and I am prepared to pay that amount and that they were due in November 1980".

The matter proceeded to trial because the appellant insisted on the claim as particularised. In his evidence-in-chief at pp 1-2 of the record of proceedings before the magistrates court, the appellant, persisting in his claim, stated:

"It was agreed that respondent was to finish paying part of this lobola that same year November. During that period, beasts could be obtained at $350 a head. I waited and kept on reminding him to pay but to no avail. In 1996, 27 December, I wrote a letter to respondent reminding him of the outstanding balance. He replied that I should go and report. What made me to charge $1000 per beast is that beasts cannot be obtained at $350 they are now dearer - if he cannot pay that amount I require the 7 beasts. That is all."

Under cross examination by the respondent, the following transpired:

" Q. I cannot pay $1000 but $350.

A. I want 7 beasts - if you can buy them at $350 OK. I require 7 head of cattle.

Q. I cannot get the beasts I am from a poor family hence $350 per beast.

A. No - the $350 was suggested by the court at that time it was a price for a beast.

Q. I had already managed to save for 7 beasts in the form of beasts (*sic*).

A. I want the beasts, I can't get a beast for $350."

The respondent appeared to have appreciated the appellant's argument that the sum of $350 was mentioned because it was at that time the average value of one beast. In his evidence-in-chief, the respondent is recorded as having said:

"I can afford $700 a beast. I confirm we agreed on 7 beasts at $350 each. I was supposed to pay before end of 1980 no date given. I was supposed to buy (pay) an equivalent amount for a beast. I did not pay I was still looking for money. I am now offering to pay the 7 x $350. I am not prepared to pay it with interest because I don't have the money. I can however pay $700 per beast. That is all."

The magistrate's judgment must be quoted in its entirety. It reads:

"The plaintiff issued summons to recover *lobola* in respect of his daughter who was

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CHINHENGO J

married by the defendant. The claim is based on a written document which was produced by the plaintiff. In fact, the document in question is a marriage certificate.

According to the document as at 8/01/80, the respondent had paid $140 as lobola and undertook to pay 7 head of cattle or their value of $350 by November 1980. He did not do that and the plaintiff did not bring his claim to the courts until about 16 years later. Now plaintiff is suing for the delivery of the 7 beasts or the value at $1000 per beast.

The defendant does not deny owing plaintiff the beasts in question but is denying that they agreed at a value of $1000 per beast. He throughout the pleadings has offered to pay 7 x $350 as per their agreement of 1980. Even at trial he offered to pay $700 per beast, but the plaintiff refused saying he wanted the 7 beasts as per agreement.

From the evidence led the parties had agreed to settle the *lobola* in 1980. The plaintiff says he had asked the defendant to pay on several occasions but to no avail. He is not prepared to receive the money at $700 per beast. The defendant on the other hand says he cannot afford more. He realises that the *lobola* was due a long time ago and thus had offered to increase it. At one point he seemed willing to pay the $700 if it was to be spread over a period of time. Unfortunately, though, plaintiff would not have it that way. At the end of the day, the defendant asked for a judgment in respect of his original plea and withdrew all the offers he had made. He also told the court that he had already separated with [*sic*] the plaintiff's daughter.

From the look of things, this case should not have dragged this long. The parties should simply have tried to reach a settlement out of court. In fact, the question to be answered is whether the parties agreed to payment of *lobola* in form of beasts/their monetary equivalent.

Lobola or a contract to pay *lobola* is a contract *sui generis*. *Lobola* is no longer obligatory but where parties agreed to the payment of the same, then they must perform as per their agreement. The difficulty one finds himself in is in determining what exactly were the terms of the contract. Did the parties agree to value the beasts at the current price or a specific price? It would appear as *lobola* agreements it is not uncommon for parties to agree that a portion will be in money terms and a portion of the beasts in live beasts. It would appear where parties agree to pay the *lobola* and the beasts are converted to monetary terms then that figure does not fluctuate. The parties can also agree on *lobola* in terms of beasts alone without bothering about value in such cases therefore no matter when the claim is brought for the recovery thereof the defendant would be expected to deliver beasts.

In the present case, it would appear the outstanding balance as at 8/01/80 was 7 head of cattle or their value of $350 or (rather $350 per beast as amplified by the pleadings). It is not clear whether the value was supposed to fluctuate. What seems to be the case is that there was according to the agreement no provision for fluctuation. The parties could have said so. So if assuming the value of the beasts were to go up by November 1980 from 350 to 400, it appears the defendant would have been entitled to pay *lobola* at the rate of $350 per beast.

On the face of it, it is unfair for defendant to offer to pay the *lobola* at $350 per beast 16 years later. However the contract of the parties seems to say exactly that. In November 1980, the defendant was in breach and so the plaintiff should have brought his case then. There is no plausible reason why he should have waited that long. He did not even sue for interest and thus he cannot raise it in the middle of the case. Unless parties agree to its payment, a claim for interest must be specifically sued for.

Indeed, the plaintiff would be entitled to sue for the delivery of the beasts. Such a course would be more advantageous to him. However, the magistrates court does not have

jurisdiction to order specific performance (see s 14(1)(d)). I don't seem to think that s14(1)(d)(i) alters the present position especially given the facts of the case. It would appear this is not mere delivery of property but the performance by the respondent of his side of the bargain in the result the court will have to give effect to what the

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parties agreed. It would appear the plaintiff should have better accepted the defendant's offers before they were withdrawn. As mentioned earlier the parties agreed to payment of *lobola* by a specific date and they agreed to seven head of cattle or their value of $350. It only became clear in pleadings and evidence that in fact, the $350 was the value of one beast otherwise one may be justified in saying it was the value for all the cattle. If parties wanted the beasts to be valued as at the value obtaining at the date of payment then they would have made such a provision. But it seems that was not the agreement and that if the value of the beast had increased from $350 in January 1980 to $500 in November 1980 then defendant would have been justified to pay $350 x 7 in November 1980.

As a result, therefore, it would appear the parties agreed to payment of 7 beasts at $350 a beast as *lobola* for the plaintiff's daughter. It is only unfortunate that the plaintiff did not sue in November 1980 but chose to be understanding until the marriage developed problems and [the] parties separated. Unfair as it may seem, the court can only give effect to what they agreed ie 7 head of cattle or the equivalent in value at $350 a beast. However, on the question of costs the court does not seem to see the purpose of trial. The defendant at pre-trial conference admitted to paying *lobola* as per their original agreement. The plaintiff refused and was not successful in his claim, therefore, it is only fair to order that he be paid costs up to the PTC stage.

Judgment is given for plaintiff and defendant is ordered to pay 7 head of cattle or their equivalent value of $2450 plus costs of suit up to PTC stage."

It is apparent that the magistrate made the following pertinent findings:

(a) the respondent did not deny that he was obliged to deliver seven head of cattle to the appellant;

(b) the respondent did not have the seven head and was opting to pay the amount representing the value of the cattle as at November 1980 being $350 per head;

(c) the appellant was no longer prepared to accept the monetary value of the seven head;

(d) whereas the parties had agreed on the amount of money to be paid in lieu of delivery of cattle, that amount does not fluctuate depending on when it is paid;

(e) the outstanding balance of *roora* as at 8 January 1980 was seven head of cattle or their value at $350 each;

(f) there was no provision for the monetary value of the cattle to fluctuate; and

(g) whilst the appellant was entitled to sue for the delivery of the cattle the magistrate's court did not have the jurisdiction to order specific performance, that is to say to order the respondent to deliver the cattle.

In the result, the court *a quo* ordered that the respondent should deliver 7 head of cattle or pay their value at $2450 plus costs of suit. Although the

magistrate used the word "pay" instead of "deliver", the substance of his order was in effect that the respondent was to deliver the cattle or pay their value in the sum of $2450.

Before considering whether the order made by the magistrate is proper in every respect, I think

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a closer analysis of the case presented by the appellant to the court *a quo* is necessary. The appellant sued the respondent for the delivery to him of seven head of cattle. He did not sue for the value of the cattle. The value which is indicated in the particulars of claim would, in my view, be indicative only of the range of value of the cattle which the appellant was claiming so as to make it clear that he was not claiming some pedigree stock valued at thousands of dollars each. That indication was not intended to suggest that the appellant was claiming the payment of the monetary value of the cattle at all. The particulars of claim must be understood in this sense. That the appellant was claiming the delivery to him of the seven head of cattle is made even clearer, as I have shown by a perusal of his evidence-in-chief and under cross examination. He was, throughout his evidence, emphatic that he wanted the cattle delivered up to him. Thus, the appellant's case which was before the court *a quo* was not for the payment of the value of the cattle as agreed in 1980.

In his plea, the respondent admitted that he was indebted to the appellant to deliver the cattle but went further to state that in terms of their agreement he could elect to pay the value of the cattle fixed at the time of the agreement, in the sum of $350 per head.

In dealing with the respondent's plea, the magistrate accepted the contention that the respondent could elect to pay $350 for each beast and that that is what the agreement provided. I find this to be an overly simplistic view of the agreement between the parties.

In his evidence, the appellant stated that the amount of $350 was fixed by the court which issued the marriage certificate. He explained that at that time one beast could be bought for $350 and that was the basis upon which the court fixed the amount. This is supportive of the appellant's argument that the agreement's subject matter was not $350 per head as the substantive obligation which the respondent was assuming, but that the subject matter of the agreement was the delivery of seven head of cattle in payment of part of the *roora*. No challenge was made to the appellant's assertion that the amount of $350 was fixed by the court. That, however, should not result in the court accepting the appellant's word on this point. The Customary Marriages Act [*Chapter 5:07*] makes provision with regard to *roora* or marriage consideration. In terms of s 4, the guardian's presence at the solemnization of the marriage is not required if it is shown that the guardian has consented to the solemnisation and has agreed to the form and amount of the marriage

consideration. Section 5 empowers the magistrate, after consultation with the guardian, to fix the amount of the marriage consideration and solemnise the marriage if the guardian has unreasonably or improperly withheld his consent. Section 8(3) provides that:

> "Every extract from the marriage register which purports to be certified as a true copy therefrom by the customary marriage officer who for the time being has the custody of the marriage register and every duplicate original register shall respectively be good evidence of the facts therein recorded in and before all courts and in criminal and civil proceedings therein and shall be admissible upon its mere production by any person."

The certificate of marriage produced to the court was duly certified as a true copy. It contains

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the following details:

> "Consideration remaining to be paid - 7 head of cattle. Value $350."

In view of the provisions of s 8(3) above, it is a correct finding that the parties agreed that the respondent was to deliver seven head of cattle or in lieu thereof, he had to pay $350 per beast. That this was the value per beast was common cause between the parties. What therefore should be made of the appellant's assertion that the amount of $350 per beast was insisted upon by the court? To my mind, the assertion is irrelevant. Whether the amount was fixed by the court in terms of s 5 of the Act or it was the value stipulated by the appellant, that is beside the point. The marriage was solemnized on the basis that the respondent was to pay as marriage consideration a further seven head of cattle each with a value of $350.

Was the fact of the basis on which the marriage was solemnized sufficient to entitle the magistrate to deny the appellant the relief which he sought? The plaintiff must have, and he indeed, appreciated that the agreement as reflected in the certificate of marriage gave the respondent the choice to deliver the cattle or pay their stated value as at November 1980. He consciously did not sue for the payment of the monetary value but for the delivery of the cattle obviously because he appreciated the disadvantage of suing for the former. During the trial, he insisted that the relief which he sought was the delivery of cattle. The respondent admitted his liability to deliver the cattle. There was no reason for the magistrate to deny the appellant the specific relief he sought especially in view of the fact that the respondent admitted that specific liability.

The appellant's substantive ground of appeal was that whereas the court *a quo* ordered the respondent to deliver seven head of cattle, the latter had opted to pay the cash equivalent in the sum of $2450. It must be appreciated that throughout these proceedings the appellant was not represented by a legal practitioner and hence his grounds of appeal were not elegantly drafted. It was not, however, difficult for this court to appreciate the true nature of his appeal and the fact that he was aggrieved that the order of the magistrate gave

to the respondent the option to deliver the cattle or pay their value at $350 per head.

This therefore brings me to the question whether the order of the magistrate was proper in providing two alternative forms of relief in the circumstances of this case. I have already determined that where the respondent admitted the liability to deliver the cattle and the appellant had specifically claimed for such delivery, the court *a quo* had no basis for denying the appellant the specific relief he sought.

The judgment of the court *a quo* reads:

> "Judgment is given for the plaintiff and the defendant is ordered to pay 7 head of cattle or their equivalent value of $2450 plus costs of suit up to PTC stage."

The order framed in this manner is in the alternative, giving the respondent the election either to deliver the seven head of cattle or to pay a certain sum. On the particular facts of this case,

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such an order should not have been made. Generally a court should not grant a judgment upon an issue not in dispute in the pleadings. In *Salisbury Municipality* v *Macmuldrow* 1916 AD 252, the judge in the court *a quo* had found against the plaintiff upon all the issues raised in the pleadings but he had awarded, by way of a *quantum meruit*, for certain work done, two amounts which upon the pleadings as framed (and not amended) the plaintiff had not claimed. On appeal, that decision was set aside with the appeal court stating at p 264 that it was wrong to award the plaintiff amounts which he never claimed upon the pleadings as they stood. In the present case, even though the respondent pleaded that he was entitled to pay the value of the beasts, by a parity of reasoning, there was no basis for the court to award the plaintiff the amount which not only had he not claimed but which he actually did not want paid to him.

The magistrate's argument against making an order that the respondent should deliver the cattle (which order he in any event made) was that his court had no jurisdiction to order specific performance. He cited s 14(1)(d) of the Magistrates Court Act [*Chapter 7:10*]. That provision states that a magistrate's court has no jurisdiction in an action wherein:

> "the specific performance of an act is sought without an alternative of payment of damages:
>
> Provided that the court shall have jurisdiction to order -
>
> (a) ... (not relevant)
>
> (b) the delivery or transfer of property, movable or immovable, not exceeding such amount as may be prescribed in the rules."

The plaintiff was careful to place a value against the head of cattle which he claimed should be delivered to him - their total value was $7000. The respondent did not challenge that value, nor did he place a higher value on the head of cattle than that given by the appellant. Thus, the appellant having brought his claim within the ambit of s 14(1)(d) aforesaid, there was no basis

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on those facts for the magistrate to contend that he had no jurisdiction to order specific performance. Even if the magistrate had been correct that he had no jurisdiction, at best he should have dismissed the claim for that reason rather than make an order which the appellant did not seek and in fact did not want. The appellant did not claim costs nor the fruit of the seven head of cattle.

In the result, the appeal is allowed. The order of the court *a quo* is altered to read:

> "The defendant shall deliver to the plaintiff seven head of cattle."

Garwe J: I agree with Chinhengo J that the trial magistrate did in fact have jurisdiction to entertain the appellant's claim. In terms of s 11 of the Magistrates Court Act [*Chapter 7:10*], a court shall have jurisdiction in civil cases whether determined by the general law of the land or by customary law, inter alia, in actions in which is claimed the delivery of property where the value does not exceed the amount prescribed. The same position is put differently in s 14(1)(d) of the Act which provides that the magistrates court has no jurisdiction to order specific performance of an act without an alternative of payment of damages, provided however that a

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court shall have jurisdiction to order the delivery of property not exceeding such amount as may be prescribed. The appellant's claim in this case was for payment (or delivery) to him of seven head. In his summons he indicated the value of the cattle to be $7000, thus bringing his claim within the jurisdiction of the magistrates court. It is important to note that the claim was not for payment of seven head or the sum of $7000. The figure of $7000 was inserted in order to give an indication of the value of the cattle for purposes of showing that the court has jurisdiction - see Jones and Buckle *The Civil Practice of the Magistrates Court in South Africa* 8 ed by Erasmus p 61. The position now seems settled that although a claim for the delivery or transfer of particular property may be in effect a claim for specific performance, it is not necessary for the claimant to add an alternative claim for payment of damages. Nor is it necessary for the magistrate to give an alternative judgment for payment of the value of property. The claim must be for the delivery of property and no more - Jones and Buckle *op cit* at p 61. The learned authors further suggest that the value of the property must be objectively assessed as at the commencement of the action. The fact that in terms of the transaction giving rise to the claim the parties may have agreed upon a certain consideration for the property, though it may in many cases be relevant and instructive, does not conclude the inquiry. Indeed, the view has been expressed that there need be no allegation of value. In these circumstances, I am satisfied that the trial magistrate was empowered to entertain the appellant's claim.

I am also persuaded, on a further consideration of this matter, that the

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conclusion reached by Chinhengo J is correct and accords with both common sense and justice. The respondent agreed to pay seven head of cattle or $350 per beast by November 1980. The sum of $350 represented the fair value of a beast at that time. Had the parties been asked in January 1980 whether sixteen years later the respondent would still pay $350 per head, their response would have been "Of course not". It is clear the figure of $350 was accepted by the parties as representing the fair value for one head at that time. It could not have been in the contemplation of the parties that whatever transpired, and irrespective of the devaluation of our currency, the value would remain static at $350 per head. The respondent must surely appreciate that he cannot buy one head in this day and age for $350. Rather than deliver seven head, which would represent considerable value, he has taken the easy way out and says he will pay $350 per head. The magistrate agreed with him and ordered him either to deliver seven head or pay $350 per head. The order by the magistrate effectively means the respondent will not deliver but will pay the equivalent value of $2450. I do not agree with such an interpretation of the agreement, given the overall circumstances of this case. Such an interpretation is overly simplistic and leads to absurdity. This is a claim involving customary law and must be understood in that context. To take into account in determining a matter such as this one, general principles of the law of contract does not achieve justice. As indicated earlier, common sense dictates that it could not have been the intention of the parties that the price of $350 per head was to remain static, irrespective of whatever happened. Such an interpretation is not in accord with customary law. That aside, I agree with my brother judge Chinhengo that since the appellant was seeking payment or delivery of seven head and nothing else the trial magistrate should have ordered such delivery without specifying the amount of money payable

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in the alternative, a relief which the appellant had not prayed for. It may well be that difficulties may be experienced by the appellant in executing the judgment but that is besides the point. The appellant did not seek payment of the value of the cattle in the alternative.

For the above reasons, I concur with the order by Chinhengo J.

H Mukonoweshuro & Partners, respondent's legal practitioners

S *v* MADZOMBA 1999 (2) ZLR 214 (HC)

Citation	1999 (2) ZLR 214 (HC)
Case No	Judgment No. HH-195-99
Court	High Court, Harare
Judge	Garwe J, Chinhengo J
Heard	September 9, 1999
Judgment	September 22, 1999
Counsel	M Hogwe, for the appellant H S M Ushewokunze, for the State
Annotations	None

Criminal appeal

Flynote

Evidence - sexual case - complainant a young child - corroboration - whether required - need for court to be satisfied of reliability of witness, whether or not corroboration is required as well

Headnote

It is permissible for a court to convict in a sexual case even if there is no corroboration of the complainant, but only where the merits of the complainant and the demerits of the accused are without question. On the other hand, corroboration will not secure a conviction unless the court is in any event satisfied that the complainant is credible. In the case of young children, the degree of corroboration or other factors required to reduce the danger of relying on the child's evidence will vary with the age of the child and the other circumstances of the case. The court must in all cases be satisfied that the danger of false incrimination has been removed before it may convict.

Cases Considered

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Cases cited:

R v *James* 1958 R & N 462; 1958 (3) SA 699 (SR)

R v *Judson* 1965 RLR 501 (A); 1966 (1) SA 88 (RA)

S v *Machowa* S-14-99

S v *Mupfudza* 1982 (1) ZLR 271 (S)

R v *Ncanana* 1948 (4) SA 399 (A)

R v *W* 1949 (3) SA 772 (A)

Case Information

M Hogwe, for the appellant

H S M Ushewokunze, for the State

Judgment

Chinhengo J: The appellant was convicted on one count of rape of a 5 year old girl who is related to him. The complainant was his niece. He was sentenced to 8 years' imprisonment of which two years were suspended on condition of good behaviour. He has appealed against both conviction and sentence.

The facts on which the appellant was convicted are that the complainant, who was five years old at the time was at the rural home where the appellant lived with his mother. The complainant had been left in the appellant's mother's custody over the school holidays of April 1995. It was the complainant's evidence that on a date which she no longer remembered she

was playing with one Shorai, a girl younger than her, behind a granary at the grandmother's rural homestead. The appellant had gone to school in the morning and had returned in the afternoon and was at home when the complainant and her friend Shorai were playing outside. The appellant's mother was out in the fields. The appellant called the complainant into his bedroom. She responded to the call and entered the appellant's bedroom where the appellant grabbed her, forced her onto his bed, removed her pants and raped her once. Before this ordeal, the complainant said that she had been raped twice by another uncle, Abias, about two days prior to this incident. The complainant said that as soon as she had been raped by the appellant, she reported the matter to her grandmother. She said that the grandmother, who is the appellant's mother, reprimanded her but did not take the matter further. The complainant said that the grandmother told her not to report the matter to her parents, admonishing and, as it were, threatening that if she did she would die. The complainant did not therefore report to either her mother or to her father for about twenty months.

This offence surfaced in 1996 when the complainant's parents wanted to send the complainant

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to the rural home where the grandmother resided. It is then that the complainant refused to go to the rural home and told her parents that if she should go, her uncles, Costa the appellant, and Abias, would sexually abuse her. The parents asked her for the details of the sexual abuse. She told them the story she gave to the court.

The matter was reported to the police and a medical report on the complainant's condition was obtained. The medical report is Exhibit 2. The doctor reported that the complainant's hymen was "not intact" and her vagina allowed one finger. In regard to whether penetration occurred, the doctor remarked that:

> "Possible but it is difficult to prove now since the incident happened 1 year and 8/12 ago though the finding of a torn hymen would be suggestive but not conclusive."

The doctor also reported that the young girl was not sexually active which would go without saying, having regard to her age.

The appellant denied the charge. The magistrate rejected his defence and accepted that of the complainant. In her judgment, the magistrate reasoned as follows:

> "In analysing the complainant's evidence, I reminded myself of the need to be very cautious. This I deemed inevitable since complainant is a minor who can easily make mistakes of fact. I also considered whether there is a possibility of false incrimination. I also took into account the two stage approach in the well known and long standing case on sexual offences the *Mupfudza* case.

Generally, complainant's evidence was clear and satisfactory in many respects.

That someone at a certain stage had sexual intercourse with the young complainant was corroborated in a very material respect by exhibit 2 which is the medical affidavit filed in

> by consent. Dr T Nyaume who examined complainant Clementine Chimusoro deposed that she led a non active sexual life.
>
> The doctor observed complainant's hymen was no longer intact. Examination allowed one finger and was painful. The doctor remarked that penetration was possibly effected. He explained that it is now difficult to prove now since the incident happened a year and 8 months ago. So what the doctor found to be highly indicative that complainant was sexually abused was the torn hymen.
>
> The complainant is adamant she reported the incident to her own grandmother who then advised that if ever she disclosed the abuse to her own parents she would die. Regina Chimusoro, who is accused's mother and complainant's grandmother, denied in her evidence in chief that complainant ever advised her along those lines.
>
> The matter was only reported by complainant to her mother in 1996. The court has to decide whether under the circumstances cited that the grandmother decided to make discouraging remarks if she did, whether the complainant did not report to the first sympathetic person as desired by the law. On this aspect, it is complainant's 'oath' against the 'oath' of her grandmother.
>
> I have no reason to disbelieve complainant's contention that she launched a report with her grandmother.
>
> Although generally when dealing with child complainants the court takes heed of the approach towards dealing with evidence of children in sexual cases, I should say complainant did not give the court the impression that she

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was someone who was fantasising or being highly suggestible. Neither could I say she did not understand the duty to tell the court the truth. Where she could not stretch her memory back she simply told the court that she could not remember. In my view, she was an honest witness who was most reluctant to exaggerate. As a matter of fact she told the court that when she saw her mother she did not report the incident to her.

She naturally brought it up when her mother wanted her to go to the communal lands. It is abundantly clear the complainant believed her grandmother that if she reports the matter she might die. When it was imminent she was going back to the same ordeal it seems it became a matter of choice between two devils and she chose to let the cat out of the bag.

When viewed from a 5 year old's point of view, the court can easily understand why after telling her grandmother, the complainant did not go on to confide in her own mother. She took the hint and managed to forget about it only to be reminded when she was supposed to go back to the scene of the alleged offence.

This in my view, goes a long way to rebut the assertion that complainant was fabricating a story to falsely implicate the accused person.

Accused's father Elliot Chimusoro testified there exists bad blood between the complainant's mother and himself. He cited incidents when the complainant's mother purportedly laced up his relish and tea with poison. Both the accused and Takawira Chimusoro corroborated each other to some extent on this aspect.

It is however, difficult to see how people who did not enjoy good relations would firstly request to take complainant to their communal lands, and would continue to stay together in Mabvuku and would decide not to report such serious incidence like food poisoning to the police and would give leave or authority for the complainant's mother to leave the complainant in their custody during her trips to South Africa.

If there existed bad blood one would think the mother would have suspected and examined the complainant each time she was from the communal home, and a bitter mother

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would seize the first available opportunity to fix the accused's family by reporting the matter straightaway to the police. In my view, this report was unsolicited. It came out spontaneously from the complainant's mouth.

If it was a fabrication then one would expect that since there was a grudge between the complainant's mother and the father in law, charges would actually target the father in law not an innocent uncle.

One also wonders why the complainant would pinpoint at her two uncles Abias and Costa and not Takawira whilst the complainant was residing at the same house with Takawira in Mabvuku.

Chounyumbe John, who is complainant's mother, maintained prior to this incident relations were very amicable. She related in detail circumstances leading to complainant reporting about the abuse. The child refused to go to the communal lands. She was scheduled to go on the next day and she explained that uncle Abias and accused person had this habit of having carnal knowledge with her and that was painful.

The child was consistent throughout her evidence and throughout her report that Abias raped her twice and the accused once. Accused was given all the leeway to cross examine the complainant's mother at length. He did cross examine the complainant's mother but never suggested that there was bad blood between him and the complainant's mother, that the mother once laced up the father's food with poison only came out during the close of the defence case.

It was a most trying time for all the three defence witnesses called by the accused person. They are all closely related to both the accused person and the complainant. None could competently dispute the allegations yet naturally all wished the accused could be exonerated from the allegations. The accused's family members seriously thought it would have been best to solve the matter somehow and maintain family unity.

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> Complainant, I must comment, gave details of what logically tantamounts to rape. Young as she is she clearly understood her public duty to tell the truth.
>
> From her evidence which was corroborated materially I am convinced beyond a reasonable doubt that accused raped the child once."

This is no doubt a thorough analysis by the magistrate of the evidence in this case. She articulated her reasoning in detail. It is an approach which should be emulated by other magistrates in similar cases. Such a thorough analysis enables a review or appeal court to fully appreciate the basis on which the magistrate reached her decision.

In this appeal, it is contended on behalf of the appellant that the magistrate erred in failing to appreciate that the allegations against the appellant only surfaced about twenty months after the alleged rape when the complainant objected to being taken to the rural home. It was argued that children with an urban background are generally averse to going to the communal areas and that in this case the complainant lied to avoid being taken to the rural home. The magistrate should therefore have inquired into the complainant's disposition towards residing in the rural areas. It was also contended that the magistrate erred in finding as a matter of fact that the rape was committed in April 1995 where other evidence tended to show that, if it occurred at all, it should have been in 1994. Time was of the essence because of the

complainant's tender age. She was unable to give the day or month or year of the alleged offence. Her memory was not sufficiently tested in order to ascertain the reliability of her recollection of events which had taken place about two years before. It was also contended that the State did not call certain key witnesses, the police officers, who attended to the indications by the complainant. The appellant's evidence during the trial had been that the complainant had not positively made any indications but had been led by the police officers who were suggestive at every turn.

In respect of sentence, it was contended that the magistrate erred in imposing an unduly harsh sentence on an offender who was about fifteen or sixteen years old at the time of the alleged offence. The sentence was not in line with sentences imposed in similar cases.

The magistrate stated in her judgment that she warned herself of the need to be cautious. She looked for corroboration of the complainant's evidence and was satisfied that her evidence was materially corroborated. The question which, in my view, tips the balance in favour of or maintains it against the appellant is whether the complainant's evidence needed to be corroborated, and if so whether it was corroborated to such a degree, that the court *a quo* could accept that the possibility of false incrimination had been negatived. Further the question is whether the magistrate exercised the caution required in such a case.

The underlying consideration for requiring corroboration in such cases or for exercising caution is the need to protect accused persons from false incrimination. It is generally accepted that it is difficult to disprove allegations of this kind and therefore the need to protect an accused person against being wrongly convicted must be uppermost in the mind of the judicial officer ceased of

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such a case.

In our law, the evidence of complainants in sexual cases has to be sufficiently corroborated to remove or reduce the risk of a wrong conviction. Corroboration is required even more where the evidence which the court is called upon to rely on is that of a young witness. Hoffmann and Zeffertt *South Africa Law of Evidence* 4 ed at p 581 have this to say about the need for corroboration of the evidence of young witnesses:

> "The cautionary rule for children's evidence is similar to that for accomplices and sexual cases. The danger of acting upon such evidence must be borne in mind by the trier of fact. It makes no difference whether the child's evidence has been sworn or unsworn. The court is entitled to take into account the falsity or absence of evidence by the accused or any other features which show that the child's evidence is unquestionably true and the defence story false, but it should not ordinarily convict unless the evidence of the child has been treated with due caution. There is no requirement of law or practice that requires that the child has to be corroborated either in criminal or, *a fortiori*, in civil cases. There is no particular age below which the cautionary rule applies; this is obviously a matter of common sense to be

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> applied in each particular case, and the degree of corroboration or other factors required to reduce the danger of reliance on the child's evidence will vary with his age and other circumstances of the case, but the courts have usually required substantial confirmation when very young children were concerned. And, when the child is the only witness implicating the accused, the dangers are even greater, particularly in a sexual case."

In *R* v *James* 1958 R&N 462; 1958 (3) SA 699 (SR), the accused had been charged with the rape of a four year old girl. Young J set aside the conviction and sentence, and also stated that corroboration of the evidence of children is not required by any positive provision of the law but in practice it would be treated with great caution. At 702 he said:

> "The imagination and suggestibility of a little child of four is so great, and the tendency of him or her to romance is so marked, that corroboration (except perhaps on a simple fact safely within the child's testimonial competence) is in practice essential."

Corroboration is, however, required where as stated in *S* v *Mupfudza* 1982 (1) ZLR 271 (S), the trial court has first decided that the complainant is credible. At 273E-G, Baron JA said:

> "The court looks for corroboration of the evidence of a suspect witness. But, perhaps precisely because of the search for corroboration, trial courts frequently forget that the court must first decide whether the suspect witness is credible, in other words, the court must first decide whether, taking into account all the circumstances of the case, including demeanour, the probabilities, and all the other considerations which triers of fact properly take into account in assessing credibility, it believes the witness. If not, the matter is at an end, support for his testimony does not arise; it is only if the court believes the witness that in cases where a cautionary rule applies it then proceeds to consider whether it might still not have been deceived by a plausible witness."

But, as I have already alluded, corroboration is not invariably required in every case. What is invariably required is the exercise of caution in dealing with the evidence of young witnesses. It is easier to understand or appreciate the fine distinction between corroboration and the extra requirement to exercise caution than it is to articulate it. The latter, to my mind, is another way of saying that despite corroboration, the judicial officer must in such cases be satisfied on all the evidence that the State has proved its case beyond a reasonable doubt, that the accused person has been protected, and the dangers of false incrimination removed before it can convict

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him. Corroboration may not by itself be sufficient in some cases to found a conviction. Dealing with accomplice evidence and the need to be cautious, which two requirements are always dealt with in the same breath, Schreiner AJA in *R* v *Ncanana* 1948 (4) SA 399 (A) said at 405-406:

> "The rule of practice ... is that caution in dealing with the evidence of an accomplice is still imperative. The cautious court or jury will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so. What is required is that the trier of fact should warn himself, or if the trier is a jury, that it should be warned, of the special danger of convicting on the evidence of an accomplice; for an

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> accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness particularly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof *aliunde* that the crime charged was committed by someone else. The risk that he may be convicted wrongly ... will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness, or if he does not give evidence to contradict or explain that of the accomplice and it will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar danger inherent in the accomplice's evidence and appreciates that acceptance of the accomplice and rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question."

See also *R* v *Judson* 1965 RLR 501 (A) at 507G-508C; 1966 (1) SA 88 at 93G-94 *per* Lewis AJA.

More directly, corroboration is not invariably required in what I might call a clear case as alluded to by Lewis AJA in the passage referred to in *R* v *Judson supra*. That this is so was also stated in *R* v *W* 1949 (3) SA 772 (A) at 780 where Watermeyer CJ said:

> "... I am satisfied that in criminal cases of the kind now in question the true rule does not insist that there must be corroboration of the complainant's evidence before the accused can be legally convicted. In rape cases, for instance, the established and proper practice is not to require that complainant's evidence be corroborated before a conviction is competent. But what is required is that the trier of fact should have clearly in his mind that these cases of sexual assaults require special treatment, that charges of the kind are generally difficult to disprove and various considerations may lead to their being falsely laid."

And at 781:

> "No doubt, applying what was said in *Ncanana's* case ..., it is permissible for a court to convict in these sexual cases even where there is no corroboration of the complainant and even where the accused has given evidence and has not been proved to be a lying witness. But that is only the position where the court is fully appreciative of the risks involved and where the merits of the complainant and the demerits of the accused as witness are beyond question."

In *S* v *Mupfudza supra*, Baron JA remarked at 275B-G:

> "The question then is: in what circumstances can the court be satisfied that the danger of false incrimination has been excluded and that it is safe to rely on the evidence of the suspect witness? Ideally, the court will rely on corroboration, in its stricter sense, implicating the accused. But even in the absence of corroboration there may well be circumstances which can properly satisfy the court that the danger has been excluded. These circumstances do not lend themselves to close description; the nature and sufficiency of the evidence in question will depend on the nature of the facts of the particular case. The danger in all cases of this kind is of false

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> incrimination, but the *reasons* for that danger - the possible motives of the suspect witness - may be many and various, and will vary from case to case ... It is the possible motives in the particular case which the court must consider

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> together with the evidence in the case in order to decide whether in the particular circumstances the danger of false incrimination can safely be regarded as having been excluded ... "

All the authorities which I have cited not only underline the need for corroboration in some cases, but they emphasis that in all cases, especially involving the evidence of young witnesses in sexual cases, special care has to be taken to ensure that the accused is not wrongly convicted. It is not a matter of the judicial officer merely stating that he looked for corroboration or that he exercised caution. It is more a matter of showing the respects in which these requirements have been satisfied.

In the present case, the complainant was only five years old when she was allegedly ravished. She was the only witness implicating the appellant. These two factors are particularly weighty considerations that oblige the court to exercise the caution called for in such cases. The fact that so young a complainant was called upon to narrate events which took place over two years before the trial was a further consideration to be taken into account by the trial court.

As a first step the trial magistrate accepted the complainant's evidence as true and the complainant herself as a reliable witness. To my mind, the trial magistrate was justified in reaching this conclusion. Though the complainant was very young at the time of the alleged rape, the unchallenged evidence was that she was called by the complainant from behind the granary where she was playing with Shorai. It was her unchallenged evidence that after reporting her ordeal to the grandmother, the grandmother scolded her and threatened that if she should report she would die. The response of the grandmother to her report is not something so young a child could make up. She not only said that the grandmother dressed the appellant down but that she scolded and threatened her. This kind of detailed and apparently sensible evidence (considering that the grandmother was reacting to a report about her own son) seems to me to be beyond fabrication by the complainant. Under cross-examination by the accused, she was able to state that the appellant had raped her in the bedroom after he had returned from school. The question paused to her was:

> "Did I not go to school on that day in question?"

and her response was:

> "Yes you went to school on the day in question, but when you came back from school you called me from where you were and I obliged. You grabbed me and started to rape me."

The complainant's mother stated that the complainant also had reported the rape to her aunt. She said she had later asked the aunt what she had done about the report. Her evidence was that "According to the explanation I got from the aunt, she told me that she just examined the girl or the complainant and

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observed nothing". This was an important piece of evidence which went uncontradicted. The aunt was not called by the appellant to refute the complainant's mother's evidence. Nor did the court do so. However, the failure to call the aunt to confirm that a report was made to her and that she examined the complainant did not, in my view, create doubt on the credibility of the complainant as a witness. The evidence, unchallenged as it was, was important, in that it showed that the complainant made a report to the grandmother and to the aunt and that the aunt examined her. Even though the aunt is said to have found nothing wrong with the complainant, the mere fact of her examining the complainant is an important indication that the complainant had reported the rape.

The complainant's grandmother's evidence that no report was made to her was correctly rejected by the magistrate. She had been sitting in court throughout the evidence of the appellant and his witnesses. She is the appellant's mother. Her evidence was suspect for these reasons. She was not cross-examined to any meaningful extent, but that was understandable. Her evidence would have been tailored to secure her son's acquittal. I am satisfied that the trial magistrate was correct in rejecting her evidence in the circumstances of this case.

The complainant alleged that she had been raped twice by Abias and only two days before she was raped by the appellant. That she had been raped by these two young men could have been corroborated by some manifestation of injury, by an inability to walk, by being in a state of shock or in distress. No evidence was led on these corroborative features. She said that the rape by the appellant was painful. But there is no evidence that she reported the rape by Abias either to the grandmother or to the aunt. Despite this, can it be said that the complainant exaggerated and generalised the allegations against Abias and the appellant or that she has made scurrilous allegations against them? Much, of course, depended on exactly how the complainant informed her mother and whether the mother, without full and mature reflection accepted without question, the child's report. It is, of course, quite possible that a child of so tender an age can make, without much thought, generalised and damaging allegations against the only persons at the place to which she is to be removed. That must, however. be balanced against the consideration why and whether a girl of so tender an age could make so serious an allegation against the appellant and Abias if nothing of the sort had taken place. The fact of the matter is that her hymen was found missing which tended to confirm her evidence that she had been sexually abused. This aspect was considered by Muchechetere JA in *S* v *Machowa* S-14-99 at p 9 of the cyclostyled judgment. He said:

> "The learned trial magistrate believed the evidence of the complainant and the state

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> witnesses. I consider that this was proper. In the first instance, the complainant was a very young girl and therefore could not have simply concocted an allegation of that nature ... There is therefore no reason as to why she would set out to lie against the appellant."

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In the present case, can it be said that the complainant could have concocted the allegation against the appellant simply because she did not wish to go to the rural home? The trial magistrate dealt with this aspect commendably. The allegation was a serious one. It was made at a time when the young girl was faced with the prospect of being taken to the place of her ordeal in the absence of her parents. To that extent, the allegation was made spontaneously. While it may be said that the making of the report at that point in time was as consistent with the truth that she had been raped as it was consistent with the possibility that she was lying in order to avoid going to the rural home, it seems to me that, taken together with all the other evidence, her story had to be believed.

The appellant had the most difficult task of proving his innocence. No precise date and time was given as to when the offence was committed. The allegation against the appellant was made some twenty months from the alleged date of occurrence. In his defence, the appellant attempted unconvincingly to show that the complainant's mother fabricated the allegations and he pointed to the bad blood between the complainant's mother and the rest of the family. Unfortunately, this defence only came up during cross-examination and not in his defence outline. The appellant had, in his defence outline, denied the charge, pointed to the fact of the police getting partisan during the indications and to the delay in making the report, but did not raise the prospect of fabrication. Even considering that the appellant was unrepresented, the defence of fabrication should have featured in his outline.

The appellant also made allegations that the complainant had frequently had sexual intercourse with her own brother, one Elliot, and possibly with Elliot's friend, Leonard. He was supported by his brother Takawira and to some extent by his father Elliot Chimusoro. Both these witnesses' evidence was hollow. It was their evidence that the complainant had sexual intercourse with her brother Elliot and possibly with other children of Elliot's age. These intimate relationships were said to have occurred quite frequently. Little did these witnesses, in their attempts to paint the complainant as almost a promiscuous five to six year old, realise that the persons whom they alleged the complainant to have had sexual intercourse with were very young boys, at most in Grade One or two at the relevant time. There was absolutely no veracity to these assertions and the magistrate was entirely justified in rejecting the evidence of the appellant and his witnesses.

The trial magistrate's reasoning on the revelations in the medical report

cannot be faulted. The report established that the young complainant had been sexually interfered with at the age of five. Although the examination could not be conclusive that penetration had occurred, the fact remained that the young girl's hymen was ruptured. No issue arose as to mistaken identity. To my mind, this is a case where it has been proved that the young girl was sexually interfered with. She names the appellant as her assailant; there is no reasonable possibility of mistaken identity; the evidence of the appellant was not credible, and the appellant himself made scurrilous accusations as to the young girl's tendency to promiscuity; his witnesses' evidence is baseless. It is a case where the merits of the complainant as a witness outstrip those of the appellant without question. Corroboration existed, in that the young girl reported the assault upon her to her grandmother and to her aunt, with the

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latter having examined her. The trial magistrate looked for corroboration and found it. She exercised caution to a degree acceptable in the circumstances of this case. The analysis of the evidence which I have undertaken satisfies me that even if the trial magistrate had not articulated all the respects in which she exercised the requisite degree of caution, the evidence before her was such that on a proper analysis of the evidence her decision was correct. The conviction must stand.

With regard to sentence, the State conceded that the sentence was excessive in the circumstances. This court is at large on this question. If the appellant had been sentenced close to the time that he committed the offence, he would in all likelihood have been sentenced to a few cuts. He was fifteen years old. At the time of conviction, however, he was eighteen years old. He was, nonetheless, a youthful offender in respect of whom the magistrate found immaturity and youthfulness in his favour. The sentence should be drastically reduced to take into account these factors and to align it to sentences imposed in similar cases.

In the result, the appeal against conviction is dismissed. The appeal against sentence is allowed. The sentence is set aside and the following is substituted:

> "30 months' imprisonment with labour, half of which is suspended for a period of 5 years on condition the appellant does not within that period, commit rape or indecent assault for which upon conviction he is sentenced to imprisonment without the option of a fine."

Garwe J: I agree.

S *v* MUDZINGWA 1999 (2) ZLR 225 (HC)

Citation	1999 (2) ZLR 225 (HC)
Case No	Judgment No. HH-197-99
Court	High Court, Harare
Judge	Chatikobo J, Gillespie J
Heard	September 22, 1999
Judgment	October 6, 1999
Counsel	G M Mabuye, for the appellant H S M Ushewokunze, for the respondent
Annotations	None

Criminal appeal

Flynote

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Appeal - criminal matter - conviction - accused having pleaded guilty in lower court - when may appeal against conviction

Criminal law - common law crimes - fraud - claim of right - allegation that accused intended to defraud a named complainant - accused claiming that his intention was to defraud another person - motive for defrauding that other person was revenge for alleged loss he had caused the accused - not a claim of right - not necessary for State to show who accused intended to defraud

Headnote

The accused had obtained goods from a supplier by making out purchase orders which purported to come from a firm by whom he had previously been employed. The supplier debited the account of the firm in whose name the purchase orders had been made out. The accused had disposed of these goods for his own benefit. When the supplier sought to claim payment from the firm, the fraud came to light.

The accused was charged with three counts of fraud. The charge alleged that he had caused prejudice to the supplier of the goods. He pleaded guilty to the charge and was convicted and sentenced. When pleading he indicated that the firm in which he had previously been employed had failed to pay him some of his terminal benefits and he had made out the purchase orders in this firm's name as a vengeful act for the wrong that this firm had done him. He appealed against both conviction and sentence.

Held, that an appeal against conviction where there has been a plea of guilty will only be entertained where from the words used by the accused in pleading to the charge it is demonstrated that the accused was raising some defence which could legitimately be raised to the charge. In the present case, the appeal was entertained because the accused in the words used when pleading was raising the defence of claim of right.

Held, further, that the defence of claim of right could not succeed on the facts. He had no genuine belief that he had a lawful right to act as he did. He was simply avenging a perceived injustice by stealing from his former employer to recover his loss.

Held, further, that it is immaterial that the accused acted under a misapprehension that he was defrauding his former employer whereas in fact he was defrauding the supplier of the goods. In terms of s 222(d) of the Criminal Procedure and Evidence Act, all that the State has to prove is that the accused intended to defraud someone. The accused intended to defraud someone and he was therefore guilty as charged.

Cases Considered

Cases cited:

S v *Katsaura* 1997 (2) ZLR 102 (H)

S v *Kwainona* 1993 (2) ZLR 354 (S)

S v *Latham* 1980 ZLR 724 (A)

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R v *Mamba* 1957 (2) SA 420 (A)

S v *Matida* HH-180-97

S v *Munechawo* 1998 (1) ZLR 129 (H)

S v *Razaro* 1979 RLR 353 (GD)

Statutes Considered

Legislation considered

Criminal Procedure and Evidence Act [*Chapter 9:07*], s 222(d)

Case Information

G M Mabuye, for the appellant

H S M Ushewokunze, for the respondent

Judgment

Chatikobo J: The appellant pleaded guilty to three counts of fraud and was convicted following on his admission of the essential elements of the offences as explained to him by the trial court. Consequent upon his conviction he was sentenced to a total of 17 years' imprisonment, 9 of which were suspended partly on condition of good behaviour and partly on condition of restitution. He now appeals against both the convictions and the sentences imposed upon him.

The appellant was, until June 1998, an employee of United Builders Merchant ("UBM"). At the time of commission of the offences he was the managing director of a different business enterprise called Bright Building and Hardware. In July 1998, the appellant approached Turnall Fibre Cement from where he ordered quantities of endurite asbestos sheets using order numbers belonging to UBM. By this device, he purported that he was ordering the goods on behalf of UBM. Thereafter, he took delivery of the goods and disposed of them for his own benefit. Turnall Fibre Cement in turn debited UBM's account with the value of the asbestos, the total of which was $366158.20. When Turnall Fibre Cement sought to claim payment from UBM, the fraud came to light, leading to the arrest and subsequent prosecution of the appellant.

The conviction of the appellant on each count is attacked on the ground that the trial court ought to have altered the pleas of guilty to not guilty since the appellant was raising the defence of a claim of right. After the appellant had admitted the facts contained in the statement of agreed facts the following question and answer exchange ensued between him and the magistrate:

" Q. Did you act in the manner described in the statement of agreed facts?

A. Yes that is what I did exactly.

Q. Did you obtain all the goods mentioned in the charge sheet?

A. Correct, your Worship.

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Q. Do you agree that in order to obtain those goods you used fictitious invoices?

A. That is correct.

Q. Do you agree that it was as a result of your misrepresentations contained in those fictitious invoices that led to Turnall supplying you with the goods mentioned in those three counts?

A. Yes.

Q. When you so presented the invoices in question you knew that you had no authority to obtain goods on behalf of UBM?

A. Yes.

Q. *Do you agree that you did this with intent to defraud the complainant?*

A. *No.*

Q. *Can you explain yourself when you deny intent to defraud?*

A. *It is not that I had not an intention of defrauding. I did have that intention but what I thought was (that I was) not stealing from Turnall Fibre Cement. I thought I was stealing from UBM of which I was doing it maliciously for what they did to me.*

Q. You agree that you had no right or lawful excuse for what you did?

A. That is correct.

Q. Any defence to offer in respect of any of the counts?

A. *I have no defence your Worship because I thought I was not stealing from Turnall and in my mind I thought that they were going to be compensated by UBM. I thought that UBM was going to pay those invoices on my behalf.*

Q. Had you such undertaking from UBM?

A. There were no arrangements with UBM your Worship. I thought that if I do that that was a way of making them pay me for my money which they had not on my terminal benefits (*sic*).

Q. Had you identified yourself to UBM that you were to use them in that way?

A. No, I did not, your Worship, but I only informed them that they had paid me little on my benefits" (my emphasis).

I have underlined the words upon which the purported defence of claim of right is predicated. Although it seems illogical for a person who has been convicted on his own plea of guilty to appeal against the conviction, there is no rule prohibiting the adoption of such a course which is only open to an offender in limited circumstances.

> "But such an appeal will only be entertained if it is demonstrated that, from the words accompanying the plea tendered, the accused was raising some defence which could legitimately be proffered in defence to the charge. In making such a determination recourse must be had to the facts as alleged and to which the accused made his responses":

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per Korsah JA in *S* v *Kwainona* 1993 (2) ZLR 354 (S). In similar vein, Schreiner JA remarked in *R* v *Mamba* 1957 (2) SA 420 (A) at 422B:

> "With us, too, it will only be in exceptional cases that one who has pleaded guilty and been convicted in accordance with his plea will be granted relief on appeal."

In context, the challenge is one that can properly be said to be exceptional enough to merit the court's indulgence. It is claimed that by the words I have

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underlined, the appellant raised the defence of claim of right sufficiently enough to have obliged the trial court to alter the pleas to not guilty and consequently that the court's failure to so alter the appellant's pleas constituted a fatal irregularity. Mr *Ushewokunze*, who appeared for the respondent, had initially conceded in his heads of argument that the conviction is unsound on account of the trial court's failure to alter the pleas to not guilty to allow for the claim of right defence to be investigated, but the concession was not persisted with in argument. The stance he took in argument was understandable, as there was no justification for the concession.

At no time did the appellant say that he did not intend to defraud. A careful reading of the words I have emphasised convinces me that all that he was saying was that the intended victim of his crime was UBM and not Turnall Fibre Cement. He intended by his deceit, to lead UBM into believing that they had ordered and received the goods in question and had become liable to Turnall Fibre Cement for the price of such goods. He specifically said he was "doing it maliciously for what they (UBM) did to him". He was avenging an injustice which he perceived UBM had committed against him by shortchanging him on his terminal benefits. In essence, he wanted to steal from UBM to recover the loss which he believed they had caused him. This is a far cry from saying that he entertained any belief that he was entitled to act as he did or that any belief he may have entertained was held in good faith. *Cf S* v *Latham* 1980 ZLR 724 (A).

To be vengeful for a wrong committed against oneself is one thing; to entertain an honest belief that one has an enforceable right is another. I cannot accept that appellant's explanation amounts to a claim of right. What it amounts to is that although he intended to defraud he acted under the misapprehension that he was defrauding UBM when in truth and in fact he was defrauding Turnall.

All that need to be established to support a conviction is that the appellant intended to defraud someone. It is not necessary to allege and prove whom it was intended to defraud. The situation is covered by s 222(d) of the Criminal Procedure and Evidence Act [*Chapter 9:07*], which provides that in any trial in which it is alleged that a person induced the payment of money or delivery of a thing by fraudulent means "it shall not be necessary to prove an intent on the part of the accused to defraud any particular person, but it shall be sufficient to prove that the accused did the act charged with intent to defraud". What happened in this case is little more. The appellant admitted that, although he intended to defraud, he acted under the mistaken view that the victim of his fraud was UBM and not Turnall Fibre Cement. I am not convinced that the words accompanying the plea disclose a defence as contended for the appellant.

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CHATIKOBO J

The trial court treated each count separately for the purpose of sentence. On count one which involved a total prejudice of $109368.45 the trial court imposed a sentence of 5 years' imprisonment; a sentence of 5 years' imprisonment was imposed on the second count which involved a total prejudice of $116170.19 and the third count which involved a total of $140619.19 attracted a sentence of 7 years' imprisonment. Of the total sentence of 17 years' imprisonment, 4 years were suspended on condition of future good behaviour and a further 5 years' imprisonment was suspended on condition the accused makes reparation to the complainant. The effective sentence is therefore 8 years' imprisonment.

This sentence is attacked on the basis that it was a misdirection for the trial court to treat the three counts separately for the purpose of sentence. This accusation, in my view, is couched in a half truth. The position is that where there are multiple counts of fraud involving the same *modus operandi*, the court may, in the exercise of its discretion, treat all the counts as one for the purpose of sentence. It is not obliged to do so. The correct approach is that:

> "separate punishments should, save in exceptional cases, be imposed for each separate charge. One globular sentence for two or more offences should only be considered where the offences are of the same or similar nature and are closely linked in point of time. If these two requirements are not satisfied then a separate sentence must be imposed in respect of each offence":

per Smith J in *S* v *Chawasarira* 1991 (1) ZLR 66 (H) 69E.

The power to impose a globular sentence is given, but only in appropriate circumstances, and then only if the sentencing court, in the exercise of its unfettered discretion, considers it necessary to do so. The sentencing court has a choice based on principle. The two choices were spelt out in *S* v *Razaro* 1979 RLR 353 (G) at 354E by Beadle AJ in these terms:

> "One approach is to treat each individual count on its merits and sentence the accused on that count as if it was the only count. If, as a result of this, the aggregate sentence on all the counts taken together is too severe, as in many circumstances it very well might be, the appropriate approach is to make the sentences on some counts run concurrently with others, so that the effective sentence which the accused actually serves on all counts is appropriate. An alternative approach is to treat all the counts together as one for sentence and then impose a sentence which the judicial officer considers appropriate. This sentence should in the result be the same as a sentence which would have been imposed had the counts been treated separately and some made to run concurrently with each other."

The trial court chose to treat the offences separately which it was entitled to do. The approach which was adopted cannot be faulted.

I am, however, concerned that inadequate weight was accorded to the mitigating features. The plea of guilty, although expressly adverted to in the reasons for sentence does not appear to have resulted in an amelioration of the severity of the sentences in the manner advocated for in cases such as

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S v *Katsaura* 1997 (2) ZLR 102 (H), *S* v *Matida* HH-180-97 and *S* v *Munechawo* 1998 (1) ZLR 129 (H).

The total sentence on the three counts, when viewed against the total prejudice of $366158.20 of which $107430.19 was recovered, is too severe. There was clearly a need to ameliorate the severity of the globular sentence. To that extent, the sentence is manifestly excessive. Account should also be taken of the fact that the appellant was in custody for 12 months while awaiting trial.

In the result, the appeal against conviction is dismissed. The appeal against sentence succeeds to this extent. The sentence imposed on count one is ordered to run concurrently with the sentence imposed on count two. The sentence on count three is reduced to 5 years. Of the total sentence of 10 years' imprisonment, 3 years' imprisonment is suspended on the conditions of good behaviour imposed by the trial court. A further 5 years' imprisonment is suspended on condition the appellant pays restitution as ordered by the trial court.

Gillespie J: I agree.

Mabuye & Co, appellant's legal practitioners

Attorney-General's office, respondent's legal practitioners

LAW SOCIETY OF ZIMBABWE & ORS *v* MINISTER OF FINANCE (ATTORNEY-GENERAL INTERVENING) 1999 (2) ZLR 231 (SC)

Citation	1999 (2) ZLR 231 (SC)
Case No	Judgment No. S-92-99
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA, Ebrahim JA, Muchechetere JA, Sandura JA
Heard	July 6, 1999
Judgment	October 7, 1999
Counsel	J C Andersen SC, for the applicants B Patel, for the respondent and intervener
Annotations	None

Constitutional application

Flynote

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Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 16 - protection against acquisition of property without compensation - withholding tax on sale of immovable property - requirement for estate agents and others to withhold portion of purchase price, irrespective of whether tax was actually due - irrationality of such requirement - s 24 - application to Supreme Court - locus standi of Law Society

Headnote

A withholding tax on the sale of immovable property was introduced in terms of ss 35 and 36 of the Finance Act 29 of 1998. The effect of these provisions was to require legal practitioners, estate agents and others who hold on behalf of others the purchase price of immovable property to withhold a percentage of the price.

The applicants brought an application in which they claimed that this withholding tax amounted to compulsory acquisition of property, contrary to s 16 of the Constitution. It argued that the provisions of s 16(7)(a) of the Constitution did not save these measures of taxation as these particular measures were not reasonably justifiable in a democratic society.

As a preliminary point, the respondent argued that one of the applicants, the Law Society, did not have *locus standi* to bring an application to determine the constitutionality of this system of taxation.

Held, that the Law Society had *locus standi* to bring this application. In matters of this nature the court will take a broad view of *locus standi*. The Law Society was empowered by the Legal Practitioners Act [*Chapter 27:07*] to assist and join in a case of this nature. In additional to its statutory interest, it had a real and substantial interest in the matter.

Held, that the onus was on the applicants to show that the tax was not reasonably justifiable in a democratic society.

Held, further, that in deciding whether legislation is "reasonably justifiable in a democratic society", the following factors must be considered:

(a) whether the legislative object is sufficiently important to justify limiting a fundamental right;

(b) whether the measures designed to meet the legislative objective are rationally connected to it; and

(c) whether the means used to impair the right or freedom are no more than are necessary to accomplish the objective.

1999 (2) ZLR p232

Held, further, that although it was permissible to collect capital gains tax, the method by which this tax was collected was indiscriminate, arbitrary, irrational and unfair and therefore unconstitutional. This was because there may have been no tax due at all, or a lesser amount than was withheld, and yet the tax would still have to be deducted. However, the court approved a subsequent amendment which allowed the seller to apply for a clearance certificate which might allow him to avoid the tax being withheld as this satisfied the criterion of being reasonably justifiable in a democratic society.

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Cases Considered

Cases cited:

Cape Brandy Synd v *IRC* [1921] 1 KB 64

CCJP v *A-G & Ors* 1993 (1) ZLR 242 (S)

CoT v *C W (Pvt) Ltd* 1989 (3) ZLR 361 (S)

de Freitas v *Permanent Sec of Agriculture* [1998] 3 LRC 62

Nyambirai v *NSSA & Anor* 1995 (2) ZLR 1 (S)

Pyramid Products (Pvt) Ltd v *Dir of C&E* S-188-98

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

United Parties v *Min of Justice & Ors* 1997 (2) ZLR 254 (S)

Zimbabwe Teachers Assn & Ors v *Ministry of Education* 1990 (2) ZLR 48 (H)

Statutes Considered

Legislatin considered:

Constitution of Zimbabwe 1980, ss 16 & 24(1)

Case Information

J C Andersen SC, for the applicants

B Patel, for the respondent and intervener

Judgment

McNally JA: This is an application brought before the Supreme Court under a certificate of urgency in terms of the provisions of s 24 of the Constitution of Zimbabwe. It is alleged that the introduction of a capital gains withholding tax in terms of ss 35 and 36 in part IV of the Finance Act 29 of 1998 is *ultra vires* the Constitution. It is claimed that the effect of these provisions is to enforce a compulsory acquisition of property contrary to s 16 of the Constitution. It is further alleged that this compulsory acquisition is not justified or excused by the provisions of s 16(7)(a) of the Constitution as read with the exception at the end of that section.

The State, by which I mean the respondent Minister and the intervener, both of whom are represented by Mr *Patel*, concedes that we are here concerned with a compulsory acquisition of property. The Law Society in turn concedes that the acquisition constitutes a tax or rate.

The crisp issue therefore is whether such tax or rate "is shown not to be reasonably justifiable in a democratic society".

Those last words indicate that it is for the applicants to show that the tax is not reasonably

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justifiable. The onus is not on the fiscus but on the taxpayer.

Mc NALLY JA

THE MEANING OF "REASONABLY JUSTIFIABLE IN A DEMOCRATIC SOCIETY"

How then does one apply the criterion of "reasonably justifiable in a democratic society?" This court has addressed the issue in *Nyambirai* v *NSSA & Anor* 1995 (2) ZLR 1 (S).

From p 12F to 15 *locus standi*, the Chief Justice set out the general approach of the court. Three criteria are set out, as follows:

1. Whether the legislative objective is sufficiently important to justify limiting a fundamental right;

2. Whether the measures designed to meet the legislative objective are rationally connected to it;

3. Whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

These criteria were applied in *Retrofit (Pvt) Ltd* v *PTC & Anor* 1995 (2) ZLR 199 (S) at 220A-C. They were approved and adopted in the *Privy Council in de Freitas* v *Permanent Secretary of Agriculture, Fisheries, Lands and Housing* [1998] 3 LRC 62. They amount to an elaboration, though not an alteration, of the criterion of reasonableness discussed in *Commissioner of Taxes* v *CW (Pvt) Ltd* 1989 (3) ZLR 361 (S) at 372A-B.

LOCUS STANDI OF THE FIRST APPLICANT

Before examining the details of the application, we must deal with a preliminary point. Mr *Patel* contends that the Law Society has no *locus standi* to bring this application. He relies upon the wording of s 24(1) of the Constitution which reads:

> "If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened *in relation to him* (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress" (the emphasis is mine).

The contention is that the Law Society may complain only about a contravention in relation to itself. It may not act, as it is doing here, for a class of unspecified persons. The judgment in *Retrofit (Pvt) Ltd* v *PTC & Anor supra* at 207D *et seq* is cited in support of the proposition.

The judgment of the Chief Justice in *Retrofit, supra,* is not to be read as a restrictive ruling in respect of *locus standi*. The restrictive interpretation sought by the respondent in that case was rejected. The applicant was permitted to speak on behalf of the public at large. But in that case the applicant itself did have an interest or right that was infringed, albeit a financial interest rather than an "information" interest.

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In the present case, the question is whether the Law Society has a basis for claiming that the Declaration of Rights has been or is being contravened in relation to itself.

In this jurisdiction, there has not yet been a great deal of development in the field of class actions or representative actions. The Class Actions Act 10 of 1999 is not yet in force. But it would not be right for this court to make any ruling which would hinder the development of such actions. Therefore, we are disposed to take a broad view of *locus standi* in matters of this nature, as indicated by the Chief Justice in *Catholic Commission for Justice and Peace in Zimbabwe* v *Attorney-General & Ors* 1993 (1) ZLR 242 (S) at 250A-E.

In the case of the first applicant, there are additional considerations. The Law Society is a body established by statute. Its aims and objects are set out in s53 of the Legal Practitioners Act [*Chapter 27:07*]. Among its objects are:

" (b) to represent the views of the legal profession;

(f) to consider and deal with all matters affecting the professional interests of legal practitioners;

(m) to consider and discuss and to confer with other bodies on alterations and reforms in the practice, procedure and administration of the law and to propose, promote or oppose legislation in Parliament;

(r) to employ the funds of the Society in obtaining or assisting any person to obtain a judicial order, ruling or judgment on a doubtful or disputed point of law where the Council of the Society deems it necessary or desirable in the interests of the public or the legal profession;

(s) to do all such acts and things as are incidental or conducive to the attainment of the above-mentioned objects."

Any doubts which there may be as to the court's power to hear the matter have been removed by the unopposed application by Mr *Andersen* to join as a co-applicant Mrs Pamela Margaret Mollatt, a person who is indisputably affected by the legislation in question. That application has been granted.

I conclude therefore, that the Law Society has *locus standi* in this matter, if only on the basis that it is statutorily empowered to assist and join with Mrs Mollatt in her application. In so ruling, I do not wish it to be understood that I am saying that the Law Society's application could not have stood on its own. I take the view that it could. It has a real and substantial interest in the proceedings, as those words were defined by Ebrahim J (as he then was) in *Zimbabwe Teachers Association & Ors* v *Ministry of Education* 1990 (2) ZLR 48 (H) at 51B *et seq*. Moreover, it has a statutory interest. Its relationship to the contravention (if it is a contravention) is sufficiently established. Its position is quite different from that of a political party, whose *locus standi* in similar circumstances, but without the statutory interest, was denied in

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*United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors 19*97 (2) ZLR 254 (S)

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at 259C-D.

With the preliminary point thus disposed of, I now turn to the substantive issue.

THE LEGISLATION ON CAPITAL GAINS

By Act 54 of 1981, a capital gains tax was introduced in Zimbabwe. The Act is now the Capital Gains Tax Act [*Chapter 23:01*]. The tax was to be a percentage of the gain or profit (not the sale price) made on the sale of a specified asset. A specified asset was defined as:

(a) immovable property; and

(b) any marketable security.

In short, this was a tax on gain or profits from the sale and transfer of land and shares.

THE PROBLEM AND THE STATE'S SOLUTION

It appears that the revenue authorities were not satisfied with the practical functioning of this legislation, essentially for two reasons. There was too much delay between the realisation of the profit and the charging of the tax. And there was too much evasion of the tax. It was difficult to monitor the transactions giving rise to the tax.

Accordingly, the Minister introduced legislation to enable him to collect tax on the transaction at the time of the transaction. Sections 35 and 36 of Part IV of the Finance Act 29 of 1998 introduced a Capital Gains Withholding Tax, as a mechanism for its collection, on behalf of the fiscus, by private individuals.

In the case of immovable property, the collectors, or "depositories", were the conveyancers, legal practitioners, estate agents or others who held the purchase price or part of it on behalf of the relevant party, normally the seller. In the case of marketable securities, the collectors or depositories were the stockbrokers, financial institutions or others who held the price paid for the securities.

Naturally, these people could not collect the exact amount of the capital gains tax, because the calculation of the "gain" (and therefore of the tax) was a complex exercise which took time. The new legislation therefore required them to withhold:

" (a) in the case of a sale of immovable property, ten *per centum* of the price at which the property was sold;

(b) in the case of a sale of a marketable security that is a listed security, five *per*

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centum of the price at which the property (now amended to read "security") was sold;

(c) in the case of a sale of a marketable security other than a security referred to in para (b), ten *per centum* of the price at which the security was sold" (s 39 of [*Chapter 23:04*]).

The time scale for the payment of this withheld money to the Commissioner of Taxes is very

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short. The money has to be paid by the depository "on or before the last day of the month following the month in which the payment was made, or within such further time as the Commissioner may for good cause allow" (new s 22C of the Capital Gains Tax Act [*Chapter 23:01*]). This must be contrasted with the "roll-over" provisions in s 21(2) in which the taxpayer selling his principal private residence is given time until "the end of the year of assessment next following the sale" to buy or build a replacement residence and thus defer or "roll-over" the payment of any capital gains tax which might otherwise have been due.

It is an interesting, but not, I think, a relevant fact, that in respect of marketable securities an outcry in financial circles, and particularly among members of the Stock Exchange, has resulted in the Minister suspending the operation of the withholding tax in relation to sales of securities. This action by the Minister is not to be seen as an admission that the tax is unconstitutional. I see it more as an exercise in market-place negotiation. Whether the Minister had the power to make this concession is not in issue.

THE CONSTITUTIONALITY OF THE LEGISLATION:

THE APPLICANTS' CASE

The applicants contend that this withholding tax is unconstitutional as being not reasonably justifiable in a democratic society. And it is not reasonably justifiable because as a method of collecting capital gains tax it is so indiscriminate, arbitrary and irrational that a large number of people will be unfairly over-taxed. A refund, some unspecified time later, of the excessive amount withheld, will not right the wrong done to them, particularly in the light of current rates of inflation. Examples are given. I will cite some of them merely as illustrations:

1. A person selling his principal private residence in order to buy another is, generally speaking, allowed to defer the payment of capital gains tax until he sells the second property, under the "roll-over" provisions of the Act. Yet, such a person is obliged to pay the withholding tax. Thus he is deprived of 10% of the money he would otherwise have available to buy the second house, and for no justifiable reason since he has no immediate liability for capital gains tax.

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2. A seller over 59 years of age selling his principal private residence is liable for capital gains tax only at the rate of 10% of the capital gain. Why should he have to pay 10% of the *sale price* as a withholding tax when that amount is almost bound to be far greater than the 10% of his *gain*, for which he will be liable?

3. Where immovable property is sold at a loss, no capital gains tax will be payable. Why should the fiscus take 10% of the sale price only to return it later?

4. There is no provision whereby the Commissioner of Taxes pays interest on amounts over-withheld. In these days of rapid inflation, the seller suffers a substantial loss simply by having his money withheld from him.

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5. Generally, there is no reason to suppose that 10% of the sale price will have any relationship to the taxable gain, if any, made by the seller. That confirms the irrationality of the withholding tax.

In effect, the applicants are saying that it would have been so simple to put in place a system of pre-assessment of capital gains, that failure to do so constitutes gross unreasonableness. As we shall see, the State's reaction to the accusation tends to confirm that assessment.

THE STATE'S CASE

The State's response to these allegations, apart from the *locus standi* argument already disposed of, is that the compulsory acquisition of property involved in this legislation is reasonably justifiable in a democratic society.

The State points out that there is provision for a refund of any withholding tax overpaid. Section 22I of the Act, introduced by s 36 of the Finance Act 29 of 1998, makes that provision.

To the argument that this is no comfort to a seller deprived of part of his sale price for what might be a considerable time and for no good reason, the State puts up a two-pronged defence. It first points to the mechanisms in place to ensure as far as possible that such situations do not arise. Secondly, it relies on the general submission that "there is no equity in tax". I will deal with these two contentions successively.

A. MECHANISMS TO AVOID INEQUITY

When the matter was heard by the court, the State relied on certain administrative practices which were designed to avoid the hardships earlier in this judgment described as "indiscriminate, arbitrary and irrational".

However, on the day after the hearing those so-called administrative practices were overtaken by a regulation promulgated as Statutory Instrument

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222E of 1999 - the Presidential Powers (Temporary Measures) (Capital Gains Withholding Tax) Regulations 1999.

The applicants initially contended that the court should not take cognisance of these regulations, and asked for time to submit further written argument. This was granted. Both parties submitted supplementary heads of argument. This exercise was completed on 8 September 1999. This is the reason for the delay in preparing this judgment.

The applicants now agree that the court may, indeed should, take the regulations into account in considering the reasonableness of the withholding tax. No point was taken as to the validity of the regulations. I proceed then to consider them.

The relevant sections of the regulations are ss 4 and 5 which make provision for the issuing of a clearance certificate which allows a depository or an agent, in a proper case, not to withhold

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capital gains withholding tax, or to withhold a reduced amount.

Without citing the whole of the amendment to the Capital Gains Tax Act, it is sufficient to set out some of the provisions, as follows:

1. The provisions of the Act in relation to withholding tax in s 22C of the Act are amended by the addition of a new subs(5) which provides:

> "(5) A depository need not withhold capital gains withholding tax in terms of subsection (1) if, before he pays any amount to or for the credit of the seller of the specified asset concerned -
>
> (a) he or the seller applies to the Commissioner for a clearance certificate in respect of the sale of that specified asset, and provides the Commissioner with such information regarding the sale as the Commissioner may reasonably require; and
>
> (b) the Commissioner, being satisfied that -
>
> (i) no capital gains tax is likely to be payable in respect of the sale or that any capital gains tax so payable is likely to be less than the capital gains withholding tax required to be withheld in terms of subsection (1); and
>
> (ii) adequate arrangements have been or will be made for the payment of any capital gains tax payable in respect of the sale;
>
> has issued a clearance certificate in respect of the sale."

2. The provisions of the Act in relation to withholding tax in s 22D of the Act are amended by the addition of a new subs (7) which provides:

> "(7) An agent need not withhold capital gains withholding tax in terms of subsection (1) if, before he pays any amount to or for the credit of the seller of the specified asset concerned -
>
> (a) he or the seller applies to the Commissioner for a clearance certificate in respect of the sale of that specified asset, and provides the Commissioner with such information regarding the sale as the Commissioner may reasonably require; and
>
> (b) the Commissioner, being satisfied that -

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> (i) no capital gains tax is likely to be payable in respect of the sale or that any capital gains tax so payable is likely to be less than the capital gains withholding tax required to be withheld in terms of subsection (1); and
>
> (ii) adequate arrangements have been or will be made for the payment of any capital gains tax payable in respect of the sale;
>
> has issued a clearance certificate in respect of the sale."

I do not think that this court can properly assume that the clearance certificate procedures will be inefficiently administered. If they are, a remedy will lie, in any particular case, through the procedure of judicial review.

The clearance certificate procedure, which is a formalisation of the administrative procedures

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which were allegedly in place before the promulgation of SI 222E of 1999, is criticised by Mr *Andersen* in his supplementary heads of argument.

CRITICISMS OF THE PROCEDURE FOR OBTAINING CLEARANCE CERTIFICATES

Mr *Andersen* makes the following points (and I summarise them):

1. The full amount of the tax is still withheld until the clearance certificate is obtained, or until a refund is made.

2. The withholding of the amount, even if only temporarily, is an acquisition of property which is not reasonably justifiable because it is arbitrary.

3. The procedures for the issuance of clearance certificates or for the payment of refunds may not be efficient.

4. Previous experience as deposed to in the affidavits suggests that they may not be.

5. The discretion lies with the Commissioner, who may exercise it wrongly.

6. The procedures will involve extra expense for the taxpayer.

7. Where liability for the tax cannot be determined at the time of sale a clearance certificate will not be issuable and the withholding tax will have to be paid.

8. A better system would be to require the seller to assess his own tax, with an appropriate penalty if he under-estimates. This is the system currently used in respect of income tax payable by taxpayers not subject to PAYE.

THE STATE'S RESPONSE IN THE LIGHT OF THE STATUTORY INSTRUMENT

In answer to these points Mr *Patel* has submitted:

1. The enactment of the Regulations transforms a purely administrative practice into a statutorily granted discretion, with the attendant advantage of transparency and the protection of judicial review.

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2. The procedure has no more disadvantage than any other withholding tax, and such unreasonableness as there might be is sought to be eliminated by the clearance certificate procedure. The seller, by organising his affairs sensibly, should be able to take maximum advantage of this procedure.

3. The practical difficulties alleged are unspecified; the Commissioner is unaware of any of the alleged delays; clearance certificates "can be issued within 24 hours".

4. The extra costs alleged are costs which would in any event have to be incurred in the calculation of the tax by the taxpayer, and they may be deductable in terms of s 11(2)(d) of

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the Act.

5. The problem of immediate quantification is in practice reduced or eliminated because all that need be established for the purpose of a clearance certificate is that "no capital gains tax is *likely* to be payable, or that any such tax payable is *likely* to be less than the capital gains withholding tax required to be withheld". (See the new ss 22C(5)(b), 22D(7)(b) and 22E(2)(b) of the Act).

6. While conceding that some cases of financial hardship might possibly arise (though no concrete cases have been cited), no real case has been made sufficient to warrant the court's interference, bearing in mind not only the onus but also the proper reluctance of the courts to determine the manner in which fiscal policy should be implemented.

7. The constitutionality of a tax cannot be questioned simply because it is actually or potentially harsh (see the *CW* case earlier referred to). Isolated instances of hardship would not justify the invalidation of an entire tax regime.

8. The competent authorities have, as a matter of policy, duly considered and selected the mechanism of a withholding tax, and it is not (extreme cases aside) the role of the courts to decide that another mechanism might be better.

THE COURT'S CONCLUSION

In my view, the submissions by Mr *Patel* as to the position after the amendments introduced by SI 222E of 7 July 1999 are a satisfactory answer to the complaints voiced by Mr *Andersen*. The legislation now meets the three criteria set out by the Chief Justice in *Nyambirai's* case *supra*. Dealing in turn with each criterion, I would say that:

1a. The objective of collecting the tax at the time of the transaction rather than considerably later is of major importance, particularly in times where the government is hard pressed for funds to meet its requirements.

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It is also important that the government, by so doing, is more likely to be able to collect the tax from all who are liable to pay it.

1b. In this particular case, the question is not whether the importance of the objective justifies the limiting of a fundamental right, but whether the method of limitation is shown "not to be reasonably justifiable in a democratic society". I do not think it has been so shown, in the light of the amendment introducing the clearance certificate concept.

2. The measures designed to meet the legislative object are clearly rationally connected to it. Some approximate method of calculating, at the time of the transaction, the capital gains tax due had to be worked out. The combination of a withholding tax coupled with a clearance certificate procedure is a *prima facie* reasonable technique for achieving the objective.

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3. The means used to achieve the objective of earlier collection from more people are no more than are necessary to accomplish the objective. The combination of withholding tax, clearance certificate procedure, and ultimate refund where necessary seems a rational and appropriate system.

THE CONSTITUTIONALITY OF THE PRE-AMENDMENT LEGISLATION

However, I do not think one can say this about the situation which pertained before the publication of SI 222E of 1999 on the day after the hearing (7 July 1999).

The question must be looked at on two levels. First, was the legislation constitutional as it stood? Second, if not, was its constitutionality saved by the so-called "administrative practices" of the Commissioner?

The State has not attempted to argue that the unamended legislation alone, without the so-called "administrative practices" was "reasonably justifiable in a democratic society". While this cannot be taken as an admission by the State, it is a factor of some significance.

I think it is necessary to make a distinction. If the State had decided to introduce a straight tax of say 10% on the sale of immovable property, then I do not think the court could intervene, however harsh and however ruinous to the economy it might have been. That, the court would say, is a matter for the legislature and not for the judiciary. But that is not the position. The tax is a withholding tax, i.e. the prepayment of a tax later to fall due. There must therefore, be some correspondence, some relationship, not necessarily exact, but reasonable, between the money withheld and the tax later found to be due. In the unamended legislation there was none. The State knew that in many

cases there would be no tax due, or far less tax due. The failure to make provision for that makes the withholding tax irrational, unfair and unconstitutional. Ironically, the amendments introduced in SI 222E illustrate with stark clarity both the failings of the original legislation and how easily it could have been made acceptable.

The question then arises - was the legislation saved from unconstitutionality by the alleged administrative practices of the Commissioner, designed to alleviate the hardships complained of?

It must be said that the evidence of these practices is very vague. The Minister, in para 9 of his affidavit, says:

> "Clause 13 of the draft Finance Bill seeks to address the concern that an amount in excess of the capital gains tax actually due is likely to be withheld in terms of the new provisions introduced by the Finance Act. A depository will have an option to avoid paying the withholding tax if he obtains a clearance certificate from the Commissioner of Taxes. The certificate will be issued if no capital gains tax is likely to be payable in respect of the sale of the specified asset concerned or if any capital gain tax payable is likely to be less than the amount of the withholding tax. The effect is that an assessment is made before any tax is withheld."

What is noteworthy about this statement is that it says nothing about any current practice. It is

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talking about the future. Yet, the affidavit was sworn in March 1999. The withholding tax was effective from 1 January 1999.

The only reference to current practice is in his para 11 where he says:

> "It is denied that the seller wishing to purchase another property will be prejudiced as the administrative procedures put in place by the Commissioner of Taxes are such that the correct tax will be levied without prejudicing the seller."

One is entitled to ask "What administrative procedures?" They have not been mentioned before. Even as late as 2 July 1999, when for the first time the Commissioner himself filed an affidavit, he does not refer to any document setting out these administrative practices. In England the Revenue authorities publish in booklet form what are called Extra-Statutory Concessions (ESC) and Statements of Practice (SP). I rely for this observation on the book *Revenue Law - Principles and Practice* by Whitehouse & Stuart-Buttle at p 5 para 3.

I note too that in LW Hill in *Income Tax in Zimbabwe* says at p 2 that the Commissioner used to publish what were called "departmental practices", but -

> "regrettably practices relating to income tax as may have been adopted in recent years have not been published for general information, nor have any in relation to capital gains tax since its introduction."

The book was published in 1997, and it is unfortunate that the Commissioner has not taken the hint. This is a case where a published "Departmental Practice Note" would have gone a long way towards solving the problem. Mr

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Patel, in argument, referred to an "administrative instruction", but I understood this to refer to an internal departmental instruction, not one published for general information.

In the absence of such a published practice, the assertions as to a departmental administratively applied practice, so obscurely formulated, cannot stand against the assertions by those involved in the day to day business of conveyancing. The Law Society, the Real Estate Institute of Zimbabwe, and Mr Matingo, the conveyancing executive who dealt with Mrs *Mollatt*'s case, all assert that the alleged administrative practice simply did not work. Mr Matingo says:

> "Of all the cases with which I have dealt, in only three has the seller been able to obtain a clearance based on the roll-over provisions in the Capital Gains Tax. In one of the cases the seller was a Minister."

There is no suggestion, it should be said, that the Minister used improper influence. But the mere fact that a Minister was involved had the desired effect on the Commissioner's office.

The Commissioner asserts that no-one complained to him. That may be so, but in the face of a law which provided no escape from the payment of withholding tax, modified only by an unpublished undefined alleged administrative practice, what legal basis was there for complaint? Eventually of course, the Law Society complained, as the representative of all the conveyancers whose clients suffered from not being able to obtain clearance certificates. That

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complaint was based not on the law but on the Constitution - not an area in which the average conveyancer moves with assurance.

In addition, one may ask, did the Minister not pass on to the Commissioner the complaints he received from the Real Estate Institute of Zimbabwe, the Law Society of Zimbabwe, and the Association of Building Societies? I cannot conclude that the Commissioner's claim can carry any weight.

In my view, the very fact that it was found necessary to promulgate SI 222E of 1999 is proof that the State recognised that the original formulation of the withholding tax legislation was grossly unfair, and that the alleged administrative practice was an unacceptable cure.

It must be said that the State's action in promulgating amendments to the legislation is to be applauded. But it does highlight the complaint by the Chairman of the Mashonaland Board of Real Estate Institute that:

> "the Institute and other relevant bodies were not consulted prior to the promulgation of the above legislation."

I conclude, therefore:

1. That s 36 (I do not think it necessary to refer to s 35) in part IV of the Finance Act 29 of 1998 was, prior to its amendment by SI 222E of 1999, *ultra vires* section 16 of the Constitution of Zimbabwe;

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2. That it was not saved by the provisions of s 16(7)(a) of the Constitution of Zimbabwe because it has been shown not to be reasonably justifiable in a democratic society.

A. THERE IS NO EQUITY IN TAX

It is a well-known *dictum* of Rowlatt J in *Cape Brandy Syndicate* v *IRC* [1921] 1 KB 64 that "there is no equity about a tax". Like all such *dicta,* it cannot be taken too far. In this court, we have held that the State may not punish a particular group who have taken them to court, by making them pay a tax from which others, less litigious, are exempted - *Commissioner of Taxes* v *CW (Pvt) Ltd* 1989 (3) ZLR 361 (S). But even in that case Gubbay JA (as he then was) remarked at 372D, that:

> "generally speaking, where taxation is concerned, it has to be acknowledged that justice and equity have little significance."

In the present case, it is not the collection of capital gains tax which is criticised. It is the technique used in the collection which is characterised as "not reasonably justifiable in a democratic society." And the principal fault in the original technique, which has now been cured, is that the withholding of tax was "indiscriminate, arbitrary and irrational".

It was indiscriminate because it failed to provide any mechanism whatever for distinguishing between those who would ultimately be liable and those who would not.

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It was arbitrary, in the dictionary sense of "based on or derived from uninformed opinion or random choice; capricious; despotic" because it was known that not everyone who sold property would be liable, yet all were obliged to pay. (Compare *Pyramid Products (Pvt) Ltd* v *Director of Customs & Excise* S-188-98). It was irrational, because the description "withholding" implies the prepayment of something which will ultimately be due, when in fact it was known that nothing (or only part) would be due in many cases.

In short, the principle set out in the *CW* case *supra*, is applicable. It is not a question of harshness or inequity. It is not precisely a question of people in the same class or category being treated differentially. It is a question of people in different classes being improperly treated the same way. People not liable for capital gains tax were treated as if they were liable for it. An exemption mechanism was essential. It is now in place. It was not, before 7 July 1999.

It is perhaps relevant to mention that the defect has been cured by using powers under the Presidential Powers (Temporary Measures) Act [*Chapter 10:20*]. Under s 6(1) of that Act, the effect of the legislation lapses after 180

days. In January 2000, parliamentary action will be necessary if the withholding tax is to be saved on a permanent basis.

THE SPECIFIC CASE OF THE SECOND APPLICANT

At the time, the matter was argued Mrs Mollatt had not yet actually suffered the ultimate fate of having 10% of the sale price of her property sent by her conveyancer to the Commissioner of Taxes. We do not know in fact whether her case was resolved to her satisfaction or not. But it will be clear from the conclusion I have already reached that the withholding tax should not have been imposed on her without her being given a proper opportunity to seek a clearance certificate. Since she made no personal application for relief, no specific order in her favour need be made.

COSTS

The effect of the conclusions which have been reached is that the applicants have been successful but that the amending provisions of SI 222E of 1999 have cured the defect in the legislation with effect from the day after the hearing was completed. Accordingly, a special order as to costs is warranted.

ORDER

In the premises, the following order is made:

1. Part III A of the Capital Gains Tax Act [*Chapter 23:01*] is hereby declared to have been of no force and effect between the dates 1 January 1999 and 7 July 1999 by reason of its being, during that period, *ultra vires* the provisions of s 16 of the Constitution of Zimbabwe.

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2. The respondent is ordered to pay the costs of the applicants, save that -

3. There will be no order as to the costs of the supplementary heads of argument.

Gubbay CJ: I agree.

Ebrahim JA: I agree.

Muchechetere JA: I agree.

Sandura JA: I agree.

Gill Godlonton & Gerrans, applicants' legal practitioners

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

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RADAR HOLDINGS LTD & ANOR *v* EAGLE INSURANCE CO LTD 1999 (2) ZLR 246 (SC)

Citation	1999 (2) ZLR 246 (SC)
Case No	Judgment No. S-96-99
Court	Supreme Court, Harare
Judge	Gubbay CJ, Ebrahim JA, Sandura JA
Heard	September 30, 1999
Judgment	October 7, 1999
Counsel	E W W Morris, for the appellants A P de Bourbon SC, for the respondent
Annotations	None

Civil appeal

Flynote

Contract - consumer contract - what is - supply of services - includes insurance contract - clause entitling insurer to reject claim if not made "as soon as possible" - whether exercise of such power "unfair" - onus on insured to show that exercise of power by insurer was unreasonably oppressive

Headnote

On 25 April 1995 a fire occurred at the premises at a foundry operated by the second appellant and caused considerable damage. The respondent insurance company was notified of the fire on 3 May, but repudiated the claim on the grounds that the appellant did not notify it "as soon as

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possible" as required by the general conditions of the policy. The appellants' claim against the insurer was dismissed on the High Court, which held that the insurer had not been informed as soon as was reasonably practicable in the circumstances. On appeal, this point was not pursued. It was argued for the appellants that the contract was a "consumer contract" in terms of the Consumer Contracts Act [*Chapter 8:03*] and that the exercise of the power to repudiate was "unfair" for the purposes of the Act. A consumer contract is defined as one for the sale or supply of services or goods or both, where the seller or supplier was dealing in the course of business and the buyer or user was not. The Act provides that a court may grant relief to a consumer if satisfied that, among other things, the exercise or non-exercise of a power, right or discretion given under the contract is "unfair", as defined by s 6 of the Act.

Held, that in entering into the contract of insurance the respondent was dealing in the course of business and the appellants were not. The word "services" was one of a very wide meaning, broader than work or labour alone. A contract for the supply of services is one in which a party thereto is obliged to do something for the other's benefit or protection. This is inherent in an insurance contract.

Held, further, that it was the intention of the lawmaker to place the onus of proof on the party seeking to show that the exercise of the power to repudiate was "unfair" in terms of s 6 of the Act. This the appellants failed to do: the exercise of the right was reasonably necessary to protect the insurer's interests and it was not unreasonably oppressive to deprive the insured of the entitlement to recover.

Cases Considered

Cases cited:

CIR v *Tvl Bookmakers' Assn (Co-op) Ltd* (1953) 19 SATC 14 (T)

H v *CoT* 1957 R & N 688 (SR)

Lake & Ors NNO v *Reinsurance Corp Ltd & Ors* 1967 (3) SA 124 (W)

Ochberg v *CIR* 1931 AD 215

Sydmore Eng Works (Pty) Ltd v *Fidelity Guards (Pty) Ltd* 1972 (1) SA 478 (W)

Statutes Considered

Legislation considered:

Consumer Contracts Act [*Chapter 8:03*], ss 2, 4 and 6

Case Information

E W W Morris, for the appellants

A P de Bourbon SC, for the respondent

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Judgment

Gubbay CJ: On the morning of 25 April 1995, a fire occurred at the foundry, in Gweru, of the second appellant, a subsidiary company of the first appellant. As a result of the damage thereby caused, the second appellant sustained a loss to the extent of $587248.33.

The appellants claimed to be entitled to recover such loss under an assets all risk policy of insurance entered into with the respondent, in terms of which it undertook to indemnify the first appellant, and all its associated or subsidiary companies, against any loss or damage occasioned to its property by fire, to a limit of $70 million for any one situation.

In disputing liability, the respondent took the stance that there had been a breach of the obligation specified in clause 3 of the general conditions of the policy. This clause, in material part, was worded as follows:

> "The insured shall notify the insurers as soon as possible of any event which could give rise to a claim."

Reliance was placed by the respondent upon the admitted fact that it was only during the afternoon of 3 May 1995 that it was notified of the fire. It was not therefore prepared to accept the appellants' insistence that such notification complied with the obligation mandated in clause 3.

The issue was decided by the High Court (Adam J) against the appellants. The learned judge held that the appellants had failed to notify the respondent as soon as was reasonably possible or practical in the circumstances. His reasons for so concluding appear at 491B-492C of the official report of the judgment in 1998 (1) ZLR 479 (H). That finding was not challenged in this appeal, which is directed solely at the effect of the application of the Consumer Contracts Act [*Chapter 8:03*] *(*"the Act") upon the appellants' non-compliance with clause 3 of the contract of indemnity insurance. More particularly, the argument addressed on behalf of the appellants was that the contract of indemnity insurance fell within the term "consumer contract" as defined in s 2 of the Act; accordingly, and by virtue of s 6 of the Act, the learned judge ought to have made a finding as to whether the actual exercise by the respondent of its right to avoid liability under clause 3 of the contract was to be regarded as unfair for the purposes of the Act.

GUBBAY CJ

Obviously, the appeal will fail should it be decided that a contract of indemnity insurance is not a "consumer contract" as defined. That is the first question to be answered.

The meaning given to "consumer contract" is:

> "... a contract for the sale or supply of goods or services or both, in which the seller or supplier is dealing in the course of business and the purchaser or user is not, but does not include -

(a) a contract for the sale, letting or hire of immovable property; or

(b) a contract of employment."

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Thus, in order to qualify as a consumer contract the particular contract must be for -

(i) the sale of goods; or

(ii) the supply of goods; or

(iii) the sale of services; or

(iv) the supply of services; or

(v) the sale of both goods and services; or

(vi) the supply of both goods and services.

Once one of the required criteria is present the court must be satisfied that the seller or supplier was dealing in the course of business and the purchaser or user was not. Then follow the specific exclusions.

It cannot be gainsaid that in entering into the contract of indemnity insurance the respondent was dealing in the course of business and the first appellant was not; it was the consumer. This was appreciated by the parties. Their debate turned entirely on whether, by undertaking to indemnify the appellants for the actual commercial value of what may be lost through the happening of the event insured against, in return for the payment of a premium, the respondent was selling or supplying a service.

The learned judge was of the view that there is to be assigned to the word "services" in the definition of "consumer contract" a wide connotation and so was prepared to accept that a contract of indemnity insurance falls under the Act (see *supra* at 492E-F).

I respectfully agree that "services" is a word capable of an expansive meaning. *Webster's International Dictionary* defines it as "acts or instances of helping or benefiting; conduct contributing to another's advantage or welfare or benefit". The *Oxford English Dictionary* is to much the same effect. It provides the meaning (*inter alia*) of "the action of serving, helping or benefiting; conduct tending to the advantage of another ... supply of the needs of persons".

What scant judicial authority there is has considered the use of the word "services" in the context of income tax legislation. Nonetheless a meaning broader than work and labour alone is given. In *Ochberg* v *Commissioner for*

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Inland Revenue 1931 AD 215 at 230, it was held that an agreement to assist a company financially was an agreement to render services. In *Commissioner for Inland Revenue* v *Transvaal Bookmakers' Association (Co-operative) Ltd* (1953) 19 SATC 14 (T) at 19, Price J was satisfied that the entitlement of members of the respondent association to borrow from it specified sums of money on easy terms of payment constituted a service rendered by the association. And in this jurisdiction, in the case of *H* v *Commissioner of Taxes* 1957 R&N 688 (SR) at 693A, Hathorn J found it to have been correctly conceded that by the grant of credit facilities and a guarantee for certain indebtedness of a company, the taxpayer rendered a

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service to his co-shareholders and to the company, and in doing so he also benefited himself.

Citing the exclusion of contracts of lease of immovable property (*locatio conductio rei*) and of employment (*locatio conductio operarum*) in the definition of a consumer contract, Mr *de Bourbon*, for the respondent, submitted that by a contract for the sale or supply of services the lawmaker must have meant a contract of *locatio conductio operis*, one party using their labour to bring about a result, like a mechanic repairing the engine of a motor vehicle or a plumber unblocking a sink.

I do not consider this reasoning to be sound. As Mr *Morris*, for the appellants, was constrained to point out, it does not follow that because two contracts which form the trichotomy of contracts known as *locatio conductio* are excluded, the third, *locatio conductio operis* (letting and hiring or work) is to be taken as the meaning to be given to a contract for the sale or supply of services. In the first place, it is only some and not all contracts in the category of *locatio conductio rei* that are excluded, namely leases over immovable property. The letting and hire of movable property and the use and enjoyment of fruits (*fruenda locata*) come within this category as well. See Zimmermann *The Law of Obligations* at 351. Secondly, it is not only the contracts of *locatio conductio* that can be classified as service contracts. Contracts of *mandatum*, in particular, but also *commodatum*, bailment and *mutuum* can also be so classified. Thus, not all contracts of service are "*locare*" (to place at the disposal of) or "*conducare*" (to carry along, to take with one).

If the legislature had been minded to limit the scope of a contract of service by the exclusion of a contract of indemnity insurance, it could so easily have done so, as it did with other contracts. I regard the absence of any such reference as a further feature which leads inevitably to the conclusion that a contract for the supply of services is one in which a party thereto is obliged to do something for the other's benefit or protection. This is inherent in a contract of indemnity insurance. See *Lake & Ors NNO* v *Reinsurance Corporation Ltd & Ors* 1967 (3) SA 124 (W) at 127A; *Sydmore Engineering*

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Works (Pty) Ltd v *Fidelity Guards (Pty) Ltd* 1972 (1) SA 478 (W) at 480G-H; Gordon & Getz *The South African Law of Insurance* 4 ed at 83.

The second critical part of the appellants' argument did not find favour with the learned judge. He rejected it for the reason that "*the plaintiffs have not shown* why clause 3 of the general conditions were (*sic*) not necessary for the protection of the defendant's interest" (emphasis added, *supra* at 493B).

It seems to me, too, that success for the appellants depends entirely upon whether s 6 of the Act places the onus under an existing consumer contract upon the seller or supplier, and not upon the affected consumer.

Section 4 of the Act provides that a court may grant relief to a consumer if satisfied: (a) in accordance with s 5, that the contract is unfair; or (b) in accordance with s 6, that the exercise or non-exercise of a power, right or discretion under the contract is unfair; or (c) that the

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contract contains a scheduled provision.

It was common cause that clause 3 of the contract of indemnity insurance is not a scheduled provision. Nor was it contended at this hearing, and wisely so, that examined objectively the contract was open to attack as intrinsically unfair for the purposes of s 5 of the Act.

Subsection (1) of s 6 of the Act reads:

> "A court may find the actual or anticipated exercise or non-exercise of a power, right or discretion under a consumer contract to be unfair for the purposes of this Act if -

(a) in all the circumstances the result of such exercise or non-exercise is or would be unreasonably oppressive to the party affected by it; or

(b) such exercise or non-exercise is not or would not be reasonably necessary to protect the interests of any party; or

(c) such exercise or non-exercise is or would be contrary to commonly accepted standards of fair dealing."

Subsection (2) provides that a court must not make such a finding solely because a party affected thereby suffers, or may suffer, a penalty, forfeiture, loss or diminution of any right or benefit under the contract. And subs (3) states that in determining whether or not the exercise or non-exercise of a power, right or discretion under a consumer contract is unfair a court shall have regard to the interests of both parties.

It was the appellants' contention that the failure of the respondent to adduce evidence before the High Court to establish that the actual exercise of the right under clause 3 of the contract did not offend against paras (a), (b) or (c) to s6(1), precluded the learned judge from finding whether such exercise was fair.

In my view, an analysis of s 6, in the context of the two preceding sections, reveals that it was the intention of the lawmaker to place the onus of proof on the party seeking to avoid the consequence of any exercise or non-exercise of a power, right or discretion under a consumer contract. Subsection (2) thereof makes it clear that the mere fact that a party suffers, or may suffer, a

penalty, forfeiture, loss or diminution by such exercise or non-exercise must not be taken as justifying a basis for a finding by a court that the consumer contract is unfair for the purposes of the Act. A court is only at liberty to find unfairness if one of the situations particularised in paras (a), (b) or (c) to subs (1) is present.

The wording of para (a) allows of no other inference than that it is for the affected party to establish that in all the circumstances the result of the exercise or non-exercise would be unreasonably oppressive. Likewise, paras (b) and (c), properly construed, indicate that it is for the affected party to show that such exercise or non-exercise would not be reasonably necessary to protect the interests of the other party, or would be contrary to commonly accepted standards of fair dealing. After all, the affected party is the one seeking relief from the court arising from the consequence of a consumer contract freely entered into and enforceable under

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the common law. Here, it was the appellants who failed to notify the respondent of the event as soon as was reasonably possible for them to do so. It is they who are the parties affected.

It only remains to state that at the trial the evidence of the appellants' the sole witness, Mr Richard Stevens, went no way in the discharge of the burden upon them. Having regard to subs (2) it cannot be claimed, indeed it was not, that the forfeiture of the entitlement to recover the loss suffered was unreasonably oppressive. And it was not suggested by the witness that the exercise of the right under clause 3 was not reasonably necessary to protect the interests of the respondent. When the policy behind such notification clauses is taken into account - which is to permit of an immediate investigation by the insurance company to either determine for itself the circumstances of the loss, or to prevent a fraud being perpetrated against it - it can hardly be disputed that such a clause is necessary to protect the interests of the insurer.

Finally, it is of some significance that the respondent's summary of evidence advised the appellants that the delay in the notification had caused prejudice because it was not able to fully investigate the circumstances of the loss. Despite this intimation, the appellants did not deal with the allegation.

It is for these reasons that I am in respectful agreement with the conclusion reached by the learned judge.

Accordingly, the appeal must be dismissed with costs.

Ebrahim JA: I agree.

Sandura JA: I agree.

Atherstone & Cook, appellants' legal practitioners

Coghlan & Welsh, respondent's legal practitioners

S *v* DHONGI 1999 (2) ZLR 252 (HC)

Citation	1999 (2) ZLR 252 (HC)
Case No	Judgment No. HH-204-99
Court	High Court, Harare
Judge	Chatikobo J and Assessors
Heard	September 30, 1999
Judgment	October 7, 1999
Counsel	S Musona, for the State S Chibune, for the accused
Annotations	None

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Criminal trial

Flynote

Criminal procedure - mental disorder - accused mentally disordered at time killed another person - circumstances not precluding self-defence - whether special verdict should nonetheless be returned

Headnote

The accused was charged with murder. He had killed another person with an axe. There was medical and other evidence to show that he was mentally disordered at the time he killed the deceased. There were also indications that the accused may have acted in self-defence, which, had he not been mentally disordered, would have entitled him to an acquittal. The question arose whether a special verdict should be returned.

Held, that a special verdict should be returned if it is shown that the accused "did the act charged". In the case of murder, this meant not only the physical act of killing, but the fact of killing qualified by consciousness, intent and unlawfulness. Self-defence precluded unlawfulness. It is only where the accused escapes conviction on the basis of his criminal incapacity, arising out of mental disorder or defect, that the special verdict must be returned. The facts did not preclude self-defence, but the accused was a person who if released might be dangerous to others. Accordingly, he should be acquitted, but an order made under s27(3)(a)(ii) of the Mental Health Act, detaining him in an institution.

Cases Considered

Case cited:

R v *Mkize* 1959 (2) SA 260 (N)

Statutes Considered

Legislation considered:

Mental Health Act [*Chapter 15:06*], ss 27(3)(a)(ii) and 28(1)

Case Information

S Musona, for the State

S Chibune, for the accused

Judgment

Chatikobo J: The accused resides in Mhandu village in the Madamombe area of Chivhu. He is charged with the crime of murder. It is alleged by the State that on 28 June 1997, the accused struck his father, Stephen Dhongi, on the head with an axe thereby causing serious injuries from which he died. The police were called, the accused was arrested and the remains of the

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deceased were conveyed to Chivhu hospital where they were examined *post mortem* by Dr Phiri who observed multiple injuries caused by

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"sharp objects on the head and trunk". He concluded that the deceased died from haemorrhage.

The accused was also examined by a psychiatrist over a period of time for he had a history of mental illness. He used to talk to himself throughout the night as if he was conversing on the telephone. From his observation of the accused, the psychiatrist formed the view that he suffered from schizophrenia and consequently that at the time of commission of the offence he was mentally disordered. A notice of recovery was produced by the psychiatrist in which he certifies that the accused is now fit to stand trial.

When he was initially called upon to plead to the charge, the accused's response was that he understood the charge but he was also injured by people. After a further explanation of the charge by the interpreter the accused denied the charge and the court entered a plea of not guilty as it was enjoined to do. The State then called the accused's mother, Plaxedes Dhongi, to give evidence.

It was to this effect. The accused is her son and the deceased was her husband. They lived together in Mhandu village. On the day in question, she spent the day with the accused at home. In the late afternoon, she followed the deceased to a beer drink in another village. While there, she partook of traditional beer well into the night. Her husband had left to go and fetch his cattle from the grazing area. When she eventually left the beer drink she was drunk and on her way home she got lost and only managed to find her way in the early hours of the morning. When she arrived home the deceased was not in their bedroom. She went looking for him near the granary which was close to the accused's bedroom. The deceased was lying prostrate by the doorstep to accused's bedroom. She tried to wake him up, in vain. He remained still. He must have been dead, although she did not realise it then. She called him out and asked if he had penned the cattle, but again she got no response. She then called out the accused and asked what had happened to the deceased. The accused's reply was that he had chopped him because he had entered "my hut". Plaxedes then alerted the neighbours. Eventually, the police came and took away the accused. She confirmed that the accused had a history of mental illness. She said, though, that the deceased also had a history of mental illness. He, too, had received treatment at Ingutsheni.

Among the weapons recovered from the scene were two axes, one with a handle and another without and both were blood stained. These were forwarded to the Forensic Science Laboratory for analysis. The analysis showed that the blood stains found on the axe with the wooden handle corresponded with the accused's blood type and the blood stains on the axe without a handle could have originated from the deceased. This finding leads to the inference that both the accused and the deceased had bled or that the

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accused had also been injured, possibly having been struck with the axe with a wooden handle.

No evidence was led from the police who attended the scene to ascertain if the accused sustained any injuries as he claims. Plaxedes was drunk and her observations of the injuries inflicted on the deceased were cursory and unhelpful. One is left to wonder if she would have noticed any injuries on the accused, especially with her drunkenness being compounded by the shock which the loss of her husband must have caused her. We are thus not in a position to discount the possibility that the accused was injured. There being no eyewitness to the assault upon the deceased, the possibility cannot be ruled out that the deceased was the aggressor. According to Plaxedes, both the accused and the deceased had consumed alcohol and both had a history of mental illness. It is more than likely that the accused and the deceased fought with axes. The accused may well have acted in self-defence.

On the evidence before us, there can be no doubt that the accused lacked *mens rea* and criminal capacity on account of the fact that he was mentally disordered. The question, however, is whether this is sufficient to justify a special verdict in terms of the Mental Health Act [*Chapter 15:06*] ("the Act").

At common law, criminal liability depends, in part, upon the commission of an act which is unlawful. J M Burchell in *South African Criminal Law and Procedure* Vol 1 3 ed p 34 says:

> "The accused's conduct must be unlawful in order to lead to criminal liability. Usually, this means that there must be no defence excluding unlawfulness available to the accused."

If the accused acted in self-defence, then his conduct in striking the deceased could be justified, depending on the nature of the threat which he faced and the magnitude of the force used, matters upon which there is no evidence on which to measure the reasonableness of the accused's conduct.

In *R* v *Mkize* 1959 (2) SA 260 (N) at 264D Jansen J stated:

> "In general, modern theory appears to require the following four factors for criminal liability of a person:
>
> (a) a voluntary act (or omission) by him;
>
> (b) unlawfulness of that act;
>
> (c) a legally blameworthy condition of mind *mens rea* at the time of the act;
>
> (d) criminal capacity on his part."

In the absence of evidence to show that the accused did not have a defence excluding unlawfulness available to him such as self-defence, he would, at common law, be entitled to an acquittal. Does the Act provide otherwise? The relevant provision, which is s 28, is in these terms:

> " (1) When, in any indictment, summons or other criminal proceedings, any act or omission is alleged against any person as an offence and evidence, including medical evidence, has been given at the trial of that person for that offence that he was mentally disordered or

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CHATIKOBO J

defective so as not to be responsible according to law for his action at the time when the act was done or the omission made, then, if it appears to the court or magistrate, as the case may be, before whom that person is tried, that he did the act or made the omission alleged but was mentally disordered or defective as aforesaid at the time when he did or made the same -

(a) the court or magistrate shall return a special verdict to the effect that the accused is guilty of the act or omission charged against him but was mentally disordered or defective at the time when he did the act or made the omission; and

(b) [... not relevant]."

In dealing with s 29(1) of the South African Mental Disorder Act 1916, which is virtually identical to s 28(1) of our Act in *R* v *Mkize supra* at 266B-H, Jansen J remarked, and I record my respectful agreement with the remarks:

"It appears that before it is incumbent upon the court to return the special verdict the court must be satisfied:

(a) that the accused 'did the act or made the omission charged';

(b) that the accused was 'mentally disordered or defective' at the time;

(c) that as a result of that mental state he was not 'responsible according to law for the act or omission charged'."

What is meant by "did the act ... charged"? Bearing in mind the considerations mentioned above in respect of the common law, it is difficult to envisage any person "doing" anything at all whilst in an unconscious state - especially in the sphere of the criminal law. But be that as it may, the question remains: What is "the act charged"? Is it any muscular activity that falls within the particulars of the charge, or is it muscular activity as qualified by the nature of the charge? In a charge of murder, is it merely the fact of killing constituted by activity of the accused's muscles causing death, or is the fact of killing qualified by consciousness, intent and unlawfulness? The latter seems to be the case. Section 29(1) commences "where in any indictment ... any act ... is alleged against any person as an offence ...", the accused was guilty of the act charged against him". "The act charged" must mean the act as constituting the offence charged. Only when the court is satisfied that muscular activity of the accused constituted the offence charged, is it incumbent to bring in the special verdict, if the other requisites are present. If this were not so, a "mentally disordered person", not knowing the difference between right and wrong, who instinctively kills in self-defence, would be subject to the special verdict if charged with murder; as would be the "mentally disordered" and irresponsible epileptic who during a seizure falls and breaks a window and is charged with malicious injury to property. This would place the mentally disordered person in a worse position than a normal person. Had he been normal, he would have been acquitted, despite the same muscular activity.

CHATIKOBO J

The true effect of s 29(1) appears to be that when an accused escapes conviction *only on the basis of his criminal incapacity* (resting on "mental disorders or defect"), the special verdict

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should be brought in. It follows that the special verdict is only appropriate where all the elements of the crime have been proved and the incapacity then functions as an excuse: only then it appears that the accused was guilty of the act charged against him but was "mentally disordered or defective so as not to be responsible according to law".

I find the logic in this reasoning most compelling. Section 28(1) of our Act, like its South African equivalent, in describing "the act ... charged" uses words which are accusatorial and judgmental, such as "indictment", "summons", "offence", "guilty", "charge", thus leaving no room for doubt that the reference to "the act" in the section is a reference to a wrongful act. Where the act is not wrongful in the sense that it was committed in circumstances of self-defence, to return a special verdict would be to find a mentally disordered person guilty of an offence committed under circumstances of justification.

The paucity of evidence in this matter leaves us in doubt on the issue of whether the accused acted in self-defence or not. It has therefore not been proved that his actions were wrongful. We are, however, satisfied beyond a reasonable doubt that the deceased died as a result of the injuries inflicted upon him by the accused. It must follow that the accused is a dangerous person. If released he might cause a danger to others. Section 27(3)(a)(ii) of the Act gives this court power, where it appears that the accused is a danger to others, to order that the accused be detained in a special institution for treatment and care in a controlled environment.

Accordingly, the following order is made.

1. The accused is found not guilty and he is acquitted.

2. It is ordered that the accused be detained in Harare Prison Hospital there to be dealt with in terms of the Act.

Attorney-General's Office, legal practitioners for the State

Chibune & Mahaso, legal practitioners for the accused

CRUSADER REAL ESTATE CONSULTANCY (PVT) LTD *v* CABS 1999 (2) ZLR 257 (SC)

Citation	1999 (2) ZLR 257 (SC)
Case No	Judgment No. S-94-99
Court	Supreme Court, Harare
Judge	Ebrahim JA, Muchechetere JA, Sandura JA
Heard	September 14, 1999
Judgment	October 12, 1999
Counsel	M R D Stonier, for the appellant A J Dyke, for the respondent

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Annotations None

Civil appeal

Flynote

Practice and procedure - execution - sale - sale by auction - property sold thereafter by private treaty - auctioneer not entitled to commission

Headnote

An auctioneer was requested by the Sheriff to conduct the sale of some property. The auction was conducted and the only bid was made by the respondent. However, the Sheriff refused to accept the bid on the grounds it was too low. The respondent subsequently offered a higher price for the property to the Sheriff. The Sheriff accepted this offer and the property was sold to the respondent by private treaty in terms of r 358(2) of the High Court Rules. The auctioneer claimed commission on this sale.

Held, that the auctioneer was not entitled to commission. An auctioneer is only entitled to his commission if he sells the property by auction. The property was sold by auction, but the sale was not confirmed by the Sheriff and the property was subsequently sold by private treaty. Even if the auctioneer was instrumental in bringing the two parties together, he did not bring about the subsequent sale.

Cases Considered

Cases cited:

Crusader Real Estate Consultancy (Pvt) Ltd v *CABS* 1999 (1) ZLR 37 (H)

Martin v *Currie* 1921 TPD 50

Case Information

M R D Stonier, for the appellant

A J Dyke, for the respondent

Judgment

Ebrahim JA: The appellant and the respondent were parties to a civil action and after summons had been issued by the appellant against the respondent they agreed to seek the opinion of the High Court by way of a special case in terms of Order 29 of the Rules of the High Court.*(63)

It was the appellant's contention that it had been requested to conduct a sale by the Sheriff of stand 113 Gaydon Road, Greystone Park, Harare. On 9 December 1994, an auction was carried at which the respondent was the highest bidder in the sum of $1.3 million. Subsequent

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to the auction the Sheriff refused to accept the bid on the grounds that it was too low. The

EBRAHIM JA

property was subsequently sold to the respondent for $2.5 million. The appellant claims that it is entitled to the commission, following this sale, in the amount of $75400.

The respondent resisted the appellant's claim on the basis that the property had been sold to it by "private treaty" in terms of Order 40 r 358(2) of the Rules of the High Court of Zimbabwe.

In referring the matter to the High Court as a special case the parties agreed on the following facts:

> "That the auction of the property was the effective cause of the sale of the property to the defendant for the sum of $2.5m and the only issue to be determined by this Honourable Court is whether the plaintiff fulfilled its mandate and is accordingly entitled to the commission in the amount claimed.
>
> That subsequent to obtaining instructions from the Sheriff of Zimbabwe, the plaintiff was instructed to conduct a sale by auction of Stand 113 Gaydon Road, Greystone Park, Harare.
>
> The sale was advertised and took place on 9 December 1994. The defendant was the only bidder at the auction. The defendant was also the judgment creditor. The property was knocked down to the defendant at its bid price of $1.3m.
>
> Subsequent to the auction, the Sheriff refused to accept the bid as too low and stated by letter to the defendant that she would accept an offer of $2.5m.
>
> The defendant notified the Sheriff that it increased its offer to $2.5m which the Sheriff accepted. No negotiations or discussions took place between the defendant and the Sheriff.
>
> The sale was confirmed by the Sheriff by letter to the defendant's legal practitioners on 19 January 1995 there being no objection.
>
> The plaintiff thereafter sought payment of its commission from the defendant on the grounds that commission was payable in terms of the Conditions of Sale. The amount of such commission was based on the scale of fees of the Auctioneers, Estate Agent and Valuers Institute of Zimbabwe. The defendant declined to pay such commission.
>
> On three other occasions, the defendant has paid commission where an auction sale in execution did not realise a purchase price satisfactory to the Sheriff and there was a subsequent sale by private treaty. In each of these cases, the commission paid was based on the prevailing tariff and based on the purchase price achieved in the subsequent sale by private treaty. These were in respect of the matter between CABS and C Nyemba, a sale by auction which took place in Kwekwe in December 1995; the matter between CABS and S Mabonga in respect of a sale which took place in July 1995 in Kwekwe; the matter between CABS and J Mhaka, a sale which took place in Kwekwe in July 1995.
>
> The question which the parties wished the High Court to answer is whether the plaintiff is entitled to its commission."

The learned judge *a quo* in finding for the respondent observed:

> "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

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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.

EBRAHIM JA

He was influenced in reaching this conclusion by a letter addressed to the respondent by the Sheriff which read:

"re: CABS vs E.X.M. KADHANI 623 A GREYSTONE T/SHIP 8

I refer to the above matter in which you emerged the highest bidder on the 9th of December, 1994.

The Sheriff declined to accept your bid and advised that she was prepared to accept an offer of $2500000. You are therefore asked to increase your offer to $2500000."

The learned judge also stated:

"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."

Clearly, these observations cannot be faulted as is evidenced from the statement of agreed facts.

The learned judge concluded that the appellant was not entitled to receive the commission prayed for. He made no order as to costs and that issue was not canvassed before him.

In resisting this appeal, Mr *Dyke*, representing the respondent in this court, brought to our attention the case of *Martin* v *Currie* 1921 TPD 50. The facts in that case were that an auctioneer was employed to sell property by auction on condition that if the reserve price was not reached no commission was to be charged. The reserve price not being reached, the property was not sold. A prospective purchaser, who was present at the auction and who knew who the owner of the property was, was about to approach the owner after the conclusion of the auction with a view to negotiating for the purchase of the property when the auctioneer formally introduced them. After protracted negotiations the prospective purchaser bought the property. It was held that the auctioneer was not entitled to a commission consequent upon the sale.

It seems to me that the facts and decision in that case are of assistance in the facts of the present matter.

There is merit in Mr *Dyke*'s submission when he says that there was no question of the auctioneer having introduced the seller to the buyer. By operation alone of the Rules of procedure of this court, it was the buyer who instructed the Sheriff to execute on the immovable property and by virtue of the Rules the Sheriff was obliged to engage the auctioneer to sell the property on public auction.

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In the instant case, the property was not sold on public auction and an approach was made to the seller (the Sheriff) by the buyer (the respondent/

EBRAHIM JA

judgment creditor) for the eventual purchase of the property. Both the seller and the purchaser in this matter were already acquainted with one another due to the court action taken by the respondent in seeking to execute on the immovable property. These facts clearly emerge from the statement of agreed facts placed before the learned judge *a quo*.

In the case of *Martin* v *Currie supra* at p 53 Bristow J stated:

> "I think it clear that the employment of an auctioneer does not give him any authority except to sell by auction. The case of Muller v *Kemp* (1 Searle 167) was cited to us, which, on the facts, is not in point, but the court there cited, with approval, a passage from Storey on *Agency* which states that the agency of an auctioneer ends as soon as the auction is held. An auctioneer is employed to sell property by auction on the conditions arranged; if he sells the property he gets his commission: if he does not sell the property he gets no commission."

On the facts of the present case, it cannot be said that the appellant sold the property. It was the Sheriff who did so. In the circumstances the appellant clearly was not entitled to receive the commission he claims.

In the case of *Martin* v *Currie supra* at p 56 Gregorowski J observed:

> "I think it is essential in all these cases to prove a contract of employment. It is not sufficient for an estate agent to say: 'I was instrumental in introducing you to a person who eventually bought your property'. He must prove he was employed in his capacity as estate agent to do this; the mere fact of being instrumental is not sufficient."

In my view, there is merit in Mr *Dyke*'s submission that the appellant cannot avoid the fact that there was neither agreement by the respondent to pay the commission to the auctioneer nor did the respondent employ him as such thereby entitling him to remuneration. That much is clear from the papers in this case.

Mr *Stonier* submitted that the respondent had previously paid auctioneer's commission on the sale even though that sale had been effected by private treaty which took place after an auction and where the respondent itself had raised the bid at the behest of the Sheriff. That may well be so but that does not alter the fact that in terms of principles correctly enunciated in the case of *Martin* v *Currie supra* there was no obligation for it to do so.

Accordingly, the appeal is dismissed with costs.

Muchechetere JA: I agree.

Sandura JA: I agree.

Winterton Holmes & Hill, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

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GWAFA *v* SMALL ENTERPRISES DEVELOPMENT CORPORATION & ANOR 1999 (2) ZLR 261 (SC)

Citation	1999 (2) ZLR 261 (SC)
Case No	Judgment No. S-136-99
Court	Supreme Court, Harare
Judge	McNally JA, Muchechetere JA, Sandura JA
Heard	October 12, 1999
Judgment	October 12, 1999
Counsel	E T Matinenga, for the appellant L Mazonde, for the first respondent No appearance for the second respondent
Annotations	None

Civil appeal

Flynote

Agency - agent - authority - ostensible or apparent authority - principles - auctioneer - ostensible authority to conclude sales of properties sold by public auction

Headnote

The first respondent put a number of vehicles up for sale by auction. The appellant bid for one of them and the auctioneer confirmed that he had won the tender. However, when the appellant tendered payment, the first respondent refused to hand over the vehicle. The conditions of sale did not specify that the first respondent's approval was essential before the sale became binding on it and the auctioneer did not tell the appellant that this was the case. The appellant sought an order compelling the first respondent to hand over the vehicle, arguing that the first respondent was bound by the agreement concluded with the auctioneers because the auctioneers had ostensible authority to conclude the sale.

Held, that if a principal employs an agent in a certain capacity, and it is generally recognised that an agent employed in that capacity has authority to do certain acts, then any of those acts performed by the agent will bind the principal because they are within the scope of his "apparent" authority. An auctioneer has ostensible authority to conclude a sale agreement in respect of the property being sold by public auction for other persons, because it is generally recognised that an auctioneer has authority to conclude sales of properties which he sells by public auction. The agreement reached by the appellant with the auctioneer bound the first

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respondent.

Cases Considered

Cases cited:

Seniors Svc (Pvt) Ltd v *Nyoni* 1986 (2) ZLR 293 (S); 1987 (2) SA 762 (ZS)

Stewart v *Zagreb Properties (Pvt) Ltd* 1971 (1) RLR 180 (A); 1971 (2) SA 346 (RA)

Case Information

E T Matinenga, for the appellant

L Mazonde, for the first respondent

No appearance for the second respondent

Judgment

Sandura JA: This is an appeal against a judgment of the High Court which dismissed with costs the appellant's application for an order directing the first respondent ("SEDCO") to deliver a Toyota Hilux motor vehicle, registration number 517-178Z ("the vehicle") to the appellant upon payment by him of the sum of $80000.

SANDURA JA

After hearing both counsel, we issued the following order:

" 1. The appeal is allowed with costs.

2. The order of the court *a quo is* set aside and the following is substituted:

'(a) The sale of the Toyota Hilux motor vehicle, registration number 517-178Z, to the applicant is confirmed.

(b) The first respondent shall deliver the said vehicle to the applicant forthwith, and shall take all steps necessary to facilitate the registration of the vehicle in his name, against payment of the sum of $80000.

(c) The first respondent shall pay the applicant's costs'."

After making that order, we indicated that our reasons would be handed down in due course. I now set them out.

What happened in this case is set out by the appellant in paras 4-9 of his founding affidavit as follows:

" 4. Through Desired Liaison Auctioneers (Pvt) Ltd, the first respondent placed a number of vehicles on tender, among them a Toyota Hilux, registration number 517-178Z. I attach hereto the advert placed by the said Auctioneers marked 'A'.

5. Pursuant to the advertisement, I purchased the tender documents, and of necessity I attach hereto the

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receipts relating to the tender [documents] I purchased. ... I tendered for all Toyota vehicles.

6. I went to inspect the vehicles and was awarded the tender, on 8 October 1998, of the vehicle referred to above. I met all the required conditions. Desired Liaison Auctioneers [confirmed] to the first respondent that I had won the tender by their letter to it dated 10 October 1998. I attach a copy of that letter marked 'C' and the conditions of the tender marked 'D'.

7. I then ran around to have the vehicle inspected by the Automobile Association of Zimbabwe on 12 October 1998. When I was satisfied that the vehicle was good I then went to my bankers for funding and they gave me a bank cheque for $80 000 payable to the first respondent. This is the amount I had tendered for the vehicle.

8. On 15 October 1998, I approached Messrs Chihambakwe, Mutizwa & Partners to forward payment to the first respondent. They duly did a letter to it attaching the cheque for $80 000. I attach hereto the said letter marked 'E' and the cheque marked 'F'. With the letter, the first respondent had also known that I had been awarded the tender and that I had met all the conditions of the tender.

9. Despite that second assurance, they replied to Messrs Chihambakwe, Mutizwa & Partners saying they wanted to approve the tender themselves. I attach a copy of that letter marked 'G'. Inasfar as I was concerned, the aforesaid Auctioneers were in charge of everything and we only had to make payment to the first respondent. As their agent the Auctioneers bind the first respondent. I verily believe that the tender was complete and it needed no further approval apart from the approval by the Auctioneers."

The conditions of sale referred to by the appellant did not stipulate that SEDCO's approval was essential before the sale became binding on it. They are as follows:

" 1. The highest bid will not necessarily win the tender, unless his/her bid is above the valuation report.

SANDURA JA

2. When there are two (2) bids on tie the first bid to be called out will win the tender. The auctioneer's decision to this effect is final.

3. Payment should be made to SEDCO Head Office, 3 Floor, Construction House, Harare no later than Thursday 15 October 1998. Failure to do so will result in the tender being awarded to the second winning bid.

4. All vehicles are exposed for examination and are sold without guarantee - *Voetstoots*.

5. After the announcement of the winning tenders on Thursday 8 October 1998, Desired Liaison Auctioneers will not accept responsibility for the safe custody of the vehicles sold.

6. Insurance is available immediately from Auto General Insurance Brokers who are in attendance to assist you. Once you buy a vehicle, the insurance lapses and it is a criminal offence to drive a car without insurance."

At no stage has it been argued that the appellant's bid was below the valuation report. So there is no question of a breach of condition 1 above.

In his affidavit, Mr Dziya, the managing director of Desired Liaison Auctioneers (Pvt) Ltd ("the auctioneers"), averred that the sale of the vehicle was confirmed by SEDCO's official who was present at the sale. He avers as follows in paras 4 and 6 of his affidavit:

" 4. I admit that Desired Liaison was to submit tenders to the first respondent for confirmation. This is what

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exactly happened in this and all other instances ...

6. When a tender would have been approved by us we then signed against the awarded tender together with Mr Mahere of [the] first respondent. His signature was confirmation of the award of the tender. Every person who participated in the tender was aware of that and the tender process proceeded in that way ..."

Whether or not Mr Mahere confirmed the sale on behalf of SEDCO was not common cause. However, it was common cause that the appellant was not aware that SEDCO's approval or confirmation was essential. The conditions of sale did not say so and the auctioneers did not tell the appellant about it.

The main argument advanced on behalf of the appellant was that SEDCO was bound by the agreement concluded by the auctioneers because the auctioneers had ostensible authority to conclude the sale.

The principles on which a seller can be bound by the ostensible authority of his agent have been set out in a number of cases which have come before this court. In *Stewart* v *Zagreb Properties (Pvt) Ltd* 1971 (1) RLR 180 (RA) at 184C-F; 1971 (2) SA 346 (RA) at 349F-H, Beadle CJ said:

"The principles on which a seller or a principal can be bound by the ostensible authority of an agent have been set out recently by this court in the case of *Reed NO* v *Sager's Motors (Pvt) Ltd* 1970 (1) SA 521 (RA). The headnote to that case, which accurately sets out the judgment, is as follows:

'If a principal employs a servant or agent in a certain capacity, and it is generally recognised that servants or agents employed in this capacity have authority to do certain acts, then any of those acts performed by such servant or agent will bind the principal because they are within the scope of his 'apparent' authority. The principal is bound

SANDURA JA

even though he never expressly or impliedly authorised the servant or agent to do these acts, nor had he by any special act (other than the act of appointing him in his capacity) held the servant or agent out as having this authority. The agent's authority flows from the fact that persons employed in the particular capacity in which he is employed normally have authority to do what he did. Whether an act is or is not within the scope of the apparent authority of an agent is essentially a question of fact'."

What the learned Chief Justice said in the *Stewart* case *supra* was subsequently quoted with approval by Dumbutshena CJ in *Seniors Service (Pvt) Ltd* v *Nyoni* 1986 (2) ZLR 293 (S) at 298F-299B; 1987 (2) SA 762 (ZS) at 766A-C.

In the circumstances, the principles enunciated by Beadle CJ are well established. Those are the principles which I shall apply in the present case to resolve the issues before me. The essential question is whether an auctioneer has ostensible authority to conclude a sale agreement in respect of the property being sold by public auction for other persons. I am satisfied that he has. That is so because it is generally recognised that an auctioneer has the authority to conclude sales of properties which he sells by public auction. In fact, the auctioneer is almost invariably instructed to do just that, and in concluding a sale agreement he acts on behalf of the seller. The sale agreement, therefore, binds the seller.

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Applying the principles enunciated by Beadle CJ to the facts of this case as set out by the appellant in his founding affidavit, which were common cause, there can be no doubt in my mind that when the auctioneers concluded the sale agreement with the appellant, that agreement bound SEDCO because the auctioneers had ostensible authority to conclude the sale agreement on behalf of SEDCO.

That is why we allowed the appeal.

McNally JA: I agree.

Muchechetere JA: I agree.

V S Nyangulu & Associates, appellant's legal practitioners

Scanlen & Holderness, first respondent's legal practitioners

MOYO *v* MOYO 1999 (2) ZLR 265 (HC)

Citation	1999 (2) ZLR 265 (HC)
Case No	Judgment No. HB-71-99
Court	High Court, Bulawayo
Judge	Cheda J
Heard	September 24, 1999
Judgment	October 14, 1999
Counsel	C Dube, for the plaintiff N Mathonsi, for the defendant
Annotations	None

Civil application

Flynote

Family law - husband and wife - divorce - division of property following divorce - when spouse may claim division of property - must do so within reasonable time after divorce

Headnote

The parties had been married in terms of the Marriage Act [*Chapter 5:11*]. Nine years after being divorced, a woman sought to claim from her former husband movable property and for the sale of the former matrimonial home so that she could be given a share in the proceeds of the

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sale. She relied on s 7(1) of the Matrimonial Causes Act [*Chapter 5:13*], which allows a court to make an order with regard to the division of matrimonial property "at any time" after the granting of a decree of divorce.

Held, that s 7(1) of the Matrimonial Causes Act was intended to cover the situation where it was not feasible to make such an order at the same time as the divorce was granted. Examples would include where one party obtains a divorce order following service of summons by publication but the other party did not see the publication, or where the other party was either disabled from claiming, or was misled on the correct position regarding the property or where the party is unaware that the property is part of the matrimonial property. In these instances, the spouse should not be barred from claiming after the divorce.

Held, further, that after divorce there must be some time limit within which a divorced spouse can institute proceedings for a division of matrimonial property. If the property being held is owned or jointly owned by the other spouse, the spouse holding the property should expect a claim after the divorce. But in respect of the other property, a spouse is entitled to start again and may remarry, and it is disruptive for the other spouse many years later to start claiming that property, some of which may have become worn out or may have been disposed of.

Held, therefore that the words "at any time" in s 7(1) must be construed to mean "within a reasonable time." In the present case, the delay in claiming was unreasonably long and the claim should be dismissed.

Cases Considered

Cases cited:

Madamombe v *Madamombe* HH-138-92

Masimirembwa NO & Anor v *Chipembere* HH-22-95

Statutes Considered

Legislation considered:

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

Case Information

C Dube, for the plaintiff

N Mathonsi, for the defendant

Judgment

Cheda J: The applicant was married to the respondent in terms of the Marriages Act which was then Chapter 37 of 1963, in September 1969. They were divorced on 13 August 1987. It is not clear on the papers which party sued for divorce. However, at the time of the divorce, the issue of division of the matrimonial property was not dealt with. It seems, nothing was said about it at

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all and no claim was made regarding property. Accordingly, all the property remained in the possession of the defendant.

On 26 January 1996, the plaintiff issued summons, claiming both movable and immovable property from the defendant. She wants the matrimonial home to be sold so that she can have a share of the proceeds.

The movable property that she claims includes furniture, pictures, curtains, books, a fridge, pots, plates and electrical goods. In his pleadings, the defendant accepts that he was married to the plaintiff and they had children who are now majors. He says that the parties' divorce came about as a result of the plaintiff's conduct which led to her being caught red- handed when she committed adultery. He further submitted that because of the long delay in filing her claim the plaintiff should be held to have lost her entitlement to the claim on property.

At the hearing of the matter, the parties and the court felt that it was necessary to deal with the special plea filed by the defendant wherein he submits that:

1. The plaintiff's claim is bad in law, by reason that it is prescribed.

2. There has been an unreasonable delay in instituting the proceedings and plaintiff is accordingly barred.

In her submissions, the plaintiff says her claim is based on s 7(1) of the Matrimonial Causes Act [*Chapter 5:13*]. The section reads as follows:

> "7(1) Subject to this section, in granting a decree of divorce, judicial separation or nullity of marriage or at any time thereafter, an appropriate court may make an order with regard to:
>
> (a) the division, apportionment or distribution of the assets of the spouses, including an order that any asset be transferred from one spouse to another;
>
> (b) the payment of maintenance, whether by way of a lump sum or by way of periodical payments, in favour of one or other of the spouses or of any child of the marriage."

In *Madamombe* v *Madamombe* HH-138-92, Sandura JP, as he then was, held that the provisions of s 7(1) make it clear that the court may order a division of the matrimonial property at any time after the dissolution of the marriage, and that the Prescription Act does not apply.

Similarly, in *Masimirembwa NO & Anor* v *Chipembere* HH-22-95, Chatikobo J held that the phrase:

> "'or at any time thereafter' is precise and unambiguous. It means what it says, that is, a

> party can return to court at any time after divorce to seek an order of redistribution of the matrimonial assets."

The question that I have to determine in this case is whether the plaintiff should be barred from making her claim of the matrimonial property because of the delay in claiming it, or should she be allowed to do so. The difficult principle is whether the provisions of the Matrimonial Causes

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Act were intended to grant to one spouse an indefinite period by which such a claim can be made.

It appears to me that the intention was that where a party was for some reason unable to claim a share of the matrimonial property at the time of divorce, that party should be allowed to institute a claim even after the divorce has been granted.

For example, where one party gets a divorce order following service of summons by publication, where she can show that she did not see the publication, or where the other party was either disabled from claiming, or was misled on the correct position regarding the property or where the party is unaware that the property is part of matrimonial property. Such party should not be barred from making a claim after the divorce has been granted. I would also add here that such party would be expected to act as soon as possible after that party is able to do so.

There are different situations that are covered by the section. One situation is that which I have referred to above. The other is one where the parties agree on divorce but disagree on the dissolution of property, and on granting the decree of divorce, the court, with the parties consent, reserve the issue of property for trial.

The section would have been much more clearer if it had included at the end words to the effect,

> "and within a reasonable time."

I say this because my view is that parties who divorce are entitled to get to a stage where they want to start again and possibly settle down with new partners. If they remarry, a lot of changes follow concerning their property. Where the one spouse remains in possession of the other's property, such party should naturally expect that the owner may at any time claim it. The same applies in a situation where property was jointly owned. But where there is no such ownership, should a party who remains with property such as a house, refrigerator or a motor vehicle, expect that some years later, the other party may return and say "we used to own such property some years back when we were still married, and I have come to claim it back"?

Can the other party come back after 5, 10 or 20 years and make such a claim? In my view, there should be a time limit. It should be borne in mind that certain items of property cannot be owned permanently. For example,

should the party be sued for a car or a stove which is no longer available due to wear and tear, or which has since been disposed of by the other party who believed that his ownership of such property would never be challenged?

There should be a time limit. Since the Act does not provide any, it seems to me that the court should be at large to consider what is a reasonable time within which the party claiming should have made the claim.

In this case, the divorce was granted on 13 August 1987. The summons claiming a share of the

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matrimonial property was only issued on 26 January 1996, this is after a period of about 9 years. I am of the view that the delay on this case is too long. The plaintiff resides in Zimbabwe, as does the defendant. Even if she suggests that she was advised by the defendant's legal practitioner that the issue of property would be attended to after the divorce, it is clear that after the divorce she did not enforce her right to claim any property.

I find the delay to be too long and unreasonable in the circumstances and I consider that in such cases the court should decline to assist a party who seeks the courts' assistance after such a long delay. To do so would be to prejudice that party against whom property is being claimed, especially where some of the property has been disposed of, or where other parties have since acquired rights on the same property.

For these reasons, the special plea is upheld and the plaintiff's claim is dismissed with costs.

Cheda & Partners, plaintiff's legal practitioners

Webb, Low & Barry, defendant's legal practitioners

FIRST NATIONAL BANK OF NAMIBIA *v* KAURE 1999 (2) ZLR 269 (HC)

Citation	1999 (2) ZLR 269 (HC)
Case No	Judgment No. HH-209-99
Court	High Court, Harare
Judge	Gillespie J
Heard	October 20, 1999
Judgment	October 20, 1999
Annotations	None

Chamber application

Flynote

Practice and procedure - jurisdiction - application for order declaring property in another country to be specially executable - court has no jurisdiction to make such an order

Headnote

The applicant bank sued for judgment on a mortgage bond securing a loan for the purchase of property in Namibia. It also sought an order declaring the property to be specially executable.

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Held, that the courts of Zimbabwe have no jurisdiction to make such an order. It would be necessary for the applicant to seek from a court in Namibia recognition of the Zimbabwean court's decision. Judgment would otherwise be entered for the plaintiff.

Cases Considered

Cases cited:

Colonial Mutual Assurance Soc Ltd v *Tilsim Invstms (Pty) Ltd* 1952 (4) SA 134 (C)

Johnston v *Cohen* 1957 R&N 185; 1957 (2) SA 277 (SR)

Judgment

Gillespie J: The plaintiff is suing for judgment on a mortgage bond securing a loan for the purchase of property in Namibia. Part of its prayer is for an order declaring the property in Namibia specially executable. I do not consider that the court has jurisdiction to make such an order.

It might well be thought that the effect of such a declaration is merely to relieve a plaintiff of the obligation to excuss the movables of the defendant. Indeed, precisely this consideration caused the Cape Provincial Division to hold that a declaration of special executability is not an exercise of jurisdiction and may be made in respect of immovable property within the jurisdiction of another provincial division. 1(64)

This decision was criticised by Professor Kahn 2(65) and by Pollak. 3(66) It conflicted with decisions from other divisions holding the correct procedure to be to procure recognition of the decision in the *forum rei sitae* and the desired declaration from that court.

GILLESPIE J

The controversy, so far as it pertains to competing provincial jurisdictions within the Republic of South Africa, is academic because of subsequent legislation 4(67) extending the civil process of a provincial or local division to run throughout the Republic. If, however, a provincial division could make no such declaration in respect of property in another division within the same nation, how much the less can the court of one nation make such a declaration in respect of property in another country altogether.

So, at any rate, it appeared to Hathorn J in this jurisdiction. That learned judge commented quite clearly:

> "This court has no jurisdiction to command a sheriff in the Union of South Africa to do anything. Even if the reasoning of Hall J were applied, namely, that the order has merely the effect of excusing the plaintiff from first executing on the defendant's movable property, such an excusal can have no effect outside the jurisdiction of this court, nor can it confer on the plaintiff any greater rights in respect of the hypothecated property than the law of the country in which it is situated confers on her." 5(68)

I have no doubt that this is correct. It is true that an order, declaring immovable property to be specially executable, has the effect of negating the requirement to excuss against movables in

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execution. 6(69) This, however, does not justify a conclusion that the court of one country can or should make such a declaration in respect of property in another country. The court giving judgment depends for execution of its judgment upon the recognition of its judgment in the foreign country where the property is situated and upon the process of the court of that foreign country. Such recognition, however, does not give to the court pronouncing judgment any control over the process of the foreign court nor any power to direct its officers in their functions.

In the premises, the declaration sought will not be made. Judgment, nevertheless, is entered for the plaintiff as follows:

(a) in the sum of $5247.45 in the currency of Namibia together with interest at the rate of 23 *per centum per annum* on the daily balance compounded monthly, from 1 April 1999 and costs of suit;

(b) in the sum of $142175.35 in the currency of Namibia together with interest thereon at the rate of 19.75 *per centum per annum* in the daily balance compounded monthly, from 1 April 1997, and costs of suit on an attorney and client scale.

Honey & Blanckenberg, plaintiff's legal practitioners

SIVAKO *v* ATTORNEY-GENERAL 1999 (2) ZLR 271 (SC)

Citation	1999 (2) ZLR 271 (SC)
Case No	Judgment No. S-100-99
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA, Muchechetere JA
Heard	October 4, 1999
Judgment	October 25, 1999
Counsel	M Marondedze, for the applicant P Muziri, for the respondent
Annotations	None

Constitutional application

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(2) - right to fair trial - accomplice being called as witness - not warned he would be discharged from liability if he gave his evidence satisfactorily and that he could decline to answer questions which might tend to incriminate him - witness admitting to further crimes with which he was subsequently charged - effect to deprive witness of right to fair

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hearing

Criminal procedure - permanent stay of proceedings - application by defence lawyer on grounds of unreasonable delay in bringing matter for trial - lawyer making statement from bar and not calling applicant to testify - insufficient to establish unreasonable delay

Evidence - accomplice - prosecutor failing to inform court that witness to be treated as unconvicted accomplice - witness not warned he would be discharged from liability if he gave his evidence satisfactorily and that he could decline to answer questions which might tend to incriminate him - contrary to interests of justice for him not be discharged - witness admitting to further crimes with which he was subsequently charged - effect to deprive witness of right to fair hearing contrary to s 18(2) of Constitution

Headnote

A person was charged in the regional court with the theft of eighteen head of cattle. The applicant was called as a witness. When the applicant gave evidence, he was awaiting trial on three charges relating to the same 18 cattle. The first charge was that he had acquired them without having reasonable cause to believe that the person from whom he was acquiring them had authority to dispose of them. The second was that he unlawfully moved them without the required movement permit. The third was that he had unlawfully failed to keep a register as required by legislation.

The prosecutor did not inform the trial magistrate that the applicant was to be treated as an unconvicted accomplice, since the main charge pending against him was a cognate crime, namely, that he had unlawfully acquired the cattle. Consequently, the regional magistrate disregarded the provisions of s 267(2) of the Criminal Procedure and Evidence Act

[*Chapter 9:07*]. He did not tell the applicant that he would be discharged from all liability for prosecution for the offence with which he had been charged provided that he fully answered all lawful questions put to him to the satisfaction of the court. Moreover, as the magistrate was not aware of the additional charges pending against the applicant, the magistrate did not apprise him of his right to decline to answer any question which might have a tendency to incriminate him in the commission of an offence.

In his evidence, the applicant admitted his involvement in the theft of the cattle and in other crimes with which he was later charged. Although the magistrate had become aware that he was an accomplice, he did not discharge him from liability for prosecution although he had given his evidence satisfactorily.

When later the applicant was charged with offences arising out of his dealing with the cattle, the defence lawyer applied for a permanent stay of proceedings on two grounds both based upon s 18(2) of the Constitution. The first was that that there had been an unreasonable delay in bringing the matter for trial. The second was that the applicant would be deprived of his right to a fair hearing if he was now to be tried for these offences. The magistrate referred these issues to the Supreme Court.

As regards the contention that there had been an unreasonable delay:

Held, that the cause of the long delay was as much the fault of the defence as the State. What

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was, however, fatal to this contention was that the applicant's legal practitioner had simply made a statement from the bar on the matter. This was totally insufficient. The applicant should have been called to testify to the extent to which, if at all, the cause of the delay was his responsibility; to whether he had asserted his right to be tried within a reasonable time; and even more importantly, to whether any actual prejudice had been suffered as a result of the delay.

As regards the contention it would be unfair to try the applicant on the basis of the evidence elicited from him as an accomplice:

Held, that as regards the first charge, this was a cognate charge to that of theft of the cattle. The applicant had satisfied the criteria for him to be granted a discharge from liability. The applicant was an accomplice witness who was testifying for the prosecution, the prosecutor knew that applicant was an accomplice to the theft and the applicant had answered the questions fully, including questions of an incriminatory nature, and to the satisfaction of the court. It would therefore be contrary to the interests of justice for the State to proceed against him. To permit it to do so would offend against his right to a fair hearing.

Held, further, as regards the other two charges, as the thief was not being charged with these offences, the applicant was not an accomplice witness with respect to the incriminating evidence he gave concerning these offences.

Held, further, that what is demanded by s 18(2) of the Constitution is that an accused is given a fair hearing. Ultimately, fairness is an issue that has to be decided objectively on the facts of each case. A value judgment must be exercised. However, it must not be assumed that a breach of the common law and the statutory right against self-incrimination will invariably render the evidence inadmissible against the accused in subsequent proceedings. This is exemplified where an accused has incriminated himself in evidence given in a bail application.

Held, further, that, in the present case, as the applicant had not been warned of his right to decline to answer questions which might incriminate him in other offences, it would be unfair and in contravention of s 18(2) of the Constitution to use such evidence against him in a subsequent trial for those offences. The applicant was ignorant of his rights and the incriminatory evidence was elicited from an unwary and ignorant person who was not trying to derive any benefit for himself in giving this testimony. Consequently, such

evidence should be excluded. This did not mean that the State was not entitled to bring the applicant to trial on these charges; only that when doing so it may not use the evidence given by him in testifying against the thief.

Statutes Considered

Legislation considered:

Constitution of Zimbabwe 1980, s 18(2)

Cases Considered

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Cases cited:

Krause v *AG* 1925 SWA 108

Magmoed v *Janse van Rensburg & Ors* 1993 (1) SA 777 (A)

S v *Amies* 1998 (1) SACR 343 (C)

S v *Banga* 1995 (2) ZLR 297 (S)

S v *Botha & Ors* (2) 1995 (2) SACR 605 (W)

S v *Chavulla en Andere* 1999 (1) SACR 39 (C)

S v *Cloete & Anor* 1999 (2) SACR 137 (C)

S v *Dhlamini & Ors* 1999 (7) BCLR 771 (CC)

R v *Isaac* (1898) 8 HCG 226

S v *Jiri* S-21-99

S v *Lwane* 1966 (2) SA 433 (A)

R v *Ndabeni* 1959 (2) SA 630 (E)

S v *Nomzaza* 1996 (2) SACR 14 (A)

S v *Venter* 1996 (1) SA 664 (A)

R v *Vice* (1882) 2 EDC 358

Case Information

M Marondedze, for the applicant

P Muziri, for the respondent

Judgment

Gubbay CJ: The applicant was arrested on 22 March 1994 and two days later was formally charged with the commission of three offences. The first was a contravention of s 5(1) of the Stock Theft Act [*Chapter 9:18*], it being alleged that on 11 March 1994 and at Devon Farm, Somabhula, he unlawfully and intentionally acquired from Themba Manyathela, Peter Mathe, Pearson Sibanda and Victor Ncube, or one or more of them, eighteen head of cattle, the property of Sydney Campbell Shaw, without reasonable cause for believing at the time of acquiring such stock that it was the property of the person or persons from whom he acquired it, or that such person or persons were duly authorised by the owner of the stock to deal with or dispose of it. The second charge concerned a contravention of s 3(1)(h) of the Animal Health (Movement of Cattle and Pigs) Regulations 1984, SI 280 of 1984, in that on the same date he unlawfully moved, or caused to be moved, the said stock from Devon Farm, Somabhula, to Stonecroft Farm, Bulawayo, without a cattle movement permit. Thirdly, it was averred that on

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the same date and at Stonecroft Farm, being a butcher, he had unlawfully failed to keep or maintain a register, in contravention of s 7(5)(a) of the Stock Theft Act.

After arrest, the applicant was remanded for trial on several occasions.

GUBBAY CJ

Eventually, the trial was set down for hearing in the regional magistrates court on 23 May 1995.

On 18 January 1995, the trial of Victor Ncube, on a charge of having stolen the eighteen head of cattle on 11 March 1994 from Devon Farm, Somabhula, commenced before a regional magistrate. He pleaded not guilty. Amongst the witnesses called by the State was the applicant. He was preceded to the witness stand by Pearson Sibanda and Peter Mathe. The prosecutor advised the regional magistrate that both were accomplices who had been convicted and sentenced for the theft of the eighteen head of cattle.

The applicant testified on 24 January 1995. The prosecutor, however, did not inform the regional magistrate that the applicant was to be treated as an unconvicted accomplice, since the main charge pending against him was that of having unlawfully acquired the stolen eighteen head of cattle. Consequently, the regional magistrate disregarded the provisions of s 267(2) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] ("the Code"). He did not tell the applicant that provided he fully answered to the satisfaction of the court all such lawful questions as were put to him, he would be discharged from all liability to prosecution for the offence concerned. Moreover, not being aware of the additional charges facing the applicant, the regional magistrate did not apprise him of the right to decline to answer any question which might have a tendency to incriminate him in the commission of an offence.

In evidence, the applicant recounted in detail the circumstances in which he acquired the eighteen head of cattle. He explained that he provided a motor vehicle and a driver in order for Ncube to transport the cattle, said to belong to the latter's uncle, from Somabhula to Bulawayo. The cattle arrived at Stonecroft Farm, in his absence, early the following morning. He viewed them later that day and discussed the purchase price with Ncube. It was settled at $22400 and paid for in cash. A receipt was obtained from Ncube. This was tendered to the court as an exhibit. The applicant went on to say that he was not shown a cattle movement permit by Ncube before purchasing the cattle (or thereafter), but the sale was recorded in his register of cattle transactions. At the instance of the prosecutor the relevant page from the register was produced as an exhibit. Although dated and signed by Ncube, the entry omitted to reflect the particulars of the stock purchased for slaughter.

After the trial had been adjourned on three occasions, the regional magistrate delivered judgment on 7 July 1995. He found Ncube guilty as charged and sentenced him to undergo six years' imprisonment with labour, of which period one year was suspended for five years on appropriate conditions. Of the applicant, he said this:

> "(He) may be taken as a potential accomplice insofar as he does not seem to have ensured that the cattle he was buying were not stolen by ensuring he saw the cattle permit. I say so

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GUBBAY CJ

> principally because both the accused and himself confirmed that they knew how cattle were supposed to be bought and translocated in that a permit was central. But in his evidence he did confirm that he did not in fact see the permit in question other than accept a story from the accused."

There can be no doubt that the regional magistrate was satisfied that the applicant had answered fully all questions put to him. His judgment reveals that reliance was placed on the credible evidence of the applicant as corroborating the accounts of the two convicted accomplices. Nonetheless, no entry was made on the record of the proceedings that the applicant was to be discharged from all liability to prosecution for the offence of stock theft involving the eighteen head of cattle stolen from Mr Shaw.

On 22 May 1995, the legal practitioner engaged by the applicant to defend him requested a postponement of the trial set down for the next day. This was agreed to and the applicant was remanded to 26 September 1995, when the charges were withdrawn before plea. The applicant was told that he would be summoned on the same charges at a later date.

A summons to appear before the regional magistrates court at Gweru on 4 December 1996 was issued against the applicant. On that day, neither he nor the State witnesses were present. It is likely that the service of the process was at fault. The trial was then reset for 6 March 1997, but the State encountered difficulty in arranging for the conveyance of the applicant from Khami Prison, Bulawayo, where he was incarcerated. Finally, the applicant was transferred to Hwahwa Prison and was summoned to appear for trial on 16 November 1998. At that stage he was represented by a different legal practitioner, who was granted a postponement on the ground of inadequate time to prepare the defence. The date of the trial was moved to 3 February 1999.

On the day of the hearing, the legal practitioner, without any advance notice to the prosecutor, sought a permanent stay of the proceedings against the applicant. He ought not to have been permitted to raise the issue in the absence of ample written notice. See *S* v *Banga* 1995 (2) ZLR 297 (S) at 302B. Nonetheless, the regional magistrate heard the submission. Two grounds were raised, both based on an alleged contravention of s 18(2) of the Constitution of Zimbabwe. The first was that the applicant had not been afforded a hearing of the case *within a reasonable time*; the second, that since the applicant had testified as a State witness at the trial of Ncube, to try him subsequently on the three charges would be to deprive him of the right to *a fair hearing*. The prosecutor was allowed a two day adjournment in order to investigate and reply to the complaints. At the resumption, and after hearing the prosecutor's opposition to the application, the regional magistrate, invoking s 24(2) of the Constitution, referred both questions to this court.

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The question as to whether the applicant has not been afforded a hearing of the case within a reasonable time may be disposed of shortly against him. The facts appear to indicate that the cause of the long delay was as much the fault of the defence as the State. There were also

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systemic problems. Quite acceptably, the trials of three of the thieves were disposed of first; and then there was the difficult matter of the applicant's conveyance from Khami Prison. But what is fatal to the contention of unreasonable delay is that it was totally insufficient for the legal practitioner to make a statement to the regional magistrate from the bar without calling the applicant to testify to the extent to which, if at all, the cause of the delay was his responsibility; to whether at any time before 3 February 1999 he had asserted his right to be tried within a reasonable time; and even more importantly, to whether any actual prejudice had been suffered as a result of the delay. See *S* v *Banga supra at* 300G-301A; *S* v *Jiri* S-21-99 (not reported).

The referral of the second question concerning the deprivation of a fair hearing is far more meaningful. It falls, so it seems to me, into two separate parts. The first, which I now turn to, is the effect of the omission to grant the applicant, who was an accomplice witness at the trial of Ncube, a discharge from all liability to prosecution in respect of the theft of the eighteen head of cattle.

The indemnity conferred by s 267(2) of the Code upon an accomplice (whether as principal or accessory) in the offence alleged in the charge giving evidence for the prosecution, corresponds in its requirements with s 254 of the former South African Criminal Procedure Act 56 of 1955. The consequence of non-compliance with this latter provision came under close scrutiny in *R* v *Ndabeni* 1959 (2) SA 630 (E). The facts were that one Qina was charged with the theft of a sheep. He was convicted and sentenced to six months' imprisonment. For the Crown evidence was given by Ndabeni and his wife. Later that day Ndabeni was charged with stock theft in respect of the same sheep. He pleaded guilty to receiving stolen stock well knowing it to be stolen. He was found guilty and sentenced to a fine. When the case came before a judge on review, he enquired from the trial magistrate why s 254 had not be applied. The reply received was that no application had been made by the prosecutor or by Ndabeni himself. In setting aside the conviction and sentence Wynne J, with whom O'Hagan J concurred, said at 639D-F:

> "A person who is an accomplice cannot give evidence for the Crown as a result whereof he renders himself liable to conviction on the major charge preferred against the accused or in respect of any alternative charge comprehended within such major charge (i.e. as principal or accessory in the commission of the offence alleged against the accused) without becoming entitled (provided his evidence is fully and satisfactorily given) to the indemnity contemplated by s 254(1) unless he has already been convicted on such major or implied alternative charge. When such evidence would render the Crown witness liable

> to convictions on a different charge, i.e. one falling entirely outside the ambit of the major charge against the accused and its implied alternatives, such a witness is entitled to claim privilege and refuse to incriminate himself, unless specially indemnified by the prosecution or unless his privilege against self-incrimination has been expressly taken away from him by statute."

I respectfully agree with these observations which are supported by the earlier decisions of *R* v *Vice* (1882) 2 EDC 358 at 359-360 and *R* v *Isaac* (1898) 8 HCG 226. In the last cited case, one Jacob had been charged with and convicted of the theft of a sheep. The principal evidence against him was that of his brother Isaac, who had assisted in the disposal of the stolen beast. Thereafter, Isaac was charged with and convicted of the same theft. In quashing the conviction,

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Laurence JP said at 227:

> "... there is the broad point that the prisoner had been previously accepted as a witness for the Crown against his brother, and had given evidence both incriminating himself and also leading to the conviction of the principal offender. After this had taken place, to proceed against Isaac for the same crime was, as it seems to me, *contrary to natural justice* and also, as was expressly decided in the Eastern Districts Court by the case of *R* v *Vice* 2 EDC 358, contrary to the provisions of s 10 of Ord. 72 of 1830. The result is that, while the conviction of Jacob will be sustained, that of Isaac must be quashed."

The case of *Krause* v *Attorney-General* 1925 SWA 108 is readily distinguishable, for there the statutory offence with which Krause was charged fell outside the ambit of the theft of twelve hides about which he testified at the trial of one Fourie. Accordingly, Krause was neither an accomplice nor technically was he an accessory in the crime. When called as a witness there was nothing to indicate that the prosecutor was aware that Krause was liable to prosecution for theft or for the statutory offence of which he was subsequently convicted.

I find that the four criteria necessary for the grant of the discharge of the applicant from liability on a charge of theft of the eighteen head of cattle or the cognate offence of contravening s 5(1) of the Stock Theft Act, were present. They are:

(a) knowledge by the prosecutor of the applicant's complicity in the theft of the cattle; (after all, he was facing a charge of acquiring the stock without reasonable cause for believing that it was not stolen);

(b) the production of the applicant as an accomplice witness for the prosecution;

(c) the applicant's submission to be sworn; and

(d) his answering fully and to the satisfaction of the court all lawful questions put to him.

In my view, it is wholly undesirable and contrary to natural justice and to the best interests of the administration of justice, that the State should either deliberately, negligently or even without definite knowledge make use of a

witness and then, after that witness, through ignorance of the law, has fully answered questions of an incriminatory nature, take steps to prosecute him or her for the same or a cognate offence. The adoption of such a practice does not accord with the high judicial traditions of this country and the vital interest of society that a hearing should be fair. That this tradition of fairness must be extended to an accused person before commencement of trial is axiomatic.

In the result, I am entirely satisfied that the State must be prevented from proceeding with the first charge laid against the applicant; to permit it to do so will offend against his right to a fair hearing in respect thereto.

The position with regard to the second and third charges presently facing the applicant is somewhat different since Ncube was not prosecuted with such offences at his trial. The applicant is not therefore to be regarded as an accomplice witness with respect to the

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self-incriminating evidence he gave concerning the two offences.

Again, it admits of no doubt that the applicant was ignorant of his rights. Having been subpoenaed or warned to appear as a State witness at the trial of Ncube, he certainly would have assumed that he had no option but to answer all lawful questions put to him.

At the outset what has to be considered is whether the regional magistrate ought to have apprised the applicant that he was not obliged to answer any question put to him if the answer tended to expose him to a criminal charge. This privilege is afforded a witness by s 297 of the Code which, the inapposite proviso apart, reads:

> "No witness in any criminal proceedings shall, except as provided by this Act or any other enactment, be compelled to answer any question which, if he were under examination in any similar case depending in the Supreme Court of Judicature in England, he would not be compelled to answer by reason that his answer might have a tendency to expose him to any pains, penalty, punishment, forfeiture or to a criminal charge or to degrade his character."

It is now a well settled rule of practice both in this jurisdiction and in South Africa that a judicial officer has a duty to warn a witness in criminal proceedings of his right to refuse to answer a question that may tend to incriminate him. The responsibility arises whenever it appears that the witness might well be about to give such evidence, whether or not a specific question has been directed thereto. See S v *Lwane* 1966 (2) SA 433 (A) at 439F-440H; *Magmoed* v *Janse van Rensburg & Ors* 1993 (1) SA 777 (A) at 820H-I; *S* v *Botha & Ors (2)* 1995 (2) SACR 605 (W) at 609f-g; *S* v *Nomzaza* 1996 (2) SACR 14 (A) at 19g-h. And a prosecutor has a complementary duty to make some prior intimation to the court of an intention to put questions to a witness likely to elicit incriminating answers.

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But given the absence of judicial warning, is incriminating evidence admissible on the prosecution of the witness? This was answered in *S* v *Lwane supra* by Ogilvie Thompson JA at 440 *in fine* - 441A in these words:

> "The effect of non-observance of that rule upon the admissibility in subsequent proceedings of an incriminating statement made by an uncautioned witness falls, in my judgment, to be determined upon the particular facts of the case. In any such enquiry, the nature of the incriminating statement and the ascertained, or presumed, knowledge of his rights by the deponent will always be important factors."

In a separate concurring judgment, Holmes JA put the matter slightly differently at 444F in saying:

> "Non-observance of the aforesaid duty is an irregularity which ordinarily will render the incriminating evidence inadmissible in a prosecution against the witness."

The pertinent point here is not so much whether the regional magistrate committed an irregularity; rather it is whether the applicant will have a fair hearing if the uncautioned incriminating evidence he gave at the trial of Ncube, and the documents he produced, are admitted in evidence. Expressed differently, if the admission of such evidence would render the hearing unfair, then the trial court ought to exclude it. See *S* v *Dhlamini & Ors* 1999 (7) BCLR

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771 (CC) at 819 C-D.

What is demanded by s 18(2) of the Constitution is that an accused is given a fair hearing. Ultimately, fairness is an issue that has to be decided objectively upon the facts of each case. A value judgment must be exercised. Yet it must not be assumed that a breach of the common law and statutory right against self-incrimination will invariably render the evidence inadmissible against the accused in subsequent proceedings. This is exemplified where an accused has incriminated himself in evidence given in an application for bail. See *S* v *Venter* 1996 (1) SA 664 (A) at 667g-h; *S* v *Amies* 1998 (1) SACR 343 (C) at 349e-f; *S* v *Chavulla en Andere* 1999 (1) SACR 39 (C) at 46c; *S* v *Cloete & Anor* 1999 (2) SACR 137 (C) at 145i-146c; *S* v *Dhamini & Ors supra* at 819B-C.

Plainly, the incriminatory evidence elicited by the prosecutor from the unwary and ignorant applicant relating to the cattle movement permit and the entry made by him in the stock register was such as to effectively convict him out of his own mouth. Mindful of the fact that, unlike bail testimony, the applicant was not seeking to derive any benefit for himself, I am of the opinion that such incriminating evidence must be excluded at the trial. Its admission will deprive the applicant of a fair hearing in respect of the second and third charges. This does not mean, however, that the State is not entitled to bring the applicant to trial on these charges; only that when doing so it may not make use of the evidence given by him at the trial of Ncube.

The following order will issue:

GUBBAY CJ

" 1. In the matter of the *S* v *Sivako*, Gweru Rural CR 90/03 and 50-1/10/94,

(a) the proceedings in respect of the first charge are permanently stayed;

(b) the evidence given by the applicant at the trial of the *S* v *Ncube*, Gweru Regional Case No. 11/95, may not be used against him in proof of the commission of the second and third charges.

2. The Attorney-General is to pay the costs of this application."

McNally JA: I agree.

Muchechetere JA: I agree.

*Sibusiso Ndlovu, ap*plicant's legal practitioners

HINGESTON *v* LIGHTFOOT 1999 (2) ZLR 281 (HC)

Citation 1999 (2) ZLR 281(HC)

Case No Judgment No. HH-218-99

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Court	High Court, Harare
Judge	Smith J
Heard	October 26, 1999
Judgment	October 26, 1999
Counsel	Miss W T Miles, for the applicant Mrs J B Wood, for the respondent
Annotations	None

Civil application

Flynote

Family law - divorce - maintenance - of children - consent paper in which father agreed to pay for "ongoing education" of children - consent paper - interpretation of - to be construed as requiring him to pay for tertiary education - not necessary for court to directly specifically that maintenance should extend beyond age of 18 years

Headnote

In the consent paper agreed to following their divorce, the parties agreed that the husband would be responsible for the costs of the "ongoing education" of the 3 children of the marriage. The husband refused to pay the costs of the children's university education, arguing that his obligation to pay for their education ceased when they reached the age of 18 years, unless the court, acting in terms of s 8(3) of the Matrimonial Causes Act [*Chapter 5:13*], directed specifically that the obligation to pay maintenance extended beyond the age of 18 years.

Held, that it was not necessary for the court to make such a specific direction, if the consent paper clearly implied that education costs would continue to be payable after the child attained the age of 18 years. In interpreting the consent paper, the court should have regard to the context, the background circumstances, and extrinsic evidence of previous negotiations and correspondence and subsequent conduct of the parties.

Held, further, that there were sufficient indications in the consent paper that the parties intended that the husband would pay for educational costs after the children reached the age of 18, though not indefinitely.

Held, further, that in respect of payments made by the wife more than three years previously, these were prescribed. They were not judgment debts, as each particular expense became a debt due by the husband when it was actually incurred.

Cases Considered

Cases cited:

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

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Kanis v *Kanis* 1974 (1) RLR 129 (A)

Lindsay v *Lindsay* 1993 (1) ZLR 195 (S)

Statutes Considered

Legislation considered:

Matrimonial Causes Act [*Chapter 5:13*], s 8

Case Information

Miss *W T Miles*, for the applicant

Mrs *J B Wood*, for the respondent

Judgment

Smith J: The applicant and the respondent were married to each other. Their marriage took place on 11 January 1969. They were divorced on 13 February 1992. There were three children born of the marriage, namely, Kirsten who was born on 10 October 1973, Shaun who was born on 4 April 1976 and Kathleen who was born on 15 September 1980. At the time of the divorce, Kirsten was a major and Shaun and Kathleen were minors. The consent paper, which was made part of the divorce order, contained the following provisions in relation to the children and maintenance. The applicant was to have custody of the two minor children and, to the extent that it was necessary or appropriate, the major child. The respondent agreed that he would be "solely responsible for all costs incurred in the ongoing education of all of the children, together with costs of their uniforms, private clothing, shoes, sports equipment, stationery and such other items as any of them may in the (applicant's) opinion reasonably require in accordance with the standard of living that each of them has enjoyed to the date of these presents". The respondent agreed that he would pay the applicant maintenance for herself until her death or remarriage at the rate of $1000 per month. There was no requirement that the respondent make any payment for the maintenance of the children of the marriage, other than the costs of their ongoing education.

The applicant, on 29 April 1999, filed this application claiming payment of $531725.30, with interest thereon at the prescribed rate from 9 December 1998. The applicant, in her founding affidavit, alleged as follows. The respondent paid secondary school fees for Kathleen and pocket money of $400 a month in 1998 but has refused to pay any of the subsidiary expenses or tertiary education expenses for Kathleen. Additionally, he has not paid all the university expenses in respect of Shaun. The applicant's claim for expenses she had met, but which she feels the respondent should have paid, fall into various categories. During 1996, 1997 and 1998, she spent $57645.43 towards Kathleen's secondary education. In 1999, Kathleen started her university education at Rhodes University and the applicant has spent $190084.80 towards that education. Shaun attended Rhodes University for 4 years and then moved to the University of Cape Town in 1999. During the years 1996, 1997, 1998, she expended $140770.05 in respect of his university education and in January 1999 she spent a further $143224.92 on

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expenses for his university course. The applicant filed, with her founding affidavit, schedules setting out the payments she had made in respect of Kathleen and Shaun in the 4 years from 1996 to 1999.

In her founding affidavit, the applicant makes the following allegations. At the time of the divorce, it was the parties' intention that the respondent would be liable for all expenses relating to the children's secondary and tertiary

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education. She rejected the first draft of the consent paper that had been prepared by the respondent's legal practitioner, because it had provided that the respondent would maintain the three minor children and bear all costs of their education, clothing and housing. That clause was altered and she and the respondent agreed to the term "ongoing education" as it covered any range of post-secondary education, whereas specifying university education would not. At the time that the consent paper was being drawn up Kirsten was in her final year at school and had registered with three universities in South Africa. When the consent paper was signed, Kirsten had already started her university course. The applicant pointed out that the respondent paid the university fees for Kirsten without quibble from 1992 to 1995 and the university tuition and residence fees for Shaun in 1995, 1996 and 1997, but only the tuition fees for 1998.

The respondent opposes the application. In his opposing affidavit, he made the following responses to points made in the founding affidavit. He is not obliged to pay for the tertiary education of the children. He is willing to pay the tuition and boarding fees and normal medical expenses for Kathleen for a period of three years. He does not admit the payments claimed and, in any event, they were incurred without his knowledge and consent. Some of the claims are prescribed. Some of the claims are for payments which are not due by him, for instance the cost of trips made by the applicant from Triangle to Bulawayo where Kathleen was at school. Shaun obtained his degree, a Bachelor of Human Movement Studies, in 1997 and whilst the respondent has paid for Shaun's tertiary education from 1995 to 1998, he is not prepared to pay for his course at the University of Cape Town in 1999. In 1995, he told the applicant that he would not be responsible for any expenditure on behalf of their children unless it had his prior approval. He also told her that he would not be able to support Shaun if he embarked on a second university degree course, because he wanted to be in a position to be able to pay for Kathleen's university expenses. He is not liable to pay the tertiary education fees of the children in view of the provisions of s 8(2) of the Matrimonial Causes Act [*Chapter 5:13*] (hereinafter referred to as "Chapter 5:13"). Kirsten was not a minor when the consent paper was drawn up. It was never his intention, when he prepared or signed the consent paper, to be bound to pay all tertiary education fees for the children. When he agreed to pay for the ongoing education, he intended that to mean the education the children were currently undergoing, namely secondary education. He had paid Kirsten's university expenses and also Shaun's, for the period 1995 to 1998, but that was because he wanted to do so and not because he was required to do so in terms of the consent paper.

Miss *Miles* argued that the respondent's admitted failure to pay the

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educational expenses of Shaun and Kathleen constituted a breach of his obligations in terms of the consent paper. The relevant provision in the consent paper should be given its "grammatical and ordinary meaning unless this would result in some absurdity or some inconsistency with the rest of the instrument". See *Coopers & Lybrand & Ors* v *Bryant* 1995 (3) SA 761 (A) at 767. The wording of the consent paper was deliberately changed in order to include post-secondary education. The respondent, by his conduct in paying all the university expenses for Kirsten and the university expenses for Shaun for the four years from 1995 to 1998, has compromised his right now to dispute the provisions of the consent paper. The applicant's claims are made pursuant to an order of court and therefore amount to a judgment debt in terms of s 15 of the Prescription Act [*Chapter 8:11*], for which the period of prescription is 30 years.

Mrs *Woods* argued that, in terms of subs (2) of s 8 of Chapter 5:13, the obligation to pay maintenance ceased when each child attained the age of 18 years. Although the court could, in terms of subs (3) of s 8, have directed that the order extend after each child attained majority, the direction would have to be specific. There is no such specific direction in the consent paper. It refers to the "ongoing education" of the children, which means the education that was going on at the time, which was schooling. By paying some of the expenses in 1996 and 1997 and failing to claim them expeditiously, the applicant was prepared to depart from the terms of the consent paper and cannot now complain. See *Kanis* v *Kanis* 1974 (1) RLR 129. In any event, some of the claims are now prescribed. The debts did not become due and payable in terms of the divorce order. They had not even been incurred at the date of the order. They arose when the expenses were incurred. The applicant has not proved that the expenses were in fact incurred, still less their reasonableness, nor has she shown that they are within the respondent's means. See *Lindsay* v *Lindsay* 1993 (1) ZLR 195 (S).

The dispute between the parties has a very narrow scope - the application of the provisions of s (2) and (3) of Chapter 5:13 to the undertaking by the respondent in the consent paper. Section 8 of Chapter 5:13 reads as follows:

" **8. Duration of maintenance orders**

(1) An order for the periodic payment of maintenance in respect of a spouse shall cease -

(a) when the spouse dies or remarries; or

(b) if the order was made pursuant to a decree of judicial separation, when that decree is set aside or if a decree of divorce is granted.

(2) Subject to subsection (3), an order for the periodic payment of maintenance in respect of a child shall cease -

(a) when the child dies or marries; or

(b) when the child is adopted; or

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(c) when the child attains the age of eighteen years; or

(d) when the child becomes self-supporting;

whichever occurs the earlier.

(3) An appropriate court may direct that the maintenance order referred to in subsection (2) shall extend beyond the date when the child attains the age of eighteen years -

(a) if the child is or will be receiving education or training beyond attaining that age; or

(b) if there are special circumstances which justify such direction."

Accordingly, the order that the respondent pay the ongoing education costs of each of the children ceased when each child attained the age of 18 years unless the divorce order granted by the court has directed that the maintenance order shall extend beyond the date the child attains that age. Must such a direction be specific? I do not think that the legislature could have intended that the court would have to state, specifically, that the maintenance would be payable even after the child concerned attains the age of 18 years. In the majority of divorce cases which come before the High Court, the court does not make an order in which the details of the maintenance payable is actually spelt out. In most cases the court order merely provides, *inter alia*, that the questions of custody and maintenance for the children of the marriage shall be in terms of the consent paper filed of record. That was what the divorce order granted by Sandura JP on 13 May 1992 stated. I consider that if the consent paper or the court order clearly implies that education costs will continue to be payable after the child attains the age of 18 years, then the requirements of subs (3) of s 8 of Chapter 5:13 would be satisfied. Therefore, if, for example, the consent paper or court order specifies that one of the parties will pay for the tertiary or university education of a child, that would be a sufficiently clear indication that the court has indicated that the maintenance order shall be extended beyond the date the child attains the age of 18 years.

In *Coopers & Lybrand supra* at 768A-E, Joubert JA said:

"The correct approach to the application of the 'golden rule' of interpretation, after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

(1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract, as stated by Rumpff CJ *supra;*

(2) to the background circumstances which explain the genesis and purpose of the contract, ie to matters probably present to the minds of the parties when they contracted. *Dalmas Milling Co Ltd* v *Du Plessis* 1955 (3) SA 447 (A) at 454G-H; *Van Rensburg en Andere* v *Taute en Andere* 1975 (1) SA 279 (A) at 305C-E; *Swart's* case *supra* at 200E-201A and 202C; *Shoprite Checkers Ltd* v *Blue Route Property Managers (Pty) Ltd & Ors* 1994 (2) SA 172 (C) at 180I-J;

(3) to apply extrinsic evidence regarding the surrounding circumstances when the

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> language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions. *Delmas Milling* case at 455A-C, *Van Rensburg's* case at 303A-C, *Swart's* case at 201B, *Total South Africa (Pty) Ltd* v *Bekker NO* 1992 (1) SA 617 (A) at 624G, *Pritchard Properties (Pty) Ltd* v *Koulis* 1986 (2) SA 1 (A) at 10C-D."

I intend to follow that approach in this case.

In this case there are, in my opinion, sufficient clear indications in the consent paper that the parties intended that the respondent would pay for the education costs of the children after they attained the age of 18 years and therefore that the court directed that the maintenance order extended beyond the date each child attained his or her majority. Kirsten had attained the age of 18 years and was enrolled at a university when the divorce order was granted on 13 May 1992, therefore clearly her university education was part of her "ongoing education". At that date, Shaun was still at secondary school and Kathleen was at primary school. I do not think it could be said that, because they were not attending university at the time, the parties intended that it was only the costs of attending school that would be covered by the consent paper. If it was contemplated and agreed that the respondent would be liable to pay the costs of a university education for Kirsten as part of her ongoing education, why should the same not apply in relation to Shaun and Kathleen? Where a child, after finishing school, goes on to attend a university, technikon, college or other tertiary education institution, surely that is part of its ongoing education? If the respondent could not afford to pay the costs of university education or the circumstances of the parties changed, he could have applied, in terms of clause 7.1 of the consent paper, for a variation of the terms thereof.

Having concluded that the respondent is liable to meet the university costs of the children, does it mean that he has to pay the costs of Shaun's university course at the University of Cape Town this year? I do not think so. The provision in the consent paper must be given a reasonable interpretation. It should not be construed as meaning that, as long as the child wants to stay at university, the respondent has to foot the bill. That would be unreasonable. If, for example, one of the children had wanted to become a doctor and spent 7 years at university and then decided that he or she would rather be a lawyer and embarked on a 6 year BA, BComm, LLB course, the respondent would not be expected to continue paying for the additional university costs. It seems to me that the costs of the degree course at the University of Cape Town fall into the unreasonable category.

Having concluded that the respondent is obliged to pay for the university education of Shaun up until the end of 1998 and that of Kathleen, what about

the claims made by the applicant? I consider that she is not entitled to the full amount she has claimed.

Firstly, some of her claims in respect of the years when Kathleen was attending secondary school cannot be accepted. Those that were incurred more than three years before the

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applicant instituted these proceedings have been prescribed. They cannot, in my opinion, be regarded as "judgment debts" for the purposes of s 15(a)(ii) of the Prescription Act [*Chapter 8:11*]. The actual school fees and associated expenses paid by the applicant are clearly required, in terms of the consent paper, to be paid by the respondent. However, that does not mean that the obligation of the respondent to pay any particular expense arose out of the divorce order and became a debt when the divorce order was granted. Each particular expense became a debt due by the respondent when it was actually incurred. Therefore, the respondent's obligation to reimburse the applicant for the education costs that she paid arose when she actually paid the costs concerned. If she paid them more than 3 years before this action was instituted, then they have become prescribed in terms of s 15(d) of the Prescription Act [*Chapter 8:11*].

Secondly, there are some claims by the applicant which do not constitute "costs incurred in the on goingeducation of the children". School fees, uniforms, clothes and shoes are clearly included, but I do not consider that fuel for trips by the applicant from Triangle to Bulawayo would be included. Expenses incurred by a child in going to or from school or university could be included, but not the costs of travelling by the applicant. Furthermore, I consider that medical and dental expenses cannot be regarded as costs incurred in the education of the children.

It is not possible for the court to go through each of the expenses claimed by the applicant and decide which should, and which should not, be allowed. It is hoped that the parties will be able to reach agreement thereon in the light of the indications given above. As neither party has been completely successful in this case, I consider that each should bear his or her costs. Therefore there will be no order in relation to costs.

The application is dismissed.

oghlan, Welsh & Guest, applicant's legal practitioners

Byron Venturas & Partners, respondent's legal practitioners

CABS *v* CHIRIMUTA 1999 (2) ZLR 288 (HC)

Citation	1999 (2) ZLR 288 (HC)
Case No	Judgment No. HH-215-99
Court	High Court, Harare
Judge	Gillespie J
Heard	October 27, 1999
Judgment	October 27, 1999
Annotations	None

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Chamber application

Flynote

Practice and procedure - summons - what may be claimed - claim for costs and collection commission - uncontested claim for trade debt - only collection commission may be claimed - trade debt - what constitutes - does not include monies payable under mortgage bond

Headnote

A building society foreclosed on a loan it made under a mortgage bond. It claimed judgment for the outstanding balance, costs and collection commission.

Held, that collection commission is claimable by a legal practitioner from his client on an uncontested claim for a trade debt. This commission is recoverable from the judgment debtor where, in terms of a prior agreement, the judgment debtor has obliged himself to indemnify the creditor for such expenses.

Held, that collection commission is chargeable by a legal practitioner in lieu of any other fees and charges and it is never possible to claim both costs and collection commission except certain minimal costs specifically provided by the Law Society By-Laws. Where there is no agreement for the recovery of commission from the debtor, the judgment creditor, in claiming costs of suit, is confined to those minimal costs permitted to be charged in addition to commission. A full bill of costs may not be charged since those full costs will not have been incurred.

Held, further, that collection commission is only recoverable from the judgment debtor when it is chargeable against the judgment creditor. Unless expense is actually incurred by the creditor, it cannot be recovered from the debtor.

Held, further, that collection commission may only be awarded if there is an uncontested claim for a trade debt. Under the Law Society By-Laws, a claim for recovery of monies under a mortgage bond does not constitute a trade debt unless it is for arrear instalments only. Arrear instalments arise where payment is demanded under the contract and not where the contract is cancelled. A claim consequent on foreclosure of a mortgage bond over an immovable is not a trade debt.

Cases Considered

Cases cited:

Scotfin Ltd v *Ngomahuru (Pvt) Ltd* 1997 (2) ZLR 567 (H)

Judgment

Gillespie J: The plaintiff has foreclosed the loan it made to the defendant. It claims payment of the full balance outstanding with interest, costs and collection commission together with an order declaring specially executable a property mortgaged to secure the loan. The claim is

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uncontested and

GILLESPIE J

judgment in default of appearance is sought. The subject of this judgment is the claim for collection commission.

The following principles concerning collection commission may usefully be summarised. Collection commission is claimable by an attorney from his client on an uncontested claim for a trade debt. 1(70) This commission is recoverable from the judgment debtor where, in terms of prior agreement, the judgment debtor has obliged himself to indemnify the creditor for such expense. 2(71)

Collection commission is chargeable by an attorney:

> "in lieu of any other fees and charges." 3(72)

It is never possible, therefore, to claim both costs and collective commission, save those certain minimal costs, specifically provided in the Law Society By-Laws, as interpreted in *Scotfin Ltd* v *Ngomahuru (Pvt) Ltd*. 4(73)

A legal practitioner is obliged to charge collection commission on uncontested claims for trade debts - there is no option to charge either commission or costs. Hence, where there is no agreement for the recovery of commission from the debtor, the judgment creditor, in claiming costs of suit, is confined in his recovery to those minimal costs permitted to be charged in addition to commission. A full bill of costs may not be charged, since those full costs will not have been incurred. Taxing officers should be aware of this when taxing any bill of costs in respect of an uncontested claim for a trade debt where commission is not ordered against the judgment debtor. 5(74)

Finally, and particularly to be emphasised in the circumstances of this case, commission is only recoverable from the judgment debtor where it is actually chargeable against the judgment creditor. Thus, even though the creditor may have the benefit of an agreement by the debtor to pay collection commission, unless expense in respect of commission is actually incurred by the creditor, it cannot be recovered from the debtor. 6(75)

In this case, as is common in all mortgage bonds, the creditor has inserted in the agreement of loan and in the mortgage the relevant claim pertaining to recovery of collection commission and costs. From what has gone before, it is obvious that this agreement can only be enforced by an order awarding collection commission if this uncontested claim is for a "trade debt".

This expression is widely defined in the By-Laws. The definition, however, specifically excludes from the concept of a trade debt:

GILLESPIE J

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" (a) any claim, other than a claim for arrear instalments only, for the recovery of moneys due under a mortgage bond hypothecating immovable property; or

(b) any claim, other than a claim for arrear instalments, only, for the payment of the purchase-price of immovable property in terms of any agreement of sale;" 7(76)

This is clear beyond peradventure. A claim consequent upon foreclosure of a mortgage bond over immovables, or upon the cancellation of the sale of an immovable, is not a trade debt. A claim enforcing such a bond or agreement, for arrear instalments only, is a trade debt.

It follows that the claim for collection commission must fail. It is recoverable neither from the judgment creditor nor from the judgment debtor. It has never been a practice to advance such a claim. I have recently, however, noted this sort of claim in summonses issued by certain attorneys for certain building societies. It seems to be an innovation. It is not widespread, but seems to be growing. It must stop because it is not lawful.

In the event, judgment is entered for the plaintiff in the sum of $130978.81 together with interest thereon at the rate of 22.5% *per annum* from l July l999, calculated monthly in advance and compounded monthly in arrears and costs of suit on an attorney and client scale. Stand 2271 Marlborough Township of Stand 2550 Marlborough Township is declared specially executable.

Gollop & Blank, plaintiff's legal practitioners

In re CHINAMASA 1999 (2) ZLR 291 (HC)

Citation	1999 (2) ZLR 291 (HC)
Case No	Judgment No. HH-217-99
Court	High Court, Harare
Judge	Blackie J
Heard	October 8, 1999; October 27, 1999
Judgment	October 29, 1999
Counsel	F Girach, as amicus curiae S Moyo, for the Attorney-General
Annotations	None

Constitutional application

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - s 24 - referral to Supreme Court of alleged contravention

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of Declaration of Rights - form in which question is to be referred to Supreme Court - s 18(3)(e) - right to examine witnesses - not breached by requiring party charged with contempt to file heads of argument - s 18(8) - protection against self-incrimination - not breached by being required to file a defence outline

Criminal law - contempt of court - contempt ex facie curiae - whether exclusively within Attorney-General's province as to whether action may be taken - whether High Court has right to deal with alleged contempt of High Court

Criminal procedure - Attorney-General - whether has exclusive right to prosecute all crimes

Headnote

Following the passing of sentence in a criminal case which had attracted much publicity, the Attorney-General made a statement criticising the sentence. The statement was made in terms which the trial judge concerned considered to be contemptuous, and a citation was issued against the Attorney-General by the Registrar of the High Court at the instance of the trial judge. Dates for hearing were set by consent, and counsel appointed by the court to act as *amicus curiae*. Counsel acting as *amicus curiae* and the Attorney-General's counsel were required to file heads of argument by a specific date. At the hearing, the Attorney-General asked for 6 questions to be referred to the Supreme Court in terms of s24 of the Constitution.

Held, that the court being asked to refer the matter has a duty to satisfy itself that he application and the question to be referred fall within the ambit of s 24. If necessary, the court should rephrase the question in a form which it considers will enable the Supreme Court to make the appropriate determination.

Held, further, that contempt of court is a crime *sui generis* and although the Attorney-General may sometimes prosecute cases of contempt, this does not always happen. The Attorney-General plays no part in cases of contempt *in facie curiae* or civil contempt.

Held, further, that s 76 of the Constitution does not give the Attorney-General the exclusive right

to prosecute all crimes. His absence from the prosecution does not deprive the court of its establishment by law.

Held, further, that the directive to file a defence outline does not contravene the protection against being compelled to give evidence at one's trial.

Held, further, that the requirement to file heads of argument does not contravene the right of an accused person to examine witnesses.

Cases Considered

Case cited:

Martin v *A-G & Anor* 1993 (1) ZLR 153 (S)

Statutes Considered

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Legislation considered:

Constitution of Zimbabwe, ss 18(3), 18(8), 24 and 76

Case Information

F Girach, as *amicus curiae*

S Moyo, for the Attorney-General

Judgment

Blackie J: Mr Chinamasa (the Attorney-General) is the Attorney-General for Zimbabwe. He has been cited to appear before this court to answer a charge of contempt of court. The allegation of contempt arises from the parts of a statement made by the Attorney General, which were published in *The Herald* newspaper for Wednesday 15 September 1999, under the headings:

> "US gunmen's sentence causes outrage."
>
> "Attorney-General's office expresses shock at court's 'trivialisation of offence'."

The article that followed those headings, reported:

> "In a statement issued yesterday, the Attorney-General, Mr Patrick Chinamasa, said the sentence handed down by High Court judge Justice Adam 'induces a sense of shock and outrage in the minds of right-thinking people' ... 'By imposing sentences, which do not match the seriousness of the offences, Justice Adam has in effect trivialised crimes of unlawful possession of arms and has seriously erred in doing so. The Attorney-General's office is bemused by the meaninglessness of it all. The nation should know and be told that the leniency of the sentences constitutes a betrayal of all civilised and acceptable notions of justice and of Zimbabwe's sovereign interests. Mere unlawful transiting of firearms through the territory of Zimbabwe is in itself a serious and gross violation of the sovereign and security interests of Zimbabwe.'
>
> Mr Chinamasa said the attitude taken by the court in meeting out sentences, which did not match the severity of the crimes committed, came against the backdrop of repeated complaints made to him by his law officers of hostility and abuse directed at them and their submissions by the bench during the proceedings. 'All these developments erode the office's confidence in the administration of criminal justice'."

The citation against the Attorney-General was issued on 28 September 1999 and served on him the same day. The citation was signed by the Registrar and stated that it was issued at the instance of the Honourable Mr Justice Adam. It directed the Attorney-General to appear in person before the High Court of Zimbabwe "on 1 October 1999 ... to shew cause why an Order

of Contempt should not be made for the wilful and intentional contemptuous publication in the issue of 15 September 1999, of the Herald of the attached copy entitled 'US gunmen's sentences causes outrage'".

The sequence and timing of the events that took place after the citation had been served on the

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Attorney-General have some significance in this application.

After the service of the citation on him, and before 1 October, the Attorney-General made two requests for the hearing of the matter to be postponed. The first was for it to be postponed from 1 to 6 October. The second was for it to be postponed from 6 to 8 October. The reason given for the first request was that the Attorney-General wished to, or was going to, visit Zambia on Government business. The reason for the second request was that he did not know whether he could get back from Zambia by 6 October. The Attorney-General himself suggested the dates of 6 and 8 October in his requests for the postponements. No mention was made by him of any difficulty in preparing a defence to the citation by the dates of hearing suggested by him. Both requests for postponements were granted.

On 1 October, and at the time the second postponement requested by the Attorney-General was granted, a pre-hearing conference was held before me in regard to this matter. The Attorney-General and Mr *Girach* (who had been briefed to appear, as *amicus curiae*, to present the case against the Attorney-General) were present. At that conference, a proposed pre-hearing programme and directives for the filing of documents in terms of that programme were put to the Attorney-General and to Mr *Girach*. Both parties were asked if they had any objection to the programme and the directives proposed. Neither party raised any objection to them. The following order, which set out the proposed programme and directives that had been put to the parties, was then issued:

> "That Mr Chinamasa's defence outline be filed by 4 pm on Monday 4 October 1999.
>
> That Mr Girach's written argument on the facts and the law be filed by 12.00 noon on Wednesday 6 October 1999.
>
> That Mr Chinamasa's heads of argument be filed by 12.00 on Thursday 7 October 1999.
>
> That the matter be and is hereby set down for hearing at 10.00 am on Friday 8 October 1999."

At the start of the proceedings on 8 October, and before any plea was taken or evidence led, Mr *Girach* applied for the amendment of the citation in two respects. The first was to add certain words to the citation to clarify it. The second was to particularise the passages in the reported words of the Attorney-General which were said to contain the contempt alleged against him. The details of these amendments are not relevant to this judgment. The application for amendment was not opposed. The citation was amended accordingly.

BLACKIE J

Thereafter, the Attorney-General requested this court, in terms of s 24 of the Constitution, to refer to the Supreme Court for determination a number of questions drafted by him in which he alleged these proceedings breached the Declaration of Rights set out in the Constitution. After argument concerning the relevance to s 24 of some of the questions raised and the accuracy of the wording of some of those questions, counsel agreed that they would endeavour to reframe the questions so that they could, if possible, be presented to the court as a joint submission and in a manner acceptable to the court. The matter was postponed to enable counsel to carry out that task.

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The questions have been redrafted in some respects and are represented by the Attorney-General for reference to the Supreme Court. There are six questions. The signatures of both counsel appear at the end of the questions.

Section 24(2) of the Constitution reads as follows:

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

Before dealing specifically with the questions requested by the Attorney-General to be referred to the Supreme Court, it is necessary to cover some general points concerning s 24 and a request made in terms of that section.

Section 24 contains three prerequisites for reference to the Supreme Court which are relevant to the determination of this application. These are: that the question must arise in proceedings before the court; that the question must concern a contravention of the Declaration of Rights; and that, if a request is made for a question to be referred to the Supreme Court, that request must be made by a party to the proceedings. Provided these prerequisites are met, the question raised must be referred to the Supreme Court unless the question is "frivolous and vexatious". The meaning to be attributed to the phrase "frivolous and vexatious" has been set out by the Supreme Court in *Martin* v *Attorney-General & Anor* 1993 (1) ZLR 153 (S) at 157B-E. A wrongful refusal by a court to comply with a lawful request made in terms of s 24 is, in itself, a contravention of the Declaration of Rights: *Martin's* case *supra* at 157G-H.

However, s 24 does not deal expressly with the responsibility for the drafting of the question to be referred to the Supreme Court, the matter of onus of proof in respect of the question and, if there is an onus, the standard of proof required before referral can take place. It is not necessary to deal with those matters in detail here. It is sufficient, for the purposes of this application, to say that where a request is made by a party to the proceedings before the court, in terms of s 24, for a question to be referred to the Supreme Court, there is, at the very least, a duty on the court which is asked to refer the matter,

to satisfy itself that the application and the question to be referred, *prima facie*, fall within the provisions of s 24 and, if they do, that the question to be referred - whether it has been drafted by the party asking for referral or by the court itself - properly reflects the true issue to be determined by the Supreme Court. If the court is not satisfied that the question drafted by the party to the proceedings, and which it is requested to refer to the Supreme Court, falls within the provisions of s 24, then it should, indeed, must, refuse to refer the question. If the question does fall within the provisions of s 24 and there is a request by a party to the proceedings to refer the question to the Supreme Court, but the question, as proposed by that party, does not properly set out the question that has arisen in the proceedings and which the Supreme Court is to be asked to determine, the court should not refuse to refer the question. It should refer the question in the form that it considers sets out the question in a manner that will enable the

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Supreme Court to make the appropriate determination. If there is disagreement between the court and the party requesting the reference as to the wording of the question to be referred, the decision of the court is to prevail but the court should, in its judgment, advise the Supreme Court of the question that was posed by the party to the proceedings and its reasons for rejecting that question in favour of its own question or wording of the question.

In this case, there is no issue as to whether the questions that have been requested to be referred have arisen in these proceedings. Nor is there an issue over whether the Attorney-General is a party to these proceedings or that he has requested the court to refer the questions to the Supreme Court. There are, however, issues as to whether the questions posed deal with the real issues arising from these proceedings, whether all the questions posed by the Attorney-General concern a contravention of the Declaration of Rights and, if they do, whether they correctly set out the real question to be determined before the Supreme Court. There is a further issue as to whether any of the questions are frivolous and vexatious.

The questions that the Attorney-General has requested be referred to the Supreme Court are as follows:

" 1. Whether the High Court of Zimbabwe and/or counsel appearing a*micus curiae,* can, before the High Court of Zimbabwe, present allegations of contempt of court in the light of the provisions of s 76 and s 18(2) of the Constitution of Zimbabwe.

2. Whether the choice and assignment to deal with this matter by the judge, who passed the sentence which was commented upon in the alleged contemptuous statement of the presiding judge and the selection of counsel to appear *amicus curiae* by the assigned judge violates the [Attorney-General's] right to appear before an independent and impartial court established by law as provided in s 18 of the Constitution.

3. Whether the order issued by the High Court on 1 October 1999, which order was

issued in the presence of the [Attorney-General] and, in respect of which the [Attorney-General], when invited, elected to make no submissions:

(a) violates the [Attorney-General's] right not to be compelled to give evidence as provided for in s 18(8) of the Constitution, given that he was ordered to file a defence outline;

(b) violates the [Attorney-General's] right to be given adequate time to prepare his defence as provided for in s 18(3) of the Constitution, in circumstances where the [Attorney-General], at no stage, applied for or requested an extension of time nor did he, at any time object to the time limits set out in the said order, and in circumstances where the [Attorney-General] requested a postponement to 6 October 1999 and then 8 October 1999, to enable him to travel to Zambia on government business, both requests being granted;

(c) violates the [Attorney-General's] rights to examine witnesses as provided for in s 18(3)(e) of the Constitution, in circumstances where he was ordered to file argument relating to the facts and the law before the hearing.

4. Whether the procedure in terms of which the Registrar can issue a court application, which is not supported by any affidavit as to facts, as is provided in Order 43 r 389, violates the [Attorney-General's] right to a fair trial as is provided for in s 18 of the Constitution.

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5. Whether the citation issued on 28 September 1999, [which] calls upon the [Attorney-General] to show cause why an order of contempt should not be made violates the presumption of innocence on the [Attorney-General] and unfairly places the onus to prove innocence on the [Attorney-General] in contravention of s 18 of the Constitution.

6. Whether the contempt proceedings, as particularised, violate the [Attorney-General's] freedom of expression, that is to say, his right to hold opinions and [to] express such opinions without interference as is provided for in s 20 of the Constitution."

Implicit in, and running through, all the questions posed by the Attorney-General, with the exception of question 6, is a common assumption. That assumption is that contempt of court is a criminal offence such as to entitle a person charged with it to the protections afforded by s 18 of the Constitution. Contempt of court, although it may have a penalty attached to it similar to that which is imposed in criminal cases, has never been treated as crime *strictu sensu*. It is, and has always been, treated as *sui generis*. For example, procedurally, although the assistance of the Attorney-General is invoked by the court to prosecute some cases of contempt of court, that is not always the position. He plays no part in cases of contempt *coram facie curiae* and what is loosely referred to as civil contempt. It seems to me that that question as to whether proceedings for committal for contempt of court are, or should be, covered by s 18 of the Constitution presupposes, with the exception of question 6, the questions proposed by the Attorney-General and that that question should be decided by the Supreme Court before those proposed by him. If s 18 of the Constitution does not cover proceedings for contempt of court, all the questions, except for question 6, in their present form will fall away.

BLACKIE J

However, because there is convenience, if the Supreme Court holds that the provisions of s 18 do cover proceedings for contempt of court, in that court being able to proceed directly to deal with such of the questions proposed by the Attorney-General, as may be sent to that court, I will deal with those questions as though s 18 was applicable. Each of the questions will be dealt with in turn and in the light of the observations which have already been made concerning s 24 generally and the applicability of s 18 to proceedings for contempt of court.

1. The Attorney-General's argument in respect of ss 76 and s 18(2) of the Constitution (if I understand the argument correctly) is, in summary, that, in terms of s 76, he (or his nominated delegate) has the exclusive right to appear and to prosecute all criminal cases in Zimbabwe. If he or his representative does not appear to prosecute a criminal case, then there has been a breach of s 18(2), in that the court hearing the matter is then not "a court established by law" as required by that section. This case, he submits, is a criminal case. He, in his capacity as the Attorney-General, is not appearing to prosecute it, nor is his nominee. Counsel appearing *amicus curiae* has no authority from him to prosecute it. This court, therefore, in attempting to try him, is in breach of the requirement of trial by a court established by law set out in s 18(2).

Section 76 is not part of the Declaration of Rights. On its own and, if it has been breached by the procedure adopted by the court in this case, it does not fall within the provisions of s 24. However, the Attorney-General seeks to bring it within the provisions of that section by linking s 76 with s 18(2) and saying that the appearance in a criminal matter of a counsel other than

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himself or his nominee deprives this court of its status as a court established by law.

Section 18(2) provides that:

> "if any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court as established by law."

The Attorney-General's argument has two important flaws. Firstly, s 76 does not give the Attorney-General the exclusive right to prosecute all crimes that he claims. Secondly, and most importantly for the purposes of this application, even if the Attorney-General has the exclusive right of prosecution claimed by him, his absence from the prosecution does not deprive the court of its establishment by law. Section 18(2) is concerned with the composition of the body that is to make the decision in the case. It is not concerned with who is presenting the case before that body . This court is established by law. It is independent of the Attorney-General, whether the matter is criminal or not. The court does not depend on the Attorney-General's appearance before it to give it its status as a court established by law. The link between ss 76 and 18(2) suggested by the Attorney-General is untenable. The

BLACKIE J

Attorney-General has thus failed to show that this question, even *prima facie*, arises out of a contravention of the Declaration of Rights.

2. The Attorney-General alleges that because the judge, who issued the citation for contempt against him, allocated this matter to me and because I advised the Registrar to appoint the counsel who appears as *amicus curiae* to present that case, these proceedings are a violation of s 18(2) by which he is entitled to have his case determined by an independent and impartial court established by law.

It is not clear from the wording of the question, whether the Attorney-General is claiming that those facts:

(i) deprive this court of its legal status as a court "duly established by law", or

(ii) demonstrate some form of possible improper or undue influence by Mr Justice Adam over me and by me over Mr *Girach* so as to make this court no longer an independent and impartial court; or that

(iii) in principle, the common law procedure whereby the court, which complains of a contempt, may itself preside over and determine its own complaint, renders the court no longer independent and impartial.

The Attorney-General has not put forward any legal basis to substantiate (i). He has made no application for recusal and has put forward no factual allegation such as would support his allegation in (ii). It is only in respect of (iii). that there is any possible substance that would justify the reference of the question to the Supreme Court. The question will be reworded to make it clear that it is referred to the Supreme Court only in the sense set out in (iii).

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3.(a) Section 18(8) provides that "no person who is tried for a criminal offence shall be *compelled to give evidence at his trial*" (my emphasis). The Attorney-General complains that the directive given to him on 1 October to file a defence outline to the citation violates the provisions of that section.

It is difficult to see how this submission can be sustained in either logic or law. A defence outline produced outside the hearing of case is not evidence at a trial and falls outside the scope of the clear wording of s 18(8). The trial on the merits has not yet started, no evidence has been led, the Attorney- General has not been compelled to give evidence at that trial and he makes no suggestion that he will be compelled to give evidence when the trial starts.

The allegation made by the Attorney-General in this question, therefore, does not establish even a *prima facie* breach of s 18(8) and, in the form presented, appears to me to be frivolous and vexatious.

3.(b) Section 18(2)(e) provides that any person charged with a criminal offence "shall be given adequate time and facilities for the purpose of the preparation of his defence". The Attorney-General's complaint relates

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specifically to the directive to him on 1 October to produce a defence outline by midday on 4 October.

A defence outline is not a complete and final defence to a charge. It is a preliminary to a hearing in court. What is a reasonable time for the production of such a document, as opposed to a defence at a hearing in court, is a question of fact. The defence outline in this case was ordered to be produced by the Attorney-General after he had suggested the date for the hearing of the matter and after the date and time for the production of the defence outline had been put to the Attorney-General, for his comment, in the light of the proposed date of hearing. The Attorney-General did not object to the period to be given to him for the production of his defence outline.

The Attorney-General is not the average litigant nor is he an unrepresented accused. He is not ignorant of the law nor unfamiliar with legal proceedings. He is an experienced legal practitioner, the chief Government law adviser and the senior law officer of this court.

It is also important to note that the Attorney-General has never asked for a postponement on the ground that he was not given sufficient time to prepare his defence proper and that the two postponements that he did apply for, on different grounds, were granted. Nearly one month has passed since the citation was served on the Attorney-General. Further time will be taken up in the reference of some of the questions proposed by him to the Supreme Court. He has had, and will have, a great deal of time to prepare his defence.

Notwithstanding all these points, the Attorney-General persists in applying for this question being referred to the Supreme Court. I have no doubt that he is frivolous and vexatious in doing

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so and I decline to refer this question on that ground.

3.(c) Section 18(3) provides that:

> "every person who is charged with a criminal offence -
>
> ...
>
> (e) shall be afforded facilities to examine in person or ... by his legal representative, the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution."

The Attorney-General submits that the order granted by the court on 1 October deprives him of the right set out in s 18(3)(e) because it requires him to file his heads of argument on "the facts and the law" before the hearing has taken place.

The order, of which the Attorney-General makes complaint, does not direct him file heads of argument on "the facts and the law" as he alleges. The order clearly distinguishes between the heads of argument to be filed by the counsel, *amicus curiae*, which are required to be on the facts and the law, and those required of the Attorney-General, of whom no such demand is made.

BLACKIE J

There is no requirement to file argument on "the facts and the law" placed on the Attorney-General. He is simply instructed to produce heads of argument. Even if it is possible to imply from the direction given to the counsel *amicus curiae,* that the same instruction was to be given to the Attorney-General, it is impossible to see how that instruction "violates the Attorney-General's right to examine witnesses as is provided in terms of s 18(3) of the Constitution". This trial has not even commenced. The Attorney-General has done nothing to show that he has been, or will, be denied his rights to such examination. I am not satisfied, even *prima facie,* that here a question arises as to a contravention of the Declaration of Rights. I am satisfied that the question as posed is frivolous and vexatious.

4. The Attorney-General's complaint here is that he has received the citation but that citation does not have an accompanying affidavit attached to it. The Attorney-General makes the bald allegation that that procedure denies him the right to a fair trial. He does not refer to any facts or law to support his allegation and I am not satisfied that the Attorney-General has established that the procedure adopted concerns a breach of the Declaration of Rights in any respect and, as expressed, in this bald and unsupported manner is frivolous and vexatious.

5. This question appears to be one that should be referred to the Supreme Court in terms of s 24 and is so referred.

6. This question falls within the terms of s 24 and, properly set out, should be referred to the Supreme Court for determination. However, the question, as framed, does not deal with the real question to be determined. It is framed as though s 20 guarantees an absolute right to freedom of expression. That is not the position. Section 20 specifically provides that "nothing contained

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in or done under the authority of any law shall be held to be a contravention of (the right to freedom of expression) to the extent that the law in question makes provision -

" (a) ...

(b) for the purpose of -

(i) ...

(ii) ...

(iii) maintaining the authority and independence of the courts or tribunals or Parliament.

(iv) ...

(v) ...

or

(c) ...

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 law concerning contempt of court is contained in the common law of Zimbabwe. The point at issue in the complaint made by the Attorney-General

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is not as expressed by him in his question for referral. The point at issue here is whether the law concerning contempt of court, as contained in the common law of Zimbabwe, is such as cannot be shown "to be reasonably justifiable in a democratic society" and, therefore, is incompatible with the provisions of s 20 of the Constitution.

In the result:

A new question for reference to the Supreme Court in terms of s 24 of the Constitution is to be added to the list of questions to be supplied by the Attorney-General. The question concerns the nature of the offence of contempt of court and whether a person charged with it falls under the protections provided to a person charged with a criminal offence under s 18 of the Constitution.

Question 1 on the Attorney-General's list of questions has not been shown to concern a breach of the Declaration of Rights and will not be referred to the Supreme Court.

Questions 3 and 4 will not be referred to the Supreme Court on the basis that they are frivolous and vexatious.

Questions 2 and 6 (as modified in this judgment) and Question 5 are referred to the Supreme Court for determination.

The questions to be referred to the Supreme Court are, therefore, as follows:

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1. Whether a charge of contempt of court is a charge of a criminal offence entitling the person charged to the protections afforded by the provisions of s 18 of the Constitution.

2. If the answer to question 1 is in the affirmative;

   (a) Whether the procedure whereby a person charged with contempt of court is tried by the court which complains about the contempt violates the right of a person, in terms of s 18 of the Constitution, to be tried by an independent and impartial tribunal.

   (b) Whether the citation issued on 28 September 1999, which called upon the accused person to show cause why an order of contempt should not be made against him should not be made against him, violates the presumption of innocence on the part of an accused person in contravention of s 18 of the Constitution.

3. Whether the law of contempt of court, as contained in the common law of Zimbabwe, is such as cannot be shown "to be reasonably justifiable in a democratic society" and, therefore, is incompatible with the provisions of s 20 of the Constitution.

It is necessary to make one final point. At the last moment, and after this judgment had been written and printed, the Attorney-General submitted an urgent request that the questions that he was asking to be to be referred to the

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Supreme Court be amended in two respects. He asks that question 1 be amended by the addition of the words, "If not, whether this violates the accused person's entitlement to protection of the law". He also asks that a new question 6 be substituted for the existing question of that number. The new question 6 is to read, "Whether the common law offence of contempt of court, as particularised in these proceedings is, in a democratic society, a reasonably justifiable limitation of freedom of expression , that is to say, the right to hold opinions and to express such opinions without interference".

I must make the point that the parties were given three weeks to draft the questions that they wished referred to the Supreme Court. That should have been more than sufficient, if the matter was taken seriously, to consider and draft the appropriate questions. It is highly undesirable and most unsatisfactory that there should be this last minute request to alter the questions that have already been submitted and on which counsel has presented argument. As it is, the words that the Attorney-General wishes to add to question 1 make no difference to the decision already given in respect of that question. The proposed substituted question 6 has already been dealt with in this judgment and is, with respect to the drafter of that question, better expressed in this judgment. The judgment and the decision reached in it, therefore, remain unaltered.

Scanlen & Holderness, Attorney-General's legal practitioners

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S *v* DZAWO 1999 (2) ZLR 303 (HC)

Citation	1999 (2) ZLR 303 (HC)
Case No	Judgment No. HH-219-99
Court	High Court, Harare
Judge	Chatikobo J, Gwaunza J
Heard	July 29, 1999
Judgment	November 3, 1999
Counsel	E T Matinenga, for the appellant P Kwenda, for the respondent
Annotations	None

Criminal appeal

Flynote

Criminal procedure - competent verdict - charge of fraud - theft not a competent verdict - Criminal Procedure and Evidence Act [Chapter 9:07] - s 223 - cannot be used to return verdict of theft on charge of fraud

Headnote

The appellant had been charged with fraud in respect of money entrusted to him. He was found not guilty of fraud because he had made no fraudulent misrepresentation but he may have committed theft by converting the money to his own use.

On appeal:

Held, that s 223 of the Criminal Procedure and Evidence Act only allows the accused to be convicted of another lesser offence where the commission of the offence contained in the charge includes the commission of the lesser offence. The section can thus only be invoked when the major offence which has not been proved includes a minor offence which has been proved. The offence that is to be substituted for the offence charged must be a minor offence. Theft is not a minor offence in comparison with fraud and thus this charge cannot be substituted for fraud.

Held, further, that the legislature should consider amending the wording of s 223 of the Criminal Procedure and Evidence Act along the lines of s 270 of the South African Criminal Procedure Act No. 51 of 1977.

Cases Considered

Cases cited:

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R v *Moosa* 1960 (3) SA 517 (A)

R v *Viljoen & Ors* 1923 AD 90

S v *M* 1972 (1) RLR 207 (GD)

S v *Ndwandwe* 1976 (1) SA 323 (N)

S v *Rautenbach* 1982 (1) ZLR 131 (H)

Case Information

E T Matinenga, for the appellant

P Kwenda, for the respondent

Judgment

Chatikobo J: The appellant was arraigned before a regional magistrate on two counts of fraud to which he tendered pleas of not guilty. At the end of the trial, he was acquitted on the second count but was convicted on the first count in which it was alleged that:

> "... on 8 February 1995 and at Harare, the accused unlawfully and with intent to defraud

CHATIKOBO J

> misrepresented to members of the Zimbabwe Child Survival and Development Board of Trustees that part of the proceeds of fund-raising activities donated to the Zimbabwe Child Survival and Development Foundation should be paid to the ZANU (PF) Harare Central District 2 as expenses for future fund-raising activities, as a result of which $50 000 was paid to the accused to the prejudice of the Zimbabwe Child Survival and Development Foundation."

At the material time, the appellant was the Deputy Mayor in the City of Harare, as well as being a member of the financial executive of a political party called ZANU (PF). In addition, he acted as chairman of the Organising Committee of Harare Central District 2 whose sole function appears to have been to organise football tournaments to raise funds for charity. The main event organised by this committee was the Africa Day Trophy which at one point was sponsored by an Insurance Company referred to in court as NICOZ and at another point by National Foods. The other members of the Organising Committee were Phineas Fundira, Robert Museruka and Ray Garwe. The initial purpose of the committee was to raise funds for the 1984 Congress of ZANU (PF). Thereafter the funds raised from the Africa Day tournament were to be channelled towards youth development programmes. In 1987, a decision was made following upon a request from the late First Lady, to donate the funds raised to charities.

In 1994, the tournament was sponsored by NICOZ and that was the last time the Organising Committee managed to get sponsorship. From the proceeds of that tournament, the sum of $275000 was donated to Child Survival and Development (the Foundation). It is from this amount that the appellant was eventually paid the sum of $50000. The circumstances under which the payment was paid forms the centre of the accusation levelled against the appellant.

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The evidence led on behalf of the State is not entirely in accord with the evidence adduced by the appellant and his witnesses. I summarise it below.

[*His Lordship summarised the evidence and continued:*]

An examination of the evidence as a whole convinces me that at the time when he asked for the money to be paid back the appellant was acting in good faith. The fact that he used the money soon after receiving it may well be evidence of a criminal intent but it does not prove that at the time the request was made the appellant was acting with intent to defraud or to misrepresent his true intentions to the Foundation. His conduct after receiving the money was probably theftuous, but that is a far cry from saying that such conduct proves the existence of a misrepresentation. The appellant may have committed theft by conversion but the State did not charge him with that offence.

The law concerns itself with dishonest misrepresentations which cause

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prejudice to others or have the potential to cause prejudice. On the evidence led in the court *a quo*, there is nothing upon which I can hold that the appellant acted deceptively with a view to gaining an advantage for himself when he asked for the money. He acted openly and in good faith. There was no perversion or distortion of the truth. In the absence of a misrepresentation there can be no conviction for the crime of fraud. It is no wonder that Mr *Kwenda*, who appeared for the respondent, readily appreciated that the sole issue was the appellant's state of mind at the time that he asked for the money. The only evidence which tends to support the existence of a guilty mind came from Fundira who denied that there was any mandate given to the appellant to ask for the money. The reliability of that evidence is questionable given the evidence of the appellant and his witnesses and the open manner in which the appellant acted.

Mr *Kwenda* argued in the alternative, that if it be found that the appellant did not make any false representation then in that event the court must invoke the provisions of s 223 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] and return a verdict of guilty of theft. Theft is of course not a competent verdict on a charge of fraud: J R L Milton *South African Criminal Law and Procedure* Vol 2, 3 ed p 736.

Section 223 of the Code provides that:

> "In other cases not specified elsewhere in this Part, if the commission of the offence with which the accused is charged as defined in the enactment creating the offence, or as set forth in the indictment, summons or charge, *includes the commission of any other offence, the accused person may be convicted of any offence so included which is proved, although the whole offence is not proved*" (my emphasis).

This section, and its local precursors as well as its South African equivalent, has been commented upon and applied in numerous cases. In this country I refer only to two cases, namely, *S* v *M* 1972 (1) RLR 207 (G) and *S* v *Rautenbach* 1982 (1) ZLR 131 (H). In the latter case, McNally J, as he then was, stated at p 133C that:

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"It is clear that the applicability of s 210 of the Code (now s 223) arises in two situations -

(a) where the commission of the offence as defined in the enactment includes the commission of another (lesser) offence; or

(b) where the commission of the offence as set forth in the charge includes the commission of another (lesser) offence ..."

In context, what needs to be stressed is the requirement that the offence "included" in the offence charged must be a "lesser" or "minor" offence. The use of the word "includes" and the reference to "the whole offence", points unmistakably to the only logical inference that the section can only be invoked when the "major" offence which has not been proved, "includes" a minor offence, which has been proved.

CHATIKOBO J

And, in *R* v *Moosa* 1960 (3) SA 517 (A) at 532B, Schreiner JA held that "includes" means "always includes", in the sense that indecent assault always includes assault and robbery always includes theft. By a parity of reasoning, if fraud does not always include theft, then it follows that when fraud has not been proved a conviction for theft cannot be returned, unless the commission of the "major" offence as set forth in the charge, "includes" the lesser offence. Thus, in *R* v *Viljoen & Ors* 1923 AD 90, the question was whether the crime of treason always includes sedition and it was held that on a charge of treason an accused could be found guilty of sedition where the treason charge took the form of violence and tumult by a number of persons. The learned judge observed:

"Not all treason, of course, is of that type, and it cannot be said that treason always includes sedition; but where the particulars of the charge show that that is the type of treason alleged, the commission of treason includes the commission of sedition for the purposes of s 242, now s 204."

I perceive this statement, with which I respectfully agree, to mean that before the provisions of the section can be brought into play the offence as defined either in the enactment (in the case of a statutory offence) or at common law, must always include the lesser offence. If the offence as defined does not always include the minor offence, then the offence as particularised in the charge, must include the minor offence. Fraud, as known to our law, does not always include theft but it sometimes does. One can misrepresent one's qualifications to gain entry into a university. Such conduct can found a charge of fraud but it does not remotely amount to theft. Yet if one perpetuates a deception to induce the taking of money which is not due to him, his conduct is theftuous, in which case theft would be included in a charge of fraud based upon such conduct. This analogy applies to the present case. The first part of s 223 which requires the offence as defined to "always include" theft does not apply because as already stated, fraud, by definition does not always include theft. The second part of the section possibly applies. The charge as particularised says the appellant made a misrepresentation as a consequence of which he was paid $50000 to the prejudice of the Foundation. I am prepared to accept that the charge as particularised, includes theft. That, however, is not the end of the matter. The authorities to which I have referred, to which should be added the judgment of van Heerden J in *S* v *Ndwandwe* 1976 (1) SA 323 (N), stress the point that the offence which is included either in the definition or in the charge, must be a minor offence. The correctness of those decisions is

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beyond question. The section uses the word "include", an indication that that which "includes" is the greater. Its reference to the "whole" offence not being proved connotes that the court is to return a verdict for something less than the whole. The greater includes the less and not vice versa.

CHATIKOBO J

Now, is theft a lesser or minor offence than fraud? The answer must be a resounding no if one goes by their seriousness as offences. One is as serious as the other. The fact that the essential elements of theft may be included in the essential elements of fraud is in my view not a reason for holding that theft is a lesser offence to fraud.

The old South African s 204 was repealed and substituted by s 270 in the Criminal Procedure Act 51 of 1977 which is in these terms:

> "If the evidence on a charge for any offence not referred to in the preceeding sections of this chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved."

Commenting on this provision in *South African Criminal Law and Procedure* Vol 5 p 554, the learned authors, Landsdown and Campbell say that:

> "In the consideration of a lesser verdict in the trial of an offence not included in ss 256-269 of the 1977 Act, the court's attention is directed, not to the legal definition of the offence charged or to the features of the charge itself, but to a comparison and a measuring up of the essential elements of the proposed verdict with those of the offence actually charged."

Section 223, as presently worded, cannot be construed so as to measure the essential elements of the verdict proposed against the essential elements of the offence charged. The offence proposed to be substituted for the offence charged must be minor. Having held that theft is not a lesser offence, it follows that the provisions of s 223 cannot be invoked in this case. The legislature may find it advisable to amend s 223 to bring it in line with s 270 of the Criminal Procedure Act of South Africa to avoid the injustice which occurred in this case.

This conclusion makes it unnecessary to consider the validity of the appellant's defence which was essentially that he used the money because he had a liquid fund with which to replace it when demanded. Suffice is to say that if the appellant had been correctly charged with the theft of the money he would have had considerable problems in persuading the court to credit his defence. I must express some surprise at the manner in which the charge was chosen. It must have been obvious that theft was the more appropriate charge. Had the correct charge been preferred the outcome may have been different.

In the result, the appeal succeeds. The conviction is quashed and the sentence is set aside.

Gwaunza J: I agree.

Kantor & Immerman, appellant's legal practitioners

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Attorney-General, respondent's legal practitioners

S *v* TARR 1999 (2) ZLR 308 (HC)

Citation	1999 (2) ZLR 308 (HC)
Case No	Judgment No. HH-216-99
Court	High Court, Harare
Judge	Bartlett J, Gwaunza J
Heard	October 21, 1999
Judgment	November 3, 1999
Counsel	Miss W T Miles, for the appellant H Ushewokunze, for the State
Annotations	None

Criminal appeal

Flynote

Criminal law - statutory offences - Parks and Wild Life Act [Chapter 20:14] - s 24(1)(b) - hunting in a national park - what is a national park - animal shot on shore between Lake Kariba and high water mark fixed by Minister - such shoreline not part of national park - "hunt" - what is

Headnote

The appellant, a professional hunter, and his client shot an elephant on the shore line of Lake Kariba. The lake itself is a national park and the Omay Communal Lands abutted the lake at the point where the elephant was shot. It ws not clear whether the elephant was shot in the Omay Communal Land at a point between the edge of the water and the designated full supply level of the lake. But under s 20(2) of the Act, exposed land between the full supply level and the actual water level is deemed to be part of the land abutting onto the lake, that is, in this case, the Omay Communal Land. The appellant held a permit to hunt, issued by the controlling authority for the communal land in question. He was charged with hunting in a national park without a permit.

Held, that the appellant had authority to hunt in the communal land and could not be convicted of hunting in a national park. The only basis on which he could have been convicted, taking account of the wide definition of "hunt" in s 2 of the Act, would have been if the evidence showed that he had searched for the elephant while he was on the lake -even if the elephant was shot in the Omay Communal Land.

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Statutes Considered

Legislation considered:

Parks and Wild Life Act [*Chapter 20:14*], ss 20 and 24(1)(b)

Case Information

Miss *W T Miles*, for the appellant

H Ushewokunze, for the State

Judgment

Bartlett J: As dusk descended across the Ume River on 6 November 1998, a lone bull elephant stood near the water's edge. A small boat and canoes approached through the fading light. The occupants saw the elephant and the boats drew into the riverbank. Tarr, a professional hunter, and his client from Woodstock, Virginia, clambered ashore. They approached to within about eleven metres of the elephant and firing their hunting rifles killed it as it grazed peacefully and quietly by the river. What it is in the minds

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BARTLETT J

of some human beings that takes pleasure in destroying a beast of stately splendour in such circumstances is not for me to ponder. I can only observe that the Good Lord has created a diversity and tells us that there is a purpose to everything under heaven.

Photographs show members of the hunting party smiling proudly while sitting astride the carcass of the fallen elephant lying in the dry and dusty earth. Human pride certainly takes some strange forms. The question argued before this court is whether that earth on which the elephant died is part of the Omay Communal Lands or the Lake Kariba Recreational Park. If it is the former, it is common cause that Tarr, the appellant, hunted the elephant in accordance with a lawfully issued permit. If it is the latter, then it is also common cause that he was unlawfully hunting in a national park and is guilty of contravening s 24(1)(b) of the Parks and Wild Life Act [*Chapter 20:14*] ("The Act"). The magistrate found that the land on which the elephant died was part of the Lake Kariba Recreational Park and convicted Tarr, fining him $1000 or 3 months' imprisonment and imposing a 4 months' suspended prison sentence. Tarr has appealed to this court against both conviction and sentence.

The evidence led by the State contained contradictions. The game ranger called insisted that the elephant was shot whilst it was in the Ume River. He agreed that if it had not been in the water it would have been in the Omay Communal Land and no offence would have been committed. The authority for the Omay Communal Land had issued a permit for Tarr to kill an elephant in the communal land. A game scout for the authority who accompanied the hunt averred that the elephant was not shot in the Ume River but on dry land, part of the Omay Communal Land. A policeman confirmed that he observed the carcass and that it was on dry land and could not have been dragged from the water. Tarr and his assistant hunters all swore

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that the elephant was shot some eleven metres from the Ume River on Omay Communal Land.

A surveyor was also called by Tarr from Bulawayo. He had prepared a plan from indications made by Tarr and those with him. The significance of this plan to the trial was that in terms of SI 274 of 1999 the appropriate minister had fixed the full supply level of Lake Kariba above mean sea level as 484.64 metres (Kariba datum) and 483.95 metres (national datum). The plan showed the first shot had been fired at the unfortunate elephant when it was 484.02 metres above mean sea level. The significance of all this, according to Tarr's counsel at the trial, was that the elephant had been shot beyond any doubt above the full supply level of Lake Kariba and therefore was within the Omay Communal Land. Even if this were not so, it was contended that in terms of s 20(2) of the Act the land exposed between the full supply level and the actual edge of the water was deemed to be part of the Omay Communal Land. It was

BARTLETT J

common cause that on 6 November 1998 the actual level of Lake Kariba at this point along the Ume River was well below the full supply level.

Faced with all the contradictions in the State case, the trial magistrate could not but find that the elephant had been shot while on dry land. With no evidence from the State as to precisely where on the dry land the shooting had taken place, the trial magistrate similarly had little choice but to accept the indications on the surveyor's plan. But he nevertheless found that the elephant was shot on dry land at 484.58 metres above mean sea level. This he found was well within the full supply level of Lake Kariba of 484.64 metres. He did not indicate why he had based his judgment only on the Kariba datum figure of 484.64 metres specified in the statutory instrument and ignored the national datum figure of 483.95 metres, also specified in the statutory instrument. He accordingly found that the elephant was shot within the full supply level of Lake Kariba. He disagreed with Tarr's counsel that s 20(2) of the Parks and Wild Life Act deemed the land between the full supply level and the edge of the water to be the Omay Communal Land and convicted Tarr.

The critical issue in the argument as presented on appeal is whether the trial magistrate was correct in his interpretation of s 20(2) of the Act. If he was incorrect, the appeal must succeed on the basis of the arguments as presented and on the basis of the evidence as led at the trial. If the trial magistrate's interpretation of s 20(2) was correct, consideration would need to be given whether it had been proved that the elephant had been shot within the full supply level of Lake Kariba.

Section 20(1) and (2) of the Act provide as follows:

" (1) Where the land inundated by any lake or part of a lake has been declared to be part of the Parks and Wild Life Estate, the Minister may, by notice in a statutory instrument, fix the height above mean sea level of the full supply level of such lake and may, in like manner, amend such height.

(2) Any land surface which is exposed at any time between a height fixed in terms of subsection (1) and the edge of the water of the lake concerned shall, for so long as it is exposed, be deemed to be part of the land abutting on to the lake and shall be subject to any enactment relating to such land."

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It is common cause that the Ume River at the point in question is part of the Parks and Wild Life Estate. It is specified as a recreational park, as part of Lake Kariba, in item 3 of Part 1 of the Fifth Schedule to the Act. A height has been fixed by the Minister by statutory instrument fixing the height above mean sea level of the full supply level of Lake Kariba. The land exposed between the edge of the water of the Ume and the full supply level of Lake Kariba, is, for as long as it is exposed, deemed to be part of the land abutting on to the lake and subject to any enactment relating to such land. To my mind, the literal, grammatical interpretation of s 20(2) is abundantly clear. The land

surface in question, as long as it is exposed, is deemed to be part of the Omay Communal Land. The legislature could not, I believe, have expressed its intention more clearly.

I disagree that a literal interpretation, to quote the magistrate, "perpetrates the mischief which the legislature sought to remove". The Omay Communal Land bounds Lake Kariba, as defined in the Fifth Schedule of the Act. When the water of the lake is below the full supply level as specified, the exposed land is deemed to be part of the Omay Communal Land for as long as it is exposed. As the water rises, the inundated land becomes part of the lake. The Omay Communal Land, according to the terms of the legislation, will always start where the water ends. There will always be an ebb and flow. The physical boundaries of the Omay Communal Land on Lake Kariba will depend on the level of the lake. The legislature has acknowledged and provided for this fact of nature in s 20(2). The legislation is not absurd and any mischief aimed at by the Act is not compounded by this interpretation of s 20(2). The section clearly, simply and sensibly defines the boundary between the Omay Communal Area and the Lake Kariba Recreational Park.

Counsel for the State argues that the interpretation of waters in the definition section of the Act supports the trial magistrate's finding. "Waters" is defined as follows:

> "any river, stream, watercourse, lake, swamp, pond, dam, reservoir, pan, furrow or other collection of water, whether natural or artificial, together with the foreshores or banks thereof, but does not include -
>
> (a) water in aquaria or ornamental ponds unconnected with any natural water; or
>
> (b) water the sole and exclusive use of which under any law belongs to any person."

It is State counsel's contention that because the definition of "waters" include "the foreshores or banks thereof" as part of any lake or river, that the bank or foreshore of the Ume is part of the Ume and hence part of the Lake Kariba Recreational Park. I am unable to agree with State counsel. Section20(2) is carefully worded and refers to the "edge of the water" of the lake concerned, as opposed to the edge of the "waters". In view of the definition of "waters" in s 2, the use of the word "water" in s 20(2) as opposed to "waters" is hardly likely to be anything other than intentional. If the word "waters" had been used it would have made the section incomprehensible and completely contradictory to the definition stated above. By using the word "water", the section is clearly and easily understood. There are numerous sections of the Act where the word "waters" has been used, as opposed to "water", and where the wide definition

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given to "waters" is clearly appropriate - see for example s 24(d)(iv) and Part XIV - ss 82-96.

Accordingly, I am satisfied that the word "water" is clearly intentionally used in s 20(2) by the legislature and that State counsel's reference to the

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definition of "waters" in s 2 is not relevant to the interpretation of s 20(2). If I am incorrect in that regard I am nevertheless satisfied that the specific provision in s 20(2) must take precedence.

On the basis of the evidence as led, and on the legal argument as presented, the trial magistrate should have acquitted Tarr - and in fact should have done so at the close of the State case. The elephant was shot in the Omay Communal Land and it is common cause that Tarr had authority to hunt the elephant in the Omay Communal Land. Accordingly, on the basis of the evidence led at the trial, and the legal issues argued at the trial, the appeal must succeed and the conviction and sentence are set aside.

But let me say this. The matter was poorly investigated by parks authorities and police and poorly prosecuted by the State. If the circumstances surrounding the hunt on 6 November 1998 had been carefully and fully investigated, there is at least a possibility - in my view a not insubstantial possibility - that Tarr may have been at risk of conviction.

The police and the prosecutor based the whole matter on whether the elephant was in the Lake Kariba Recreational Park or the Omay Communal Lands when it was shot. Tarr, as would be expected, responded to the evidence led against him and the legal arguments raised against him. There is, however, an alternative way the matter could have been looked at.

The definition of "hunt" in s 2 of the Act is very wide. It is as follows:

" (a) to kill, injure, shoot at or capture; or

(b) with intent to kill, injure, shoot at or capture, to wilfully disturb or molest by any method; or

(c) with intent to kill, injure, shoot at or capture, to lie in wait for, follow *or search for*;" (the emphasis is mine).

If Tarr, with intent to kill or shoot at the elephant, searched for it while he was in the Lake Kariba Recreational Park he would, in terms of para (c) of the definition of "hunt", be unlawfully hunting even if the elephant was ultimately shot while it was outside the Park.

But the detailed definition of "hunt" is something of which the parks officials, the police, the prosecutor and the magistrate all appeared to be completely oblivious. Although it was a factor they should all have been aware of, and which should have played a significant role in the investigation and prosecution of the alleged offence.

If the matter had been properly investigated, the parks officials, police and prosecutor would have examined in detail the circumstances surrounding the hunt that day. If Tarr and his hunting party had come direct from wherever their base camp was and used the boat and canoes only to transport themselves directly to the Omay Communal Land, and had seen the elephant as

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they made landfall at their destination, then their actions would clearly not

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have fallen under the definition of "hunt". But if Tarr used the boats to sail up and down the Ume, where it is part of the Lake Kariba Recreational Park, searching for elephant or other game, and then on seeing such game on the Omay side of the Ume river, had landed and shot it there , those actions might well have fallen within para (c) of the definition of "hunt". A permit to hunt the elephant in the Omay Communal Land does not include the right to search for the elephant while the hunter is in the Lake Kariba Recreational Park.

The evidence of the State witnesses, and the cross-examination of Tarr and the defence witnesses, was not, however, directed to ascertaining whether the circumstances indicated that hunting may have been carried out in terms of para (c) of the definition of "hunt". Tarr's bald statement that the boats were used for transport and not hunting was accepted without question and without investigation.

On a general aspect and for the assistance of both hunters and Parks and Wild Life officials, I would emphasise that I do not consider the fact that the animal is shot just outside the boundaries of the national park means that a person acting within para (c) of the definition of "hunt", is not unlawfully hunting in a national park. If a person is within a national park, albeit close to the boundary of the Park, searching for an animal just outside the park in order to shoot it, he is hunting within the national park in terms of para (c) of the definition of "hunt". As long as the hunting within para (c) of the definition of "hunt" is within the national park, the offence is committed. Such hunting is not only a glaring contravention of the spirit of the law in regard to national parks but also of the letter of the law - and, in my view, would in appropriate circumstances not be regarded as only a technical contravention of the legislation.

I would also point out that it is at any rate an offence in terms of s 8(d) as read with s 111 of the Parks and Wild Life (General) Regulations SI 362 of 1990 to possess a firearm within the Parks and Wild Life Estate (which includes the Lake Kariba Recreational Park) without the permission of an officer.

In view of the attempt to provide general guidance copies of this judgment will be made available to officials of the Department of Parks & Wild Life as well as to the appellant.

Gwaunza J: I agree.

Webb, Low & Barry, appellant's legal practitioners

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

S *v* SABAWU & ANOR 1999 (2) ZLR 314 (HC)

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Citation 1999 (2) ZLR 314 (HC)
Case No Judgment No. HH-223-99
Court High Court, Harare
Judge Chatikobo J
Heard November 10, 1999
Judgment November 10, 1999
Annotations None

Criminal review

Flynote

Criminal law - rape - penetration - what is required to commit rape - nature of penetration in the medical sense - how this may differ from penetration in legal sense

Criminal procedure - charge - prosecutor's discretion as to which charge to prefer - duty of prosecutor to ensure that the accused is charged with the correct offence

Criminal procedure - review - alteration of verdict on review - Magistrates Court Act [Chapter 7:10] - altering verdict to one which inferior court ought to have returned - verdict may only be altered to one which could have been reached on charge actually brought - whether conviction for indecent assault can be altered to rape

Headnote

The accused were charged with and convicted of indecent assault. The circumstances showed that they were guilty of rape. The High Court could not alter these verdicts to rape using the powers contained in s 29(2)(b) of the Magistrates Court Act [*Chapter 7:10*]. This section, which allows the High Court on review to alter the verdict to that which the court ought to have reached, does not allow the substitution of a conviction for a more serious offence, unless that offence was one that could have been reached on the charge that was brought. There appears to be no power on review or appeal for a court to substitute a more serious offence where the accused has been charged with and convicted of a less serious offence than the evidence discloses he has committed. A conviction for rape is never possible on a charge of indecent assault.

Prosecutors must exercise care when preferring charges so as to ensure that offenders are charged with the correct charges and are not wrongly charged with lesser charges. Magistrates should not accept the charges without question. If it appears to the magistrate during the trial that the evidence establishes a more serious offence than that charged, the magistrate should stop the trial in terms of s 54 of the Magistrates Court Act [*Chapter 7:10*] and refer the matter to the Attorney-General.

In both these cases, the medical doctors who examined the complainants noted that penetration

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had not been effected. The doctors must have been referring to penetration, in the medical sense that the hymen had not been broken. In both these cases, however, there had been penetration in the sense required by law for the purposes of this crime. For the purposes

of the crime of rape the requirement of penetration is met if the male organ is in the slightest degree within the genitals of a female. It is not necessary to prove that the hymen was ruptured.

Cases Considered

Cases cited:

S v *Collett* 1978 (2) RLR 288 (G)

S v *Mhlanga* 1987 (1) ZLR 70 (S)

S v *Muvandiri* 1995 (2) ZLR 250 (H)

S v *Nyuke* 1981 RLR 158 (GD)

R v *Tarusika* 1959 (1) R&N 51 (SR)

S v *Torongo* S-206-96

Judgment

Chatikobo J: These two matters are reviewed together because they raise the same issue. It is the increasing tendency on the part of public prosecutors to prefer charges of attempted rape or indecent assault in circumstances where the evidence warrants that the offenders be charged with the crime of rape.

THE FACTS

A. *S* v *Mabvura Sabawu*

The accused is an uncle to the complainant who at the time was aged 9 years. On a day in March 1999, the complainant was left in the accused's custody. While the two were together, in a hut, at a farm outside Harare, the accused increased the volume of a radio which was playing therein. He proceeded to remove the girl's underwear before laying her on the floor from where he "inserted his penis between her legs and ejaculated". Although she cried for help, no one heard her because her voice was smothered by the blaring noise from the radio. After he completed his purpose, the accused released the complainant but threatened to kill her if she made a report of the incident to anyone. She did not report. The offence only came to light when the girls' mother noticed that she was walking irregularly. On being examined by the mother's friend, the girl revealed her ordeal. She was then examined by a medical practitioner who subsequently compiled a report. The doctor observed, among other things, that there was hymenal redness on the vestibule and some watery discharge. The girl had also contracted a sexually transmitted disease.

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These facts gave rise to the prosecution of the accused, who I should say is 32 years old, on a charge of indecent assault. He was convicted, in spite of his protestations of innocence, and consequent upon his conviction he was sentenced to 7 months' imprisonment 3 of which were conditionally suspended.

B. *LIVESON PASI*

In a rural homestead in Sianembwa which falls under Chief Mola, three women, who were all married to one man, had died, it seems in quick

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succession of each other. Their husband was also critically ill. The relatives engaged the accused, a self-styled prophet of the Zion Apostolic Church of Zimbabwe to cleanse the homestead of the evil spirits which were believed to be the cause of the deaths of the three women and the illness of their husband.

The accused then said that to enable him to perform the task he required a woman who had reached menopause, two virgin girls at premenstrual stage and whose breasts were undeveloped as well as a virgin boy. The sick man's daughter and his granddaughter, both aged twelve, were offered for the ritual alongside a virgin boy called Lameck. A separate hut from which the accused would perform the ritual was set aside for the purpose.

A chicken was slaughtered in a dish from where the sick man caught its blood with his cupped hands. There were herbs in the dish. The two girls were then ordered to place the herbs between their legs after which they ground the herbs to powder by pestle and mortar. Thereafter, the accused called the first girl, Stella, who is the daughter of the sick man, into the hut where he tripped her to the ground and removed her pants. His fly was open. He proceeded to insert his organ into hers. She wanted to cry, but the accused told her that if she cried, the disease which was afflicting her father would leave him and attack her and she would die. When she eventually stood up she observed mucous like substance on her person.

A medical report which was compiled after the examination which followed shows that there were bruises on her genitals, in particular there was bruising on the inner side of the labia minora and around the hymen, although the hymen was not ruptured. The doctor concluded that penetration was not effected.

During the night of that day, the accused slept in the same hut with Lameck and the two girls. Before going to sleep the accused ensured that the second girl, Yemurai, slept next to him. During the night, he mounted her. Although she tried to cry, the accused intimidated and asked her why she was crying when he was doing it in order to cure her grandfather. He proceeded to insert his organ into hers. Thereafter the accused went outside and started to blow his horn. Yemurai was also examined by a medical practitioner whose report shows that, like Stella, she suffered bruising to her genitals, that is, on the inside of her labia minora and around the hymen. Like in Stella's case, the doctor observed that the hymen was intact and concluded that penetration had not been effected.

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It is a trite proposition that for the purposes of the crime of rape, penetration is effected if the male organ is in the slightest degree within the female body. It is not necessary to prove that the hymen was ruptured. If authority were required for this settled proposition I would refer to *S* v *Mhlanga* 1987 (1) ZLR 70 (S) at 72F and *S* v *Torongo* S-206-96.

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In Sabawu's case, although the doctor remarked that there was no hymenal trauma, he nevertheless observed what he termed hymenal redness, which must be an indication that the man's organ had been in contact with the girl's hymen, thus showing penetration, albeit slight penetration. The girl experienced difficulty in walking afterwards and she was infected with a sexually transmitted disease. This in my view, goes to show that there was penetration which enjoined the prosecutor to prefer a charge of rape and not indecent assault.

In Pasi's case, each of the two girls had bruises on her vagina, in each case on the inside of the labia minora, again a clear indication that there had been contact between the girls' vaginas and the accused's penis.

Although in each case the doctor said penetration had not been effected, he must have been referring to penetration in the medical sense that the hymen had not been ruptured. A legally trained mind ought to appreciate that legal penetration connotes the slightest entry of the male organ into the female body, which is what happened in both cases under review.

These courts have on numerous occasions implored prosecutors to exercise care when preferring charges so as to ensure that the correct charges are put to offenders. Magistrates for their part should not accept without question charges which are not consistent with the evidence put before them. If it occurs to the magistrate during the course of the trial that the evidence established a more serious offence than the one brought against the accused, he or she should stop the trial in terms of s 54 of the Magistrates Court Act [*Chapter 7:10*] and refer the matter to the Attorney-General.

I am now faced with a situation where offences which should have attracted sentences in the region of seven to ten years' imprisonment have been so trivialised that, in the case of Sabawu, a mere 4 months' imprisonment has been imposed and, in Pasi's case, 4 years' imprisonment was imposed for two counts which could easily have attracted a minimum of fifteen years' imprisonment, especially bearing in mind the elaborate, barbarous and deceptive strategy employed by the accused on both the girls and the entire village.

The question now is whether there is anything which can be done to salvage the situation.

I sought the views of the Attorney-General on the point and he advises me in a helpful memorandum that the court has the power, in terms of s29(2)(b)(iii) to correct the proceedings. The section provides that:

> "If on a review of any criminal proceedings of an inferior court or tribunal, the High Court considers that the proceedings -

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(a) ...

(b) are not in accordance with real and substantial justice, it may, subject to this section -

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(i) ...

(ii) ...

(iii) set aside or correct the proceedings of the inferior court or tribunal or any part thereof or generally give such judgment or impose such sentence or make such order as the inferior court or tribunal ought in terms of any law to have given, imposed or made on any matter which was before it in the proceedings in question."

That the section gives the court the power to alter or correct a verdict is evident from the wording itself. The question which arises in the context of the present case is whether the court can alter a verdict on a charge alleging the commission of a minor offence so as to substitute a conviction for a more serious offence and, if that is permissible, would such power include the power to impose a more severe sentence which is consonant with the gravity of the substituted verdict? The issue came before Gubbay J (now Chief Justice) in *S* v *Hove* 1981 ZLR 610 (H) at 612A-B. He there observed that:

> "In reviewing criminal proceedings of an inferior court, this court is empowered by s29(2)(b)(i) and (iii) of the High Court of Zimbabwe Act of 1981 (now the High Court Act [*Chapter 7:06*] to alter or correct a verdict, even if it involves substituting a conviction for a more serious offence in lieu of one for a less serious offence, provided that all the ingredients of the more serious offence were clearly set out in the charge."

Hove had been found in possession of emeralds with no commercial value. Because the emeralds were of no commercial value it was erroneously thought that his conduct amounted to no more than an attempt. On review, it was held that he should have been found guilty of the substantive crime of possessing emeralds in contravention of s 3(1) of the Precious Stones Trade Act 1978 (now [*Chapter 21:06*]). The verdict was altered to the more serious offence and the mandatory sentence was brought into effect. The alteration in this case was possible because the ingredients of the offence, that is wrongful possession of emeralds, were contained in the charge. Once the verdict was altered, the harsher sentence had to be imposed because no other sentence was legally competent.

The older case of *R* v *Tarusika* 1959 (1) R&N 51 (SR) was slightly different. The accused had been charged with theft but the trial court had returned a verdict of guilty of attempted theft. On review, it was held that a theft had been proved and consequently a verdict of guilty of theft was substituted but the sentence was not increased because the Act then prohibited, as it does now, the increase of a sentence which is legally competent, on review, a fact which was recognised in *Hove*'s case *supra*.

S v *Muvandiri* 1995 (2) ZLR 250 (H) was a case where the accused was charged with rape and alternatively he was charged with contravening a section of the Criminal Law Amendment Act [*Chapter 9:05*]. The magistrate returned a verdict of guilty of the alternative charge before he adjourned to

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consider sentence. During the ensuing period of cogitation, the magistrate realised that he ought to have convicted the accused of rape. He sent the matter on review and a verdict of rape was substituted. The matter was then remitted to the trial court for sentence.

It can thus be seen that the conviction and sentence in *Hove* were altered because of the error in so far as the court had thought that stones with no commercial value were not emeralds and because once the verdict was altered, the sentence became incompetent. In the other two cases, that is, *Tarusika* and *Muvandiri*, the verdicts were altered because the magistrate could and should have reached that verdict considering the charge that was brought and the evidence that was, or should have been accepted. Thus the learned author, John Reid-Rowland *Criminal Procedure in Zimbabwe* at 26-7 says:

> "It would thus be possible to alter the conviction to one which is *prima facie* of greater gravity than the one reached by the magistrate. Thus, if the accused was charged with the substantive offence but the magistrate convicted him of an offence of which he might have been found guilty on that charge (such as an attempt) although the facts showed that he should have been convicted of the substantive charge, the conviction can be altered accordingly."

The cases upon which the learned author relies for this statement were cases where the accused persons had been charged with the main offence but had been convicted on lesser offences which were either competent verdicts or had been charged in the alternative. Where the charge as framed and as put to the accused is of a minor nature than the one which is proved on the evidence and which is of greater gravity there appears to be no power either on review or on appeal to substitute the more serious offence. Hence, Reid-Rowland states on the same page:

> "On the other hand, where the accused was charged with and convicted of an attempt to commit an offence but the evidence shows that he committed the substantive offence, it would not be competent to alter the conviction to one of committing the substantive offence, because that was not a verdict which the magistrate could have reached."

This statement derives support from respectable authority and I respectfully associate myself with it. See *S* v *Collett* 1978 (2) RLR 288 (G) 291 and *S* v *Nyuke* 1981 RLR 158 (G) 159.

Turning to deal with the facts of the cases under review. In the first case, the charge preferred against the accused was one of indecent assault. Although the evidence disclosed the crime of rape it was not open to the magistrate to return a verdict of guilty of rape on the charge as framed. In the second case, two counts of attempted rape were preferred in circumstances where two counts of rape should have been preferred. It was similarly not open to the trial court to return verdicts of guilty of the substantive offence even though the evidence justifying it was available.

CHATIKOBO J

All I can do is to decline to grant my certificate as the proceedings cannot be said to be in

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accordance with real and substantial justice.

My brother Bartlett J has read this judgment and he has authorised me to say that he agrees with it.

LIBERTY PARTY OF ZIMBABWE *v* REGISTRAR-GENERAL 1999 (2) ZLR 321 (HC)

Citation	1999 (2) ZLR 321 (HC)
Case No	Judgment No. HB-83-99
Court	High Court, Bulawayo
Judge	Cheda J
Heard	August 30, 1999
Judgment	November 11, 1999
Counsel	D Coltart, for the applicants P Ncube, for the respondents
Annotations	None

Civil application

Flynote

Election - local authority election - candidate - disqualification - candidate disqualified if in default of payment of rates etc - onus on party claiming candidate to be disqualified - not for candidate to prove he is not disqualified

Headnote

A candidate for a municipal election may be disqualified on the grounds that he is in default with the payments of rates or other charges due to the council. The applicants were disqualified by the Registrar-General from standing for positions as councillors in municipal elections on the grounds that they had not produced rates clearance certificates either at all or in time.

Held, that there was no onus on them to prove that they were not disqualified. It was for the respondent, as the party who claimed that the applicants did not qualify, to prove the disqualification.

Statutes Considered

Legislation considered:

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Electoral Act [*Chapter 2:01*], s 103G(2)(h)

Case Information

D Coltart, for the applicants

P Ncube, for the respondents

Judgment

Cheda J: The applicants are members of a political party known as the Liberty Party of Zimbabwe. The party sponsored the applicants as candidates for the municipal elections for the City of Bulawayo which were held on 30 and 31 August 1999.

According to the election notice published in *The Chronicle* of Wednesday 4 August 1999, the nomination court was to sit in Bulawayo on Tuesday 10 August 1999 to receive nominations of candidates for both mayoral and councillors positions. The notice should have given not less than seven days' notice for the nomination court's sitting. This requirement is set out in the Electoral Act [*Chapter 2:01*] as amended by Act 21 of 1997.

The applicants also challenge the respondent for disqualifying them on the basis of s 103G(2)(h), which says a person shall be disqualified from being nominated as a candidate for election as a councillor if:

CHEDA J

" (i) on the nomination day in question; or

(ii) the day of the election in question;

he is in default with the payment of any levies, rates, charge or tax due and payable to the Council concerned, and has been in such default for more than one hundred and twenty days."

In this case, in order to satisfy himself that the candidates were not in default, the Registrar asked the candidates to produce rates clearance certificates at the time when they were submitting their applications. The candidates did not have any.

However, it cannot be said that their failure to produce them meant they were disqualified, just as it was not known whether they were in default or not. The Act did not provide it as a condition for registration, that candidates should produce rate clearance certificates. This was clearly an additional requirement imposed by the Registrar which the candidates were not aware of.

The candidates also say that when they were advised of this requirement they went to seek the certificates, and some of the candidates did get them, although others did not.

However, even for those who got them, they were told that the nomination court had closed, as it was too late for their applications to be processed, despite the fact that all the members of the court were still there. The candidates claim that they had been advised by a member of the nomination court, one Miss Edna Ndlovu, that the court would wait for them to obtain the

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clearance certificates. It also turned out that none of the candidates were in default for the period of 120 days.

After reading through the papers I allowed the parties' representatives to argue the matter, although the applicants submitted that the respondent should be barred for contempt of the provisional order. I was of the view that the article in the newspaper relied upon for what the Registrar was said to have stated could be misleading, and that elections referred to could be in the other wards.

In his replying affidavit, the Registrar-General referred to the notice in *The Herald* newspaper of 3 August 1999 which he said was lawful. He does not refer to the one in *The Chronicle* which the applicants referred to, nor does he say why he contends that it was lawful. He argues that logically it is the candidate who has to obtain confirmation from the Council to satisfy the court that he or she is not in default. This cannot be correct. The party who claims that a person does not qualify is the one who has to prove that disqualification.

The respondent does not dispute that a member of the nomination court told the candidates that the court could wait for them while they went to get clearance certificates. The candidates cannot be penalised for acting on information given to them by a member of the nomination court.

CHEDA J

Once the respondent decided to add the additional requirement, he should have afforded the candidates enough time to meet the requirements, and not to close the court while they were out to get the clearance certificates which were not part of the Act's requirements in the first place.

It follows, therefore, that the candidates were disqualified on grounds that were not provided in the Act, and for delays caused by the additional requirements imposed by the respondent. The disqualification was certainly not a legal requirement of the Act, and is null and void. The disqualification is set aside and there will be an order in terms of the provisional draft order as follows:

1. That the nominations of candidates for election as councillors for wards 9, 12, 13, 14, 16, 17, 18, 24, 25, 26 and 28 of Bulawayo District be and are hereby set aside.

2. That the respondent be, and is hereby interdicted from proceeding with the elections for the councillors in wards 9, 12, 13, 14, 16, 17, 18, 24, 25, 26 and 28 of the Bulawayo District.

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

It is my view that the costs should normally follow the results in this case. The respondent is to pay the costs.

Webb, Low and Barry, applicants' legal practitioners

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

CHISIPITE SCHOOL TRUST (PVT) LTD *v* CLARKE 1999 (2) ZLR 324 (SC)

Citation	1999 (2) ZLR 324 (SC)
Case No	Judgment No. S-112-99
Court	Supreme Court, Harare
Judge	Gubbay CJ, McNally JA, Sandura JA
Heard	November 1, 1999
Judgment	November 15,1999
Counsel	J B Colegrave, for the appellant Mrs J B Wood, for the respondent
Annotations	None

Civil appeal

Flynote

Employment - contract - termination - suspension of employee without pay and benefits pending application for order to terminate employment - benefits including housing and motor vehicle - whether employer entitled to obtain order for eviction of employee from house and return of motor vehicle

Headnote

As part of her benefits from her employment as headmistress of the appellant school, the respondent was entitled to free occupation of a house and the use of a motor vehicle. The school authorities suspended the respondent without pay and other benefits in terms of s3(1)(h) & (i) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985 (SI 371 of 1985). The grounds for her suspension were that she lacked the skills required to manage the school and had not demonstrated an appropriate level of competence in the discharge of her duties as headmistress. After suspending her the school authorities then applied to a principal labour relations officer for an order terminating her employment on the grounds set out in her letter of suspension. The respondent refused to vacate the house and to return the motor vehicle to the school so the school authorities applied to the High Court for an order obliging her to vacate the house and return the vehicle.

Held, that the respondent had not challenged the legality of the suspension by referring the dispute to a labour relations officer under s 93(1) of the Labour Relations Act [*Chapter 28:01*] and therefore there was no question of having to wait for the outcome of this challenge before

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bringing the High Court application.

Held, further, that s 3 of the Labour Regulations provides for the summary suspension of an employee without pay and other benefits. After such suspension the employee is not entitled to continued enjoyment of the employment benefits and these benefits remain lost to the employee until a labour relations officer decides whether the grounds for suspension had been proved.

Held, further, that in terms of s 3 of the Labour Regulations, the labour relations officer is only entitled to investigate whether the grounds for suspension have been proved. If they are, he or she will issue an order terminating employment. If they are not, he or she will issue an order the removal of the suspension and to reinstatement or payment of damages to the employee and may also order the payment of back pay from the time of summary suspension and compensation for any loss of benefits incurred by such suspension.

Held, further, that the labour relations officer had no power to order the employee to surrender employment benefits such as the house and car which she was permitted to use and the

school authorities, who were not permitted to resort to self-help, were entitled to approach the High Court for relief and were justified in doing so.

Semble, that an employee is entitled to refer a matter under s 93(1) without having to wait for the conclusion of the determination in terms of s 3(2) of the Labour Regulations. The referral can be made on grounds such as that the suspension was vitiated by bad faith, was not based on any of the grounds of misconduct specified in s 3(1) of the Labour Regulations, or *ex facie* the allegations did not constitute the ground of misconduct relied upon. If the employee establishes one or more of these grounds, the employee would be entitled to have the withdrawal of pay and other benefits set aside without having to await the conclusion of the investigation in terms of s 3(2) of the Labour Regulations.

Cases Considered

Cases cited:

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

Case Information

J B Colegrave, for the appellant

Mrs *J B Wood*, for the respondent

Judgment

Gubbay CJ: The appellant is a non-profit making company limited by shares. Its directors consist of a Board of Governors (the Board), who administer the Chisipite Senior School, one of the premier private schools for girls in Harare.

Under a written contract entered into on 4 March 1997, the Board undertook to employ the

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respondent as headmistress of the school from 1 September 1997 to 31 December 2002. The contract provided that the respondent was to receive a salary and other perquisites. These included the free occupation of a house situated in the grounds of the school, with the costs of lighting, water, local telephone calls, postage and the services of a domestic servant, at the expense of the appellant; and, in addition, the use of a Mazda 323 sedan motor vehicle.

The respondent assumed her duties on 1 September 1997 and availed herself of the beneficial right to the motor vehicle. She commenced residence at the headmistress' house on 1 May 1998, having been in receipt of a monthly housing allowance until April 1998.

On 9 October 1998, the chairman of the Board wrote to the respondent. He advised that as she was considered to lack the skills required to manage the school, and had not demonstrated an appropriate level of competence in the discharge of her duties as headmistress, the Board had decided to suspend her with immediate effect without pay and other benefits in accordance with paras (h) and (i) to section 3(1) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985, SI 371 of 1985 (the Regulations). Thereafter, written application was made to the principal labour relations officer for an order terminating the respondent's contract of employment on the grounds particularised in the letter of suspension, a copy of which was attached.

GUBBAY CJ

Permission was given to the respondent to remain in occupation of the house and retain use of the motor vehicle until 31 December 1998. However, disputing the grounds upon which she had been suspended, the respondent subsequently refused to vacate the house and return the motor vehicle.

The impasse over possession led the appellant to seek an order from the High Court for: (1) the eviction of the respondent from the headmistress' house; and (2), the delivery of the Mazda 323 motor vehicle.

The basis for the relief was that once suspended by virtue of s 3(1) of the Regulations, the respondent became disentitled to the receipt of pay and other benefits until an order removing the suspension was made by a labour relations officer. But, as the nature of the relief claimed was beyond the power of a labour relations officer to grant, the appellant's only remedy lay within the jurisdiction of the High Court.

The respondent opposed the application. She deposed in an affidavit that she had "complained" to the Labour Department about the validity of her suspension (though obviously not in writing). To this vague and undetailed assertion was added the submission that "the matter of the validity of my suspension is *sub-judice*". The defence raised, as I understand it, was this. Since a labour relations officer is enjoined to determine at a forthcoming investigatory hearing whether the grounds for suspension relied upon are proved, the High Court has no jurisdiction to entertain the relief.

There was no suggestion of the respondent having made a substantive counter application to a labour relations officer. What her so-called complaint portrayed was nothing more than that, as

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the grounds for suspension could not be proved against her at the hearing, the only appropriate order would be one removing the suspension.

The learned judge *a quo* dismissed the application with costs. He reasoned that as a dispute had been referred by the respondent to a labour relations officer under s 93(1) of the Labour Relations Act [*Chapter 28:01*], (the Act) the domestic procedure authorised therein ought to have been exhausted first; and that until the dispute as to the validity of the suspension had been determined by a labour relations officer, the respondent was entitled to receive pay and other benefits.

With deference to his Lordship I am unable to agree. As already observed, the respondent's reaction to the suspension was merely to inform the Labour Department that, in her opinion, valid grounds were lacking. There was no intention to refer a dispute under s 93(1)(b) of the Act. If this were not so, at the very least one would have expected the legal practitioner, who was consulted by the respondent shortly upon receipt of the letter of suspension, to have written to a labour relations officer specifically referring the dispute as to whether the appellant had *good cause* to believe the respondent guilty

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of the acts of misconduct specified in paras (h) and (i) to s 3(1) of the Regulations. He did not do so.

Furthermore, it is most significant that a reading of the record of the recently held proceedings before the labour relations officer (made available to this court with the consent of the parties), which is headed "*Chisipite Senior School* v *JM Clarke*", reveals that the same legal practitioner did not at any stage of the investigation see fit to intimate that the separate and preliminary issue to determine was the dispute as to the existence of good cause; that the respondent's complaint was different from a mere denial of any misconduct, in that taken at face value the allegations against her did not establish either of the specified grounds of misconduct. The legal practitioner simply proceeded to contest the allegations made against the respondent in an effort to persuade the labour relations officer that no ground for suspending her had been proved; and that, consequently, an order to remove the suspension should be made.

In any event, it is my view that the provisions of s 3(2) of the Regulations, properly construed, do not allow of a separate investigation into the existence of good cause for the belief that an employee is guilty of any of the specified acts of misconduct. There is only one investigation consequent upon the suspension of an employee under s 3(1). And termination of the contract of employment arises automatically upon proof of any of the specified acts of misconduct alleged against the employee. If the grounds of suspension are proved to the satisfaction of the labour relations officer (that is to say, that good cause existed for the employer believing the employee to be guilty), he will serve upon the employer a determination or an order terminating the contract of employment. If, on the other hand, such grounds are not proved to the satisfaction of the labour relations officer (that is to say, that good cause did not exist for the employer believing the employee to be guilty), he will serve upon the employer a determination or an order for the suspension to be removed and the reinstatement of the employee or, in the

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alternative, award damages. See *Hama* v *National Railways of Zimbabwe 1996* (1) ZLR 664 (S) at 678B.

What is provided for in s 3(1) of the Regulations is *summary suspension* without pay and other benefits. If the grounds for suspension are *not* proved then, in accordance with s 3(3) of the Regulations, the determination or order served by the labour relations officer upon the employer "may provide for back pay from the time of the summary suspension and compensation for any loss of benefits incurred by such suspension". The labour relations officer is not empowered to grant any other form of relief.

It follows that the preliminary point taken by the respondent before the lower court that a dispute had been referred concerning the lawfulness of the

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suspension and was still to be determined by a labour relations officer, ought not to have been upheld.

On the facts of this matter, it is strictly unnecessary to decide whether it is open to an employee to challenge a suspension from employment by the referral of a dispute under s 93(1) of the Act. Nonetheless I would venture the opinion that if able to show that the suspension was vitiated by bad faith, or was not based on any of the grounds of misconduct specified in s 3(1) of the Regulations, or *ex facie* the allegations made did not constitute the ground of misconduct relied upon, the employee would be entitled to have the withdrawal of pay and other benefits immediately set aside without having to await the conclusion of an investigation held in terms of s 3(2) of the Regulations.

Pending the removal of the suspension, the respondent was not entitled to the continued enjoyment of the benefits comprising the free occupation of the headmistress' house and the use of the motor vehicle. A labour relations officer cannot order the respondent to surrender these particular benefits. Consequently, the appellant, being unable to resort to self-help, approached the High Court for relief. I consider it was justified in doing so.

Whether the acts of misconduct relied upon are ultimately proved and so result in the termination of her contract of employment, was an issue awaiting decision by a labour relations officer; and until made the enjoyment of all benefits remained lost to the respondent. That was the position in law facing the learned judge. On his approach, however, the question did not arise of whether the particular relief sought depended upon it being proved to *his* satisfaction that the suspension of the respondent was lawful.

I consider that the learned judge would have erred had he not accepted the legality, under the Regulations, of the temporary suspension and its consequences, as this court is now obliged to do. That being so I find the appellant deserving of the relief claimed. The application should have been granted.

In the result the appeal must be allowed with costs. The order of the court *a quo* is set aside. Substituted therefor is an order in terms of the draft, being Annexure E to the application, in

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which the date 30 November 1999 is inserted in paragraph 1 thereof.

McNally JA: I agree.

Sandura JA: I agree.

Coghlan Welsh & Guest, appellant's legal practitioners

Byron Venturas & Partners, respondent's legal practitioners

CHIKONYE & ANOR *v* PETERHOUSE 1999 (2) ZLR 329 (SC)

Citation	1999 (2) ZLR 329 (SC)
Case No	Judgment No. S-105-99
Court	Supreme Court, Harare
Judge	McNally JA, Muchechetere JA, Sandura JA
Heard	October 14, 1999
Judgment	November 16, 1999
Counsel	P Nherere, for the appellants A P de Bourbon SC, for the respondent
Annotations	None

Civil appeal

Flynote

Employment - contract - termination - contract of fixed duration - employee not regarded as having been dismissed when contracts expired

Review - jurisdiction - High Court - domestic remedies not exhausted - when court may entertain application for review

Headnote

The appellants were employed by the respondent school as teachers. Their employment ceased. They claimed to have been unfairly dismissed. They took the matter to a labour relations officer who ordered their reinstatement. The school noted an appeal, but pending the appeal applied to the High Court for a declaration that the appellants' contracts were of fixed duration and had terminated by effluxion of time. The High Court upheld the school's contention. On appeal:

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Held, that the High Court ought not to have entertained the application, as the question of the status of the contracts was one of the points to be decided on appeal to the senior labour relations officer. In addition, a declaration that the contracts were of fixed duration or not would not in practice finally resolve the matter, as there were other issues to be decided in the appeal to the senior labour relations officer. However, the decision of the judge *a quo* was not one that no reasonable judge could have reached, and so the exercise of his discretion could not be interfered with on appeal.

Held, further, that the contracts were of fixed duration. Unless the contracts were renewed by the school, the appellants ceased to be employees. There was no obligation on the school to offer them permanent positions.

Cases Considered

Cases cited:

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

Eagle Tanning (Pvt) Ltd & Anor v *Employees, Eagle Tanning (Pvt) Ltd & Anor* S-238- 91

Girjac Svcs (Pvt) Ltd v *Mudzingwa* 1999 (1) ZLR 243 (S)

Lever Bros (Pvt) Ltd v *Marafuzah & Ors* S-23-97

Mbedzi v *Deputy Registrar, High Ct & Anor* S-57-97

Mudakureva v *GMB* S-15-98

Munyira v *Sec for Education & Anor* S-214-98

Musundu v *Chairperson, Cresta Lodge Disciplinary & Grievance Cttee* HH-115-94

Nhidza v *Unifreight Ltd* S-27-99

Rauties Tpt v *Voorsitter, Plaaslike Padvervoerraad* 1983 (4) SA 146 (W)

S v *Stead* 1991 (2) ZLR 54 (S)

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

Zikiti v *United Bottlers Ltd* 1998 (1) ZLR 389 (H)

Case Information

P Nherere, for the appellants

A P de Bourbon SC, for the respondent

Judgment

The Full Court: The two appellants were teachers at Peterhouse. Their employment ceased at

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the end of 1996. They claimed to have been unfairly dismissed. They took the matter before a labour relations officer, who agreed with them and ordered their reinstatement. Peterhouse noted an appeal, but then, while the appeal was still pending, made an application to the High Court for a declaration that the contracts with the two teachers were contracts of fixed duration which terminated by effluxion of time on 31 December 1996. This application succeeded, and the appeal is against the declaration by the High Court in favour of Peterhouse. The matter has been before us previously. See judgment No. S-205-98.

Mr *Nherere*, for the appellants, took two points. The first was that the High Court should not have entertained the application while the parties were still involved in the labour relations proceedings. The second, relevant only if the first failed, was that the contracts were not contracts of fixed duration.

As to the first point, it has not proved easy over the years to formulate a definition of the circumstances in which a litigant in the labour relations system may by-pass that system by taking the case to the High Court, whether by way of review or, as in this case, by way of seeking a declaratory order.

It is accepted that the High Court has a discretion, to be exercised, of course, judicially. There is no statutory ouster of the court's jurisdiction pending exhaustion of domestic remedies. This has been noted in such cases as *Tutani* v *Minister of Labour & Ors* 1987 (2) ZLR 88 (H) at 95D; *Musundu* v *Chairperson of Cresta Lodge Disciplinary & Grievance Committee* HH-115-94; *Zikiti* v *United Bottlers* 1998 (1) ZLR 389 (H) at 392F; *Mudakureva* v *Grain Marketing Board* S-15-98 at p 3; *Nhidza* v *Unifreight Ltd* S-27-99; and *Girjac Services (Pvt) Ltd* v *Mudzingwa* 1999 (1) ZLR 243 (S). In the *Girjac* case, it was said that a litigant should exhaust his domestic remedies unless there are good reasons for approaching the court. Also in this court, it has been said that "domestic tribunals" should not be by-passed without good reason; one such reason would be lack of jurisdiction on the part of the tribunal - see *Munyira* v *Secretary for Education & Public Service Commission* S-214-98 (not reported), which relied for the proposition on Baxter *Administrative Law* pp 720-721.

In this case, the learned judge went very carefully into the question whether he should exercise his discretion so as to hear the matter. He knew that it was

a matter in which the procedures under the Labour Relations Act had been initiated. The point must be made, incidentally, that it was not Peterhouse which took the first step along that path. Peterhouse was obliged to respond when the appellants approached the labour relations officer. Moreover, it was obliged to note an appeal, in order to keep its position open while it applied to the High Court. In *Rauties Transport* v *Voorsitter, Plaaslike Padvervoerraad (Chairman, Local Road Transportation Board)* 1983 (4) SA 146 (W), Goldstone J (as he then was) specifically ruled that the noting of an appeal did not deprive the applicant of his right to take the same decision on review to the Supreme Court (now the High Court).

The learned judge in this present case, though not in so many words, recognised that the point on which a declaratory order was sought was a jurisdictional point - a point of law which, if decided in Peterhouse's favour, would short-circuit the procedures under the Labour Relations

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Act. He also noted that it would be quicker and cheaper for him to decide the point, rather than to refer it back to the senior labour relations officer. His decision would conclude the matter, subject of course to any appeal.

These were considerations properly taken into account by the learned judge. It is not important that this was an application for a declaratory order rather than a review. The same principle, that enunciated by the Chief Justice in *Cargo Carriers (Pvt) Ltd* v *Zambezi & Ors* 1996 (1) ZLR 613 (S), applies.

The submission, however, was that these features were not sufficiently weighty to justify the learned judge's decision to exercise his discretion to hear the matter. In considering this issue we must bear in mind that we do not have the right to replace his discretion with ours. We may say "had we been in his position we would not have accepted jurisdiction; we would have sent it back". But, as the Chief Justice said in the *Cargo Carriers* case *supra*:

> "Unless it can be found that no reasonable judge would have acted other than to decline jurisdiction ... the decision made is plainly beyond interference by this court."

There are two factors which would have influenced us to decline jurisdiction. They are:

1. The "jurisdiction" issue is essentially a question of fact. Were the contracts contracts of fixed duration or not? That is precisely the question raised by Peterhouse in its first ground of appeal to the senior labour relations officer. It is a question which arises because of the provisions of s 2(1)(c) of SI 371 of 1985, which reads:

   > "No employer shall ... terminate a contract of employment ... unless the employee was engaged for a period of fixed duration or ..."

   Therefore, there is no reason why the senior labour relations officer should not have decided the matter on appeal to him.

2. It does not seem to us that a declaration as to whether the contracts were of fixed duration or not will in practice finally resolve the matter. Paragraph 1 of the draft order was not granted. Thus the decision of the labour relations officer has deliberately not been reversed; the appeal to the senior labour relations officer remains to be determined; there may be other issues arising out of grounds 2 and 3 in Peterhouse's "Application for Reference of matter to senior labour relations officer" dated 15 January 1997. The matter will therefore, unless resolved by consent, have to go back to the "domestic tribunal" for completion.

We are therefore, and with due deference to the learned judge, of the view that it would have been preferable for him to have declined jurisdiction. We do not go so far as to say that no reasonable judge would have done otherwise. We will, however, give effect to our view by making a special order as to costs.

We turn therefore to the second question. Were these contracts contracts of fixed duration? If they were, then that issue at least can be disposed of.

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It seems to us to be beyond doubt that they were contracts of fixed duration, as the learned judge found. If one applies the principles laid down in *Lever Brothers (Pvt) Ltd* v *Marafuzah & Ors* S-23-97 and *Mbedzi* v *Deputy Registrar of the High Court & Anor* S-57-97, one can come to no other conclusion. The relevant clause is Clause 9. It reads:

" 9.1. All employment contracts (unless otherwise stated) will be subject to the employee's satisfactory completion of a first year of service. Upon fulfilment of this condition the employee may be offered a second year of service, during which period the employee's post may be declared permanent.

9.2. The rector/headmaster shall be the arbiter in considering whether or not an employee's professional services are satisfactory."

The exception in brackets in 9.1. does not apply. The use of the word "may" in two places in the second sentence of 9.1. makes it clear that even if the service is satisfactory (or cannot be proved to be unsatisfactory) there is no obligation on Peterhouse to offer a permanent post. So it is not relevant to argue that the appellants' service was satisfactory. That is only the first hurdle. The fact is that the contract involves three consecutive appointments: a one-year fixed term appointment; a second one-year fixed term appointment; and, during or at the end of that second period, a permanent appointment - what the Americans call "tenure".

Thus at the end of the second year, in the absence of a further offer of employment, the appellants ceased to be employees. They were covered by the provisions of s 2(1)(c) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations 1985, SI 371 of 1985. Compare *S* v *Stead* 1991 (2) ZLR 54 (S); *Eagle Tanning (Pvt) Ltd & Anor* v *Employees of Eagle Tanning (Pvt) Ltd & Anor* S-238-91; and the *Mbedzi* case *supra*.

The appellants were not dismissed. Their contracts expired by effluxion of time. They were not offered a permanent post. There was no obligation upon Peterhouse to make such an offer.

Mr *Nherere* raised, at the very end of his submissions, the question of s 5 of the Labour Relations Act, which deals with "protection of employees against discrimination". This point was not one which was raised in the notice of appeal; no application has been made, as set out in s 5(4), under Part XII of the Act, specifically relying upon the provisions of s 5; Peterhouse has not been invited to reply squarely to allegations based on s 5 of the Act and has not done so; no order has specifically been sought in terms of s 5(4)(b) of the Act. In fact, the only document in which s 5 of the Labour Relations Act is specifically referred to is in paras 12: 1-2-3 of the applicants' heads of argument in the application for condonation of the late noting of the appeal. It is not mentioned anywhere in the documents relating to the merits of the dispute.

In the circumstances, this aspect cannot be considered in this forum at this time. The appeal has been fought on the basis of whether or not the contracts of employment were fixed-term contracts. We agree with the learned judge that they were fixed-term contracts. The appellants were not unfairly dismissed, because they were not dismissed at all. Their contracts had expired.

The appeals therefore must be dismissed. However, because of the considerations mentioned

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earlier, there will be no order as to costs in this court.

I E G Musimbe & Partners, appellants' legal practitioners

Scanlen & Holderness, respondent's legal practitioners

CHISVO & ORS *v* AUREX (PVT) LTD & ANOR 1999 (2) ZLR 334 (HC)

Citation	1999 (2) ZLR 334 (HC)
Case No	Judgment No. HH-229-99
Court	High Court, Harare
Judge	Gillespie J
Heard	November 17, 1999
Judgment	November 17, 1999
Counsel	P Nherere, for the applicant E Matinenga, for the respondents
Annotations	None

Civil application

Flynote

Employment - labour dispute - industrial action - disposal order ordering workers to return to work - when service of order is adequate

Practice and procedure - parties - representative action - when action appropriate - individuals having different causes of action - representative action not appropriate - need for proof of authority to represent others

Headnote

A number of workers at a company, including the chairman of the workers' committee, went on strike in defiance of a referral by a labour relations officer of the dispute to compulsory arbitration. The company obtained a show cause order in terms of s 106 of the Labour Relations Act [*Chapter 28:01*] which directed the workers' committee to show cause why the action should not be disposed of in terms of s 123 of the Labour Relations Act. Pending its determination, it ordered the termination of the strike. Despite the order, and despite the absence of cause shown, the workers' committee decided to continue the strike. A labour relations officer then addressed the workers and the disposal order was read out, declaring the strike to be illegal and requiring the workers to return to work by a specified time or be dismissed. When the

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workers failed to comply with this order to return to work, they were dismissed.

The chairman of the workers committee brought a representative action in which he purported to represent a large number of workers, none of whom were parties to the litigation. In this action he sought to challenge the validity of the dismissal of the workers whom he was purporting to represent.

As regards the representative action:

Held, that r 89 of the High Court Rules permits a party to sue, representing others who have the same interest in matter but who are not parties to the proceedings. Instead of requiring each party to bring a separate action, this flexible rule of convenience permits one party to obtain a judgment binding, but not executable without leave, on all the parties being represented in the action. In such an action there must be proof of the authority of the representative to act in that capacity and submission of the parties represented. If the court is not satisfied as to the capacity to represent the other parties, not only will it refuse judgment but it might forbid the continuation of such proceedings. There are various ways in which the authority to represent the others can be established. A single affidavit of authority signed by all the parties might well be sufficient in most cases, provided it is regular and complete on the face of it, particularly if it is notarised. In the present case, there was no proof of authority. There was simply a list of names, unsigned and unauthenticated. A deed entitled "Special

Power of Attorney" was produced a long time after the litigation had commenced but this deed was riddled with inconsistencies such as that some of the workers were no longer employees at the time of the disposal order.

As regards the argument that the dismissal of the employees was illegal because of lack of proper service of the order:

Held, that s 12 of the Labour Relations (General) Regulations require service of orders, such as an order to return to work, by hand or by post. However, the service of such an order upon unruly picketing strikers may be a difficult undertaking. The officer issuing the order to return to work must not impose deadlines which make due service impossible. In principle, there is no objection to service of the order by distribution of copies to picketing strikers accompanied by oral announcements and explanations made over a public address system. Nevertheless, this method may not be completely effective where it is attempted during a commotion. Some workers may remain unaware of the order and their dismissal will be invalid. Others may hear the public announcement and but may refuse to take the document containing the order. The latter would not be able to complain about defective service as they have deliberately frustrated the service. Because of the disorder prevailing at the time, there is no evidence as to service, or lack thereof, on any particular individual. However, as a representative action had been brought the employees themselves were not parties to the proceedings and they had therefore led no evidence about non-service upon them. The court was thus unable to make a finding on this issue in relation particular individuals. The bringing of a representative action in this case was thus misguided as this action is inappropriate where the causes of different individuals are

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dependent upon separate issues and discrete findings of fact.

Cases Considered

Cases cited:

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

Comley v *Schmidt* 1947 (2) SA 317 (E)

Gudza v *University of Zimbabwe* HH-201-93

Mashave v *Zupco Ltd & Anor* 1998 (1) ZLR 567 (H)

Prosser & Ors v *Zisco Ltd* HH-201-93

Wakefield v *ASA Seeds (Pvt) Ltd* 1976 (2) RLR 63 (G)

Zimbabwe Amalgamated Railwayman's Union v *NRZ* 1992 (1) ZLR 37 (H)

Zisco Ltd v *Dube & Ors* 1997 (2) ZLR 172 (S)

Statutes Considered

Legislation referred to:

High Court Rules 1971 (RGN 1074 of 1971), r 89

Case Information

P Nherere, for the applicant

E Matinenga, for the respondents

Judgment

Gillespie J: Mapope Chisvo was chairman of the Workers Committee at Aurex (Pvt) Ltd. He was an employee there. So, too, were the cryptonomous 255 others. In July 1997, they were coming to the culmination of an employment dispute with Aurex. Dissatisfied with the manner in which their grievances were addressed, they threatened collective job action. This threat was in defiance of a referral of the dispute by a labour relations officer to compulsory arbitration. The strike commenced on 15 July 1997.

GILLESPIE J

In the face of this action, Aurex obtained a "show cause order" 1(77) in terms of the Labour Relations Act. The order directed the workers' committee to show caused why the action should not be disposed of in terms of s 123 of the Act. I ordered, pending it determination, the termination of the action. The order was issued on 17 July.

On 18 July, there was held the meeting appointed by the show cause order as the date upon

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which the issue should be addressed. Despite the terms of the order, and despite the absence of cause shown, the workers' committee determined to persist with the strike.

On 21 July, a large crowd of workers were picketing the premises of Aurex. A number of officials arrived. These included Miss Matsvangwa, the labour relations officer and the second respondent; Mr Mbeno, personnel manager of Aurex; senior policemen and riot police. What followed is disputed in its timing and detail; it is clear, however, that this is generally what happened. The crowd was addressed by the officials. A "disposal order" 2(78) was read out. The disposal order required members to return to work that afternoon or be dismissed. It declared the strike illegal. Attempts were made to distribute fifty copies of the order. Contrary attempts were made to disrupt the reading of the order; to prevent distribution of the copies; and to discourage workers, who might have been inclined to do so, from complying with it.

The application is for an order awarding three species of relief. First, the setting aside of the show cause order. Second, the setting aside of the disposal order. Third, the reinstatement of Mapope Chisvo and 255 others. And, of course, costs.

The challenge to the show cause order is on the ground that it was not signed by the Minister responsible. Accepting that this, if true, would invalidate the order, 3(79) it is not true. The order was produced by the respondent and bears, for all to see, the Minister's signature. The show cause order, therefore, was valid.

The attack on the disposal order, shorn of any invalidity in the show cause order, relies solely on the averments that the order was either not served on, or alternatively afforded insufficient notice to, workers dismissed for failure to comply with it. In principle, the requirement of service of such an order, in such a manner and on such notice as affords the effected employee, a real opportunity to consider their position and return to work, is to be upheld. Regulations required service of such an order by hand or by post. 4(80) The

telephonic communication of the contents of an order to a person affected has been held invalid. 5(81) Other than that no specific period of notice is prescribed nor any other formality laid down.

The service of such an order upon a tumult of strikers may well be a difficult undertaking. Undoubtedly, an officer issuing a disposal order should take care not to impose deadlines that make due service impossible. I can see, however, no objection in principle to an order which contemplates service of the order by distribution of copies to picketing strikers accompanied by oral announcements and explanations given by some form of public address system. It is, nevertheless, a method of service which is calculated to be less than completely effective. Where employed, it is to be expected that many individuals may, in the hubbub of the occasion, remain unaware of the significance of garbled inaudibilities from a far away loud-hailer and be ignorant of documents being thrust at individuals in the front rank of a body of striking workers. Such individuals may well be able to show an absence of service of an order; an unintentional failure to comply with it; and an invalid dismissal. Conversely, workers who, through

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megaphoned announcements, are aware of the existence of the order and of attempts by officials to distribute it, refuse to take the documents thrust upon them, might not be able to make the same challenge. It is a fundamental principle that a person who knowingly frustrates service can scarcely complain of a defect in service or insist upon a regularity or formality he prevents. 6(82)

In any case, where these are the determinative considerations, the issues must be factual. Whether a dismissed worker was a ringleader, screwing up orders and hurling them at the feet of officials, or at the fringes of a gathering, trying to decide whether to make his way through picketers to work and ignorant of any order or constraint other than the crush of bodies around him, is a matter of evidence. In this case, there is general agreement as to the attempts made to serve in circumstances of no little disorder, and considerable dispute as to the general success and timing of these attempts. There is no evidence whatsoever as to service, or lack thereof, on any particular individual.

This brings me to an area of fundamental defect in the application. The defect lies in the fact that, although Mapope Chisvo purports to represent 255 workers, as well as himself, none of these workers are parties to the litigation. If they are not joined as parties, the only basis upon which their cause can be heard and adjudicated is if representative proceedings are brought on their behalf.

GILLESPIE J

The rule, permitting a party to sue as representing numerous others who have the same interest but who are not parties to the proceedings 7(83) is intended as a "flexible rule of convenience". 8(84) It is designed to permit the attainment of a judgment binding, but not executable without leave, on persons *in consimili casu* without the need of a multiplicity of trials or an extended trial with a multiplicity of parties. A prior direction appointing a representative is not necessary, but may well be expedient or desirable. 9(85) No requirements are prescribed as to proof of the authority of the purported representative to act in that capacity, nor as to the submission of any party, said to be represented, to the judgment of the court. Nevertheless, proof of such authorisation should be regarded as indispensable, 10(86) since a court, particularly if the point is raised by the other party, will be scrupulously cautious not to make an order on a person who is not a party and not otherwise amenable to that order. If the court is not satisfied as to the capacity to represent the party concerned, not only will it refuse judgment but it might forbid the continuation of proceedings (at least as purported representative proceedings). 11(87)

Flexible as the rule is intended to be, there is no uniform guidance to be found as to the manner of proof of the capacity of the representative and submission of the parties represented. There are many ways in which sufficient proof of this can be adduced. An affidavit from each of them might well be desirable in a preliminary application for directions. It would not generally be required in a substantive representative application - the deponents to such affidavits might just as well be made parties - but might be required in some cases. 12(88)

A single affidavit of authority signed by all concerned might well be sufficient in most cases, provided it is regular and complete on the face of it, 13(89) particularly if it were notarised. An

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affidavit from the attorney of the representative stating that he had the powers and instructions of all other interested parties, and was satisfied himself by interview of their collegiality with the representative, might be regarded as sufficient in some cases.

What can never be sufficient is simply a list of names. Unsigned. Unauthenticated. And that is what I have here. A typewritten roll of 255 names. It is quite valueless.

The worthlessness of this proceeding is, ironically, compounded by a very belated attempt to remedy it. Months after the papers were complete, and right on a year after the litigation commenced, there was filed, without any

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explanation or leave, a signed deed in 55 pages entitled "Special Power of Attorney" and purporting to bear the signatures of the 255 persons authorising Mapope Chisvo to represent them in these proceedings. Had this deed been regular on the face of it, I might well have regarded it as remedying the irregularity. An obvious shortcoming in it is that the two witnesses subscribing each signature are unidentified. Even this might probably not have concerned me had the deed been filed at the commencement of proceedings, properly explained, and been unchallenged. A less obvious shortcoming is that it does not contain 255 signatures (excluding witnesses). It contains 277. This, unexplained, adds to the reason to question the document.

This discrepancy is exacerbated by other evidence. The first respondent, faced with the original typewritten list of names had itself attempted to account for each of these names. It filed a schedule of employees and former employees in some way affected. This schedule contains 232 names. These names are in three categories. 107 contract workers whose contracts had expired before the date of the disposal order. 106 contract workers whose contracts were still extant on the date of the disposal order and who were dismissed. Nineteen permanent employees dismissed. Of the 232 names thus accounted for, 28 are noted as having been re-employed after dismissal. These 28 all appear on the typewritten list. They do not appear on the special power of attorney.

This accumulation of circumstances is of great significance, both as to the authority of the applicant to represent the 255 others and as to the individual interest in the proceedings and the individual causes of action of these 255. First, doubt is cast on the genuineness of the original list because of the inclusion of persons late rehired. Second, doubt is case on the second deed because of the unexplained 50 extra names. 14(90) Third, the cause of action in respect of the 107 contract workers whose terms had expired before the disposal order is completely rebutted. Mapope Chisvo himself is one of these. Fourth, the cause of action of the 106 contract workers whose contracts were current on the relevant day but would have expired either before the institution of proceedings or in any event before the hearing of the application, is equally nullified. Fifth, the only theoretical cause of action which could exist is a claim by the permanent employees dismissed (18 of them, 1 having been re-employed).

This last cause of action, as I have demonstrated above, depends upon a

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factual finding that none of them were served with the disposal order timeously or at all. The misguided and irregular choice of procedure by purportedly representative litigation, by which they are not parties and lead no evidence themselves, has resulted in the situation that the factual finding they would rely on is one I simply cannot make. None of them have stated that to be the case. The generality of the attack on the mode of service is inadequate for the different individuals. Some of them properly served, might have returned to work, others not. Some of them might be entitled to reinstatement, others not.

It will be deduced from the foregoing that representative proceedings are completely ill-advised where the causes of different individuals are dependent upon separate and discrete issues and findings of fact. Those issues can only be properly addressed, and the findings properly made, where the various persons lead evidence to discharge whatever *onera*, persuasive or evidential, they must.

I would remark finally that the citation in this case is wrong. In representative proceedings the interested persons are not to be referred to as if they were other parties (ie "and 255 others"). The sole applicant, for such he is, should have been cited as "Mapope Chisvo, representing himself and 255 other interested parties". His founding affidavit should have stated his capacity and should have identified the interested parties while producing proof of his authority and of their submission.

In conclusion, for the avoidance of doubt, I find the power of the applicant to represent the other 255 persons to be insufficiently established. Assuming it to have been proven, however, I find, nevertheless, no cause of action to be disclosed in respect of any individual for the reason for that:

1. The show cause order was valid;

2. The disposal order was valid;

3. No reinstatement can be ordered since -

   (a) the applicant and 106 others were no longer employees at the time of the disposal order;

   (b) 106 others would have ceased to be employees at the latest by October 1998;

   (c) the remainder have not shown any individual cause for reinstatement.

Accordingly, the application is dismissed with costs.

Stumbles & Rowe, plaintiff's legal practitioners

Coghlan Welsh & Guest, first defendant's legal practitioners

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NDLOVU *v* MURANDU 1999 (2) ZLR 341 (HC)

Citation	1999 (2) ZLR 341 (HC)
Case No	Judgment No. HB-72-99
Court	High Court, Bulawayo
Judge	Sibanda J
Heard	May 14, 1999
Judgment	November 18, 1999
Counsel	S Ndlovu, for the applicant Miss M Beja, for the respondent
Annotations	None

Civil application

Flynote

Contract - completion - fictional fulfilment - contract of sale, with payment in instalments - buyer tendering final instalment but seller rejecting tender - seller not entitled to cancel

Legal practitioner - conduct and ethics - abuse of court process - legal practitioner helping client to attempt to frustrate binding contract by using court process - practitioner deprived of fees

Headnote

The applicant entered into a written contract with the respondent in terms of which he sold his interests, rights and title to a stand in one of the high density suburbs of Bulawayo. Most of the purchase price was paid by the respondent to the applicant when the agreement was signed. The remainder of the purchase price, namely, $2000, was to be paid in instalments over three months but it was later agreed between the parties that the remaining $2000 would be paid against transfer of the stand. Acting on instructions to do so, the applicant's lawyer then demanded payment of the $2000 plus interest from the applicant within seven days, thereby purporting to put the respondent *in mora*. In response to this demand, the respondent tendered payment of the $2000 against transfer. Presumably on the advice of his lawyer, this tender was ignored or rejected and instead a letter was dispatched to the respondent, purporting to cancel the sale and tendering back the money already paid to the applicant. The applicant then applied to court for an order confirming this purported cancellation of the sale.

Held, that the later agreement that the respondent would pay the $2000 against transfer was not a variation of the contract, but even if it was, it was justified as it was merely intended to complete the terms of the written agreement, the agreement having failed to include the

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essential clause relative to transfer.

Held, further that a tender of performance is equivalent to performance. If a contract of sale provides that payment has to be made by a certain date by the buyer, a tender made by that time will be valid and will protect the buyer from the consequences which would otherwise follow in terms of the contract. If the tender of the required payment is made but it is rejected by the seller, the seller is not then legally entitled to cancel the sale. The doctrine of fictional fulfilment applied, as in this case the applicant by his fraudulent conduct had intentionally sought to defeat the rights of the buyer. He had attempted to resell the stand to a third party. He had then deliberately refused to accept the balance of $2000 when tendered and had instituted legal proceedings to bring an end to a valid contract and perpetrate his fraud. The agreement must therefore be deemed to have been fictionally fulfilled.

Held, further, that at the time of the sale the applicant must have been aware that he was not armed with the city council's authority to cede his rights to the respondent. In so doing, either he acted fraudulently, in which case he was not entitled to benefit from his own fraud, or he must be held to have impliedly undertaken to obtain the council's authority.

Held, further, that the applicant's legal practitioner must have been aware that the contract he sought to terminate was valid and legally binding. His duty was to advise his client of this but instead he chose to act as a catalyst in the applicant's attempt to defeat the rights of the respondent. As a result of this, he had to be made to pay the price of his indiscretion by being barred from claiming his legal fees for work done from the time that the respondent's tender of payment was made.

Cases Considered

Cases cited:

Chirigo v *Mudavanhu* 1990 (1) ZLR 1 (H)

Flashco (Pvt) Ltd v *Fox & Carney (Pvt) Ltd* 1979 RLR 407 (A); 1980 (1) SA 235 (ZRA)

Gowan v *Bowern* 1924 AD 550

Guthrie Corp plc v *Matrac (Pvt) Ltd* 1989 (2) ZLR 323 (H)

Herbert v *Isaacs & Anor* 1973 (1) RLR 316 (A); 1973 (4) SA 106 (RA)

Koenig v *Johnson & Co Ltd* 1935 AD 262

Macduff & Co v *Johannesburg Consol Invstm Co* 1924 AD 573

Morris & Anor v *Kambadzi & Anor* 1992 (1) ZLR 61 (H)

Mukarati v *Mkumbu* 1996 (1) ZLR 212 (S)

Leyland (SA) (Pty) Ltd v *Rex Evans Motors (Pty) Ltd* 1980 (4) SA 271 (W)

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Case Information

S Ndlovu, for the applicant

Miss *M Beja*, for the respondent

Judgment

Sibanda J: It should be relatively easy to commit oneself to a bad deal in search of a bargain. But one should not assume and expect that it should be equally easy to extricate oneself from it should it turn out to be what one did not bargain for. Perhaps for the applicant this, it seems, may have been such a bad bargain which at the time of its conclusion must have appeared highly lucrative and profitable to the applicant. But alas! that was not to be.

The applicant mounted this application seeking an order for confirmation of his purported unilateral cancellation of the contract of sale between him and respondent. In this application, he seeks an order in the following terms:

1. That an order be and is hereby made declaring that the sale agreement which was executed by and between the applicant and the respondent on 2 April 1996 was formally and lawfully cancelled by the applicant.

2. That an order be and is hereby made evicting the respondent and all persons claiming through her from Stand No. 64503 Tshabalala, Bulawayo.

3. That an order be and is hereby made that the respondent should pay the costs of this application.

Significantly, the order sought is totally silent on one important issue, the fate of the $34000 already paid by the respondent as part of the purchase

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price. I may only infer that the applicant intended that it be forfeited to the applicant.

The application is opposed by the respondent. The facts in this case are not in dispute and in the main they are common cause, save for the circumstances surrounding the alleged none payment of the outstanding balance of $2000.

The following facts are common cause. On or about 3 April 1996, the parties entered into a written agreement of sale in which the applicant sold to the respondent his interests, rights and title in Stand No. 64503 Tshabalala Township, Bulawayo for the agreed purchase price of $36000. The said purchase price was to be paid as follows: $34000 in cash on the date of the signing of the agreement which amount was paid as agreed, leaving the balance of $2000 to be paid over a period of 4 months at the rate of $500 per month with effect from 31 July 1996. That amount was not paid and to date is still outstanding.

It is over the non-payment of that balance of $2000 that the seller and purchaser viciously came

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to grief and led to this litigation. According to the applicant, that balance is still outstanding, due to the fact that the respondent has failed and still is unable to raise that amount. However, the respondent says that on the date of signing of the agreement, she went to the bank and withdrew the whole of the purchase price in the sum of $36000. To this extent she is supported by annexure A1 a photocopy of the extract from her bank account. It shows that on 3 April 1996, the date of signing of the agreement, she withdrew the sum of $36000, an amount equal to the purchase price in order to settle the whole of the purchase price on that same day.

Contrary to what the applicant would want the court to believe, the respondent says that at the time she made payment of the sum of $34000 she was informed by the applicant that, as of that moment, he was unable to give her vacant possession and occupation, because he had inherited the house in question and was still waiting to be appointed heir and issued with a certificate of heirship. She states in her affidavit, which has not been challenged, that it was then agreed between the parties that the $2000 would be paid against transfer.

The respondent states that thereafter she approached the applicant on numerous occasions and asked him to effect transfer and at the same time tendered payment of the balance of $2000. The applicant still claimed that he had not yet been appointed heir. She then heard rumours that the applicant wanted to resell the house to someone else. Concerned about the dilly-dallying tactics of the applicant she approached the Housing Office to check on the status of the house. To her surprise, she discovered that the house was, in fact, transferred into the name of the applicant the very next day following the date of the signing of the agreement of sale, that is to say on 4 April 1996.

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Confirmation of the date of transfer is provided by annexure B1, a letter from the Housing Office, which clearly confirms the date of transfer as 4 April 1996.

The respondent, out of concern that the applicant would defraud her, sought and obtained the services of the Legal Project Centre which then caused to be endorsed and registered her interests in the house, so as to forestall any attempt by the applicant of reselling the same house to someone else. Indeed, she says when the applicant subsequently attempted to resell the house to someone else, he failed to do so and hence his attempt to cancel the agreement and then proceeded to institute these litigation. The applicant has not filed a replying affidavit to refute these damaging allegations. Therefore there must be taken as admitted by the applicant and thus true.

The applicant's case is primarily founded upon the assertion that respondent is in breach of the agreement because she failed to pay the balance of $2000 within the stipulated time limit. That by making payment of the balance of $2000 subject to transfer respondent was seeking a variation of the terms of a written agreement. That when she was put *in mora* she failed to meet the deadline and has failed to "make a verbal tender" (whatever that means). He has yet to receive a "valid tender from the respondent".

The applicant is tragically naive. His naivity lies in the fact that he ought to know and therefore is

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deemed to know that there is only one mode of transferring ownership of immovable property from one person to another. The demand for transfer could not by any stretch of the imagination be said to amount to a variation of the written agreement. How else did the applicant expect the respondent to take ownership of a house she had legitimately purchased? The demand for transfer, amounted to a demand for the fundamental term of the agreement of sale, relating to the cession of the rights, interests and title of the seller to the purchaser of the immovable property. The demand for transfer could not and cannot be construed as constituting variation of the agreement.

On the other hand, it is my view that if the withholding of payment of the balance of $2000 amounted to a variation of the written agreement, such was justified as it was merely intended to complete the terms of the written agreement. The written agreement had omitted to include the fundamental and essential clause relative to transfer of the subject matter of the agreement. What the respondent did was perfectly proper and was done in order to protect her rights and interests.

When the applicant sought legal advice, it seems he informed his lawyer that the respondent was unable to pay the balance. I would have been inclined to believe that the applicant did not tell his lawyer that on the date of the signing of the agreement the purchaser had raised the full purchase price, and

that the balance of $2000 was held back and not paid by agreement between the parties. However, the reaction of his legal practitioner to the tender to settle the balance of $2000 made by a fellow legal practitioner strongly militates against such belief.

Had he so informed his lawyer, it is doubtful that the lawyer would have taken the fateful step of putting the respondent on terms, which is what he did. In a letter addressed to the respondent dated 15 October 1998, annexed herewith marked B, the lawyer duly put the respondent on terms, purportedly to put her *in mora*. The letter demanded that payment of the sum of $3083.33 (now including interest) be made within 7 days of the letter and not later than 4.00 pm on 23 October 1998 at the lawyer's offices, that is, Sibusiso Ndlovu Legal Practitioners.

On receipt of that letter, the respondent instructed her legal practitioners, Ben Baron & Partners, to respond to the demand. Her lawyers replied on 23 October 1998 and duly tendered payment of the outstanding balance of $2000 against transfer. The said tender was made by fax on the same day the 23 October 1998. It was indicated in the said letter that the applicant owed respondent $690, being the costs of drawing up the agreement of sale which in terms of para 10 of the said agreement was to be paid by the seller, but he had defaulted and the same was paid by the purchaser.

Despite this tender being made by a legal practitioner to another legal practitioner, within the accepted norms and practice of the profession, the applicant, presumably on the advice of his lawyers, promptly ignored or rejected the tender. Thus, on 28 October 1998 his lawyer, Mr *Ndlovu*, in a letter couched in the tersest of terms, purported to cancel the agreement. It read in

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part:

> "Our client did not receive the $2 000 as called for in our letter to your client dated 15 October 1998. Regrettably, our client has instructed us to cancel the sale agreement and tender back to your client, which we hereby do the purchase moneys so far received by our client from your client."

Mr *Ndlovu* continued:

> "Your letter fails to meet this specific demand ..."

The "specific demand" referred to is the payment of the $2000. The letter completely ignored the tender made for payment of the $2000, the refund of $690 and a lawful demand for the transfer of the house. Instead, the applicant's lawyer demanded to know whether the respondent's lawyers could confirm that their client accepted termination and tender made or whether the applicant's lawyers should proceed to file a court application.

This letter, in my view, amounted to a contemptuous disregard and rejection of a tender made by a fellow legal practitioner. It is the terms of this letter that have satisfied and convinced me that when the applicant put the

respondent on terms, he did so, not intending that respondent should pay but merely as an excuse for coming to court as he did, pretending that the respondent is in breach of the agreement.

When the applicant, in his letter of 15 October 1998, demanded payment of the $2000 and the respondent in her letter of 23 October 1998 tendered payment against, cession or transfer of the applicant's interests, rights and title, that constituted a valid tender made within the time limit set out in his letter above referred.

In his *Law of Contract in South Africa* 3 ed at p 449, Christie states:

> "When payment has to be made by a certain time, a tender made by that time will be valid and will protect the debtor from the consequences of failure to pay on time such as forfeiture of lease."

See also the cases cited therein.

In my view, the respondent was willing and able to discharge her obligations under the contract. But she was prevented from so fulfilling her obligation by the conduct of the applicant. In the *Law of Contract* 11 ed 1986 by Cheshire, Fifoot and Firmstone at p 541, the learned authors state:

> "If A, one party to a contract, can not complete the performance without the concurrence of the other party B, it is obvious that an offer by him to perform and a rejection of that offer by B entitles him to a discharge from further liability. His readiness to perform has been nullified solely by the conduct of the other party. The rule, therefore, is that a tender of performance is equivalent to performance."

The contract is silent on the issue of transfer. It is a fact that the property was sold, sold to be owned by the respondent. She could acquire such ownership by cession or transfer of the

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rights, interest and title of the applicant. It is, therefore, perfectly in order to read into the contract that, by the necessary implication the parties intended, at the time of the contract that the property shall be transferred into the name of the respondent.

The respondent, in her uncontradicted evidence, says when the omission of the provision in the contract for the transfer of the property was discovered, the parties agreed that she should hold the part of the purchase price in the sum of $2000 pending transfer. The applicant has termed such recognition of the essential missing term of the of contract and providing for it a "variation" of the written agreement.

It is clear that the provision relating to the omission of an essential element in contract cannot amount to a variation of the contract. The parties, when they entered into the agreement, intended that the property be transferred to the respondent and what the respondent sought was no more than rectification of the contract. The clause providing for the transfer of the property must have been omitted by mutual error by the parties, hence the need to rectify the error.

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In *Leyland (SA) (Pty) Ltd* v *Rex Evans Motors (Pty) Ltd* 1980 (4) SA 271 (W) at 272H-273B, Melamet J states that rectification does not constitute a variation as envisaged by a non-variation clause, but that it is rather a correction or completion of the contract so as to correctly reflect what the parties actually agreed. Indeed, such rectification is essential so as to give effect to the intention of the parties.

In the instant case, it would have made nonsense of the entire transaction had the respondent just paid the greater portion of the purchase price $34000 and the agreement was left with no provision for the transfer of the property into her name. In any event, Melamet J at 273b held that:

> "The exclusion of such a well established common law right should be in clear and explicit terms."

The contract between the parties has no such express or implied exclusion clause. The conditional tender was therefore properly made and the applicant could not refuse it and must be held to have intentionally frustrated by his conduct, the finalisation of the agreement.

Under the doctrine of fictional fulfillment, I have therefore come to the conclusion that the respondent performed her obligations under the contract.

Maasdorp's Institutes of South African Law: The Law of Contract volume III, after citing a number of authorities, therein sets out the circumstances under which the doctrine will be applied. The learned author states at p 44-45:

> "It was a precept of the Roman Law that, if a promisor prevents the happening of a condition upon which the contract turns the law regards that condition as having been performed. By intentionally preventing the fulfillment of the condition the promisor commits a breach of contract and the promisee can claim fulfillment of it."

He continues:

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> "Where *dolus* on the part of the promisor is present and non fulfillment is due to his deliberate and calculated action the doctrine of fictional fulfillment must be applied."

Kerr, in his *Principles of the Law of Contract* 3 ed at p 275, after citing a number of authorities, states:

> "If one of the parties deliberately, intentionally and directly prevents the fulfillment of positive suspensive condition then the condition will, by a fiction of law be deemed to be fulfilled against him even though the event has not in fact occured."

This doctrine has been discussed extensively and intensively and in great detail by the Appellate Division in the three leading South African cases, *Gowan* v *Bowern* 1924 AD 550; *Macduff and Co* v *Johannesburg Consolidated Investment Co* 1924 AD 573 and *Koenig* v *Johnson and Co Ltd* 1935 AD 262. Also considered, examined and discussed therein are a number of texts from the *Digest* which constitute the basis of the doctrine.

In *Gowan* v *Bowern* 1924 AD 550 at 567-568, de Villiers JA discussed

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the question of whether the doctrine formed part of the Roman-Dutch Law and having come to the conclusion that it did and in support of that conclusion cites Ulpian D 35.1.81 where he says:

> "In the civil law, the rule obtains, Ulpian says, that whenever the person to whose interest it is that the condition should not be fulfilled is the cause of its not being fulfilled, the condition is held to have been fulfilled."

See also the following cases where the doctrine is extensively discussed: *Koenig* v *Johnson & Co Ltd supra* at 272. In *Macduff & Co Ltd* v *Johannesburg Consolidated Investment Co Ltd supra*, Innes CJ reviewed numerous Roman-Dutch Law authorities and came to the conclusion at p 591:

> "There is weighty authority which affirms that it (the doctrine) is so applicable, and the grounds on which it vests are equitable and sound. I am therefore of opinion that by our law a condition is deemed to have been fulfilled as against a person who would subject to its fulfillment, be bound by an obligation and who has designedly prevented its fulfillment unless the nature of the contract or circumstances show an absence of *dolus* on his part."

I may also refer to the judgment of Beadle CJ in *Herbert* v *Isaacs & Anor* 1973 (4) SA 106 (RA) where he says at p 109A:

> "... it is a first principle of the common law when dealing with contracts that if a promisor prevents the happening of a condition upon which the contract turns, the law regards that condition as having been performed. By intentionally preventing the fulfillment of the condition, the promisor commits a breach of the contract and the promisee can claim fulfillment of it."

In *Flashco (Pvt) Ltd* v *Fox & Carney (Pvt) Ltd* 1980 (1) SA 235 (ZRA) Lewis JP, in dismissing an appeal against judgment of the court *a quo*, applied the doctrine and held at p 239G:

> "In these circumstances, on the doctrine of fictional fulfillment, the condition must be deemed to have been fulfilled against the defendant, and the plaintiff was entitled to its commission."

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Adam J, when considering the application of the doctrine in *Guthrie Corporation plc* v *Matrac (Pvt) Ltd* 1989 (2) ZLR 323 (H) at 325B-D quoted with approval a passage from Joubert *General Principles of Law of Contract* (1987) pp 175-176 where he states:

> "The law, however, makes use of a fiction called fictional fulfillment of the condition in order to treat the case as one where the condition has been fulfilled, where justice requires this. According to this doctrine, the condition will be regarded as fulfilled even though it has not been fulfilled and may be incapable of fulfillment, if a party who would have been a debtor had it been fulfilled has designedly prevented its fulfillment contrary to the intention of the parties.
>
> The first requirement is that the act in question must have been contrary to the intention of the parties. Sometimes the law imposes a duty to act, such as where the one party has to apply for some permit of indulgences and in such a case refraining from doing that act will bring the fiction into play ...
>
> The act must in the second place succeed in preventing the fulfillment of the condition ...

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> The third requirement is that the act must have been intentional, ie done with the object of frustrating the fulfillment of the condition."

See also *Chirigo* v *Mudavanhu* 1990 (1) ZLR 1 (H) at 5A-E; *Morris & Anor* v *Kambadzi & Anor* 1992 (1) ZLR 61 (H) at p 64D-E.

Christie *op cit* discusses the doctrine at p 164 *et seq*. After reviewing numerous authorities, he states at pp 167-8:

> "The conclusion to which the cases point, therefore is that the doctrine applies equally to true conditions precedent and to terms of the contract that operate as conditions precedent, that in either case it will apply when there has been bad faith, it will also apply when there has been deliberate intention whatever the motive, unless the terms of the contract and the surrounding circumstances indicate to the contrary, it will apply when there has been negligence only if the terms of contract and the surrounding circumstances so indicate, and at all levels no distinction is drawn between acts and omissions."

In this case, the seller is guilty of fraudulent conduct of intentionally seeking to defeat the intention of the parties. He has attempted to resell the same house to a third party. He has refused to accept the balance of $2000 when tendered and ultimately in his determination to bring to an end a valid contract, he instituted these proceedings.

There, certainly, in my view, is no reason why the agreement should not be deemed to have been fulfilled in accordance with the doctrine. I am in agreement with Miss *Beja*'s submission that the applicant has sought to use this court in order to perpetrate his fraud. He, must, therefore fail on this ground and is bound by the terms of the agreement between the parties.

Further, it has been submitted for the applicant that, because the prior written consent of the council was not obtained to sanction the cession and transfer of the property into the name of the respondent, the agreement of sale is invalid and the respondent cannot enforce such contract. This argument has been appropriately, said to be indicative of the applicant's *mala fides.*

That, however, does not reflect a correct statement of the law on the issue. It is trite law that a

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contract of this nature is conditional to an implied term that the sale is subject to the approval of the local authority. The contract is not void *ab initio* but it casts a duty upon the seller to seek Council's approval and to that extent he can be compelled to do so. It is only the local authority that may raise such an argument if it should be of the view that it has been defrauded and not the applicant. In any event, he did not cite the City Council of Bulawayo, the local authority.

The applicant must have been aware at the time of sale that he was not armed with the Council's authority. The Supreme Court in *Mukarati* v *Mkumbu* 1996 (1) ZLR 212 (S) at 215C, stated that a person, seized with such knowledge and purporting to sell the property, has either:

" (a) ... acted fraudulently by misrepresenting that she has title when in fact she had not, or

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(b) impliedly agreed that she will seek the Council's consent."

It follows that the applicant either acted fraudulently and as such he may not benefit from his own fraudulent conduct or he must be held to have impliedly undertaken to obtain the Council's authority. The applicant again must fail on this ground also.

These proceedings should never have come to this court at all, save for the greed of the applicant and probably that of his legal practitioner as well. He made every conceivable effort to frustrate and defeat the intention of the parties. It is clear that his intention in doing so was to resell the house obviously for a higher price.

When the applicant sought legal advice, it must be assumed that he was keen to be advised as to the legality of his conduct in seeking termination of the contract when he was in receipt of more than half the purchase price. He, on his own accord, could hardly have turned down the tender made by the respondent's legal practitioners on 23 October 1998. He must have been advised by his lawyer not only to reject the tender for payment but to take the respondent to court to seek and secure an order for the termination of a valid agreement of sale.

I have no doubt at all in my mind that his legal practitioner knew at all material times that the agreement he sought to terminate was valid and legally binding on the applicant. Thus these proceedings amount to an unacceptable abuse of the court process. It is surprising that in his draft order the applicant seeks termination of the agreement and the eviction of the respondent from the house. However, he has not tendered the refund of the sum of $34000 paid as part of the purchase price. The implications of such omission is that the same was deliberate with the intention that the respondent forfeit that amount. There has been no legal basis advanced for the seizure of the said sum. This clearly indicates that the applicant has acted *mala fide* throughout. I can find no legal basis for allowing the applicant to retain the money in the event of the cancellation of the agreement.

In considering the issue of costs, I have to take into account all these factors and decide upon an appropriate order for costs. It is likely that the applicant lied in his initial instruction to the effect that the respondent was unable to pay the balance outstanding. Such lies as he may have perpetrated upon his legal practitioner were dispelled, when the respondent's legal

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practitioners confirmed that she was able and ready to pay off the balance, upon transfer.

It was then the duty of the legal practitioner to advise his client properly as to the legal status of the contract. It was his duty to advise his client that the agreement of sale was perfectly valid and legally binding. Instead, he chose to act as a catalyst in the applicant's attempt to frustrate and defeat the intention of the parties. He must be made to pay the price for his indiscretion

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in instituting these proceedings at a time when he was in possession of a letter from a fellow legal practitioner confirming that the money for payment of the balance was available and ready to be paid.

Accordingly, the application is dismissed with costs and the following order is made:

It is ordered:

1. That the respondent shall pay:

    1.1 The sum of $2000 to the applicant being the outstanding balance of the purchase price.

    1.2 The respondent shall deduct from the said $2000 the sum of $690 she paid to Ben Baron and Partners for the drawing up of the agreement of sale that was to be paid by the applicant.

2. That the applicant be and is hereby ordered to sign all the essential documents in order to facilitate the transfer of the said house to the respondent.

3. In the event of his failure so to sign, the Sheriff of this Honourable Court or his lawful Deputy be and is hereby authorised and empowered to sign all the documents necessary to effect the transfer of the said house to the respondent.

4. Costs shall be paid as follows:

    4.1 Mr *Ndlovu*, the legal practitioner for the applicant, be and is hereby ordered to pay the cost of this application *de bonis propriis* at an attorney and client scale.

    4.2 The legal practitioner's own fees shall be paid in the following manner:

        4.2.1 He shall charge his client, the applicant, fees for taking instruction and work done up to and including the 22 October 1998. His bill of fees shall be subject to taxation.

        4.2.2 For all purported professional services rendered from 23 October 1998 to 14 May 1999 he shall not charge his client for such services, save as ordered in para 4.2.1.

        4.2.3 Whatever deposit the applicant has paid and fees charged he shall be refunded all his money subject to a deduction in respect of any fees charged from the date of

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instructions to 22 October 1998, the date prior to receipt of the tender dated 23 October 1998, from Ben Baron & Partners.

5. The Assistant Registrar is directed:

5.1 To bring to the attention of the applicant the order made in respect of costs and fees. That should his legal practitioner in contempt of this order levy any fees other than those awarded in 4.2.1 *supra* he should notify the Assistant Registrar who shall immediately notify

SIBANDA J

the Secretary of the Law Society for an appropriate action to be taken for contempt of court.

5.2 To notify the Secretary of the Law Society of the order made against the legal practitioners concerned on the issue of costs and fees recoverable from his own client.

Sibusiso Ndlovu, applicant's legal practitioners

Ben Baron & Partners, respondent's legal practitioners

NYANDORO *v* SITHOLE & ORS 1999 (2) ZLR 353 (HC)

Citation	1999 (2) ZLR 353 (HC)
Case No	Judgment No. HB-84-99
Court	High Court, Bulawayo
Judge	Cheda J
Heard	October 22, 1999
Judgment	November 18, 1999
Counsel	S Ndlovu, for the applicant M Shotgame, for the first and second respondents
Annotations	None

Civil application

Flynote

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Legal practitioner - conduct and ethics - arrogant and impolite language used in reference to opposing practitioner - errant practitioner himself wrong on the law - order made for costs de bonis propriis

Magistrates court - jurisdiction - civil matter - plaintiff resident in jurisdiction - defendant not resident - when court has jurisdiction over defendant

Headnote

A magistrates court does not have civil jurisdiction over a defendant not resident or carrying on business within its province unless the cause of action arises wholly within the province. The fact that the plaintiff resides within the province is irrelevant. Nor may a magistrates court grant an order for eviction in respect of premises not situated within its province.

A legal practitioner who used highly intemperate language in respect of the opposing legal practitioner, unjustifiably accusing him of ignorance of the law, was ordered to pay costs *de bonis propriis*.

Statutes Considered

Legislation considered:

Magistrates Court Act [*Chapter 7:10*], s 11(1)(a)

Case Information

S Ndlovu, for the applicant

M Shotgame, for the first and second respondents

Judgment

Cheda J: The applicant says he was served with a notice of eviction on 21 April by the third respondent. He was also served at the same time with a copy of an *ex parte* application wherein an order had been granted in chambers by the fourth respondent. The third respondent wanted to evict him on the basis of this order granted *ex parte* on 27 April 1999 with no provision for him to anticipate the return date which was given as 8 June 1999.

He submits there was no reason or justification for an urgent application made *ex parte* since the violent and forcible occupation took place some three years ago in 1996. I should say at the onset that it was not proper for a court to grant an *ex parte* application for eviction without the applicant being heard. The applicant could only be evicted after the provisional order was confirmed.

CHEDA J

The second point raised is that the magistrate who dealt with the matter had no jurisdiction at all. The applicant, who is the defendant in the main case, resides in Bulawayo, which is in Matabeleland Province. The cause of action arose in Bulawayo. The Provincial Magistrate in Harare, which is in Mashonaland Province, has no jurisdiction. He seeks an order declaring as

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void the order granted by the magistrate.

The application is opposed by the first and second respondents. In his opposing affidavit, the first respondent argues that the application is not properly before this court because it is based on a matter which is still pending at the magistrates court. He says the applicant should have appealed to the Supreme Court instead of instituting fresh proceedings.

He also submits that the magistrates court is competent to rule that it has no jurisdiction to deal with the matter, otherwise he is only entitled to attack the proceedings by way of review. He also says the applicant can only approach this court after the magistrates court has determined the matter.

He argues that the magistrates court has jurisdiction to grant the relief sought because s 11(1)(a) (i) of the Magistrates Court Act [*Chapter 7:10*] accords the magistrates court, Harare, jurisdiction to hear his case, since the applicant admits that the respondent resides in Harare, and on that aspect alone he is justified in lodging the application in Harare. He goes on to state as follows:

> "I wish to educate the applicant even though the cause of action arose in Bulawayo, the mere fact that I and second respondent are residing in Harare is ground on which I found jurisdiction with the magistrates court in Harare. It is not my duty to educate the applicant and his legal practitioner on the correct interpretation of s 11(1)(a)(i) of the magistrates court but for his ignorance I am obliged to interpret it. I have jurisdiction by the mere fact that I have alleged and proved one of the 4 grounds listed in s 11(a)(1)(i-iv). I need not to cause [*sic*] all the 4 requirements to found jurisdiction fulfilled."

The first respondent also says the applicant should have challenged the issue of jurisdiction in the magistrates court which granted it rather than at the High Court. He says that since the applicant is forum shopping he should pay costs at a higher scale. The respondent's legal practitioner came to court to argue on these very same lines adopted by the first respondent in his affidavit. The respondent's legal practitioner raised several points in his heads of argument in support of his client's stand. He says, for example:

> "The Act says the court shall have the jurisdiction over:
>
> (i) any person who resides, carries on business or is employed within the Province;"

then he says:

> "It is clear and unambiguous from the afore quoted section that the magistrates court will have jurisdiction in respect of any person who resides, carries on business or is employed within the Province. Both respondents reside at 40 Westview Mansions, Marlborough,

CHEDA J

> Harare, which is the Province of Mashonaland where the magistrates court which granted the *ex parte* application for eviction is situated."

To support his contention further, he quotes the following from the Magistrates Court (Civil) Rules 1980 (SI 290 of 1980) in Order 8 r 1(2):

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"The period within which the defendant is called upon to enter appearance to defend (or oppose) shall be not less than:

(a) seven days if the defendant does reside;

(b) fourteen days if the defendant does not reside;

within the jurisdiction of the court where the summons (application) is issued."

He argues that this shows that where the defendant is not within that province he can still be sued but is given 14 days and there was no need for the legislature to give the defendant 14 days if he is not resident within the jurisdiction where the action is instituted. The respondent found jurisdiction with the magistrates court in Harare by virtue of the fact that they are resident in Harare and do ply their business or trade in Harare. He says that is the correct interpretation of s 11(1)(a) which has been grossly interpreted and evaded by the applicant. He says the fact that the magistrates court, Harare, has jurisdiction to hear the respondents' application is unquestionable and any other interpretation can only be described as magical and mystical.

He says the applicant and his lawyers are manifesting a high degree of innocence of the correct law in Zimbabwe. He says the court must manifest its displeasure by awarding costs at a higher scale. The magistrates courts must be allowed to hear its own cases or matters made through it and the court must tame the tail of the applicant and dismiss the application with costs on attorney and client scale for disregarding of the magistrates court rules. He also says if the applicant's lawyers have done elementary procedural law they should, with respect, know that an application for review is done by way of court application rather than chamber application. He goes on to say:

"For the benefit of the applicant who is mischievously and erroneously advised that the Chamber Application is proper, respondent will quote Order33 r 256 of High Court Rules 1971 which is instructive."

He argues that this matter should have been brought by way of review or notice of application.

For my part, I find the attitude of the respondent and his legal practitioner shocking. The language used is arrogant and most impolite. It is most objectionable. He accuses the applicant and his legal practitioner of ignorance of even elementary law. Perhaps at the end of my judgment it will be much clearer which party is ignorant of even elementary law.

Section 11 of the magistrates court Act reads as follows:

"11. **Jurisdiction in civil cases**

(1) Every court shall have jurisdiction in all civil cases ...

CHEDA J

(a) ... the persons in respect of whom the court shall have jurisdiction shall be:

(i) any person who resides, carries on business or is employed within the province."

This is the section which the respondent's legal practitioner relies on in his argument. I should point out that this section does not assist him in as much as he uses it to reflect the position of

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the respondents, who are the plaintiffs in the magistrates court case. It is acceptable that they reside and carry on business and so the court in Harare would have jurisdiction over them.

However, the contested jurisdiction is not that over the respondent, but over the applicant who is the defendant in the court case.

Subsection (1)(a)(iv) reads as follows:

" (iv) any person, whether or not he resides, carries on business or is employed within the province, *if the cause of action arose wholly within the province*" (my emphasis).

Subsection (b)(iii) reads as follows:

" (iii) in actions of ejectment against the occupier of any house, land or premises *situate within the province*" (my emphasis).

The provisions of these subsections are so clear that it is difficult to understand the respondents' reasoning.

Firstly, subs (1)(a)(i) clearly excludes the applicant because he does not reside in or carry out any business within the province where the process is issued.

Secondly, subs (1)(a)(iv) says the court would have jurisdiction even if the person is not within the province, but *if the cause of action arose wholly within the province* (my emphasis). It is very clear again that the applicant is not included because, in addition to him being not resident within the province, neither did the cause of action arise within the province where the court is. It arose in a different province. It arose at a province where the defendant resides, which is different from the province where the court is.

It follows that the argument that fourteen days are allowed where the defendant resides outside the province is for a defendant who is resident outside the province where process is issued, as long as the other requirements referred to above are met.

For example, if the cause of action arose in Harare, the court there would have jurisdiction over the defendant even if he is resident outside that province, and he would be allowed the fourteen days to enter appearance.

It was also most irregular for the respondent to seek and obtain an order which provided for the eviction of the applicant even before the return day and before the applicant was heard. The Rules do not permit this.

These are the clear provisions of the sections on which the respondent has been advised, clearly by his legal practitioner, to argue this case. It is most unfortunate that the respondent got such advice over a very simple issue. In

so doing, the respondent's legal practitioner acted in a most unreasonable manner. The Harare magistrates court clearly had no jurisdiction at all to deal with the matter in which both the

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defendant and the cause of action fall under a different province. Both parties agree that the wrong party should pay costs on a higher scale.

The applicant asked for *de bonis* costs. I agree with the applicant that for such arrogance against clear facts, this is a suitable case for the court to award costs *de bonis propriis*.

I therefore make the following order:

1. The provisional order granted by the magistrates court, Harare in case No. 8653/99 be and is hereby declared to be null and void and of no force or effect.

2. The respondent's legal practitioner is ordered to pay costs *de bonis propriis*.

Sibusiso Ndlovu, applicant's legal practitioners

Karuwa & Associates, respondents' legal practitioners

H *v* H 1999 (2) ZLR 358 (HC)

Citation	1999 (2) ZLR 358 (HC)
Case No	Judgment No. HH-232-99
Court	High Court, Harare
Judge	Bartlett J, Assessors
Heard	October 28, 1999
Judgment	November 24, 1999
Counsel	W Ncube, for the applicant Respondent in default B Patel, for the Attorney-General, intervening
Annotations	None

Civil application

Flynote

Criminal law (common law offences) - rape - marital exemption - rule that husband cannot commit rape against his wife - rule no longer part of modern Roman-Dutch law

Headnote

A husband and wife were estranged and were living apart but they had not sought an order of judicial separation. The husband had gone to the matrimonial home where his wife had been

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living and had allegedly forcibly raped her. The court hearing the case called for legal argument on whether in law a husband who forcibly has sexual intercourse with his wife without her consent, during the subsistence of the marriage and without any order of judicial separation, commits an offence.

Held, that in Roman-Dutch law there was a long-standing rule that a husband cannot be held criminally liable for rape if he has sexual intercourse with his wife without her consent. This rule was part of Roman-Dutch law when Zimbabwe adopted that system of law. Thus a husband could not be found guilty of raping his wife, although he could be found guilty of assault or indecent assault.

Held, further, that the rationale for this rule was never very clear. The justification that the wife has irrevocably consented to allow her husband to have sexual intercourse with her and offends against the morality of a civilized society.

Held, that society and social attitudes had changed since this rule became part of our law. Strong emphasis is now placed on gender equality. In modern society a husband and wife have become equal partners with full dominion over their own bodies. The woman is entitled to withhold her consent to sexual intercourse. If his wife is refusing to have sexual intercourse and this is affecting the marriage, the husband is entitled to sue for divorce. The husband is not entitled to take the law into his own hands by forcing his wife to have sexual intercourse with him without her consent. This marital rape exemption is offensive and undesirable in the contemporary context.

Held, further, that it is a legitimate function of the judiciary to develop the law where that law had become outmoded in the light of changes in society and in social attitudes. The rape exemption was outmoded and unacceptable.

Held, further, therefore, that the exemption was no longer part of our law. The effecting of this change to the law was not a matter that had to be left to be dealt with by Parliament; it was a matter that could be properly dealt with by the court.

Held, further, that the courts will need to approach cases of alleged rape of husband by wives with caution as in some instances wives may convert their grievances against their husbands into allegations of rape. The issue of consent will need to be carefully explored. Because the marital relationship is so intensely personal and generative of the most

powerful of human emotions, the courts will have to approach allegations of rape with substantial discretion and tact.

Cases Considered

Cases cited:

Blower v *van Noorden* 1909 TS 890

Chiviya v *Chiviya* 1995 (1) ZLR 210 (H)

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CIR v *Lazarus' Estate & Anor* 1958 (1) SA 311 (A)

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

Magaya v *Magaya* 1999 (1) ZLR 100 (S)

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

Room Hire Co (Pty) Ltd v *Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T)

R v *Chakumora* 1945 SR 88

R v *Gumede* 1946 (1) PH H68

S v *H M Advocate* 1989 SLT 469

R v *K* 1958 (3) SA 420 (A)

R v *Mosago & Anor* 1935 AD 32

S v *Ncanywa (1)* 1992 (2) SA 182 (CkG)

S v Ncanywa (2) 1993 (2) SA 567 (CkA)

S v *Ndebele* HB-23-98

S v *Ngwenya* HB-20-90

R v *R* [1991] 4 All ER 481

R v *Z* 1960 (1) SA 739 (A)

Walker v *Industrial Equity* 1995 (1) ZLR 87 (S)

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

Case Information

W Ncube, for the applicant

Respondent in default

B Patel, for the Attorney-General, intervening

Judgment

Bartlett J: This matter came before me as an urgent application. The applicant and respondent are married but estranged and living apart. The applicant is the wife and the respondent the husband. The applicant sought urgently, *ex parte,* a provisional order, interdicting, *inter alia*, the respondent from coming within 200 metres of her or her home and from abusing, harassing, threatening or assaulting her in any way. In addition she sought, (also urgently and *ex parte*) an immediate interim order of judicial separation suspending all marital privileges.

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In her founding papers, it is her allegation that the respondent constantly harassed and abused her and was violent and threatening towards her. She also alleged that she had obtained several peace orders from the Magistrate's Court, interdicting the respondent from coming to the home where she resides with the children of the marriage and from abusing, threatening or assaulting her. She alleged that he consistently ignored those orders. She referred also to an incident in December 1998 where she alleged that, in violation of a peace order, the respondent entered the former matrimonial

BARTLETT J

home, assaulted a man who was with her in the lounge, and then dragged her through to the bedroom and raped her. Her founding affidavit alleges constant harassment and threatening conduct since then by the respondent in continuing violation of peace orders. She refers to the reluctance of the police to assist and alleges a fear of further violent conduct and further attempts by the respondent to have sexual intercourse without her consent. It is because of her stated fear of the respondent forcing her to have sexual intercourse against her will that she seeks the order of judicial separation.

On consideration of the urgent application, I issued the following interim order and directions:

"IT IS ORDERED THAT:

1. Subject to directions given below -

   In terms of r 246(1)(b) of the High Court Rules, the applicant's legal practitioner shall appear in court to present further argument.

2. The papers in this matter and a copy of these directions shall be served upon the respondent by the Deputy Sheriff and upon the Attorney-General by the applicant's legal practitioners.

3. The applicant shall, and the respondent and the Attorney-General may, within 20 days from the date hereof, file heads of argument on the following points of law:

   (a) Whether in law a husband who forcibly has sexual intercourse with his wife without her consent, during the subsistence of the marriage and without any order of judicial separation in force, commits a wrongful act upon his wife.

   (b) Whether a wife who has suffered or fears she will suffer, the forcible infliction upon her of sexual intercourse without her consent may:

      (i) Seek an interdict preventing such a feared act; or

      (ii) Seek a provisional decree of judicial separation urgently and *ex parte i*n order to render any such feared act wrongful.

4. The applicant shall file together with heads of argument, a notice requesting a date of set down in court for the hearing of argument on the points of law.

5. The applicant shall and the respondent and the Attorney-General may, appear on the date appointed in terms of para 4 hereof, to make submissions on the points of law.

6. The hearing shall in terms of r 446 of the High Court Rules take place before two or more judges.

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7. Pending the determination of argument on the point of law, the respondent shall be and is hereby restrained from communicating with the applicant either orally, telephonically, in writing or in any other way, save through legal practitioners or from coming within 50 metres of the applicant or the applicant's place of residence, save that the parties may both attend the hearing of argument as directed herein and any other court proceedings in which they are involved. Contact by the respondent with the minor children of the marriage, pending determination of argument on the points of law, shall be by arrangement with the applicant through suitable intermediaries."

The interim relief accorded the applicant, in my view, sufficient relief from harassment and the reason the directions were given was that the application raised the question of law - put in simple terms - of whether in Zimbabwean law a husband is entitled to rape his wife. I considered that this question of

law should be fully argued before any order of judicial separation were considered. In view of the importance of the question, I also thought it appropriate that the Attorney-General should be invited to intervene, should he so wish, to present argument on the legal point from the perspective of the State. The Attorney-General has accepted that invitation and I am grateful to Mr *Patel* for the detailed heads of arguments he has filed.

The respondent has filed an opposing affidavit accepting that intercourse should not take place without his wife's consent and accepting the stormy nature of their marriage but specifically denying her allegations of fact. The respondent did not, however, take up my invitation to file heads of argument. He also did not appear for argument of the questions raised though notice of set down was served on his legal practitioners.

I also considered that, because of the importance of the issue and the difficulty of the question of law, it would be appropriate for the question to be argued before two or more judges of the High Court. In deference to the directions of the Chief Justice I have, however, amended that aspect of the order I gave and am sitting as single judge. But I have, in accordance with my discretion and the provisions of the High Court Act [*Chapter 7:06*], decided to ask two assessors to sit with me.

I am pleased that Adv *Edith Mushore* and *Muchadeyi Masunda* were able to accept my invitation to sit as assessors. They both bring a wide knowledge and experience of the law and of life to the deliberations in this matter. They also enable the question to be considered from differing cultural and gender perspectives. Their advice, views and assistance have been invaluable to me in reaching a decision and I am most grateful to them. The decision I hand down in this matter is, of course, mine alone, as a single judge, but the findings I make are in full accordance with their views and approach on the questions in issue.

The first question in respect of which I asked for argument is whether in law a husband who forcibly has sexual intercourse with his wife without her consent, during the subsistence of the marriage and without any order of judicial separation in force, commits a wrongful act upon his wife.

The object of that question was to enable this court to make a finding as to whether there is a

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marital rape exemption in Roman-Dutch Law. It is possible to take a simplistic view of the question posed and say that a husband in such circumstances commits the wrongful act of assault and possibly indecent assault and that a fuller answer is unnecessary. Mr *Patel* made this observation but also provided detailed argument as to the existence or otherwise of the marital rape exemption. The heads of argument filed by Mrs Jarvis, the applicant's instructing legal practitioner, provided exhaustive, detailed and thorough argument on the existence or otherwise of the marital rape exemption

BARTLETT J

- and all other aspects of the questions raised. Mr *Ncube* very capably argued the points at the hearing. The legal argument encompassed the sources of Roman-Dutch law, judicial precedent, various sections of the Declaration of Rights of the Constitution and international treaties and declarations to which Zimbabwe is party. I am grateful to all the legal practitioners for the thoroughness and quality of the preparations and presentations. Would that such quality and thoroughness were the general rule in the preparation and argument of matters before the High Court as opposed to the shining exception.

Before proceeding to consider the arguments, I should point out that at the commencement of the hearing I made an order in terms of s 3(1)(b) as read with 3(2)(iv) of the Courts and Adjudicating Authorities (Publicity Restriction) Act [*Chapter 7:04*] that the name and addresses or other information likely to reveal the identity of any person concerned or mentioned in the proceedings should not be publicly disclosed. This was because the applicant and the respondent have three minor children and I considered that the publicity that this matter would very likely generate could have a prejudicial effect on the minor children. That order remains in force.

The question of the existence of the marital rape exemption in Roman-Dutch law has been the subject of detailed legal research and judicial consideration. In *S* v *Ncanywa (1)* 1992 (1) SA 182 (CkG), the basic facts alleged are quite similar to those alleged by the applicant in this matter. Ncanywa and his wife had been married for a number of years, but the relationship between them had gradually deteriorated and they had become estranged and were no longer living together in the common home. Ncanywa arrived at the former matrimonial home, found another man present with his wife, and allegedly assaulted the man and then raped his wife. Ncanywa was accused of raping his wife. The question clearly before the court was whether a husband could be convicted of raping his wife - that is, whether there is a marital rape exemption.

Heath J, after an exhaustive analysis of Roman-Dutch law, South Africa law and relevant English and Scottish authorities, summarised his conclusion at the end of his lengthy and closely reasoned judgment as follows at 211B-212E:

" 1. I find that the reference to the principle that a husband cannot rape his wife in earlier decisions of South African Courts, in the judgments *R* v *Mosago supra* and *R* v *Gumede supra*, does not serve as an introduction of the principle into South African law and Ciskei law. The most positive approach with regard to the effect of these two judgments, is that the courts in those cases assumed the existence of the principle in South African law or that their reference to the principle may be regarded as *obiter dicta*. It is

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evident that no attempt was made in those cases to introduce or assimilate the principle into South African law.

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2. In *S* v *H supra* Nienaber J expressly stated that he assumed the existence of the principle in South African law. This judgment also cannot serve as a precedent for the introduction or existence of the principle in South African law.

3. Insofar as the writings of jurists in South Africa can constitute authority for the existence of the principle in South African law, it follows from the analysis *supra* that at least the majority of writers expressed their doubts as to the existence of the principle in South African law, the desirability of the application of the principle and whether its continued existence should be allowed or tolerated.

4. Judging from the works of the authors and from the judgment of Nienaber J in *S* v *H*, it is clear that the principle is not acceptable to them and they are of the view that the rule is against the *boni mores* of the South African community. In my own view, it is overwhelmingly likely that the South African society is against such an old-fashioned principle and that society will regard it as obsolete, insofar as it might have existed. Support for the view that the rule has become obsolete is to be found in the English law and Scottish law. It is unlikely that any civilised country or legal community will still adhere to such a principle.

5. The old, medieval concept of the husband's dominion over his wife's body and the concept of his marital privileges have been abrogated in various spheres and in different stages of its application since the previous century in most civilised countries. Notwithstanding the liberation of married women, it would appear that married women are in law still subject to (or in countries like England and Scotland, have until recently still been subject to) the husband's dominion, in the nature of a dominion dating from the dark ages, when it comes to this aspect of marital privileges.

6. I respectfully agree with the view of Hawkins J in *R* v *Clarence* that I cannot be a party to a judgment which would proclaim to the community that by the law of South Africa and Ciskei in this year 1991 'a man may deliberately, knowingly, and maliciously perpetrate upon the body of his wife the abominable outrage charged against the prisoner, and yet not be punishable criminally for such atrocities barbarity'.

7. I also respectfully agree with Lord Lane in *Regina* v *R supra* that this decision

> 'is not the creation of a new offence, it is the removal of a common-law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it.'

There is no justification for the old marital exception to the crime of rape.

8. The fiction of consent and even irrevocable consent by a wife to intercourse with her husband has no foundation in law and offends against the *boni mores* of any civilised society. The absence of consent to sexual intercourse cannot and should not be ignored. The husband and wife have in modern society become equal partners with full dominion over their own bodies. To withhold consent to sexual intercourse, unilaterally, may be contrary to marital obligation to allow intercourse by the other partner in the marriage and may affect the continued existence of the marriage relationship between the parties. The marital obligation does not, however, entitle the husband to take the law into his own hands by having intercourse with his wife against her will. He may, however, have a redress against his wife, but then obviously in terms of the legal remedies at his disposal."

The matter went on appeal to the Ciskei Appellate Division - *S* v *Ncanywa (2)* 1993 (2) SA 567, Galgut JA, in a much less detailed and exhaustive

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BARTLETT J

judgment than Heath J's (though the learned appeal judge had the benefit of the considerable research carried out by Heath J), reached the following conclusions at 575D-576B:

" (aa) Although it is said that the authority in the Roman-Dutch law for the existence of the rule is scant (Hunt) or thin (*S* v *H*), the fact remains there is such authority. See the extracts from Damhouder and Moorman quoted above.

(bb) Prominent and reliable writers and commentators in the RSA, named above, while critical of the need for the rule, as at today's date, have stated the rule to be the law in the RSA. They have done so after studying the position as it was in the Roman-Dutch law.

(cc) The reasons for rejecting the rule in England and Scotland cannot be faulted. However, it must be remembered that the rule there was a fiction based on what was stated by Hale, *viz* that the wife by marriage has given the husband an irrevocable consent to intercourse. In the Roman-Dutch law, there was no such fiction. The rule was a consequence of marriage.

(dd) As set out above, the Appellate Division of the RSA in three different cases defined the crime of rape as including the rule. It was submitted that in each of the three cases what was said was *obiter.* The fact is the judges were defining rape. The judges who delivered the judgments were eminent judges of the appeal court. They, and the judges who sat with them, would not place a wrong definition of a crime on record.

(ee) The strongest argument in favour of this court not deviating from what was said in the above three appeal court cases appears from the following statement of the law by Schreiner JA in *Commissioner for Inland Revenue* v *Lazarus' Estate & Anor* 1958 (1) SA 311 (A) at 322:

> 'Before I leave the above mentioned decision, I should mention that counsel for the respondents argued that this was not the kind of case in which this court should hesitate to depart from an assumption made in previous decisions in which the precise point was not raised and decided. But the weight to be given to the cases that I have cited arises not from the principle of *stare decisis* but from the persuasiveness of the fact that the assumption in question was so generally made without challenge until the present case. Naturally, one must not give undue weight to what might conceivably have been due to the oversight of courts and counsel, but it is permissible and I think right to hold that there is some probability that so general an assumption is well-founded.'

(ff) In view of what has been said in (aa) to (ee), it would not be proper for this court to change the law."

Diemont JA and Rabie JA concurred with Galgut JA.

Neither decision in the *Ncanywa* matter is binding on me, though both are persuasive authority and of course the Ciskei Appellate Division decision should be regarded as being particularly persuasive in nature.

In Zimbabwe, it has hitherto, apparently, been baldly accepted without argument, research, analysis or discussion, that the marital rape exemption is part of Zimbabwean law - see *R* v *Chakumora* 1945 SR 88; *S* v *Ngwenya* HB-20-90 and *S* v *Ndebele* HB-23-98.

BARTLETT J

I do not propose to repeat the research, analysis and arguments so thoroughly and carefully

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compiled by Heath J in *Ncanywa (1)*. The breadth of the learned judge's research is impressive and the nature of his argument and analysis compelling. I also consider, however, that there is wisdom in a number of the conclusions drawn by Galgut JA and the Ciskei Appellate Division.

It is correct, as stated by Heath J, that the Roman-Dutch authorities establishing a marital rape exemption are hardly numerous. It is, however, also true that Damhouder *Pracktycke in Criminal Sake* (1650) 95.16 states that:

> "A husband cannot rape his wife because he has full right to the person of his wife with whom he has consummated a marriage" (S v *Ncanywa (1) supra* at 186D).

and that Moorman *Verhandelinge over de Misdaden en der Selver Straffen* (1764) C 88 states:

> "When a man rapes his wife the same is punishable neither at civil law nor at canon law because the man has full right over his wife and the person of the same" (*S* v *Ncanywa (1) supra* at 186E)."

It is also true that Heath J's extensive researches did not unearth any other Roman-Dutch writers specifically contradicting Damhouder or Moorman. It is, however, surprising that the question is not specifically addressed in any of the more mainstream Roman-Dutch writers.

Heath J is also correct that the introduction of the principle that a husband cannot rape his wife into South African law has been on the basis of an assumption of the existence of the principle - as opposed to careful analysis and argument. There is the statement of Wessels CJ in R v *Mosago & Anor* 1935 AD 32 at 34 that:

> "Now by our law a person commits the crime of rape if he has carnal connection with a woman (not his wife) without her consent."

And from Schreiner JA, a definition of rape in *R* v *K* 1958 (3) SA 420 at 421:

> "The offence consists in having a connection with a woman, other than the man's wife, without her consent."

Similar statements are made by Ramsbottom JA in *R* v *Z* 1960 (1) SA 739 at 745 and Hathorn JP in *R* v *Gumede* 1946 (1) PH H68.

But among the judges who made these assumptions are the most eminent to have ever graced the Bench in Southern Africa. There is accordingly considerable force in the observation in *Ncanywa (2)* at 575G that:

> "They, and the judges who sat with them, would not place a wrong definition of a crime on record."

There is also considerable force in the observation of Schreiner JA in *Commissioner for Inland Revenue* v *Lazarus's Estate & Anor* 1958 (1) SA

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311 at 322, quoted in *Ncanywa (2)* at 575H-576A, and I repeat that observation:

> "Before I leave the above mentioned decisions, I should mention that counsel for the respondents argued that this was not the kind of case in which this court should hesitate to depart from an assumption made in previous decisions in which the precise point was not raised and decided. But the weight to be given to the cases that I have cited arises not from the principle of *stare decisis* but from the persuasiveness of the fact that the

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assumption in question was so generally made without challenge until the present case. Naturally, one must not give undue weight to what might conceivably have been due to the oversight of courts and counsel, but is permissible and I think right to hold that there is some probability that so general an assumption is well-founded."

The question before this court for the purposes of Zimbabwean law is whether the marital law exemption was part of Cape Law on 10 June 1891. Because of the paucity of Roman-Dutch authority and absence of clear early case law, it is difficult to judge exactly when the marital rape exemption was accepted in the Cape. In the heads of argument filed on behalf of the applicant, it is submitted that the existence of the exemption in the Cape Law of 1891 remains open to doubt, but that the absence of any case before then cannot be ignored and must suggest that the exemption enjoyed general recognition in practice before then.

I am satisfied that, for the reasons set out in the conclusions drawn in *Ncanywa (2)*, the marital rape exemption was part of the Cape Law in 1891 and became part of Zimbabwean law. It would, in my view, be incorrect, and indeed theatrical, to suggest that the marital rape exemption has not been part of Zimbabwean law. Whether it should remain part of Zimbabwean law, is, however, another question.

The Ciskei Appellate Division decision in *Ncanywa (2)* has come in for severe criticism from academics. In *Tydskrif: Journal of Contemporary Roman-Dutch Law* (November 1993) an article by Professor van der Merwe of the Rand Afrikaans University entitled "Marital Rape, Judicial Inertia and The Fatal Attraction of the Roman-Dutch Law", commences as follows:

"Mrs Bertram: 'That sounds like nonsense, my dear.'

Mr Bertram: 'Maybe so, my dear, but it may be very good law for all that.'

(Sir Walter Scott *Guy Mannering* (1815) Chapter 9).

1. *Introduction*

In bygone days, moral conviction held that men had by nature authority over women (given, so Ullrich Huber tells us, 'by the laws of nature, of God and of all nations ... in all things which do not clearly conflict with honour and virtue' (*Heedendaegse rechtsgeleertheyt* 1.10.1). This meant that a husband could 'take' his wife as a natural consequence of his manhood and that, therefore, in brief and crude terms, if a man had sexual intercourse with his wife, with or without her consent, it was none of the law's business.

One would have thought that the enlightened moral sense in sexual matters and in civil libertarian considerations of the late twentieth century would have come to prevail to the extent that non-consensual sexual intercourse would be deemed so clearly in conflict with

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notions of human dignity and virtue that a man's 'taking' of his wife without her consent would be very much the law's business. One would, however, be wrong, at least if the decision of the Ciskei Appellate Division (Galgut, Diemont and Rabie JJA) in the above case is anything to go by ...

This decision is wrong. It is palpably at odds with prevailing social *mores* and overwhelming jurisprudential opinion. This case note will attempt to seek an explanation for a conception of the judicial function so parsimonious as to reduce the judge in a court of appeal to a mere transmitter of received legal wisdom in a spirit of deferential acquiescence."

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The rising ride of academic anger against the Ciskei Appellate Division was stemmed by the South African legislature which abolished the marital rape exemption by s 5 of the Prevention of Family Violence Act 13 of 1993.

Heath J, in my view, sets out in *Ncanywa (1)* a compelling argument for regarding the marital rape exemption as not remaining part of Roman-Dutch law today. The conclusions he draws in this regard at 211G and 212C-E bear repeating:

> "In my own view, it is overwhelmingly likely that the South African society is against such an old-fashioned principle and that society will regard it as obsolete, insofar as it might have existed ... It is unlikely that any civilised country or legal community will still adhere to such a principle ...
>
> The fiction of consent and even irrevocable consent by a wife to intercourse with her husband has no foundation in law and offends against the *boni mores* of any civilised society. The absence of consent to sexual intercourse cannot and should not be ignored. The husband and wife have in modern society become equal partners with full dominion over their own bodies. To withhold consent to sexual intercourse, unilaterally, may be contrary to the marital obligation to allow intercourse by the other partner in the marriage and may affect the continued existence of the marriage relationship between the parties. The marital obligation does not, however, entitle the husband to take the law into his hands by having intercourse with his wife against her will. He may, however, have a civil redress against his wife, but then obviously in terms of the legal remedies at his disposal."

I believe that each and everyone of these wise words of Heath J apply to Zimbabwe today.

I would also refer to the words of the Lord Justice General (Lord Emslie) in *S* v *HM Advocate* 1989 SLT 469 at 473 that the marital rape exemption was no longer part of Scottish Law:

> "We say no more on this matter which was not the subject of debate before us, because we are satisfied that the Solicitor-General was well-founded in his contention that whether or not the reason for the husband's immunity given by Hume was a good one in the 18th and early 19th centuries, it has since disappeared altogether. Whatever Hume meant to encompass in the concept of a wife's 'surrender of her person' to her husband 'in that sort' the concept is to be understood against the background of the status of women and the position of a married woman at the time when he wrote. Then, no doubt, a married woman could be said to have subjected herself to her husband's dominion in all things. She was required to obey him in all things. Leaving out of account the absence of rights of property, a wife's freedoms were virtually non-existent, and she had in particular no right whatever

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> to interfere in her husband's control over the lives and upbringing of any children of the marriage. By the second half of the 20th century, however, the status of women, and the status of a married woman in our law have changed quite dramatically. A husband and wife are now for all practical purposes equal partners in marriage and both husband and wife are tutors and curators of their children. A wife is not obliged to obey her husband in all things nor to suffer excessive sexual demands on the part of her husband. She may rely on such demands as evidence of unreasonable behaviour for the purposes of divorce. A live system of law will always have regard to changing circumstances to test the justification for any exception to the application of a general rule. Nowadays, it cannot seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances. It cannot be affirmed nowadays, whatever the position may have been in earlier centuries, that it is an incident of modern marriage that a wife consents to intercourse in all circumstances, including sexual intercourse obtained only by force. There is no doubt that a wife does not consent to assault upon her person and there is no plausible justification for saying today that she nevertheless is to be taken to consent to intercourse by assault. The modern cases of *HM Advocate* v *Duffy* and *HM Advocate* v *Paxton* show that any supposed implied consent to intercourse is not irrevocable, that separation may demonstrate that such consent has been withdrawn, and that in these circumstances a relevant charge of rape may lie against a husband. This development of the law

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since Hume's time immediately prompts the question: is revocation of a wife's implied consent to intercourse, which is revocable, only capable of being established by the act of separation? In our opinion, the answer to that question must be no. Revocation of a consent which is revocable must depend on the circumstances. Where there is no separation this may be harder to prove but the critical question in any case must simply be whether or not consent has been withheld. The fiction of implied consent has no useful purpose to serve today in the law of rape in Scotland. The reason given by Hume for the husband's immunity from prosecution upon a charge of rape of his wife, if it ever was a good reason, no longer applies today. There is no, accordingly, no justification for the supposed immunity of a husband. Logically, the only question is whether or not as a matter of fact the wife consented to the acts complained of."

These words were adopted by the House of Lords in *R* v *R* [1991] 4 All ER 481 at 485f in ruling that the marital rape exemption was also no longer part of English law. They also seem to be entirely apposite and appropriate to Zimbabwe. And it is in this regard that the views, advice and assistance of my two assessors has been particularly valuable.

The marital rape exemption, to my mind, belongs to the past and not to the present or future of Roman-Dutch law. It would be a sad indictment of Zimbabwe's legal system, if, as it moves into the 21st century, it were to drag with it so outdated a concept as the marital rape exemption.

There are other arguments apart from those so eloquently described by Heath J in *Ncanywa (1)* and Lord Emslie in *S* v *HM Advocate* which make the retention of the marital rape exemption singularly inappropriate. The Zimbabwe criminal law, as summed up by Professor Feltoe in *A Guide to Zimbabwean Criminal Law*, is that a man cannot be guilty of raping his wife under Roman-Dutch law - but that he may be guilty of assault if he forces

her to have sexual intercourse against her will or indecent assault if he assaults his wife in an indecent manner (other than having natural sexual intercourse) against her will.

So a man is not allowed to assault or indecently assault his wife - but he may rape her. It is those sorts of conclusions which result in the law being likened to an ass. If a man cannot assault or indecently assault his wife, it seems to fly in the in the face of all common sense and logic that he should be allowed to rape her - see the observation in *S* v *H M Advocate supra* at 473. The marital rape exemption was undoubtedly an acceptable part of the social *mores* of centuries past (and may have been so in the earlier part of this century). But societies develop and become more civilised with the passage of time. Social customs change. The law, if it is to be relevant to society, needs to be alive to those changes.

A further salient point is that if a husband applied to court for an order compelling his wife to provide consortium and have sexual intercourse with him a court would not compel the wife so to do - see *South African Law of Persons and Family Law* 3 ed Barnard, Cronje and Olivier at 183 and Wille *Principles of South African Law* 8 ed at 110. But with the existence of the marital rape exemption there is nothing preventing a husband walking out of the court and obtaining the relief a court would not order by raping his wife. It is a basic tenet of the Roman-Dutch Law that the resort to self-help should not be countenanced. But the marital rape exemption allows a husband to do precisely that.

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A further factor is that the enhancement of gender equality has in general been a hallmark of the development of Zimbabwean law since independence. The continued existence of the marital rape exemption stands in stark contrast to this trend.

It should accordingly be clear that while I consider that the marital rape exemption has been a part of Roman-Dutch Law, I do not consider that it should remain so. Am I therefore able to rule that the marital rape exemption is no longer part of Roman-Dutch Law?

Ninety years ago in *Blower* v *van Noorden* 1909 TS 890 at 905 Innes CJ stated that:

> "There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision and when they are so important or so radical that they should be left to the legislature."

In *Zimnat Insurance Co Ltd* v *Chawanda* 1990 (2) ZLR 143 at 153D-154F Gubbay ACJ (as he then was) stated as follows:

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> "Even if confirmation of the appellant's liability to the respondent should meet with disapproval as being an encroachment upon the discretion reposed in the law-giver to change the law, we would strongly defend the judiciary's right to do so. 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. As that celebrated American jurist, Oliver Wendell Holmes, wrote on the opening page of his famous work *The Common Law*."
>
> > 'The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do that the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.'
>
> Today, the expectations amongst people all over the world, and particularly in developing countries, are rising, and the judicial process has a vital role to play in moulding and developing the process of social change. The judiciary can and must operate the law so as to fulfill the necessary role of effecting such development.
>
> It sometimes happens that the goal of social and economic change is reached more quickly through legal development by the judiciary than by the legislature. This is because judges have a certain amount of freedom or latitude in the process of interpretation and application of the law. It is now acknowledged that judges do not merely discover the law, but they also make law. They take part in the process of creation. Law-making is an inherent and inevitable part of the judicial process.
>
> The opportunity to play a meaningful and constructive role in developing and moulding law to make it accord with the interests of the country may present itself where a judge is concerned with the application of the common law, even though there is a spate of judicial precedents which obstructs the taking of such a course. If judges hold to their precedents too closely, they may well sacrifice the fundamental principles of justice and fairness for which

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they stand. In a famous passage, Lord Atkin, referring to judicial precedents, said:

> 'When these ghosts of the past stand in the path of justice, clanking their medieval chains, the proper course is for the judge to pass through them undeterred'."

These sentiments have been repeated by Gubbay CJ in *Walker* v *Industrial Equity* 1995 (1) ZLR 87 at 100A; Robinson J in *Mashingaidze* v *Mashingaidze* 1995 (1) ZLR 219 (H) at 224D-26A and by me in *Industrial Equity* v *Walker* 1996 (1) ZLR 269 (H) at 299C-E.

Mr *Patel*, for the Attorney General, while acknowledging that this court has the power to rule that Roman-Dutch Law has developed to a stage where the marital rape exemption is no longer part of the law, urges that I should exercise considerable caution before so doing. I have no doubt that

he is correct in urging such caution. It would be most irresponsible of me to make such a decision without the most anxious of consideration.

Mr *Patel* also points out that the competent authorities are actively considering legislating the marital rape exemption out of existence. He indicated that a draft bill has been prepared which includes a section making such provision. This aspect of the draft Bill is, he states, in view of its controversial nature, being dealt with as a "white paper" in order to elicit the views of the public before any enactment. He accordingly suggests that any abrogation of the marital rape exemption should be properly left to Parliament - particularly since it involves a matter of a most sensitive nature impinging on the social custom of the community at large. Once again there is considerable substance in Mr *Patel's* submission in this regard and it requires careful consideration.

It is, in fact, comforting to note that my views on the continuing existence of the marital rape exemption apparently accord with the thinking of the relevant authorities - to the extent that the most active consideration is being given to putting before Parliament a Bill consigning the marital rape exemption to history. I have taken the most careful account of Mr *Patel's* cogent submissions. I do not consider, however, that I should hesitate to rule that the marital rape exemption is no longer part of the Roman-Dutch Law in Zimbabwe, if I believe that to be so - simply because there is a possibility that Parliament itself might act to end the exemption.

I have also noted the restraints referred to by Innes CJ in *Blower* v *van Noorden supra.* I do not consider, however, that this is a matter which should be left only to the legislature. It is not, in my view, sufficiently complex a matter as to make only a legislative approach possible - see *Magaya* v *Magaya* 1999 (1) ZLR 100 (S) at 113. I would also point out that both the Scottish and English courts were satisfied that the abolition of the marital rape exemption was an appropriate matter to be dealt with by the courts as opposed to the legislature. Lord Keith, in handing down the unanimous decision of the House of Lords in *R* v *R supra,* referred with approval at 489j-490b to the statement made in the Court of Appeal by Lord Lane that:

> "The remaining and no less difficult question is whether, despite that view, this is an area where the court should step aside to leave the matter to the Parliamentary process. This is not the creation of a new offence, it is the

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removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it."

I am satisfied that the living, growing developing system of law that is Roman-Dutch Law in Zimbabwe has developed to the point where the marital rape exemption is no longer part of the law. I would emphasise in so ruling I am carrying out my duty to enunciate the law as I believe it to be. If I did not do that I would be betraying my judicial oath.

BARTLETT J

In view of my unequivocal finding that the marital rape exemption is no longer part of the law of Zimbabwe, I do not consider it necessary to decide whether the marital rape exemption contravenes any of the provisions of the Declaration of Rights or the provisions of any international treaty to which Zimbabwe is party. I would simply state in passing that, in my view, the most cogent argument presented by the applicant in relation to the Declaration of Rights was in respect of the prohibition against degrading treatment.

In further consequence of my finding that the marital rape exemption is no longer part of the law of Zimbabwe, the answer to the first question of law I posed in the directions I gave, is that the husband commits rape. The answer to both parts of the second question is that such actions would ordinarily be unnecessary in view of the answer to the first question. I accept, however, the applicant's submission in her heads of argument that there is a practical advantage for both spouses in having a judicial separation order in place even if it is not essential in terms of the law. A provisional order for separation (as submitted) may be particularly appropriate where the parties are forced by circumstances to continue remaining in the same house and sharing the same accommodation as may often be the case. It is also correct (as submitted) that a husband would benefit from the certainty that his wife's general assent to intercourse (implied in a marriage) has formally been withdrawn and be guided to modify his conduct accordingly.

The applicant has addressed considerable argument as to whether applications can be used for matrimonial causes, whether an order for judicial separation can be provisional and whether it can be granted urgently and *ex parte*. In view of my overall finding, I propose to deal only very briefly with these questions.

It is clear that matrimonial causes will ordinarily be only by way of action - *Room Hire Co (Pty) Ltd* v *Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T). But, in my view, where necessary a court will always exercise its discretion and allow the procedure to be by way of application - see for example the observations of Robinson J in *Chiviya* v *Chiviya* 1995 (1) ZLR 210 (H) at 217A-D. In general, however, I think it likely that a court would only countenance such proceedings to be by way of application where urgency is a factor.

I am also of the view that it would ordinarily be unlikely for a court to grant a provisional order of judicial separation - but I accept that it is within the power of a court to do so where it considers it appropriate. Urgency is an obvious situation where such action might be considered appropriate. It is equally unlikely that an order for provisional separation would be granted *ex parte*. But if the circumstances were sufficiently urgent and compelling then the possibility of

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such an order being made should not be discounted.

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Very clear and cogent evidence of feared assault, rape, or HIV infection obviously would be examples of relevant factors in such an equation.

I turn now to the order I need to make in this particular application. I have been told by the applicant's legal practitioner that the tension and conflict between the applicant and respondent has now very substantially diminished. The respondent is complying with this court's interim order and the divorce proceedings are moving towards trial in a much less heated atmosphere. Accordingly, having made finding on the law in regard to the marital rape exemption, I consider it is only necessary to amend suitably the interim order I gave to remain in force until the conclusion of the divorce proceedings between the parties. I do not consider it necessary, on the facts as at present, to make any order of judicial separation.

It is therefore ordered that, pending the determination of the divorce action between the applicant and respondent, the respondent shall be, and is hereby restrained from communicating with the applicant, either orally, telephonically, in writing or in any other way, save through legal practitioners, or from coming within 50 metres of the applicant or the applicant's place or residence, save that the parties may both attend in respect of any court proceedings in which they are involved. Contact by the respondent with the minor children of the marriage, pending finalisation of the divorce proceedings, shall be as in accordance with any relevant court order or by arrangement with the applicant through suitable intermediaries.

The applicant's heads of argument indicated that the applicant would not seek any costs unless the application was opposed. Although the respondent did file an opposing affidavit he did not file any heads of argument or appear to argue the matter. His opposing papers also did not put in issue the fundamental question argued in regard to the marital rape exemption. Accordingly, I think it appropriate to make no order as to costs.

I would make one final observation in view of my finding that the marital rape exemption is no longer part of Zimbabwean law. I would refer to the words of Heath J in *S* v *Ncanywa (1) supra* at 212F-I:

> "This judgment should not be treated by wives as a licence to avenge or to convert their grievances against their husbands into charges of rape. A court will probably have to approach a case of alleged rape by a husband with caution because of the human failings and in order to avoid a situation where the trial develops into a forum to settle marital grievances ...
>
> As far as the onus of proof of the elements of rape in such a case is concerned, proof of the existence of a marriage between the parties will not create a presumption, let alone an irrefutable presumption, of the existence of consent or lawfulness, but depending on the facts of the case, it may constitute strong evidence of the existence of consent or lawfulness. Each case will have to be decided on the particular facts of the case on the question whether the coition was lawful or unlawful, or to put it differently, whether the element of consent was absent or present."

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BARTLETT J

I respectfully agree with those observations. I would only add that because the marital relationship is so intensely personal and generative of the most powerful of human emotions, there will always be grey areas, areas of conflict and of considerable uncertainty. It accordingly, would in my view, be always appropriate to approach allegations of marital rape with substantial discretion and tact. But let it also be clear that the statement that the marital rape exemption is no longer part of Zimbabwean law should enable fundamental principles of justice and fairness not to be obstructed by archaic principles of law - and to ensure that "the ghosts of the past clanking their medieval chains do not stand in the path of justice".

Atherstone and Cook, applicant's legal practitioners

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

Attorney-General's Office, intervening

MANDIZVIDZA *v* CHADUKA NO & ORS 1999 (2) ZLR 375 (HC)

Citation	1999 (2) ZLR 375 (HC)
Case No	Judgment No. HH-236-99
Court	High Court, Harare
Judge	Gwaunza J
Heard	November 24, 1999
Judgment	November 24, 1999
Counsel	L T Biti, for the applicant R M Fitches, for the respondents
Annotations	None

Chamber application

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - s 23(1) - prevention of discrimination on the grounds of gender - applicability to church-run college receiving State support - requirement that pregnant female students should withdraw from the college - discriminatory nature of requirement

Contract - enforceability - provision discrimnating against female students at teachers' college - provision contrary to public policy

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Headnote

The applicant, a woman, enrolled for a 3 year teacher training course at a college run by a church. Before entering, she signed a contract in which it was agreed that she would be withdrawn from the course if she became pregnant. After she had been on the course nearly 2 years, she married a man according to customary law, and shortly afterwards became pregnant. The respondent, the principal of the college, required the applicant to withdraw from the college but recommended that she rejoin the next year's course.

The applicant sought a declaration that the policy of expelling or suspending pregnant students was unconstitutional, in that it contravened s 23(1) of the Constitution and that she should be allowed to sit her examinations. The respondents argued that the college was a private institution, not a public authority; that the relationship between the parties was contractual and should be regarded as a matter of personal law; and that the college's right of freedom of association entitled it to exclude those persons who did not conform with its requirements.

Held, that the college had sufficient "public" features to bring it within the definition of a public office or public authority. These features were that education is a public concern in which the Government plays a controlling and regulatory role; that the Ministry of Higher Education regulated the colleges academic activities; that the lecturers received their salaries from the State; and that the students enrolled at the college were sponsored by the State.

Held, further, that the conduct of the college was patently discriminatory. It was not saved by the requirement that a male student who caused the pregnancy of a female student should also withdraw from the college. A married male student would not be affected if his wife became pregnant, while a married female student who became pregnant would have to withdraw from the college. In addition, the reality was that it was mostly, if not only, pregnant female students who were visited with the penalty. The condition of pregnancy was a certain fact, while all that faced a male student was at best an allegation that he was responsible for a pregnancy, an allegation that he could deny.

Held, further, that the lack of child care facilities could not be used to justify the requirement for pregnant students to withdraw; rather, the lack of facilities was itself a form of discrimination.

Held, further, that the principle of freedom of contract was outweighed by the principle of fairness. In any event, students did not in reality contract freely. They had no choice but to accept the terms of the contract. The contract did not preclude students from engaging in sexual activities, and pregnancy could occur even if the most rigorous of contraceptive methods were used. It was unfair to punish the consequence of sexual activities and not the conduct that leads to it. The clause also did not distinguish between married and unmarried women, which was unfair and discriminatory even by religious standards.

Held, further, that the enforcement of the discriminatory clause would be contrary to public policy in a country where concerted efforts have been and continue to be made to eliminate discrimination on the grounds of sex or gender. Pregnancy in itself would not frustrate the primary purpose of the college, which was to train teachers.

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Cases Considered

Cases cited:

Mfolo & Ors v *Min of Education, Bophuthatswana & Anor* 1992 (3) SA 181 (B)

Wazara v *Principal, Belvedere Technical College & Anor* 1997 (2) ZLR 508 (H)

Wittman v *Deutscher Schulverein, Pretoria* 1999 (1) BCLR 92 (T)

Statutes Considered

Legislation considered:

Constitution of Zimbabwe 1980, s 23(1)

Case Information

L T Biti, for the applicant

R M Fitches, for the respondents

Judgment

Gwaunza J: The applicant, a third year student at Morgenster College (the college) sought a provisional order to the following effect:

> "That you show cause to this Honourable Court why a final order should not be made in the following terms:
>
> (a) That it is declared that the policy or directive in institutions of higher education of expelling adult female students who fall pregnant is unconstitutional.
>
> (b) That the decision taken by the first respondent on 15 July 1999 in expelling applicant from Morgenster Teacher's College be and is hereby declared null and void.
>
> (c) That the applicant be and is hereby allowed forthwith to sit her examinations.
>
> (d) That applicant be and is hereby allowed to submit all assignments and course work papers which she would have had to present between July and October 1999, had she not been expelled, by 31 November.
>
> (e) That costs of suit on an attorney and client scale to be paid by the second respondent.
>
> 2. INTERIM RELIEF SOUGHT
>
> It is ordered that this order operates as an interim order authorising the applicant to sit and write her final exams and barring and interdicting the first and second respondents from doing anything that may prevent or frustrate the applicant from sitting and writing her examinations.

GWAUNZA J

> 3. SERVICE OF ORDER
>
> The applicant's legal practitioners be and are hereby given leave to serve this order by way of delivery to the first

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and second respondents' legal practitioners."

The facts of the case according to the papers and evidence before me are as follows:

In January 1997, the applicant enrolled for a 3 year teacher training course with the college, which, according to the first respondent who is its principal, falls under the auspices of the Reformed Church in Zimbabwe. Upon enrolment, the applicant, as was the practice of the college, was made to sign a document entitled "*Contract/Agreement form between the student and the Teachers' College*" (Annexure "C" to the opposing papers). Although stating in her founding affidavit that she did not sign this document, it is clear from Annexure "C" that the applicant did so.

Relevant to this dispute are clauses 6 and 7 of this contract, which read as follows:

" 6. Morgenster Teachers' College is an Institution of the Reformed Church in Zimbabwe, so as a student of this college, I agree to abide by the rules and regulations of this church.

7. I understand that I will be withdrawn from the course when:

(a) I fall pregnant or am involved in causing the pregnancy of another student or pupil;

(b) I am found to be under the influence or in possession of intoxicating liquor and habit forming drugs at the college;

(c) I am absent from duty while on Teaching Practice without the permission of the Headmaster;

(d) ...

(e) ...

(f) ..."

In December 1998, the applicant married one Jealous Hlanganiso according to customary law and tradition, and soon after that, fell pregnant. Part of the applicant's sponsorship for the course comes from the Government. About 7 months into the pregnancy, ie on 9 July 1999, the applicant was called to the first respondent's office and even though obviously pregnant, was asked to execute the Government loan forms covering her fees to the end of the year, which was her final year of study. On 13 July 1999, the first respondent again called the applicant into his office, reminded her of clause 7(a) of the contract and asked her to execute, in her own handwriting and sign, Annexure "A" to the opposing papers. The relevant part of Annexure "A" reads as follows:

"Dear Sir

I am withdrawing from the college with effect from 14 July 1999. I am seven months pregnant."

On 14 July 1999, the applicant was made to fill, again in her own handwriting, a form entitled "Withdrawal From College", which informed

that she had withdrawn from the college with effect from 14 July 1999, because she was

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pregnant. In the space entitled "Recommendation" at the bottom of the form is the following notation:

> "to rejoin in the year 2000"

The form was copied to the chairman, Department of Teacher Education at the University of Zimbabwe, the Teacher Education Department of the Ministry of Higher Education, who is the third respondent, and to "VTL - Higher Education". The latter is presumably a reference to something to do with vocational training, again in the Ministry of Education.

Soon after leaving the college, the applicant lodged a complaint with the office of the Minister of the State in the President's Office responsible for Gender Issues - the Hon Oppah Muchinguri. A letter from the Minister's office was written to the first respondent (Annexure "D" to the opposing papers) in which it was reported that the applicant questioned the way she had been expelled, particularly that a few days before the expulsion, she had been made to sign the Government loan forms in order to secure the relevant funding to complete her course of study. The letter also requested information on the college's policy on pregnant students, particularly in light of the fact that the applicant personally knew of a number of female students who, despite their pregnancies and, in one case, delivery of a baby at the college, had been allowed to complete their studies. In a follow up letter, the office of the Minister responsible for Gender Issues gave the names of some of the women who had fallen pregnant but had not been expelled. In his response to these letters, the first respondent explained that the church had certain moral standards to maintain, that the applicant had signed a contract in which she agreed to be bound by, among others, clause 7(a) thereof, that she had not been expelled but had voluntarily withdrawn from the course due to the pregnancy and that in any case, her withdrawal from the course was on the almost certain understanding that she would be allowed to rejoin the college in the year 2000 to complete her course. The first respondent also explained that he relied on the student herself, and lecturers who interacted with her on a regular basis, to report the pregnancy. Where such pregnancy was not brought to his attention, it was possible for a pregnant student to escape the consequences thereof, as per the contract. He also invited the applicant to personally bring the details of the students she said had fallen pregnant and escaped expulsion or withdrawal, so that the cases could be dealt with accordingly. He, however, did not explain how he was to deal with the cases. Although acknowledging that the applicant had signed the relevant loan forms, the first respondent explained this must have happened in his absence, and in any case, arrangements could be made to refund the money.

1999 (2) ZLR p379

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The application was opposed by the first and second respondents on essentially the same grounds as those cited in the first respondent's letter to Minister Muchinguri. Heads of argument had been filed for the respondents. I directed that the applicant file an answering affidavit and heads of argument. In the event, only the heads of argument were filed on behalf of the applicant. After hearing argument from both counsel, I granted the provisional order, as prayed, and indicated I would give my reasons later. I do so now.

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It is contented for the applicant that the conduct of the first respondents, firstly, in requiring the applicant to sign a contract which provides that she would be withdrawn from the course if she fell pregnant, and, secondly, in forcing her to so withdraw in accordance with clause 7(a) thereof, contravened the part of s 23 of the Constitution that outlaws discrimination on the grounds of gender.

The relevant provision provides as follows:

> "23(1) Subject to the provisions of this section -
>
> (a) ...
>
> (b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority;
>
> (2) For the 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 opinion, colour or gender are prejudiced -
>
> (a) by being subjected to a condition, restriction or disability to which other persons of another such description are not made subject; or
>
> (b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first mentioned description;
>
> and the imposition of that condition, restriction or disability or the according of that privilege or disadvantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour or gender of the persons concerned."

For the respondents, it is contended that para (b) of subs (1) of s 23 of the Constitution was not applicable to the circumstances of this case because;

(a) the college is a private ecclesiastical college and not a public authority, and

(b) that the circumstances between the applicant and respondents are contractual and fall squarely within the ambit of the limitations to s23(3)(a), specifically the one relating to personal law.

The subsection reads as follows:

> "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) ..."

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It was contended further for the respondents that the second respondent has a constitutional right, that is, freedom of association, to exclude those who are not prepared to conform with the group's requirement. The case of *Wittman* v *Deutscher Schulverein, Pretoria* 1999 (1) BCLR 92 (T) is cited as authority for the proposition that freedom of association includes the right to

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require those who join an association to conform to its principles and rules.

Is the college a public authority?

As already pointed out, the complaint *in casu* is directed at the conduct or actions of the first respondent rather than any law. For such actions to be unconstitutional, they must have been taken in the course of the performance of the functions of a public office or public authority. This makes it necessary to first determine whether or not the college in question is a public authority.

While conceding that the college is indeed a private ecclesiastical institution falling under the auspices of the Reformed Church in Zimbabwe, counsel for the applicant, Mr *Biti*, contended that the college has sufficient "public" features to render it a public authority for purposes of s 23(1) and (2) of the Constitution. The features include:

(a) the fact that education is a public concern in which Government plays a controlling and regulatory role;

(b) that the college in question falls under the auspices of the Ministry of Higher Education, which regulates its academic activities;

(c) that the lecturers receive their salaries from the Government and are therefore public servants; and

(d) that the students enrolled at the college are sponsored by the Government.

While these assertions were not challenged, no evidence was put before the court to indicate the ecclesiastical features that could have been balanced against these "public" features, to enable a more realistic assessment of the character of the college. I was accordingly persuaded to the view that the college is indeed, in reality, more public than private in its character. I was persuaded further to this view by the fact that education is indeed a public concern and that the core business of the college in question is training. That being the case, I am satisfied that any conduct of the respondents, particularly the first respondent, that is related to the performance of the functions of the college falls within the constitutional definition of functions of a public office or public authority. The respondents' emphasis of the role of the church in upholding high moral standards in accordance with its religious character does not, in my view, detract from the public educational character of the college, as suggested.

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Was the conduct discriminatory?

Next to be considered is whether the conduct complained of was discriminatory on the ground of gender, within the meaning of s 23(1) and (2) of the Constitution.

Not too long ago, in the case of *Wazara* v *Principal, Belvedere Technical College & Anor* 1(91) our courts were called upon to deal with a similar problem. Although in that case it was not so much the conduct of the respondents as the import of a circular on the same subject of

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pregnant students, exactly the same principles apply to the case at hand. In the *Wazara* case, a pregnant student at a Government Teacher's Training College was withdrawn from the course in accordance with the Chief Education Officer's Circular Minute No. 29/83, the import of which was essentially the same as that of Clause7(a) in the contract *in casu*. As the incident happened in 1993, before the Constitutional Amendment No. 14 was passed, the applicant's contention that the circular was *ultra vires* the Constitution could not be sustained. This was because at that time, and without a provision in the Constitution specifically outlawing discrimination on the ground of gender, any rules and regulations that were so discriminatory did not offend against the Constitution. Although the student succeeded in her claim, albeit on a different premise, the learned judge's hands were clearly tied on the point of gender discrimination. The learned judge, Smith J, intimated as much in the following *dictum*, at p 513G:

> "I accept that, since the Constitution was adopted for Zimbabwe in 1980, great strides have been taken in many countries of the world, including Zimbabwe, towards the abolition of discrimination on the basis of gender. Zimbabwe has adhered to a number of conventions aimed at raising the status of women and outlawing gender discrimination. However, at the relevant time s 23(2) of the Constitution had not been amended to elevate Government's attitude to 'gender discrimination' into a constitutional right or protection. Section 15 of the rules and regulations of the college is, in my opinion, discriminatory against females. It subjects women to a penalty to which males are not subjected.
>
> For the reasons set out above, however, I do not consider that the discrimination was, at the relevant time, unconstitutional because s 23(a) of the Constitution did not outlaw discrimination based on sex or gender".

It is evident from the above that, had the Constitution been amended then, the learned judge's decision on this point would have been different. Unlike the learned judge in *Wazara*'s case, *supra*, my hands are fortunately no longer tied in the same way. For the reasons outlined below, I find clause 7(a) of the contract in question to be patently discriminatory, particularly against the female student. That being the case, it follows that the conduct of the first respondent in giving effect to the clause, is discriminatory.

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It should be noted that the respondents appear to have a superficial understanding of gender discrimination within the context of clause 7(a) of the contract. The contention of the first respondent is that the clause treats both male and female "offenders" equally by providing that a female student who fell pregnant and a male student who caused the pregnancy of a female student or pupil breached the contract and were deserving of penalty. I find such reasoning to be fundamentally flawed. At a theoretical level, discrimination is evident in the fact that while a male student only offends against the provision if he impregnates a female student (at the college) or a female pupil, the female student offends by the mere fact of falling pregnant. For her, it does not matter whether the person who makes her pregnant is a student or pupil, while, on the other hand, the male student who makes a woman other than a student or pupil pregnant presumably will not offend against clause 7(a) and will not be visited by the same penalty. More to the point, a male student who is married will not offend against clause7(a) if he makes his wife pregnant, while a married female student who falls pregnant from her husband will offend it and be visited with the penalty of having to withdraw from the college. The discriminatory effect,

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not to mention unreasonableness, of the clause needs no emphasis.

Clause 7(a) also evinces gender discrimination at a deeper level. The condition of pregnancy, what provisions may be put in place to foster it and the responsibilities for the nurturing of the baby that results from such pregnancy, are issues that do not, biologically and socially, easily admit of equality of treatment between the sexes. As a biological truth, only women fall pregnant. Men cause the pregnancy but do not carry the physical evidence of it. A woman's pregnant state is visible and incontrovertible. The identity of the man who caused the pregnancy cannot be deduced from simply looking at the pregnant woman. *In casu*, therefore, while it is easy to identify pregnant female students by simply looking at them, it is neither easy nor possible to tell, in the absence of a confession by him, or other scientifically proven means, that a particular male student is the author the pregnancy of any given woman, whether student, pupil or wife. Realistically, therefore, the effect of clause 7(a) is that female pregnant students mostly, if not only, are visited with the penalty. The condition of pregnancy for the female student is a certain fact, while all that faces the male student is at best an allegation (which he can deny and which it is unlikely the college authorities will seek to prove) that he is responsible for pregnancy.

It is thus evident that the import of clause 7(a) is nothing more than a condescending attempt to create equality between the sexes in a situation where such equality is in almost all respects not feasible. To the extent that only female pregnant students are likely to end up offending against clause7(a),

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the respondents' contention that it is concerned about promoting morality, maintaining standards and not setting a bad precedent, is clearly discriminatory for being targeted against the female students.

Lastly, there is the contention that the college does not have facilities to care for pregnant and nursing mothers and their babies. Again, to the extent that only women fall pregnant, can and may need to breastfeed their children, this stance is clearly targeted against women. There is another dimension to the non-existence of childcare facilities. It can be argued that non-provision of these facilities amounts to discrimination against women, in as much as it negates the right by women to combine their roles as mothers and productive members of the society, when at the same time the father of the child is free to pursue his productive activities unencumbered by any such responsibilities. That this is not a farfetched idea is attested to by the fact that a number of countries in the world have outlawed, as gender discriminatory, the non-provision of childcare facilities at the work place or any other place of human endeavour like teacher training colleges. It appears to me that the respondents *in casu*, and others in their situation would be better off employing their energies towards the provision of childcare facilities at their college instead of victimising pregnant students, or for that matter, male students who make female students pregnant.

The discriminatory nature of the respondent's conduct aside, I find the arguments advanced in support of the respondents' case, on the question of the applicant's contractual obligations, to

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be without merit. It is contended for the respondents that the applicant signed a contract with the college and freely consented to be bound by the terms thereof. Further that she withdrew from the college of her own volition and in accordance with her contractual undertaking. In other words, that she did no more than uphold her side of the bargain, as it were. The thrust of the respondent's defence is that the parties, ie the applicant on the one hand and the college on the other, freely entered into a contract and should therefore abide by its terms.

As a general rule, it is indeed an accepted principle of our law that all people should or do enjoy freedom of contract, and that the whole basis of the law of contract is that the courts will enforce the parties' agreement. However, it is equally accepted that there are numerous grounds upon which the court will interfere with a contract and its terms. One of these is unfairness or unreasonableness.

In that connection, I found the following passages from R H Christie *The Law of Contract in South Africa* 2(92) to be instructive:

> "... but freedom of contract is not an absolute principle. It has undergone changes over the

> centuries and may be in for further change. Jurisprudentially, the situation is one where principles conflict and it is by no means self evident that the principle of freedom of contract, which carries with it the principles of certainty and predictability (I need to be certain that my contract into which the other party freely entered will be enforceable) outweighs the principle of fairness. When principles conflict, jurisprudence requires that, if possible, a synthesis should be achieved which takes both principles into account. It is a confusion of failure when a sound principle is abandoned because the competing principle is considered even sounder."

Applying this argument to the case at hand, I would hesitate to conclude, as the respondent clearly wishes me to, that the principle of freedom of contract and the freedom of association outweigh the principle of unfairness. I found to be persuasive the argument that a student embarking on a course of the nature in question is hardly in a position to choose whether to sign the contract or not. It is common knowledge, and indeed the first respondent confirms it, that there is such tremendous demand for places at teachers' colleges - where tens of thousands of applications are received for only a few hundred vacancies - that a student who has been accepted dares not risk losing the place by objecting to the provisions of the pre-prepared contract, however unfair some of its provisions. It can thus hardly be said the two sides "freely" entered into the contract in question. The student, male or female, clearly has no choice but to sign the contract in question.

It should also be noted and accepted that, married or not, the college's students are adults. They naturally engage in "adult" behaviour, which includes sexual conduct. It must also be accepted that pregnancies do occur against even the most rigorous of contraceptive methods. Thus, unless a student deliberately falls pregnant, it cannot be said that it was within her power to absolutely avoid falling pregnant as long as she was sexually active. It hardly seems fair to penalise a party to a contract for breaching a clause that was never completely within their power not to breach. As I understand it, clause 7(a) of the contract does not forbid the college's adult students from engaging in sex. Rather, it forbids them from either falling pregnant or causing the pregnancy of female students or pupils. This strikes me as an absurdity.

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Pregnancy is a consequence of sexual conduct, and as long as it is not in the power of someone who engages in sexual conduct to prevent the consequence - ie pregnancy - it is in my view unfair to punish the consequence and not the conduct that leads to it. And to the extent that clause 7(a) does not distinguish between married women and unmarried ones, it is also unfair and discriminatory, even by religious standards. Married couples are expected to engage in sexual conduct, which more often than not leads to the expected outcome of pregnancy. Clause 7(a) is, in effect, saying that the married student may engage in sexual conduct but may not fall pregnant or, if male, may not cause the pregnancy of his student wife. There is thus no

doubt much that is unfair and unreasonable in the terms to the contract in question, not only in respect of the female student, but the male one as well. As competing principles go, I am satisfied, *in casu*, that the principle of fairness far outweighs those of freedom of contract and freedom of association.

There are other compelling arguments against clause 7(a) of the contract. These come out in the following words of the learned author, R H Christie: 3(93)

> "... the present state of the common law is that the courts will not interfere with a contract or term on the ground that it is unreasonable, unless it is restraint of trade, or is contained in a document that is signed without being read or is an unsigned document such as a contract. They will however interfere with a contract or term that is 'plainly improper' and unconscionable and 'unduly harsh and oppressive'. *In each case the court will interfere only if it is driven to the conclusion that the enforcement of the term or contract would be contrary to public policy taking into account the circumstances prevailing at the time enforcement is sought. Public policy is a matter of fact not law and changes with 'the general sense of justice of the community, the* boni mores, *manifested in public opinion*' (my emphasis).

Given the circumstances currently prevailing in Zimbabwe and elsewhere regarding the gender debate, it is not in doubt that the enforcement by the respondents of clause 7(a) of the contract would have been contrary to public policy. The policy since independence has been to promote the development of women's status in all fields of human endeavour. In pursuance of this policy much effort has been put into the removal of barriers that have stood in the way of women achieving both *de jure* 4(94) and *de facto* equality with men. Public policy also acknowledges that women should not be disadvantaged by the mere fact of having to carry the burden of domestic responsibilities. The field of education and training has, like other areas, received special attention. The strongest statement on the government's policy on pregnant students at tertiary institutions is contained in the policy document adopted by the Ministry of Higher Education on 12 January 1998, the full text of which I have taken the liberty to set out below:

> "POLICY ON PREGNANCIES IN TEACHERS TRAINING COLLEGES
>
> The Ministry has reviewed the current policy on pregnancies in colleges, in particular, teachers training colleges which were required to immediately exclude any students who fell pregnant in the course of their programmes.
>
> The new policy position is that:
>
> (a) students who fall pregnant in the course of their programmes or students who are already pregnant when applying for admission into teachers colleges should not be prejudiced by the condition of pregnancy;

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(b) notwithstanding (a) above, pregnant students or applicants should satisfy the minimum conditions prescribed for the courses or programmes;

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(c) pregnant students shall be responsible for seeking and making all arrangements for their own health care arising from their condition;

(d) pregnant students on teaching practice will be subject to the rules and regulations governing student teachers; and

(e) conditions of student financing apply to pregnant students.

This Circular letter cancels and replaces the CEO Circular No. 30 of 1986 with immediate effect. All principals are expected to observe the provisions of this circular letter and accordingly review their college rules and regulations.

The interpretation of this Circular letter rests with the Secretary for Higher Education and Technology,

Signed

Director

(Manpower Planning and Development)

for SECRETARY FOR HIGHER EDUCATION AND TECHNOLOGY"

While this circular sets out in clear terms what the Government policy is on pregnant female students at tertiary colleges, the matter is put beyond doubt when regard is had to s 23(1) and (2) of the Constitution, as set out above. Clearly, these provisions make clause 7(a) of the contract in question totally untenable. Such thinking as is implicit in clause 7(a), and the contentions put forward by the respondents, clearly no longer have a place in a country which has made and continues to make, concerted efforts to eliminate discrimination on the grounds of sex and gender. If Government policy, correctly, is not to regard pregnancy as a condition detracting from or adversely affecting the academic competency of pregnant female students, or leading to the disruption of lessons, there is no justification, in my view, for the respondents to maintain a contrary view. It is not disputed that the primary mandate, or core business, of the college is to train future teachers. To this end, the college is perfectly within its rights to impose rules and regulations against conduct that is likely to frustrate the achievement of its primary goal. While such conduct as alcohol and drug abuse, absenteeism, violent behaviour and strike action (as outlined in clause 7(a)) pose a serious threat to the discharge, by the college, of its primary mandate, it is difficult to see how pregnancy *per se* can constitute a similar threat. To the contrary, the pregnant female student is unlikely to take alcohol, abuse drugs, engage in violent and other disruptive behaviour. She literally has better things to worry about and would in all probability pose the least threat of all. That being the case, there seems to be no good reason for the college to disregard the policy spelled out in Circular Letter No. 1 of 1998 and not leaving the responsibility of seeking and making all arrangements for her health, lying-in and childcare facilities to the student herself.

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Even though the substance of what is quoted below has been addressed above, I found the following *dictum* by Comrie J (cited in the applicant's

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heads of argument), to be particularly apposite, given the circumstances of this case. 5(95) The *dictum* also underlines the inappropriateness of clause 7(a) and its effect, in contemporary times.

> "It seems to me that there may be good reason for a regulation which caters for pregnant female students at teachers' training colleges. My difficulty is with the uniform sanction, namely that pregnancy during the academic year always means suspension for the remainder of that year. It matters not whether the student is married or unmarried, or whether pregnancy occurs early in the academic year or later. It matters not whether the student resides in the college hostel or elsewhere. The ability of the pregnant student to continue with her studies is not a factor. Nor is her academic and personal record. Her financial circumstances are not taken into consideration. Nor is the effect of suspension on her future. As I have mentioned earlier, the principal or rector has no discretion to deal with individual cases according to their own exigencies. He must suspend. I have been unable to think of a satisfactory explanation or justification for his fixed rule. Very little is said in the affidavits filed on behalf of the respondents. The affidavit for first respondent was made by the deputy Minister. The regulations were published quite recently, in August 1989, so that he should have been able to tell me why reg 13(2) takes this form. He merely supports the second respondent who states;
>
> > 'I aver that the regulations are necessary for the smoother and healthy running of the college and are necessary to uphold good moral standards and discipline or the college.'
>
> During argument, counsel for the respondents said that according to his information the purpose or main purpose of the regulation is to encourage morality. That is less than plain, since reg 13 as a whole deals with health whereas misconduct and discipline are governed by regs 15, 16 and 18 *et seq*. But assuming a moral purpose, and assuming this to be a proper purpose in relation to student teachers, that purpose is not served in the case of married female students, such as the first applicant. Instead, she is visited with a harsh penalty for an event which is a natural and normal and morally approved consequence of marriage. As I recall, the procreation of children is one of the purposes for which the institution of marriage was ordained.
>
> I cannot think that married female students are so rare that it was not reasonably necessary to make an exception to the general rule in their case. Moreover, the burden of pregnancy is silent on the responsibility of male student teachers who father children in or out of wedlock by female student teachers. If the promotion of morality is the purpose, why should the men be immune to some penalty? Despite s 9 of the Constitution, is it still a man's world?"

Parts of the above *dictum* touch on one other issue raised during argument *in casu*, that is the question of balance of convenience. The applicant seeks a provisional order which is in the form of a positive interdict. The requirements for such an interdict have been ably canvassed by counsel for the applicant Mr *Biti*, through reference to relevant authorities. These are:

(a) the existence of a clear right;

(b) the existence of an infringement or interference with the right by the respondent;

(c) the absence of any other satisfactory remedy; or

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(d) a balance of convenience.

It is evident from the foregoing that that the applicant has established a clear right to the relief sought, has proved the existence of an infringement thereof by the respondents and established the absence of any other satisfactory remedy.

She must, however, prove in addition that the balance of convenience favours her being granted the relief sought.

Mr *Fitches*' submission is that the balance of convenience favoured the respondents' case in that the withdrawal of the applicant did not mean the end of her training, that she would, almost certainly, in another two months (ie January 2000) be allowed to rejoin the college and continue with her studies and that the college had no facilities to cater for nursing others. A closer consideration of the consequences, to the applicant, of her forced withdrawal from the college will serve to highlight the lack of merit in these submissions.

The respondents aver that the applicant, having merely been withdrawn from the college and not expelled, had a good chance of being allowed back the following year. They do not suggest that the applicant has an absolute right to come back to the college next year to complete her studies. In other words, if for some reason the college declined to take her back, she would have no legal basis to force them to take her back as the decision is entirely in the discretion of the college authorities. The result, should they refuse to take her back, would be two wasted years of training, not to mention the waste of Government resources represented by three years' sponsorship. In addition to which the applicant would have missed out, at the whim of the college authorities, on an opportunity which in reality is one of a lifetime - to acquire the profession of her choice. Weighed against the certainty of allowing the applicant to sit for the examinations at the end of the year, a right that I have determined should not have been denied her in the first place, the balance of convenience clearly favours her reinstatement. Nor do I find the possibility or even certainty of the applicant being allowed to rejoin the college next year to tilt the balance of convenience in favour of the respondents. The applicant was forced to withdraw from the college two-thirds of the way through her final year of training. Being re-admitted in the year 2000 would, in effect, mean she has to repeat the whole of the third year. Not only does that strike me as unnecessary under the circumstances, it also means she is pushed back one year behind her colleagues in the original course. Another practical consideration relates to the sponsorship already paid by the Government for her to complete the course. As she has demonstrated that she is perfectly able to complete her course despite the pregnancy and subsequent delivery of her baby, it strikes me as being unnecessarily inconvenient to attempt to arrange, as suggested by the first respondent, for

the sponsorship to be withdrawn and the money refunded to the Government. She would then have to go through the process of re-applying for the funding, with no guarantee that she would receive it. It is more expedient, in my view, for the college to keep the sponsorship and allow the

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applicant to sit the examinations.

The last submission put forward by Mr *Fitches* in this respect relates to the non-availability of childcare facilities. It has not been suggested that the applicant intends to bring her baby to the college. In keeping with the policy enunciated in Circular Letter No. 1 of 1997, it is submitted for the applicant that she would not expect to bring the baby along. Rather she would (and presumably already had) make such arrangements for the care of the baby as would not interfere with her studies or the writing of the exams. There is thus no merit in the respondent's contention in this respect. All in all, I am satisfied the balance of convenience favours the applicant in this case.

My determination of this matter makes it unnecessary for me to consider the merits of Mr *Biti*'s contention that the applicant was not afforded the opportunity to be heard. Apart from the fact that the first respondent makes it clear the applicant was indeed not properly heard, it is highly unlikely that even had she been heard, the outcome would have been any different.

In all respects, therefore, I was satisfied the applicant had proved her case and was entitled to the relief sought.

Honey & Blanckenberg, applicant's legal practitioners

Wintertons, respondent's legal practitioners

S *v* SAWYER 1999 (2) ZLR 390 (HC)

Citation	1999 (2) ZLR 390 (HC)
Case No	Judgment No. HH-231-99
Court	High Court, Harare
Judge	Gillespie J
Heard	November 24, 1999
Judgment	November 24, 1999
Annotations	None

Criminal review

Flynote

Criminal procedure (sentence) - common law offences - fraud - employer defrauded of large amount over long period - need to assess overall moral blameworthiness rather than dwell on amount taken

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Criminal procedure (sentence) - general principles - multiple counts - treating as one for sentence - principles - impropriety of "hybrid" approach of combining certain counts and treating them as one for sentence

Criminal procedure (sentence) - general principles - suspended sentence - suspension of part of very lengthy term - when appropriate

Headnote

The accused, an accountant, defrauded his employer of a large amount of money over several months. He was convicted on 11 counts of fraud. The magistrate treated groups of the counts as one for sentence and imposed an overall sentence of 22 years, of which 4 were suspended on conditions of good behaviour.

Held, that while it is permissible to combine multiple counts as one for sentence, there must be some logical basis for doing so. The magistrate had adopted a "hybrid" approach, combining groups of counts in order to reach the aggregate he considered appropriate.

Held, further, that in crimes of dishonesty, there must be an upper limit to the sentence that should be passed, irrespective of the amount of money involved. The downward spiral in the value of money also must be recognised. The accused's overall moral blameworthiness is of greater concern than the amount taken. Here the accused's moral culpability was to be found in the breach of trust, the planning, the extended and persistent defalcations and in the final massive theft, accompanied by flight, after suspicion had fallen.

Held, further, that while it is generally inappropriate to suspend portion of a very lengthy sentence on condition of good behaviour, it may sometimes be proper to do so. Suspending portion of a lengthy sentence can, as well as encouraging the rehabilitation of the offender, mitigate the severity of the sentence where general deterrence requires an exemplary sentence but individual circumstances call for meaningful mitigation of the sentence. The mitigating circumstances in this case - the accused's voluntary return to Zimbabwe and his plea of guilty - should be given due weight.

Held, further, that account must also be taken of the greatest potential for mitigation, restitution. The greatest possible incentive should be given to make restitution. Increasing weight has been given in recent years to restitution, reflecting a growing and enlightened embrace of

reconciliation, rather than retribution, as the preferred object of criminal sanction. In addition, once full restitution is made, the offence would have been entirely unprofitable.

Held, therefore, that the sentence should be altered to one of 18 years, of which 6 would be suspended on conditions of good behaviour; and a further 8 on condition of full restitution

Cases Considered

Cases cited:

A-G v *Paweni Trade Corp (Pvt) Ltd & Ors* 1990 (1) ZLR 24 (S)

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S v *Banda* 1984 (1) ZLR 96 (H)

S v *Chari* S-230-95

S v *Chawasarira* 1991 (1) ZLR 66 (H)

S v *Chikunga* S-23-93

S v *Faku* 1997 (1) ZLR 389 (H)

S v *Gorogodo* 1988 (2) ZLR 378 (S)

S v *Katsaura* 1997 (2) ZLR 102 (H)

S v *Mpofu (2)* 1985 (1) ZLR 285 (H)

S v *Mucherawo* 1998 (1) ZLR 129 (H)

S v *Nyajena* 1995 (2) ZLR 242 (H)

S v *Razaro* 1979 RLR 353 (G)

S v *Sharma* S-117-84

Judgment

Gillespie J: The accused was an accountant with a construction firm. He took advantage of his position of responsibility to perpetrate a protracted series of frauds. On eleven occasions between 6 February and 11 November 1998, he drew cheques on his employer's bank account. He presented them for payment at the employer's bank and received payment. He is said to have "forged" the cheques. It is not clear whether this means that he made any false entry or signature on them or whether he abused any authority to issue and sign cheques himself. Whatever the case, by this fraudulent means he obtained from the Standard Chartered Bank $1665210 to which he was not entitled. Suspicion must have fallen on the accused after the ninth count - when $80000 was recovered from him after a search. He nevertheless committed two further counts and fled to Botswana.

The regional magistrate adopted a curious approach to sentencing. Some counts he treated together, others separately for sentence. He then ordered some individual sentences to run concurrently. By this, means he achieved an overall 22 years' imprisonment. Of this, he suspended 5 years on condition of good behaviour and 6 years on condition of restitution. The total effective sentence, assuming full restitution, is 11 years' imprisonment. I consider the sentence excessive. I am also obliged to make some remarks concerning the approach to sentence and as to the structure of the sentence.

The table sets out each count according to dates, *falsitas*, whether taken together with any other count, sentence, concurrence of running and effective sentence.

Of these, twenty two years' imprisonment, five years were suspended on

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1	6/2/98	300 000	1 & 2) together)	6 years	1 2 3 & 4) Counts)	
2	24/2/98	100 500	1 & 2) together)		1 2 3 & 4) counts)	6 years
3	30/4/98	50 00		2 years	1 2 3 & 4) counts	
4	11/5/98	25 000		11/2 year	1 2 3 & 4) counts	
5	15/6/98	45 000	5 & 6) together)	4 years	5 6 & 7) counts	
6	26/6/98	60 000	5 & 6) together)		5 6 & 7) counts	4 years
7	15/9/98	123 500		4 years	5 6 & 7) counts	
8	6/10/98	200 000		5 years counts)	8 & 9) counts	
9	13/11/98	85 210		3 years	8 & 9) counts	
10	16/11/98	125 000		4 years	10 & 11) counts	7 years
11	19/11//98	545 000		7 years	10 & 11) counts	
		1665 210				22 years

condition of good behaviour and six on condition of restitution.

The regional magistrate, in assessing sentence, was faced with a choice of approach. He had either to sentence each count individually or to treat all counts as one for sentence:

> "One approach is to treat each individual count on its merits and sentence the accused on that count as if it was the only count. If, as a result of this, the aggregate sentence on all the

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> counts taken together is too severe, as in many circumstances it very well might be, the appropriate approach is to make the sentences on some counts run concurrently with others, so that the effective sentence which the accused actually serves on all counts is appropriate. An alternative approach is to treat all the counts together as one for sentence and then impose a sentence which the judicial officer considers appropriate. This sentence should in the result be the same as a sentence which would have been imposed had the counts been treated separately and some made to run concurrently with others." 1(96)

Where the counts are all disparate in name or nature, time or circumstances, then it is improper to impose a globular sentence.

> "Separate punishments should, save in exceptional cases, be imposed for each separate charge." 2(97)

On the other hand, where the different counts are all closely related to one another in some way, then it is not only permissible, but often preferable, to treat separate counts collectively for sentence. For instance, where different offences are committed together as part of the same criminal activity; or where identical or similar offences are committed individually over a period of time but as part of an ongoing cause of conduct; a collective sentence will generally be appropriate. 3(98)

In this case, it would have been most appropriate to impose a globular sentence in respect of the many identical counts of fraud, all showing the same *modus operandi*, and all part of a single ongoing criminal endeavour. Such a course would, however, have limited the regional magistrate to a sentence of the maximum of his jurisdiction. If such a sentence were inadequate then it would be, of course, be proper to sentence each count individually. I would not, therefore, criticise the regional magistrate for electing so to do.

Having chosen to treat the counts separately, however, the regional magistrate then combined certain of those counts (as shown in the table) for some sort of mini-globular sentence. This seems to me irrational. He appears to have done this where separate counts occurred in the same month, namely February and April; yet there was one month, November, where a number of counts were committed where he did not combine the counts. He was not moved by consideration of the amount of *falsitas* since although in April the amounts taken were relatively modest, in February, they were anything but. Criticism for a similarly inconsistent approach was voiced thus:

> "The trial regional magistrate treated multiple counts as one for the purpose of imposing corporal punishment and treated the same multiple counts separately for the purpose of imposing a custodial sentence. This she cannot do. When it comes to sentence the trial court has two options open to it. It should either treat each count separately for sentence or treat

> them jointly or together for the purpose of sentence. The two approaches should not be married to produce a hybrid approach as happened in this case." 4 (99)

I think the regional magistrate erred in this "hybrid approach" of his.

It is of the essence, when sentencing multiple counts separately, that an appropriate sentence be imposed on each count. It is a misdirection, when sentencing counts individually, to assess a

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cumulative desideratum, and to juggle the individual sentences so as to reach the anticipated appropriate aggregate. 5(100)

The individual sentences, seen particularly as part of the "hybrid approach" criticised, give the impression of just such legerdemain in sentencing. There is, I must acknowledge, some justification for different sentences in each count. That justification lies in the difference in amounts defrauded. That justification carries with it its own refutation, however, in that the gradation of sentence (although not without anomaly) suggests the oft-criticised "mathematical approach" to sentencing - by which too much emphasis is placed on the amount stolen, rather than upon moral blameworthiness.

Despite these errors and inconsistencies, were I satisfied that the results were substantially in accordance with justice, I would not interfere in the exercise of his discretion by the regional magistrate. After careful consideration, however, I am obliged to hold the overall sentence, and the effective sentence in particular, manifestly excessive. My reasons are best explained by comparison with the sentence I would have imposed at first instance, or were I at large to substitute my own discretion in the matter.

Were I, in such an event, to elect to treat each count individually, I would probably order as tabulated below:

1.	6 years)		
2.	4 years)	Counts 1 to 7 to run concurrently	
3.	2 years)		6 years
4.	2 years)		
5.	2 years)		
6.	2 years)		
7.	4 years)		
8.	6 years)		
9.	2 years)	Counts 8 to 10 to run concurrently	
10.	4 years)		6 years
11.	6 years)		
	40 years		18 years

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If, as I would almost certainly prefer, I were to take all counts as one, I would undoubtedly impose an overall 18 years' imprisonment. Thus, one demonstrates that whichever approach to sentence one adopts, faced with a multiplicity of counts, the overall result should be the same.

In setting upon the figure of 18 years, I am influenced primarily by two considerations. The first is a remark by McNally JA, which all judicial officers should bear in mind. With the law reports burgeoning with examples of ever-increasing sentences, such that it is regrettably easier to justify harshness and severity rather than clemency and moderation, 6(101) the learned Judge of Appeal has criticised a tendency to ever-increasing heavy-handedness:

"How does one begin to measure the outer limits of a sentence in a case of this magnitude? One may say that even murder with actual intent often attracts a sentence of 16-18 years. One may ask - what sentence would be appropriate where a quarter of a million dollars is stolen and nothing is recovered? What sentence would be appropriate where five or six million dollars is involved?

These considerations and suggestions suggest to me that a twenty year sentence for a crime of dishonesty unaccompanied by violence must be approaching the outer limit of what any court in this jurisdiction would impose for such a crime". 7(102)

The other consideration was set out by Bartlett J:

> "Just as it must be accepted that the corrosive effect of inflation drives honest people into dishonesty, so it must be accepted that the downward spiral in the value of money needs to be recognised in the sentences imposed for thefts and frauds. The $44000 defrauded by Katsaura in this matter would, 15 years ago, have bought him a mansion in Highlands. Today he would struggle to buy a two-roomed house in Chitungwiza with it. Similarly, he could have bought a new car in the early 1980s for little more than $6000 or $7000. Today, his pilfered $44000 would not even pay for half the price of the cheapest new vehicle. Inflation has devoured the value of money at an average annual rate of at least 20-25% in the last five years. To impose the same sentence today as would have been imposed 10 years ago for a theft or fraud involving $44000 would be unfair. $44000 was worthy very much more then than it is now. The same principle applies in my view even over a period of as little as 2-3 years as long as inflation continues its headlong gallop." 8(103)

Although the sum stolen here - $1.6million - exceeds by far the amount stolen by Paweni (below) - $1.3million its value in real terms is probably one tenth of the lesser nominal value in the earlier case. This factor alone demonstrates the folly in being impressed by the amount stolen alone rather than by the overall moral blameworthiness. The moral culpability here is to be found in the breach of trust; the planning, the extended and persistent

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defalcations and in the final massive theft, accompanied by flight, after suspicion had fallen.

The difference in overall sentence, between the twenty two years imposed by the regional magistrate and the eighteen years preferred by myself, is significant. I am uncertain as to whether that in itself is sufficient ground for interference. The disparity between the punishment imposed, and that I consider appropriate, becomes more profound as one considers refinements to the sentence.

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The regional magistrate suspended five of the twenty two years on condition of good behaviour. In doing so, he, in common with most other judicial officers, is acting in a manner occasionally criticised by the Supreme Court. In that body, it has been held that the suspension of part of a very lengthy prison term, imposed on an individual unlikely to offend again, is inappropriate. Thus, Gubbay JA (as he then was) has said, in connection with a punishment of twelve years imprisonment for multiple counts of embezzlement:

> "And I do not believe that it is appropriate to suspend any portion thereof. There is no rule that every first offender who is to be imprisoned is entitled to have a portion of the period suspended. See *S* v *Moyana & Anor* 1980 ZLR 460 (A) at 464E-F. The main purpose of a suspended sentence is rehabilitative. Where, in consequence of the nature of his wrongdoing, the offender is required to undergo very lengthy incarceration (as in this instance), if that punishment does not induce him to settle down to a useful life, it is unlikely that upon his release from gaol a further period of imprisonment hanging over his head will deter him from future crime." 9(104)

Likewise from Korsah JA:

> "One final observation must be made: I do not think that where a convicted person is to undergo a very lengthy sentence, such as was imposed by the trial court, anything is to be gained by suspending seven years on condition of good behaviour. See *S* v *Gorogodo* S-192-88 (not yet reported) at p 6. There is no doubt that such suspension was made by the trial court as a matter of personal deterrence. Such personal deterrence is not justifiable because those who have their wits about them usually find the closing of prison gates an experience which they do not want again, and if they do not learn their lessons after a lengthy period of incarceration, they can always be dealt with by the courts on the basis of the severity of the offence committed. To bring into effect a suspended period of seven years for defrauding a man of $200 would appear unjust to the man in the street." 10(105)

These remarks ought not to be misunderstood.

They were made in the context of the reduction of overall sentences, part of which were suspended on conditions of good behaviour, to a lesser overall sentence, equivalent to the effective portion of the sentence appealed against, with no suspension. Thus, in *Gorogodo*, the sentence of seventeen years with

five suspended was reduced to twelve years effective. In *Paweni*, punishment of twenty five years with seven suspended was reduced to seventeen years effective. The alterations were thus effectively the deletion of the suspended sentences. They removed from the appellants the exposure to a substantial suspended sentence.

In that context, the remarks are, with respect, beyond criticism. They should not, however, be understood as an indication that it would never be appropriate to suspend a portion of a sentence solely because of a view that further offence is unlikely. They should not be taken as meaning that it would never be proper to suspend portion, even a substantial portion, of a lengthy prison sentence.

These two misapprehensions (for such they are) are refuted thus. Although the primary object of the suspension of a sentence, or portion of it, on conditions of good behaviour, is to encourage the rehabilitation of the offender, that is not the only purpose.

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Another important reason so to act as to mitigate the severity of the sentence imposed, where general deterrence requires an exemplary sentence but individual circumstances call for meaningful mitigation thereof. The danger of a substantial sentence being brought into effect for a minor transgression is no reason to deprive a deserving person of the mitigatory effect of suspension of portion of his prison term. Rather that danger, already minimal if the favourable view of the likelihood of his recidivism is correct, should be addressed by the judiciously strict formulation of the condition of suspension.

In this case, therefore, I would, as did the regional magistrate, suspend portion of the sentence on condition of good behaviour. The accused is admittedly unlikely to offend again. He is a thirty four year old first offender. He is married with two sons aged seven and two years. He is a professionally qualified person - an accountant. Although he committed a very serious crime of dishonesty he has substantially mitigated his offence in an extraordinary way.

That mitigation is his voluntary return to Zimbabwe from his fugitive sanctuary and his surrender. This is a very real act of repentance. His plea of guilty is no mere reluctant acceptance of an inevitable fate. Such remorse merits the fullest consideration in sentencing. 11(106) That same remorse also, perhaps, suggests that the accused is unlikely to offend again in this way. Nevertheless, applying the reasoning above, I would think it wholly appropriate to impose a substantial sentence of imprisonment, as a measure of general deterrence but to mitigate that, because of the individual

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circumstances of this case, by the suspension of a significant portion, on conditions of good behaviour, suitably defined, to reduce the burden of perfection imposed by intolerant conditions. Where the magistrate suspended five years, I would suspend six. The sentence imposed and my ideal thus move further apart.

Account must finally be taken of the last and greatest potential for mitigation. Restitution. The increasing weight that, over the last quarter of a century, has properly been placed on restitution by an offender reflects a growing and enlightened embrace of reconciliation, rather than retribution, as the preferred object of criminal sanction. True it is that crime should not pay. Once full restitution has been made, however, then the offence thus restored will be seen to have been entirely unprofitable. The greatest possible incentive, therefore, should be given to an accused to restore to his victim that which he has wrongly gained.

In this case, the accused, in submitting to justice, volunteered restitution of the stolen monies ($80000 of course had already been recovered). The magistrate properly responded to this intimation by suspending six years of the remaining sentence on condition of restitution. My own discretion would be influenced strongly by the compelling concept, as stated by Bartlett J 12(107) (with due acknowledgments), of restricting the effective portion of any period of imprisonment to the minimum necessary. I would have suspended eight years of the sentence on condition of restitution.

It might well be said by some that four years effective, for the theft of over a million and a half

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dollars, is manifestly inadequate. That would be a most misleading thing to say. The truth is that four years in prison is a most arduous punishment. Four years will be served only if all the money stolen is repaid. If it is not, twelve years will be served. In twelve years an accountant would expect to earn considerably more than $1.6 million. The loss of income, not to mention freedom, for four years, after the restitution of $1.6 million dollars, is by no stretch of any reasonable imagination a soft option. More lenient than most reported cases it certainly is. The minimum effective imprisonment properly, I hold it to be.

The divergence between this final result and that imposed by the learned regional magistrate is such that one may justly regard the sentence imposed as manifestly excessive. For that reason, I consider that I can properly, and must, set aside the sentence, as I do, and replace it with the following:

> "18 years' imprisonment, of which 6 years is suspended for 5 years on condition that the accused is not within that period convicted of fraud, forgery, uttering or theft by false

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> pretences for which he is sentenced to imprisonment in excess of twelve months without the option of a fine; and in addition a further 8 years is suspended on condition that the accused should repay to the Standard Chartered Bank the sum of $1 582 010 by no later than 31 December 2000, or such extended date as the court might, on good cause shown, direct."

Chatikobo J agrees.

SECRETARY FOR JUSTICE *v* PARKER 1999 (2) ZLR 400 (HC)

Citation	1999 (2) ZLR 400 (HC)
Case No	Judgment No. HH-243-99
Court	High Court, Harare
Judge	Devittie J
Heard	October 22, 1999
Judgment	November 30, 1999
Counsel	Mrs J Zindi, for the applicant F Girach, for the respondent
Annotations	None

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Chamber application

Flynote

Family law - application for return of abducted minor children - proceedings under Child Abduction Act [Chapter 5:05]

Headnote

A Zimbabwean woman had married a Scottish man in England where they resided. They had two minor children. During the marriage, the man had been violent and intimidating towards the woman but had not physically harmed the children. Because of marital problems, the parties eventually separated. The children lived with their mother in England but the father enjoyed rights of custody together with the mother and he had frequent access to the children. The woman removed the children from England and brought them to Zimbabwe. At the time she was removing the children the man was attempting to obtain a court order to prohibit her from taking the children out of England.

An application was made for the return of two minor children to England under the Convention on the Civil Aspects of International Child Abduction which has been given the force of law in Zimbabwe by the Child Abduction Act [*Chapter 5:05*].

Article 3 of the Convention provides that the removal of a minor child by one parent is wrongful where the child has been removed from the place where it was habitually resident in breach of rights of custody which the other parent has in terms of the law of that country and those rights were actually being exercised. Article 12 provides that where there has been such wrongful removal and proceedings for the child's return have been commenced less than one year from the date of removal, the court "shall order the return of the child forthwith". The present application satisfied these requirements.

However, article 13 stipulates that the court of the requested state is not bound to order the return of a child if the parent opposing the return of the child establishes that there is a grave risk that the child's return "would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation". The question in the present case was whether this provision applied.

Held, that the primary purpose of the Convention is to provide a mechanism to for the return of the child to the country where the child is habitually resident and from which it has been wrongfully removed. The principle underlying the Convention is that it is in the best interests of the child for him or her to return to the county from which he or she has been wrongfully removed. It is normally to be expected that the courts in the country from which the child has been taken will assume the responsibility to look after the interests of the child and prevent harm to the child.

Held, further, that only in exceptional cases will the court have the discretion not to order the return of the child. There must be a grave risk of severe harm to the child on return or a situation entailing a high level of intolerability.

1999 (2) ZLR p401

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Held, further, that in the present case it was not established that the child would be exposed to a grave risk of harm and the court was obliged to order the return of the child.

Held, however, that the court was entitled to order the father in England to make certain specified undertakings before finally ordering the return of the child to England.

Cases Considered

Cases cited:

A & Anor (minors: abduction: acquiescence), Re [1992] 1 All ER 929 (CA)

A (a minor: abduction), Re [1981] FLR 365

C v *C (minor: abduction)*, [1989] 2 All ER 465 (CA)

F (minor: abduction: rights of custody abroad), Re [1995] 3 All ER 641 (CA)

Case Information

Mrs *J Zindi*, for the applicant

F Girach, for the respondent

Judgment

Devittie J: This is an application for the return to England of two minor children, Chays and Knol. It is brought under the Convention on the Civil Aspects of International Child Abduction, which has force of law in Zimbabwe by virtue of the Child Abduction Act [*Chapter 5:05*].

The minor children, Chays and Knol were born on 13 July 1992 and 8 February 1994, respectively. Their mother is Zimbabwean aged 30 and their father is Scottish aged 37. They met in Newmarket, England, in 1990. At the time, the mother had recently completed a degree in horse mastership in Natal, South Africa. She had then gone to Newmarket hoping to enrol for a course as a horse trainer. On arrival in England, she did not succeed in enrolling for the course in horse training. She obtained temporary employment as a stable hand. She intended to return to Zimbabwe soon. Then, she met the father of the minor children. Their relationship developed and they married in 1993. Save for the occasional trip to Zimbabwe and a brief stay in Scotland, they lived in England with the minor children up to the time of the events that preceded this application. It is to these events that I must now turn.

It appears that the marriage was not a happy one. In late 1998, they separated. The mother moved out of the matrimonial home and she obtained rented accommodation for herself, the minor children and her sister who was on a lengthy visit from Zimbabwe. In January 1999, the mother's sister decided to return to Zimbabwe. According to the mother, this placed her in a difficult situation. She states that she panicked because she did not know how she would cope with the children without her sister's assistance. She took the decision to return to Zimbabwe. She explains that decision in these words:

> "I knew that I could not find any support from George nor did I wish to have any. I realised that if I stayed in the United Kingdom, I would have to stop work and I would have to rely on full social benefits as I would be unable to

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work without the help of my sister. Accordingly, I decided to bring my plans to return to Zimbabwe forward."

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The father, it seems, sensed her mood. Fearful that she was about to leave England with the minor children, he obtained an order *ex parte* from the Cambridge County Court on 3 February 1999. The order forbade the mother from removing the minor children from the jurisdiction of the Court. The order was not served on the mother. She had left England for Zimbabwe two days before the order was granted.

On 16 February 1999, the Lord Chancellor's Department in England, applied to the Secretary of Justice, Legal and Parliamentary Affairs for the return of the minor children to England. No doubt, the father had sought relief under the Convention. For the purposes of the Convention, the Secretary is the central authority and it is to him that such applications are addressed in the first instance. For reasons not immediately apparent, this application was not brought before me until late October 1999, several months after the arrival of the children in Zimbabwe.

The Secretary for Justice, Legal and Parliamentary Affairs, as the Central Authority, seeks an order for the immediate return of the minor children to England. He avers in his founding affidavit that the children were wrongfully removed from the United Kingdom and that prior to their removal they were habitually resident in the United Kingdom. He further avers that, prior to the removal of the children to Zimbabwe, both parents enjoyed custodial rights. These averments are necessary to bring the application within the ambit of article 3 of the Convention. Article 3 provides that the removal or retention of a child is to be considered wrongful where:

" (a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention."

In substantiation of the allegation that the children were wrongfully removed, an affidavit, sworn to by the father, is annexed to the application. He states that after the mother moved out of the matrimonial home in late 1998, he played an active role in the children's lives. He claims that, in January 1999, one of the children confided in him that his mother intended to take them to Africa. This was of real concern to him and he subsequently telephoned the mother to advise her that he intended to bring a court action to prevent her taking the children out of the country.

The application for the return of the minors is opposed on several grounds. Mr *Girach* for the applicant, raised a point *in limine*. It is that as the application involves minors, r 249 of the Rules of Court applies. Rule 249 provides that in any application in connection with a minor, a chamber

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application shall first be made for the appointment of a curator *ad litem*. After his appointment,

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the curator *ad litem* is required to conduct an investigation and submit a report for consideration in the substantive application. Mr *Girach* submitted that the application ought not to be entertained until there has been compliance with r 249. I do not agree that in applications under the Convention, a curator *ad litem* has first to be appointed. As will become apparent in the course of this judgment, I consider that the issues which arise for determination in this case turn on an application of the principles of the Convention. In my judgment, a resolution of these issues does not require me to consider the interests of the minor children, in the sense ascribed to that phrase in applications under r 249. I readily accept, though, that situations may arise in applications under the Convention, where the court may be assisted by a specialist's report touching on the health of a minor child and the harm that may result if the child is returned to his place of habitual residence. This, however, is not such a case.

The next argument raised in opposition was that the removal was not wrongful because the father consented to their removal. In this regard, reliance was placed on the mother's claim, in her opposing affidavit, that the father agreed in January 1999 that it would be in the best interests of the children to grow up in Zimbabwe. She stated that when she indicated that he could come with her to Zimbabwe, provided they lived separately, his anger flared up. It cannot in these circumstances be seriously contended that the father agreed to the removal of the children. Moreover, his subsequent actions in instructing his solicitors to obtain an order prohibiting her from removing the children from Newmarket, and in promptly applying for relief under the Convention, are hardly consistent with his having consented.

No question arises as to the father not having enjoyed rights of custody in English law. Clearly, he did. This much is clear from the letter from the Lord Chancellor's Department, where reference is made to the relevant English statute. I find therefore that, the removal of the minor children was wrongful in terms of article 3. In terms of article 12, where a child has been wrongfully removed in terms of article 3, and, at the date of commencement of proceedings for the return of the child, a period of less than one year has elapsed from the date of removal, the court "shall order the return of the child forthwith". This is the position that now obtains.

It was submitted, however, that even if I do find that requirements of article 12 are met, I should not order the return of the minor children because there is a grave risk that the return of the children would "expose them to physical or psychological harm or otherwise place them in an intolerable situation". In making this submission, counsel seeks to bring the facts of this case within

the exception in article 13 of the Convention. It provides that a judicial authority of the requested state is not bound to order the return of the children if the person who opposes their return establishes that:

" (a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or

(b) there is a grave risk that his or her return would expose the child to physical or psychological harm or

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otherwise place the child in an intolerable situation."

I turn, therefore, to consider whether there is a grave risk that the return of the minors would expose them to physical or psychological harm or otherwise place them in an intolerable situation. The mother has set out, in great detail, the history of the marriage. She claims that throughout the marriage the father has subjected her to physical and verbal abuse. He drank heavily and, when under the influence of alcohol, he hurled verbal abuse at her. At times he severely assaulted her. He was financially irresponsible and on one occasion, after a visit to Zimbabwe, she discovered that he had gambled away all the family's savings. At the time that she moved to Zimbabwe, she says that she was at the end of her tether and had moved out of the matrimonial home. She had resolved to return to Zimbabwe. What precipitated her resolve was the realization that she would be unable to cope with the minor children when her sister returned to Zimbabwe.

She says that both children were affected by the father's conduct and developed emotional problems. Chays became truculent. She believes he was emulating his father's behaviour towards her. At times, he refused to go to school. The other child developed a condition she described as alopecia areata which is caused by stress. The symptoms are loss of hair and a photograph she produced indicated a substantial loss of hair. She attributed all this to the stressful environment in which the children were growing up. The children have been in Zimbabwe for about ten months. The mother says they have settled well into their new environment at their grandparents' home in Chiredzi. The younger child's hair has grown and the headmaster's reports are positive.

When considering applications under the Convention, it is important to pay heed to the purposes of the Convention and the principles subscribed to by the contracting states.

The preamble to the Convention reads thus:

> "Firmly convinced that the interests of the children are of paramount importance in matters relating to their custody; desiring to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the state of their habitual residence, as well as to secure protection for rights of access."

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In article 1, the objects of the Convention are stated as follows:

" (a) to secure the prompt return of children wrongfully removed or retained in any contracting state; and

(b) to ensure the rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states."

The clear purpose of the Convention, as the preamble and article 1 indicate, is to provide a mechanism to deal with situations where children are wrongfully removed from a jurisdiction in which they are habitually resident. I am bound therefore to endeavour to give maximum force to the purposes of the Convention. As Lord Donaldson MR said in Re *A & Anor (minors: abduction: acquiescence)* [1992] 1 All ER 929 at 942:

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> "In considering the first issue, the court of country B should approach the matter by giving the fullest force to the policy which clearly underlies the Convention and the Act, namely, that wrongful removal or retention shall not confer any benefit or advantage on the person who has committed the wrongful act. It is only if the interests of the child render it appropriate that the court of country B rather than country A shall determine its future that there can be any exception to an order for its return. This is something quite different from a consideration of whether the best interests of the child will be served by its living in country B rather than country A. That is not the issue unless para (b) of article 13 applies. The issue is whether decisions in the best interests of the child shall be taken by one court rather than another. If, as usually should be the case, the courts of country B decide to return the child to the jurisdiction of the courts in country A, the latter courts will be in no way inhibited from giving permission for the child to return to country B or indeed becoming settled there and so subject to the jurisdiction of the courts of that country. But that will be a matter for the courts of country A."

What clearly emerges from the above *dictum* is that I am not required to consider the interests of the minor child as though this were a custody dispute. That is a matter for the English courts to decide.

As Nourse LJ said in Re *A (a minor: abduction)* [1981] FLR 365 at 368:

> "These and other provisions of the Convention demonstrate that its primary purpose is to provide for the summary return to the country of their habitual residence of children who are wrongfully removed or retained in another country, in breach of subsisting rights of custody or access. Except in specified circumstances, the judicial and administrative authorities in the country to which the child is wrongfully removed or retained cannot refuse to order the return of the child, whether on grounds of choice of forum or on a consideration of what is in the best interests of the child or otherwise."

The Convention, if it is to be effective, requires uniform application by the contracting states. Accordingly, it is proper that I have regard to decisions in other jurisdictions.

In *C* v *C (minor: abduction)* [1989] 2 All ER 465 at 473, Lord Donaldson MR considered the degree of psychological harm contemplated in article 13(b). He said:

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> "We have to consider article 13, with reference to 'psychological harm'. I would only add that in a situation in which it is necessary to consider operating the machinery of the Convention, some psychological harm to the child is inherent, whether the child is or is not returned. This is, I think, recognised by the words 'or otherwise place the child in an intolerable situation', which cast considerable light on the severe degree of psychological harm which the Convention has in mind. It will be the concern of the court of the state to which the child is returned to minimize or eliminate this harm and, in the absence of compelling evidence to the contrary or evidence that it is beyond the powers of the courts in the circumstances of the cases, the courts of the country should assume that this will be done. Save in an exceptional case, our concern, ie the concern of these courts, should be limited to giving the child the maximum possible protection until the court of the other country, Australia in this case, can resume their normal role in relation to the child."

In Re *A & Anor (minors: abduction: acquiescence)* [1992] 1 All ER 929, the submission was made that the minor would be placed in an intolerable situation if they returned because on their arrival there would be no home and no financial support save for state benefits. Balcombe LJ rejected this submission in these words:

> "The judge also rejected a submission on behalf of the mother that there was a grave risk that to return the boys to Australia would place them in an intolerable situation. If the judge had accepted that submission that would have unlocked the door to the exercise of his discretion under article 13(b). 'The argument there is that on their arrival there is no home and there is no financial support forthcoming from the plaintiff who himself lives on state

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benefits. That is in contrast to the security that the mother has achieved since her arrival in this jurisdiction. Here she has the support of her parents. She is in a position to sign a lease immediately for the rent of a suitable home. There is a letter from the school *sharing* that the children have apparently settled in well to a Church of England primary school. Therefore, it is said that the situation on their return would be intolerable and pointless.' The judge rejected this argument: 'I have reached the clear conclusion that the mother has not established a sufficiently grave risk of a sufficiently intolerable situation. The fact is that between July and September of this year the whole family was dependent on state benefits. In this jurisdiction, equally the mother and children are dependent on state benefits. On their return, they would again be entirely dependent on Australian state benefits. So that can hardly be said in itself to constitute an intolerable situation.' This submission was revived before us. Nevertheless, I am quite clear in my mind that the matters (largely financial) upon which the mother seeks to rely as constituting an intolerable situation in Australia came nowhere near to establishing what the Hague Convention requires by that phrase."

A useful illustration of the degree of psychological harm that would suffice is the case of Re *F (minor: abduction: rights of custody abroad)* [1995] 3 All ER 641. The facts of that case are that the mother obtained an order from a Colorado court ousting the father from the matrimonial home. The order was based on allegations of the father's violent conduct and the adverse effect on the minor child. The mother, a British citizen, left the United States with the minor shortly after the order was granted. She returned to the United Kingdom. The father applied to the English for the return of the child. The

judge ordered the return of the child. The mother appealed. She contended *inter alia* that, given the serious effect on the minor of the father's violent behaviour, there was a grave risk that returning the child would expose him to "physical or psychological harm or otherwise place him in an intolerable situation".

The factual findings which led the court to conclude that the exceptionally high standard required by article 13(b) had been reached were summed up by the Court of Appeal at p 648:

"This child was, like so many other children, present at acts of violence and displays of uncontrollable temper directed at his mother or elsewhere, and at occasions of violence between the parents. These included assaults on his mother and one on his grandmother on the 6th June, destruction of household items such as ripping the fridge door off its hinges. More important in my view was that the child was himself the recipient of the violence by the father. The judge was in error in finding only one occasion which directly affected the child when he suffered a nosebleed caused by the father in a temper throwing a coolbox onto the backseat where the child was sitting which hit him in the face. There were other incidents. He destroyed the child's toys by stamping on them and smashing them when the child was present. This happened more than once. On several occasions, he pinched the child on the legs causing bruising. One occasion of pinching was witnessed by the maternal grandmother. On 6 June, C was thrown out of the house as well as his mother. On this occasion, which was immediately before the mother made her *ex parte* application to the county court, the police were called and took his father away. His father in his presence threatened to kill him and his mother. In these incidences, the child was not a bystander to matrimonial discord but a victim of it. In addition, other aspects of the behaviour of the father towards the child were unusual and inappropriate, such as waking up the child aged under four in the early hours of the morning, wanting to get him to wash the jeep. In addition, after the temporary restraining order was made and the father left the house, the father seems to have engaged in a campaign of intimidation or harassment directed at the mother, including following her about in his car and threatening her with a gun. He also camped in the jeep several doors away from the matrimonial home, which had a very adverse effect upon the child as well as upon the mother.

The child is asthmatic and the effect upon him of this behaviour was serious. He was present when his grandmother, who was recovering from surgery, was forcibly pushed out of the house and thrown against the wall.

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The child's reaction was to scream and to cry. He started to bed wet regularly and to have nightmares where he screamed out in his sleep. He became unusually aggressive at the child care centre as well as at home. The effect of the father camping nearby in the jeep made him scared and upset. He copied the tantrums, the yelling, the screaming and the bad language of his father.

The extent to which the child was himself drawn into the violence between his parents and the clear evidence of the adverse effect on him of his father's violent and intimidating behaviour would not, in my view, in themselves be sufficient to meet the high standard required in article 13(b). The matters which I find most telling are (1) the actual effect upon the child of the knowledge that he may be returning to Colorado together with the unusual circumstances, (2) that he'll be returning to the very same surroundings and potentially the very same situation as that which has had such a serious effect upon him before he was removed. There has to be concern as to whether the father would take any notice of future orders of the court or comply with undertakings he has given to the judge. How is a child

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of four to have any security or stability or from his perception come to terms with a return to his former home? I have come to the conclusion on the unusual facts of this case that the extreme reaction of the child to the marital discord and the requirement by article 12 to return him on the facts of this case to the same house with the same attendant risks would create a grave risk that his return would expose him both to psychological harm and place him in an intolerable situation."

One of the judges of appeal, Millett LJ, was not entirely persuaded that the evidence established that the return of the child would expose him to physical or psychological harm or place him in an intolerable situation. The learned Lord Justice however stated at 649 that "I am not prepared to pressure doubts to a dissent".

The principle underlying the Convention is that the best interests of children dictate that they be return to the country from which they have been wrongfully removed. As the English court law demonstrated, it is only in exceptional cases that a court will have a discretion to refuse to order the immediate return. A parent who opposes the return must meet stringent requirements. The Convention has in mind a high degree of harm to the child. So, too, the level of intolerability has to be high.

The factors which lead me to the conclusion that the mother has failed to establish the requirements of article 13(b) are these:

(a) the father's violent and intimidating conduct was directed at the mother and not the children. The stressful environment to which the mother says the children were exposed was caused by the strained relations between the parents. This is not, therefore, a situation where the risk of harm emanates from any conduct by the father directed at the minors. Even in the increasingly strained relationship that now existed after the separation, the father had frequent access to the minor children. The mother made no objection to the father's demands for access. On the contrary, she seems to have encouraged the father have contact with the minor children. The mother has been in Zimbabwe since February 1999. She is living at her parents' farm in Chiredzi where the minor children are attending school. It appears, from the reports of the teachers, that they have settled well into their new environment.

(b) Children are invariably affected by acrimony between their parents. When the children were

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removed, the mother and father had separated. An order that the children return to the United Kingdom does not oblige the mother to resume co-habitation with the father. Consequently, the mother need have no fear that the children will be exposed to the stressful conditions that existed before she separated from the father.

(c) I accept that the mother will face some hardship upon her return. She has no relatives in England. If she cannot engage a child minder at a

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reasonable rate, it may mean that she will not be able to obtain full time employment and will be dependent on State benefits. I do not consider that these financial hardships are sufficiently weighty matters to cause me to decline to order the return of the minors.

There are a number of undertakings the father should give as a prerequisite of the return of the children, failing which the children should not be expected to return. These are that:

(a) he will not remove the children from the care and control of the mother until the question of custody has been determined by the English Courts.

(b) he will make suitable arrangements for separate accommodation for the mother and the children for a period of two months after their arrival. He must provide suitable and sufficient furniture.

(c) he will provide air tickets and book seats for the mother and the minor children to travel to the United Kingdom on a day after 1st January 2000.

When the above undertakings are given on behalf of the father to this court and to the English Court, I shall order the return of the minor children to England.

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

Gollop & Blank, respondent's legal practitioners

CROC-OSTRICH BREEDERS OF ZIMBABWE (PVT) LTD *v* BEST OF ZIMBABWE (PVT) LTD 1999 (2) ZLR 410

Citation	1999 (2) ZLR 410
Case No	Judgment No. HH-239-99
Court	High Court, Harare
Judge	Gillespie J
Heard	May 28, 1999

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Judgment	December 1, 1999
Counsel	A J Dyke, for the applicant F Girach, for the respondent
Annotations	None

Civil application

Flynote

Insolvency - liquidation - application for - allegation that company unable to pay its debts - court's discretion to refuse liquidation even where grounds are established - natural and extent of discretion

Headnote

The applicant, one party to an agreement of joint venture, place the respondent, the other party to that venture, in provisional liquidation, on the basis of an unpaid debt, being rental for occupation of land belonging to the applicant and used in the joint venture. It had originally sued for the eviction of the respondent for non-payment of rent but had discontinued the action upon realization that the agreement between the parties did not permit such a course. The land in question had been improved by the respondent or its predecessor at its expense and the agreement permitted the respondent no compensation for the improvements. The effect of winding up would be to deny the respondent its secured long-term use of the property and its opportunity to recoup its investment and to restore the property to the applicant without liability for compensation to the respondent.

On the return day of the order of provisional liquidation, the judge hearing the matter had before him certain further documentation and accounts, which had not been before the judge who granted the application for provisional liquidation.

Held, that if this additional information had been placed before the first judge, he would not have made the finding he did about the respondent company's inability to pay its debts.

Held, further, that even if this finding was not correct, the court could still not countenance the winding up of the respondent company. The court has an inherent discretion to refuse to order liquidation, notwithstanding the proven existence of grounds for liquidation. This discretion derived from two sources. Firstly, s 206 of the Companies Act [*Chapter 24:03*] gives the court a discretion in this regard by the use of the word "may". Secondly, the court has a discretion flowing from its inherent jurisdiction to prevent abuse of its process.

Held, further, that even if the respondent company was unable to pay its debts, the inability was temporary and the consequence of winding-up would be seriously disproportionate in its prejudicial effect upon the respondent company. The respondent company had a secure long term occupation of the use of the land and buildings. An order of winding-up on the grounds of non-payment of rent might well bring about the respondent's loss of occupation, for less than value, in a manner that the agreed rights under the joint venture do not permit. Additionally, the

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debt had been paid or at least payment was tendered and was wrongly refused.

Held, further, that these proceedings were suggestive of an abuse of process. The sole or

dominant motive of the applicant was not to secure payment of the sum due, or failing payment, as distribution of the respondent's assets in insolvency. The object of the proceedings was to harass or oppress the respondent or fraudulently defeat his rights by removing him from occupation of the property.

Cases Considered

Cases cited:

Croc-Ostrich Breeders of Zimbabwe (Pvt) Ltd v *Best of Zimbabwe (Pvt) Ltd* HH-206-98

Millward v *Glaser* 1950 (3) SA 547 (W)

Pillay & Anor v *Liquidators, Union & Rhodesian Wholesale Ltd* 1927 SR 136

Service Trade Supplies (Pvt) Ltd v *Dasco & Sons (Pty) Ltd* 1962 (3) SA 424 (T)

Tuckers Land & Development Corp (Pty) Ltd v *Soja (Pty) Ltd* 1980 (3) SA 253 (W)

Statutes Considered

Legislation considered:

Companies Act [*Chapter 24:03*], s 206

Case Information

A J Dyke, for the applicant

F Girach, for the respondent

Judgment

Gillespie J: Croc-Ostrich Breeders of Zimbabwe (Pvt) Ltd owns some land. On this land is built a safari lodge. It was built and operated as a joint venture between Croc-Ostrich and TA Trading Corporation (Pvt) Ltd. TA ceded its rights, and assigned its obligations, under the agreement to Best of Zimbabwe (Pvt) Ltd. The joint venture agreement is such that Croc-Ostrich must stock and maintain a game park on the land, Best of Zimbabwe must operate and maintain a hotel on the land. A third party was involved, the obligation of which was to take hotel guests on safari in the game park, but that is incidental to this case. The facility thus described is known as Pamuzinda Safari Lodge.

Pamuzinda, before the laws of entropy, unabated by any input of work, impelled it along its alleged inexorable course to dilapidation, was a most desirable resort. In November 1998, however, Best of Zimbabwe was placed in the hands of a provisional liquidator. This was done at the instance of Croc-Ostrich. The ground, found to be proven by Chinhengo J, 1(108) was

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the inability of Best of Zimbabwe to pay its debts. This inability was found by the learned judge to manifest itself in the cessation of hotel operations and maintenance; in the failure to pay amounts due as rent to Croc-Ostrich; and in certain other facts.

This, then, is the return day of the order of provisional liquidation. Since that order was given, certain further documents have been filed. These are affidavits of the respondent opposing confirmation of the provisional order and certain affidavits, supplementary to those, covering balance sheets and profit and loss accounts for the respondent and a subsidiary company,

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Pamuzinda Safari Lodge (Pvt) Ltd, for the year ended 31 December 1998. There were filed within two weeks of the return day. Answering these, and filed the day before the hearing, is the affidavit of the applicant.

These affidavits raise the issues to which the helpful arguments of Mr *Dyke* and Mr *Girach* were confined. These restricted issues are whether the belatedly produced accounts show Best of Zimbabwe to be insolvent; and whether the application for liquidation is an abuse of process, brought *in mala fide* for an ulterior motive.

I turn to the first of these issues. The balance sheet shows an investment of just under $12 million. This is almost entirely made up of a capital reserve account and a shareholders' investment account. This is said to be represented by fixed and current assets. No current liabilities are recorded. Most significant amongst the fixed assets is the purported cost of the buildings of Pamuzinda Safari Lodge. This is said to be $9108777.01 - or after depreciation just over $8.6 million.

Mr *Dyke* mounts substantial attack against this figure. It is to be contrasted with the figure of $l.6 million recorded for the same item the previous year. No new building was done - the increase is attributed entirely to revaluation. This increase in value of the buildings (before depreciation in each year) is accounted for in the investment side of the account as the capital reserve account of $7432441.

Not only does this tend to suggest the lack of practical value of the balance sheet, but, more importantly, there is doubt as to whether the hotel buildings are an asset in the hands of Best of Zimbabwe. It is a fundamental principle of law that *aedificium solo adhesit*. At common law, therefore, these buildings must be regarded as the property of the landowner, Croc-Ostrich. This is not altered by the terms of the joint venture. Although the buildings were constructed at the expense of TA (predecessor to Best of Zimbabwe), the joint venture agreement bestows no right in the property upon TA other than a right of occupation, subject to payment of rent. It provides for no compensation to TA at the termination, premature or otherwise, of the joint venture. There is a single indication that in the event of expropriation the compensation paid (to Croc-Ostrich) will be shared in an unspecified way with TA. Best of Zimbabwe acquired its rights from TA and could not have acquired a real right in the property or its improvements. It therefore has no entitlement to regard the cost of the buildings as an asset held by it.

Further anomalies are manifest in the accounts. Best of Zimbabwe does not trade. It shows a

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loss for the year of the accounts but that loss is almost entirely depreciation. It has no current liabilities - yet it has an obligation to pay rent to Croc-Ostrich. It has current assets (cash on hand and deposits) of $10000 - yet it must run an international quality safari hotel.

GILLESPIE J

Yet, do these allegedly questionable features support the finding that Best of Zimbabwe is unable to pay its debts? In my estimation they do not. They are all perfectly susceptible of explication. That unfolding comes from the circumstance that Best of Zimbabwe runs the hotel through its subsidiary, Pamuzinda Safari Lodge (Pvt) Ltd. That is why there are no current liabilities declared; little cash on call; no expenses of hotel management; and no income from such a source. All these *indiciae* of trade are to be found in the subsidiary's accounts. Both books reveal that Best of Zimbabwe charges its subsidiary rent for use of equipment and that the amounts due to Croc-Ostrich are accounted for directly between Croc-Ostrich and the hotel management subsidiary and not through the books of Best of Zimbabwe.

In this light, the further allegedly glaring circumstance relating to the value of the hotel buildings pales. Granted that Best of Zimbabwe has no title to the buildings - yet it nevertheless has a financial interest in relation to them. It acquired the right of secure long term occupation of them, for value, from the original party to the joint venture, TA. It is the sort of right that, in the absence of a *pactum de non cedendo* (which does exist in this case) could be freely disposed of for value. It is a right which can be ceded with the consent of Best of Zimbabwe. An acknowledgement of the value of this right appears in the joint venture agreement. This does not permit cancellation and eviction in the event of non-payment of rental. It does also provide for a sharing of compensation between the allied parties in the event of expropriation. Best of Zimbabwe does not own the value of the buildings. But it does possess a valuable incorporeal right related to their occupation and use.

Moreover, even if one removes from the balance sheet the impermissible fixed asset value, that does not place the company in a position of illiquidity. Rather, in writing back that value, one must make the balancing entry, on the other side of the balance sheet, to the capital reserve fund mentioned. The end result remains unchanged.

Since the new documents do not prove the respondent's inability to pay its debts, I must revisit the interlocutory finding of Chinhengo J. My learned brother held that this inability was disclosed by:

> "the respondent's failure to pay two sets of rentals timeously, its admission that funds were not then available, its resort to its subsidiary for funds with which to pay the rentals, its inability to meet its obligations under the lease agreement with respect to maintenance and repairs of the lodge, the fact that its liabilities exceeded its assets, that it is running at a loss, that it has contemplated selling its rights under the lease agreement or bringing in an investor, and its admission of being in a financial crisis ..." 2(109)

In reconsidering these findings, I have the benefit, not afforded Chinhengo J, of full financial statements. Thus, the learned judge's reliance upon the

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"resort to its subsidiary for funds" is now to be seen as quite innocuous, given that Best of Zimbabwe was a holding concern and the subsidiary the operating business. Again, the "inability to meet its obligations ... with respect to maintenance" is shown by reference to the latest accounts of the operating subsidiary to be, perhaps, in hindsight, an overstatement. These accounts, disclose gross revenue for 1998 of $4.5 million and expenses of $4.2 million including rent (to Croc-Ostrich) of $438427 and repairs and maintenance of $121246. Not lavish maintenance true, but scarcely completely neglectful (almost half of the profit transferred to the appropriation account). Further, the finding that liabilities exceeded assets was based upon rough schedules of income and expenditure in the hands of the operating subsidiary (not a balance sheet of the holding company) for the first few months of the year. The full accounts for the year for the subsidiary reveal an excess of income over expenditure; a turnaround from a situation of a loss to one of profit; and an excess of assets over liabilities. The accounts for Best of Zimbabwe, even shorn of the invalid inclusion of the value of the buildings, shows an excess of assets over liabilities. Although it shows too a deficit of revenue against expenditure, it is a non-trading body and the deficit is generated by depreciation on revalued assets.

I am confident that had this information been placed before Chinhengo J he would not have made the finding he did. Favoured as I am with this advantage, I am unable to hold Best of Zimbabwe to be unable to pay its debts, and would be similarly inclined as regards the subsidiary operating company, Pamuzinda Safari Lodge.

Even were I incorrect in such a finding I would still not countenance the winding up of the respondent. Mr *Girach*, for Best of Zimbabwe, urged upon me the discretion inherent in the court to refuse to order liquidation notwithstanding the proven existence of grounds for liquidation. Such a discretion is deliberately provided for by the use of the permissive "may" in the enactment providing the grounds of winding up by the court. 3(110) Even without this the court would, in the proper case, have the discretion flowing from its inherent jurisdiction to prevent abuse of its process. 4(111) These two sources together provide a judicial discretion, based on all the relevant circumstances of any case, to withhold an order of winding up even if grounds have technically been established.

The discretion is regarded as a narrow one. 5(112) Narrow in the sense that a creditor is entitled to a winding-up *ex debito justitiae* save in exceptional

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circumstances. 6(113) The essence of the discretion is a decision as to whether to withhold relief, objective grounds for the granting of which have been established. The factors to be considered in any case do not differ depending on the grounds advanced for winding up. The discretion is a judicial value judgment to be made on all the relevant factors. 7(114)

The factors which influence me in this case, assuming the inability to pay its debts had been proven against Best of Zimbabwe, are the following. The inability was temporary. There is no reason to suppose that the safari hotel operation is not a profitable business nor that any

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liquidity problem is a symptom of serious financial embarrassment within either the holding or the operating company.

The consequence of winding-up will be seriously disproportionate in its prejudicial effect upon the debtor. As shown heretofore, the debtor has a secure long term occupation and use of the land and buildings. The joint venture agreement does not permit cancellation on the grounds of non-payment of rent. Only a claim for payment and for damages is countenanced. That right of occupation is valuable but, in terms of a *pactum de non cedendo*, cannot be alienated without consent. An order of winding-up on the grounds of non-payment of rent might well bring about the respondent's loss of occupation, for less than value, in a manner that the agreed rights under the joint venture do not permit.

The debt has been paid. Or at least payment was tendered. Before the hearing of the argument for the provisional order. It was refused on the grounds that payment was not being tendered by the debtor (Best of Zimbabwe) but by a third party (in fact the subsidiary company).

An action claiming cancellation of the joint venture and the eviction of Best of Zimbabwe has been instituted. It has not been prosecuted. Mr *Dyke* acknowledges that it has been effectively abandoned, in favour of liquidation proceedings, after due consideration being given to the terms of the agreement which limit the creditor's right in such a circumstance to recovery of the debt and damages.

All these factors seem to me highly suggestive of an "abuse of process". This term

> "suggests the employment of the judicial process for a purpose other than that for which it was intended. The court is not prepared to countenance such practice." 8(115)

The primary purpose of liquidation proceedings is

GILLESPIE J

> "to secure payment of the sum due, or, failing payment, a distribution of the respondent's assets in insolvency." 9(116)

The combination of all the factors in this case satisfy me that the sole or predominant motive of the applicant cannot be so defined. Its aspirations are more clearly directed at removing from occupation of the property a respondent, which it now seems to regard as more of an incubus than Gilbert and Sullivan's judge ever thought the "rich attorney's elderly, ugly daughter". 10(117)

I find, therefore, even if the company was unable to pay its debts at a particular point in time, that payment of the debt has been lawfully tendered and wrongly refused. That persistence in these proceedings is not

"to bring about the respondent's [winding up] for its own sake but to harass or oppress the respondent or ... fraudulently to defeat [its] rights." 11 (118)

I would therefore, discharge the provisional order with costs.

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Coghlan, Welsh & Guest, applicant's legal practitioners

Gollop & Blank, respondent's legal practitioners

TRINITY ENGINEERING (PVT) LTD *v* COMMERCIAL BANK OF ZIMBABWE LTD 1999 (2) ZLR 417 (HC)

Citation	1999 (2) ZLR 417 (HC)
Case No	Judgment No. HH-242-99
Court	High Court, Harare
Judge	Smith J
Heard	November 23, 1999
Judgment	December 1, 1999
Counsel	G Chikumbirike, for the applicant C Lemani, for the respondent
Annotations	None

Application for particulars

Flynote

Practice and procedure - particulars - application for - what particulars applicant is entitled to

Headnote

A defendant is entitled to request and be supplied with particulars when the plaintiff's declaration is lacking in certainty and particularity. The facts which the plaintiff may be required to state are facts which fill in the picture of the plaintiff's cause of action. A defendant is not entitled to request further particulars for the purpose of enabling him to ascertain whether he has a defence or to formulate such a defence. Applications for particulars should not amount to a series of interrogatories to the other party.

Cases Considered

Cases cited:

CBZ v *MM Builders & Suppliers (Pvt) Ltd* 1996 (2) ZLR 420 (H); 1997 (2) SA 285 (Z)

Insamcor (Pty) Ltd v *Machinenfabriek Sidler Stalder AG* 1987 (4) SA 660 (W)

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Purdon v *Muller* 1961 (2) SA 211 (A)

Samuels & Anor v *William Dunn & Co SA (Pty) Ltd* 1949 (1) SA 1149 (T)

White v *Moffett Bldg & Contracting (Pty) Ltd* 1952 (3) SA 307 (O)

Case Information

G Chikumbirike, for the applicant

C Lemani, for the respondent

Judgment

Smith J: The respondent has issued summons claiming various payments from the applicant. The applicant has made various requests for further particulars which it claims are necessary to enable it to plead to the summons. The applicant requested further particulars on 25 February 1997 (hereinafter referred to as "the first request") when it entered appearance to defend. The respondent complied with that request on 29 April 1997. The applicant then requested further and better particulars on 27 June 1997 (hereinafter referred to as "the second request") and the respondent submitted the particulars requested on 29 September 1997. Those particulars were amended on 4 December in order to rectify a typographical error - in the earlier particulars it was stated that the total sum claimed was $63030.49 and this was amended to reflect a figure of $68030049.42. On 24 October, the

SMITH J

applicant filed yet another request for further and better particulars (hereinafter referred to as "the third request"). On 28 March 1998, the respondent filed the further and better particulars requested. The applicant filed an application (case No. H-1582-97) on 24 March 1997 for an order compelling the respondent to comply with its first request. Garwe J, on 30 April, dismissed the application with costs on the grounds that the respondent had filed the particulars requested. Then on 2 December 1997, this application was filed, seeking an order that the respondent comply with the third request.

The application is a bulky document of 286 pages, which has 57 annexures, much of which is irrelevant, repetitive or unnecessary. The application was filed by the applicant without assistance from, or being represented by, a registered legal practitioner. The respondent's opposing affidavit was filed on 17 December 1997 and then the applicant's replying affidavit was filed on 24 August 1998. The applicant then retained the services of a legal practitioner, the first of many. Many of the voluminous letters it sent to the original firm of legal practitioners that represented it were sent to the Registrar. They unnecessarily clutter up the files. I have instructed the Registrar to throw them away. On 3 May 1998, the applicant filed another court application, in which it sought an order that the respondent furnish the further particulars requested in case No. H-1582-97 by delivering to the applicant photostat copies of all facility letters, statements and ledger sheets prepared by the respondent concerning all accounts maintained by the applicant with the respondent. That was case No. H-6268-98. The application

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was dismissed with costs on 25 March 1999, on the basis that the applicant was seeking the same relief in that case as he was seeking in this case.

The applicant appeared to be in no hurry to have the matter set down for hearing. In a letter dated 27 May 1999, the respondent advised the applicant's then legal practitioner that, if this application was not withdrawn within 3 days, it would apply for the matter to be set down for hearing. It filed its heads of argument on 28 May 1999. The respondent's legal practitioners, in a letter to the applicant's then legal practitioners, which was dated 10 June 1999, said that they were proceeding to have the matter set down. In that letter the legal practitioner said that he had received the letter of 7 June which the applicant's general manager had written to the applicant's legal practitioner and copied to him. He then went on to add:

> "We wish to suggest to you that you advise your client's Managing Director to direct all such correspondence directly and solely to yourselves in future. We know and understand that your client's Managing Director is a prolific scribe and does not hesitate to put down his views in writing, but we feel, and justifiably so, that we are under no duty, legal, ethical or otherwise, to endure or suffer the inconvenience of reading some of his letters which in all honesty should be directed to yourselves alone in your capacity as your client's lawyers.
>
> We are not interested in your client's Managing Director's *ad hoc* views on what he

> considers to be the applicable law relating to supply of further particulars nor in his frequent references to alleged breaches of the *in duplum* rule by our client in this case simply because we consider that his views are not entirely correct and fly against basic common sense as far as this particular case is concerned.

In the circumstances, it would be best if all correspondence in this case came directly from you so that we are assured that what we get ultimately constitutes relevant and usable parts of your client's instructions to you and not your client's Director's wholesale opinions which in the largest part are lay, ill-informed, and of no consequence or significance to this case. We therefore urge you to advise your client's Director to resist any further desire he may have to correspond directly with us except through you and at the same time, also please advise him that he should not copy his correspondence to you to us."

These remarks of the legal practitioner are very pertinent and well advised. The suggestion made in the first sentence quoted above is very apt and should be followed.

Attempts were made by the respondent to have the matter set down for hearing in July and again in September 1999. On 6 September, the respondent's legal practitioner set this matter down for hearing on the opposed court roll on 23 November. By that time, the applicant was barred. On 22 September, Gwaunza J granted an order uplifting the bar and giving the applicant leave to file its heads of argument by no later than 4.00 pm on Tuesday 28 September 1999. The applicant's then legal practitioners had meanwhile renounced agency on 9 September 1999. The applicant's heads of argument are not dated so I do not know when they were filed.

The parties were eventually heard on 23 November, some l0 days short of 2 years after the application was filed. Mr *Chikumbirike* submitted that the issues were whether the applicant was entitled to the further particulars requested in paras 2, 3 and 4 of the third request and paras 2.11, 2.13, 3.1, 3.4, 3.5, 4.2, 4.5, 6.3, 6.4, 6.6 and 7.1 of the second request. When it was

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pointed out to him that the order sought by the applicant related only to the third request, he conceded that the issues raised relating to the second request were of no relevance. The arguments relating thereto merely add to the bulk of the papers before the court and, like much of the other papers, are of no relevance.

Paragraphs 2, 3 and 4 of the applicant's third request for particulars read as follows:

> " 2. Without prejudice to that stated at para 1 herein above, the defendant requires to know the following particulars in respect of all accounts, whether closed or still on-going, ever conducted by the defendant with the plaintiff as the Bank of Credit and Commerce International Zimbabwe Limited -cum- the Commercial Bank of Zimbabwe Limited: concerning each account, the plaintiff to indicate clearly the amount of capital due; the total amount of interest due thereon as at a specified date; whether or not interest on the total amount is being claimed or was ever claimed and, if so, the amount in respect of which the interest is/was so claimed and the date with effect from which the said interest is/was

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> alleged to run, as the case might be. In the case of all overdraft accounts, the defendant requires to know the total amount of the various debts, if any, claimed over the years and the amounts being claimed now and, *separately*, the total capital amounts loaned, the total amount of interest due thereon as at a specified date and, if appropriate, the total amount due in respect of bank charges, cheque books and other administrative fees, and the interest, if any, due thereon as at a specified date. If it is alleged that the defendant made any payments in respect of the said overdraft account or accounts, the defendant needs to know specifically the total amount paid with an indication of how payments were appropriated.
>
> 3. Without detracting from the generality of all that stated at paragraphs l and 2 above, the defendant requires to know the origins of *Account 12008330/11006414*, including all agreements pertaining to it and the particulars in which transactions have been affected in terms of the agreements. If this account reflects an opening debit balance brought forward, the defendant needs to know how that alleged debit balance is supported in terms of the agreements and the relevant bank statements showing the pertinent debits and credits.
>
> 4. If the plaintiff admits that it is not entitled in law to claim interest accumulating in excess of the unpaid capital, then the defendant needs to know from the plaintiff when the said plaintiff applied this rule. defendant needs to have, in respect of each and every one of its accounts with the plaintiff, whether closed or on-going, a copy of the plaintiff's computation of the figures showing the application of the rule that interest may not accrue in excess of the capital sum. If the plaintiff did not apply this rule to any of the defendant's accounts, the defendant needs to know which account and why not."

As can be seen, the request for further particulars is very comprehensive and rambling and follows the pattern of letters sent by the applicant's managing director to all and sundry.

Mr *Chikumbirike* argued that the applicant was entitled, in terms of s 137 of the High Court Rules, to apply for further and better particulars. He relies on the comments of Gillespie J in C*ommercial Bank of Zimbabwe* v *M M Builders & Suppliers (Pvt) Ltd & Ors* 1996 (2) ZLR 420 (H); 1997 (2) SA 285 (Z) for his submissions as to what details should have been contained in the respondent's particulars of claim. He submitted that the applicant had had various accounts with the respondent over many years. Over a lengthy period, there had been a dispute as to what monies were advanced, what interest was due and what the balances were. The respondent transferred transactions from one account to another. There was a probability that the respondent was claiming interest in breach of the *in duplum* rule. The particulars furnished did not enable the applicant to know what case it had to meet and therefore to be able to plead

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to the claim.

Mr *Lemani* submitted that the respondent had supplied all the particulars reasonably necessary to enable the applicant to plead to the claim. When one had regard to the particulars of claim that were filed and all the subsequent further and better particulars filed in response to the applicant's requests, the requirements set out in the *Commercial Bank of Zimbabwe* case, *supra*, have been met and indeed exceeded. The respondent has supplied the applicant

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with photocopies of all bank statements relating to the three accounts concerned, together with others that the applicant insisted upon, even though the respondent considered that they had nothing to do with the accounts in question and its claim. Therefore the applicant was not entitled to any further particulars additional to those already supplied.

In *White* v *Moffett Building & Contracting (Pty) Ltd* 1952 (3) SA 307 (O) it was held that a defendant was entitled to request and be supplied with particulars when the plaintiff's declaration was lacking in certainty and particularity. However, the defendant is not entitled to request further particulars for the purpose of enabling him to ascertain whether he has a defence to the claim or to formulate such a defence - see *Insamcor (Pty) Ltd* v *Maschienenfabriek Sidler Stalder AG* 1987 (4) SA 660 (W). In *Samuels & Anor* v *William Dunn & Co SA (Pty) Ltd* 1949 (1) SA 1149 (T) at 1157-1158 Ramsbottom J said:

> "I think I may safely adopt what was said by Scott LJ in *Bruce* v *Odhams Press Ltd* [1936] 1 KB 697 at p 712. The learned judge said:
>
> > 'The cardinal provision in r 4 is that the statement of claim must state the material facts. The word "material" means necessary for the purpose of formulating a complete cause of action; and if any one "material" fact is omitted, the statement of claim is bad; it is "demurrable" in the old phraseology, and in the new is liable to be "struck out" under Order XXV, r 4; see *Philipps* v *Phillips* 4 QBD 127; or "a further and better statement of claim" may be ordered under Order X1X, r 7. The function of "particulars" under r 6 is quite different. They are not to be used in order to fill material gaps in a demurrable statement of claim - gaps which ought to have been filled by appropriate statements of the various material facts which together constitute the plaintiff's cause of action. The use of particulars is intended to meet a further and quite separate requirement of pleading, imposed in fairness and justice to the defendant. Their function is to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial. An examination of the cases in our courts to which we were referred shows that it is in this sense that the word "particulars" is used. The particulars required "to fill in the picture of the plaintiff's claim" may be required in order that the defendant may plead to the claim - in which case they will be ordered before plea. Or they may not be required to enable the defendant to plead to the declaration but they may be required to prevent him from being taken by surprise at the trial and to enable him to prepare his case; in that event they may be ordered after plea and before trial. But in either case, the facts which the plaintiff is required to state are facts which "fill in the picture of the plaintiff's cause of action"; they are not facts which form no part of the plaintiff's cause of action but which the defendant wishes to allege and upon which he wishes to found a plea in confession and avoidance'."

In *Purdon* v *Muller* 1961 (2) SA 211 (A) Ogilvie Thompson JA referred to the detailed further particulars which had been requested in that case and on which the judge in the court *a quo* had adversely commented. He mentioned the tendency on the part of practitioners to abuse the

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further

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particulars procedure by making unnecessary, and unduly lengthy, requests for information before pleading. He said that that inevitably led to much delay and the court, instead of being furnished with a reasonably concise and self-contained statement of the respective cases of the parties, was confronted with a formidable array of papers from which the real issues between the parties can only be ascertained by a laborious process of reference and cross-reference to a whole series of documents. He pointed out that it was by no means rare for the further particulars to obscure, rather than clarify, the real issues between the parties. At p 215G-H, the learned Judge of Appeal said:

> "On the other hand, while it is of course fundamental that a party should be adequately apprised of the case he has to meet, the ingenious inquisitor should not be permitted, under the guise of a request for further particulars of a pleading, in effect to submit a series of interrogatories to the opposite party. The increasing tendency on the part of practitioners to do, or attempt to do, just that is to be deprecated. Properly used in appropriate cases, the further particulars procedure is a useful procedure. Its true function, however, is neither to afford a refuge to the slovenly pleader nor to be the vehicle of what in reality amounts to a fishing expedition."

It is clear to me that the particulars of claim filed by the respondent, as supplemented by the further and better particulars it has provided in response to the three requests by the applicant, are more than adequate to enable the applicant to plead to the respondent's claim. The third request, which I have set out in full, clearly establishes that the applicant is looking for a defence. The *bona fides* of the applicant are very suspect. The bulk of the application (which, as I have said earlier, consists of 286 pages) and the inclusion of so much repetitious, irrelevant or worthless matter amounts to an abuse of the legal process. The applicant has taken the opportunity to include most of his prejudices and to repeat them *ad nauseam*. Had the applicant been *bona fide* and intent on clarifying the position and clearing its reputation and its debts, it would have pressed its application with a little more vigour. The fact that the application has taken two years to get to court and that it is only because of the insistence and persistence of the respondent that it has been set down, shows how successful the applicant has been in delaying the prosecution by the respondent of its claim against the applicant. It is clear that the applicant has been ducking and diving for a long time in order to avoid coming to court. Its managing director has used whatever stratagems have come to hand. At least three firms of legal practitioners which have handled the applicant's case have renounced agency. Having regard to the many lengthy and verbose letters written by the managing director of the applicant, I am not surprised that the legal practitioners have found it impossible to represent the applicant. This application clearly amounts to vexatious conduct on the part of the applicant and an abuse of

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the process of the law. That being the case, the respondent is entitled to its costs on the higher scale.

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

Chikumbiriki & Associates, applicant's legal practitioners

Hove Dzimba & Associates, respondent's legal practitioners

DUBE & ANOR *v* LAW SOCIETY OF ZIMBABWE 1999 (2) ZLR 424 (SC)

Citation	1999 (2) ZLR 424 (SC)
Case No	Judgment No. S-122-99
Court	Supreme Court, Bulawayo
Judge	Gubbay CJ, Ebrahim JA, Sandura JA
Heard	November 29, 1999
Judgment	December 8, 1999
Counsel	T A Cherry, for the appellants A Brooks, for the respondent
Annotations	None

Civil application

Flynote

Criminal law (statutory offences) - Legal Practitioners Act [Chapter 27:07] - s 9(2)(b) - unregistered person assisting person to sue out process for a fee - director of company writing letters to insurers threatening legal action on behalf of accident victims - such conduct in breach of Act

Legal practitioner - conduct and ethics - unregistered person assisting person to sue out process for a fee - director of company writing letters to insurers threatening legal action on behalf of accident victims - such conduct in breach of s 9(2)(b) of the Legal Practitioners Act [Chapter 27:07]

Headnote

Section 9(2)(b) of the Legal Practitioners Act [*Chapter 27:07*] provides that no person other than a legal practitioner in possession of a valid practising certificate may, in consideration of the payment of a fee or commission, assist another person to sue out or threaten to sue out a summons or process in a court of civil jurisdiction.

The managing director of a firm, who was not a legal practitioner, had, for a fee, assisted motor accident victims to pursue claims for compensation against motor insurers. He had written to the insurance companies, threatening to commence legal proceedings against them if they did not settle the claims. The Law Society sought an interdict preventing the director from continuing to

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act in this way.

Held, that although the managing director had not stated expressly that he would himself institute such proceedings, he had to be judged by what he had written, instead of by an unexpressed and unstated intent that he would engage legal practitioners to institute the legal proceedings. The managing director was, therefore, in breach of s 9(2)(b) of the Legal Practitioners Act.

Cases Considered

Cases cited:

Pieters & Co v *Salomon* 1911 AD 121

Levy v *Banket Hldgs (Pvt) Ltd* 1956 R & N 98; 1956 (3) SA 558 (FS)

R v *Chad & Ors* 1972 (2) RLR 42 (G)

R v *Joel* 1962 R&N 851 (SR); 1963 (2) SA 205 (SR)

SAR&H v *National Bank of SA Ltd* 1924 AD 704

Springvale Ltd v *Edwards* 1968 (2) RLR 141 (G)

Statutes Considered

Legislation considered:

Legal Practitioners Act [Chapter 27:07], s 9(2)(b)

Case Information

T A Cherry, for the appellants

A Brooks, for the respondent

Judgment

Gubbay CJ: The first appellant is the managing director of the second appellant which, as its name suggests, has as its stated objects:

" (i) To advise and assist victims or relatives to victims of road traffic accidents to claim from insurance companies in terms of the Road Traffic Act of Zimbabwe.

(ii) Assist same to institute action against the insurance company for compensation where appropriate.

(iii) Assist and advise policy holders in respect of their policies, benefits and rights and obligations arising from such insurance policies.

(iv) Assist dependants or beneficiaries of a policy holder to claim in case the holder and/or breadwinner is deceased."

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Neither the first appellant nor the other director of the second appellant is a registered legal practitioner.

Arising from complaints received from several insurance companies, the respondent formed the opinion that the first appellant, in the conduct of the business of the second appellant, was in breach of s 9(2)(b) of the Legal Practitioners Act [*Chapter 27:07*] ("the Act"). It sought from the High Court an interdict preventing the appellants from "communicating in any way with insurance companies and/or their legal representatives in connection with accident damages claims on behalf of members of the public".

After a close examination of the relevant correspondence placed before him, the learned judge *a quo* held that the appellants were in contravention of s 9(2)(b) of the Act to the extent that, in consideration of the payment of a fee or a commission, they were assisting persons by threatening to sue out a summons or process in a court of civil jurisdiction. Accordingly, he granted an interdict prohibiting the appellants from so conducting themselves, with costs awarded against them jointly and severally.

Aggrieved at the outcome of the proceedings, the appellants now advance the contention before this court that the correspondence relied upon by the learned judge for his conclusion did not disclose the making of a threat; and, in any event, did not indicate that any summons or process would be issued *by themselves,* rather than by registered legal practitioners acting in accordance with their instructions.

Section 9(2)(b) of the Act provides that:

> "Subject to any other law, no person other than a registered legal practitioner who is in possession of a valid practising certificate issued to him shall -
>
> (a) ...

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> (b) for or in expectation of any fee, commission, gain or reward in any way instruct or assist any other person to sue out or threaten to sue out any summons or process or to commence, carry on or defend any action, suit or other proceeding in any court of civil or criminal jurisdiction."

It was not in dispute that the first appellant, in the letters he wrote on behalf of the second appellant, offered to assist the addressees "for or in expectation of a fee or commission". The letters say so. See, for instance those dated 10 May 1991, 20 May 1991, and 10 June 1991. And in an interview reported in the *Sunday News* the first appellant stated that "when the case has been won ... the claimant is required to pay a commission to the company".

The word "threaten" is not defined in the Act. Its import has been considered in a number of cases. In both *R* v *Joel* 1962 R&N 851 (SR) at 853A-B; 1963 (2) SA 205 (SR) at 206C-G and *R* v *Chad & Ors* 1972 (2) RLR 42 (G) at 44B-C, the meaning most apposite was considered to be that referred to by Peterson J in *Hodges* v *Webb (1)* [1920] 2 ChD 70 at 89, namely:

> "... an intimation by one to another that unless the latter does or does not do something the former will do

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something which the latter will not like."

In the context of s 9(2)(b) of the Act, I am satisfied that no different meaning should be attributed.

Thus, the first obstacle the respondent was obliged to overcome was whether the correspondence revealed that the recipients, mainly insurance companies, were being threatened with the commencement of legal proceedings.

A variety of phraseology was used by the first appellant: "We would like to point out that we would prefer handling this matter on an 'out of court settlement' basis unless there is a need to go to court" (letter of 5 July 1990); "We would not brush aside an *ex gratia* payment but otherwise the whole matter is a court matter ..." (letter of 15 August 1990); "Going back to the sum ($30000) claimed should you induce us to go to court this figure might be much higher as there is no limit as the client was not doing any act related to him as a passenger" (letter of 5 November 1990); "An out of court settlement is preferred bearing in mind that legal costs will not arise if this is settled on a mutual basis" (letter of 12 December 1990); "We prefer an out of court settlement on mutual trust and understand this can be agreed" (letter of 24 April 1991); "It is in our interest through mutual understanding and trust that we believe all hurdles shall be overcome without difficulty as we prefer an out of court settlement unless otherwise necessary for court action" (letter date obliterated); "As we stated in our letter of 23/11/92 this claim can be reassessed and might warrant over $200000 claimable and we ask you as insurance experts to consider the immediate settlement of $68560.50 or as

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per agreeable after you submit a counter-offer or settlement through the courts where $200000 plus will be claimed" (letter of 4 May 1993).

The overall thrust is clear, though perhaps more explicit in some letters than in others. It was that unless the claims were compromised legal proceedings would follow - a fact which necessarily involves the issue of civil process. I agree entirely therefore with the observation of the learned judge that the recipients of the letters were given the alternative of an out of court settlement or face the prospect of court action.

None of the letters referred to, however, contained the express intimation that the appellants intended to institute the threatened proceedings themselves. Hence the crucial question before the lower court was whether such an understanding was the only reasonable inference to be drawn therefrom.

It was of no assistance to the appellants to proclaim that what it was sought to convey to the recipients of the letters was that, if litigation became necessary, *legal practitioners* would be engaged. The appellants were to be judged objectively by what was written and not allowed to take refuge in any unexpressed mental reservation or unstated intent. Their situation was rightly viewed as being analogous to quasi-mutual consent. See such cases as, *Pieters & Co* v *Salomon* 1911 AD 121 at 137; *South African Railways & Harbours* v *National Bank of South Africa Ltd* 1924 AD 704 at 715-716; *Levy* v *Banket Hldgs (Pvt) Ltd* 1956 R&N 98 (FS) at

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105B-F, 1956 (3) SA 558 (FS) at 561 *in fine* - 562B; *Springvale Ltd* v *Edwards* 1968 (2) RLR 141 (G) at 147I-148C.

Significantly, no letter mentioned the involvement of lawyers. Each letter made it clear that the matter in issue was one solely between the second appellant, acting on behalf of its client, and the addressee concerned; and that any necessary legal action would be resorted to by the second appellant.

I do not think the ordinary reasonable reader would scrutinise the letters for possible ambiguities. He or she would take what was written at face value. In doing so, it seems to me that they would inevitably infer that it was the second appellant itself which would sue out the requisite summons or process and thus commence the proceedings.

It follows that I respectfully share the conclusion of the learned judge that the appellants acted in breach of s 9(2)(b) of the Act.

Counsel for the appellants submitted that the learned judge had erred in not depriving the respondent of part of the costs. He claimed a special order was justified because the interdict granted was not in the wide terms sought by the respondent.

There are two reasons why at this stage the order should not be altered. First, this court will only interfere with the exercise of a judicial discretion

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upon well established grounds, none of which have been shown to be present. Second, and in any event, the notice of appeal did not cover the contention advanced.

I would accordingly dismiss the appeal with costs.

Ebrahim JA: I agree.

Sandura JA: I agree.

S K M Sibanda & Partners, appellants' legal practitioners

Coghlan & Welsh, respondent's legal practitioners

MWENYE *v* LONRHO ZIMBABWE LTD 1999 (2) ZLR 429 (SC)

Citation	1999 (2) ZLR 429 (SC)
Case No	Judgment No. S-128-99
Court	Supreme Court, Harare

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Judge	Gubbay CJ, McNally JA, Sandura JA
Heard	November 23, 1999
Judgment	December 14, 1999
Counsel	J James, for the appellant P Nherere, for the respondent
Annotations	None

Civil appeal

Flynote

Employment - disciplinary proceedings - code of conduct in existence - reference of matter to labour relations officer - reference in less than 30 days after notification of proceedings - when permissible

Headnote

The appellant, an employee of the respondent, was accused by another employee of sexual harassment. He was suspended from duty without pay pending investigation by an independent investigator. Twenty-eight days later, the appellant referred the matter to a labour relations officer. Two days after that, the respondent wrote to the labour relations officer, requesting that the officer determine the matter, as the matter had not been determined under the relevant code of conduct within 30 days of the date of notification to the employee. The labour relations officer subsequently determined the matter against the appellant. The appellant appealed to a senior labour relations officer and then to the Labour Relations Tribunal. He argued that the labour relations officer had no jurisdiction to deal with the matter, on the grounds that the letter of suspension did not amount to a notification to the appellant and that the reference to the labour relations officer was premature. The Tribunal dismissed the appeal. On appeal to the Supreme Court:

Held, that in terms of s 101(6) of the Labour Relations Act [*Chapter 28:01*], a matter may only be referred to a labour relations officer if:

(a) the matter has not been determined in terms of the relevant code;

(b) 30 days have elapsed; and

(c) notification has been given to the employee that proceedings are to be commenced against him in respect of the alleged breach.

Held, further, that although the letter to the appellant could have been drafted more explicitly, the appellant's conduct showed that he accepted the letter as a notification of disciplinary proceedings.

Held, further, that although the parties had referred the matter to the labour relations officer before the 30 day period had elapsed, the section did not preclude an earlier reference to the

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labour relations officer where both parties agreed that the dispute was incapable of resolution under the code or where both deemed it more advantageous to have the dispute determined by a labour relations officer. The labour relations officer therefore had jurisdiction to determine the matter.

Cases Considered

Cases cited:

Macara v *Min of Information & Anor* 1977 (1) RLR 67 (G)

Ndlovu Ex p 1981 ZLR 216 (G)

Sterling Products International Ltd v *Zulu* 1988 (2) ZLR 293 (S)

Swift Tpt Svcs (Pvt) Ltd v *Pittman NO & Ors* 1975 (2) RLR 226 (G)

Statutes Considered

Legislation considered:

Labour Relations Act [*Chapter 28:01*], s 101(6)

Case Information

James, for the appellant

P Nherere, for the respondent

Judgment

Gubbay CJ: At a hearing before the Labour Relations Tribunal, the appellant raised the point *in limine* that the labour relations officer, to whom the matter had been referred by both parties in terms of s 101(6) of the Labour Relations Act [*Chapter 28:01*] ("the Act"), lacked the jurisdiction to determine or otherwise dispose of it in accordance with s93 thereof. The learned Deputy Chairman disagreed with the submission. He dismissed the preliminary point with costs and directed the registrar to set down the appeal on the merits as soon as possible. It is against that ruling that the appeal to this court now lies.

In order to decide the jurisdictional issue, persuasively argued for both the parties, it is necessary at the outset to trace the relevant historical events. They were these:

(1) The appellant was employed by the respondent in a managerial capacity in its textile division. His conditions of employment were governed by the registered code of conduct for that industry.

(2) On 17 January 1994, a junior employee, Miss Angela Gwelo, wrote to the respondent's general manager complaining that she had been subjected to sexual harassment by the appellant.

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(3) The appellant responded by memorandum dated 31 January 1994, denying Miss Gwelo's allegation.

(4) By letter of 8 February 1994, the appellant was suspended from employment without pay and with immediate effect.

(5) On 8 March 1994, twenty-eight days after his suspension, the appellant referred the matter to a labour relations officer.

(6) Two days later the respondent wrote to the principal labour relations officer informing him that it had suspended the appellant after a formal allegation of sexual harassment had been made against him. The letter continued:

> "The suspension was to allow the company to carry out further investigations in the matter. An independent investigator was tasked to look into the matter and compile sworn statements from those involved. We expected to hear the matter in-house but due to Mr Mwenye's absence from his home this could not be done.
>
> In terms of (s 101(6) of the Act) if a matter is not determined within thirty days

> from the date of notification the matter should then be handed over to a labour relations officer in terms of (s 93) for a determination."

The letter ended with a request that there be a speedy resolution.

(7) The matter was heard by the labour relations officer on 4 May 1994 and a determination made to permit the respondent to terminate the appellant's contract of employment. That determination was confirmed by a senior labour relations officer, to whom the appellant had applied for it to be referred, on 2 August 1994.

(8) Thereafter, an appeal was noted to the Labour Relations Tribunal.

The powers of a labour relations officer to deal with labour disputes derive from s 93 of the Act. Section 101(5) of the Act provides:

> "Notwithstanding this Part, but subject to subsection (6), no labour relations officer or senior labour relations officer shall intervene in any dispute or matter which is or is liable to be the subject of proceedings under a code, nor shall he intervene in any such proceedings."

And subs (6) of s 101, to which subs (5) is subject, reads:

> "If a matter is not determined within thirty days of the date of the notification referred to in paragraph (e) of subsection (3), the employee or employer concerned may refer such matter to a labour relations officer, who may then determine or otherwise dispose of the matter in accordance with section *ninety-three*."

Finally, in this legislative recitation, para (e) to s 101(3) stipulates in relevant part that:

> "A code shall provide for -
>
> ...

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(e) the notification to any person who is alleged to have breached the code that proceedings are to be commenced against him in respect of the alleged breach."

Thus, it will be seen that s 101(6) gives to both employee and employer the right to refer a matter to a labour relations officer only if:

(i) the matter has not been determined in terms of the relevant code; and,

(ii) thirty days have elapsed; and,

(iii) notification has been given to the employee that proceedings are to be commenced against him in respect of the alleged breach.

In elaboration of the point *in limine* that the labour relations officer was not vested with jurisdiction to determine the matter, counsel for the appellant relied upon two grounds. The first was that the letter of 8 February 1994 did not amount to "notification" to the appellant that proceedings were to be commenced against him in respect of an alleged breach of the textile industry's code of conduct. In essence, so the argument went, the letter merely advised the appellant that he was being placed under immediate suspension so as to enable an investigation to be undertaken into the veracity of the allegation of sexual harassment. It was for that reason that he was to

hand over the keys and not enter the premises until the matter was concluded. No mention was made of proceedings being commenced.

Perhaps the letter could have been drafted in a more explicit manner. Yet this is not to say that it failed adequately to advise the appellant of the pendency of proceedings against him in terms of the code of conduct. A sensible way of testing whether the letter complied with the requirement of notification is to ask what the appellant understood by it. The answer is not open to doubt. The fact that the appellant referred the matter to a labour relations officer on 8 March 1994 in the belief, albeit mistaken, that the thirty day period had expired on that very day, established that he must have taken the letter to be the form of notification referred to in s 101(3)(e) of the Act. And significantly, the absence of such notification was not raised before the two labour relations officers or even in the notice of appeal to the Labour Relations Tribunal.

The acceptance of sufficient notification on the appellant's part was totally rational. The letter was headed "RE: ALLEGATIONS OF HARASSMENT". It informed the appellant of the nature of the allegation against him by specific reference to the written complaint received from Miss Gwelo, that had been copied to him. He had been called upon to respond to it, which he did on 31 January 1994. Thus the appellant knew exactly what the case against him was. Furthermore, the suspension was *without* pay, being a strong indication, especially to a managerial employee, that the commencement of proceedings was to follow. If the intention had been merely to conduct an ordinary inquiry into the allegation, the appellant would not have been suspended at all, or would have been suspended *with* pay. Finally, the use of the phrase "impartial inquiry", in contradistinction to "in house enquiries" referred to in the opening

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sentence of the letter, was indicative of an official inquiry under clause 4, at p 7, of the code of conduct.

The appellant's alternative argument was that the references of the matter, on 8 and 10 March 1994, pursuant to s 101(6) of the Act, were premature. Insofar as each party was concerned, the thirty day period from 8 February 1994 had not expired. Accordingly, the labour relations officer was not empowered under s93 of the Act to make a determination. He was precluded from exercising his jurisdiction, for compliance with the provision was peremptory. A shortfall in the period prescribed may not be waived or consented to, even where the parties are agreed that the matter is incapable of resolution under the code of conduct.

It is obvious that in seeking to refer the matter to a labour relations officer both the appellant and the respondent overlooked that February has twenty-eight days and that it would be only by 11 March 1994 that the thirty days

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elapsed. The appellant's reference was therefore short by three days, and the respondent's by one.

The categorisation of an enactment as "peremptory" or "directory", with the consequent strict approach that if it be the former it must be obeyed or fulfilled exactly, while if it be the latter substantial obedience or fulfilment will suffice, no longer finds favour in our courts. See *Swift Transport Services (Pvt) Ltd* v *Pittman NO & Ors* 1975 (2) RLR 226 (G) at 228C-229C; *Macara* v *Minister of Information, Immigration and Tourism & Anor* 1977 (1) RLR 67 (G) at 70H; Ex parte *Ndlovu* 1981 ZLR 216 (G) at 217F-G; *Sterling Products International Ltd* v *Zulu* 1988 (2) ZLR 293 (S) at 301H.

The proper criterion in determining whether there has been compliance is not the quality of the injunction, but the object the legislator sought to achieve by it. The question is simply whether that object is defeated or frustrated by the non-compliance complained of.

Section 93(1) of the Act vests in a labour relations officer a general jurisdiction to deal with any dispute, either on his own initiative or on reference to him by one of the parties. Section 101 of the Act (then as s 117A) was introduced, on 1 January 1993, by the Labour Relations Amendment Act 12 of 1992. It then became possible for an employment code of conduct, binding in respect of a particular industry, undertaking or workplace, to be registered, provided it contained the matters specified in s 101(3) of the Act. Significantly, there is no requirement that there has to be a registered code of conduct in existence. This is optional. Disputes between employee and employer may follow the old route of an initial determination before a labour relations officer, or be dealt with internally under the registered code of conduct. Either path taken leads to the Labour Relations Tribunal.

Against this background, it does not seem to me that the legislative objective in introducing the new procedure was to relieve labour relations officers of the burden of determining disputes. It was rather to return to the employee and employer a greater degree of autonomy with regard to

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the determination of their disputes than previously enjoyed.

Section 101(5) of the Act is, in effect, an exception to s 93. It is a provision designed for the benefit of the parties. As long as the dispute or matter is:

(a) the subject of proceedings under a code; or

(b) liable to be the subject of proceedings under a code;

no labour relations officer may intervene. His power to determine or otherwise dispose of the matter under s 101(6) is placed in abeyance for a period of thirty days. This is to afford the parties, should one of them so wish, the opportunity to utilise the internal mechanisms specified in the code. Consequently, if either party were to refer the matter to a labour relations

officer before the expiry of the thirty day period, the other could raise s 101(5) as a defence.

On the other hand, where the parties are *ad idem* that their dispute is incapable of resolution under the code, or both deem it more advantageous to have it determined by a labour relations officer, then the dispute or matter is no longer "liable" to be the subject of proceedings under the code. It may be referred immediately to a labour relations officer.

I am in agreement therefore with the respondent's counsel that to hold otherwise would result in an absurdity. It is easy to envisage the situation occurring in which on the first day both the parties accept that their dispute cannot be resolved in terms of the code. It could not have been the intention of the legislator that, instead of being entitled to refer the matter there and then to a labour relations officer, they would be required to await the expiry of thirty days.

While *in casu* the appellant and the respondent did not jointly agree to refer the matter to a labour relations officer, they both did so individually before the thirty day period had expired. Clearly, they were of the same mind that it was not to be dealt with in terms of the code of conduct.

In such circumstances, I do not consider that the shortfall in the period of thirty days deprived the labour relations officer of his power to determine the matter in accordance with s 93 of the Act.

For the reasons aforegoing, it follows that the learned Deputy Chairman was correct in concluding that the point *in limine* was not well taken.

Accordingly, the appeal is dismissed with costs.

McNally JA: I agree.

Sandura JA: I agree.

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

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Gill, Godlonton & Gerrans, respondent's legal practitioners

MUTAISI *v* MUZONDO 1999 (2) ZLR 435 (HC)

Citation	1999 (2) ZLR 435 (HC)
Case No	Judgment No. HH-250-99
Court	High Court, Harare
Judge	Gillespie J, Chinhengo J
Heard	October 7, 1999
Judgment	December 15, 1999
Counsel	The parties in person
Annotations	None

Civil appeal

Flynote

Customary law - what is - how should be ascertained - need to consider norms which actors in a social situation abstract from practice and which they invest with binding authority

Headnote

The appellant was married to the respondent's daughter in terms of customary law. Part of the *roora* had been paid, but before it was all paid the daughter died. Since the daughter's death, the appellant had paid off some of the outstanding *roora*, but not all. The appellant claimed that, under customary law, the respondent was obliged to take possession of and distribute the deceased's clothing soon after her death; but the respondent refused to do so until all the *roora* had been paid off. An application to the magistrate's court to compel the respondent to take possession of and distribute the deceased's clothing was dismissed. The question on appeal was whether what was being required of the respondent was merely a customary practice or was sanctioned by customary law.

Held, that customary law emerges from what people believe they ought to do, rather than from what a class of legal specialists considers they should do or believe. It can be regarded as a set of norms which the actors in a social situation abstract from practice and which they invest with binding authority. The development of customary law in Zimbabwe has been retarded because it has been viewed as a secondary form of law, generally applied only where the common law did not find favour. Its ascertainment has been subject to unnecessary and often alien concepts regarding what law is, befuddled, as such concepts are, by distinctions between custom and

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law. State law or state-sanctioned law has no monopoly on legal and social regulation, and this means that it is essential to explore people's lives beyond the confines of state law and focus on people's practices which are not recognised in the state courts.

Held, further, that the parties accepted that the custom requiring the father-in-law to take possession of and distribute his deceased daughter's personal effects was binding on them. Their only difference was whether this obligation was enforceable before *roora* was paid in full. The respondent had already obtained a judgment that the appellant pay the outstanding *roora*, but instead of enforcing his rights under that judgment, he was using it as an excuse not to perform his customary law duty. He could not have it both ways. He would therefore be ordered to take possession of the deceased's possessions.

Statutes Considered

Legislation considered:

Customary Law and Local Courts Act [*Chapter 7:05*], s 2

Customary Law Application Act [*Chapter 8:05*], s 2

Case Information

The parties in person

Judgment

Chinhengo J: The issue in this appeal is fairly straightforward. The appellant was married to the respondent's daughter in terms of customary law. It was not clear what marriage it was, but on the facts before me, I would assume that the marriage was an unregistered customary union. The appellant paid part of the *roora* and it is common cause that he had been accepted as the respondent's son-in-law. The appellant's wife (the deceased) died about two years ago. The balance of the *roora* at the time of the deceased's death was, according to the appellant, some 5 head of cattle or their agreed value at $400 per head; one live beast; and clothing for the father and mother in-laws. The appellant, since the deceased's death, has made some payments to reduce the amount of *roora* outstanding. As of the date of the hearing, both parties were agreed that the *roora* outstanding was a bovine, $400 and clothing for the in-laws.

The appellant's case was that whereas, in terms of African custom, the deceased's relatives, in this case the deceased's father, is obliged to take possession of and distribute the deceased's clothing soon after her death, the respondent has refused to do so until all the outstanding *roora* has been paid. The appellant sought from the magistrate's court at Harare an order that the respondent be ordered to take possession of and to distribute the deceased's items of personal property listed in the schedule appearing in the summons. The court declined to issue that order. The respondent confirmed at the hearing that he is unwilling to take possession of or to distribute the deceased's personal property until the balance of *roora* has been paid in full.

The magistrate's court was dismissive of the appellant's case. It ruled, without really hearing

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him, that he was "advised to register the estate at the deceased estates [office] and the property will be distributed in terms of the law".

The appellant's grounds of appeal were that the magistrate failed to afford him an opportunity to give evidence; that he misdirected himself by failing to appreciate that the respondent had a duty under African custom to distribute the deceased's personal effects; and that he erred in referring the matter to be dealt with in terms of the Administration of Deceased Estates Act [*Chapter 6:01*]. He also stated that as there was no other remedy available to him the magistrate should have granted the order sought.

At the hearing of the appeal, both the appellant and the respondent were given the widest berth to present their arguments. After hearing them we did not think that the case should be remitted to the magistrate's court, despite recognising that the magistrate had erred. The issue for determination was clear. That issue was whether, if at customary law the father-in-law is required to take possession of and to distribute his daughter's personal items,

he was entitled to refuse to do so pending the payment in full of the outstanding roora by the son-in-law, the appellant.

My examination of the issue for determination must begin with an assessment of whether or not what the appellant requires of the respondent is merely a customary practice or is sanctioned by customary law. Customary law is not fully defined anywhere in our statutes. In the Customary Law Application Act [*Chapter 8:05*], it is defined as "the customary law of the indigenous people of Zimbabwe or any section or community thereof". This is not a very helpful definition. It does not inform what the content of that law is, nor of its substance. The Customary Law and Local Courts Act [*Chapter 7:05*] contains the same definition except for the addition that such law is the law "before the 10th June 1891 as modified and developed since that date". This definition attracts the same criticism as the definition in the Customary Law (Application) Act. The concern with a precise definition is in my view academic and of no practical use. I accept what is stated by Hamnett *Chieftainship and Legitimacy* at pp 9-6 (quoted by TW Bennet in a source book of *African Customary Law for Southern Africa* at p 6) where the author states that:

> "Customary law emerges from what people do or - more accurately - from what people believe they ought to do, rather than from what a class of legal specialists consider they should do or believe ... (T)he ultimate test is not 'what does this judge say?' but rather 'what do the participants in the law regard as the rights and duties that apply to them?' The real task of the customary jurist is to answer this last question, not to apply deductive or analytical reasoning to a set of professionally formulated legal concepts."

At p 7 Hamnett is quoted again as stating that:

> "The argument so far has raised a number of substantive and not merely definitional issues and suggests a formula that omits purely contingent and accidental features and yet it is not entirely trivial. *Customary law can be regarded as a set of norms which the actors in a social situation abstract from practice and which they invest with binding authority.* The positive content of this definition may be taken as fourfold: the relation of norms to practice rather than to 'lawyers' reasoning'; the dominant role of the *actors* or participants in the determination of the law; the *authoritative* or legitimate, rather than the merely factual or utilitarian character of the emergent rules; and the

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essentially *social* nature of their validation and status ..."

I accept the definition of customary law given above. In Zimbabwe, customary law has been viewed as a secondary form of law, generally applied only where the common law did not find favour, this despite the fact that the majority of the people's lives are governed by customary law. This has retarded the development of customary law. Its ascertainment has been subject to unnecessary and often alien concepts regarding what law is - befuddled, as such concepts are, by distinctions between custom and law. I need not, for the purpose of my decision in this case, enter the debate

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whether a practice is or is not law and how to ascertain what the customary law is.

This is so because the parties' arguments were clear. They accepted that the custom requiring the father-in-law to take possession of and to distribute his deceased daughter's personal property was binding on them. Their only difference was whether this obligation was enforceable before *roora* was paid in full. Arguing for the wider recognition of customary law, Professor Welshman Ncube, in his article *Law, Culture and Tradition in East and Southern Africa*, being Chapter 8 of *Law, Culture Tradition and Children's Rights in Eastern and Southern Africa*, (ed. Ncube), stated at p 156:

"Recognising that state law or state-sanctioned law has no monopoly or hegemony on legal and social regulation means that it becomes essential to explore people's lives beyond the confines of state law and also beyond the interplays, intersection and interfaces between various sources of state law, such as Roman Dutch common law, statutory law, and various customary state-recognized normative orders and into other traditional/customary norms which operate outside the state's version of customary law. Thus in addition to focusing on state law one has also to focus on people's practices which are not 'recognised' in the State courts. Only by doing this is one able to explore the reality of people's lives ..."

This argument, even though it is advanced in the context of determining the law applicable to non-marital children, is relevant and applicable to the present case.

Over the last few years since independence in this country, indigenous scholars have undertaken research into customary law and practices with the result that they have unwoven what to the western scholar was the labyrinth of customary law. We can now boast of a clearer exposition of customary law by scholars who are actors in the social situation and are better able to understand and abstract from customary practices those norms which constitute customary law.

In *Inheritance in Zimbabwe, Law Custom and Practices*, published by Women and Law in Southern Africa Research Trust, 1995, the learned authors of that book state at p 192 that their research findings in respect of the subject matter of this judgment is the following:

"From our findings, it can be broadly stated that the matri-estate goes to the family of the deceased woman, then it is their discretion as to how it is to be used. However, the motivating factors in the distribution will be the needs of the family of the deceased. Some families may not show concern for the children or the husband, but this is not a question of law but rather one of social relationships. The husband is expected to produce everything that the woman bought through her own endeavours."

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This research finding indicates that it is recognised in customary law that on the death of the female spouse her property is to be surrendered to her natal family. This research finding accords or is consistent with the parties' own

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view of the law applicable to their situation. They were both agreed that that was the practice, indeed, the customary law applicable.

The application of customary law in all situations where the wife predeceases the husband is fraught with difficulties. Where the matri-estate is small or insignificant, as in this case, the application of customary law would appear the more appropriate. But where the matri-estate consists of significant items of property, as where the deceased wife owned very valuable movable and immovable property, the simple application of customary law may be undesirable. In my view, resort will have to be had to the Administration of Estates Act [*Chapter 6:01*] as amended by the Administration of Estates Amendment Act 1997 when dealing with the more significant estates. Again, fortunately for my decision in this case, the parties were agreed that customary law was applicable and it seems to me that it is so, considering the nature of the movables in issue.

Having established that under customary law the deceased female spouse's property, of the nature itemised in the appellant's summons, should be surrendered to her natal relatives ie to her father who is the respondent, the question which remains to be answered is whether the respondent can be ordered to do so before his claim for payment of *roora* in full is met. It was not disputed that the respondent obtained an order in the magistrate's court that the appellant should pay the outstanding *roora*. It is up to him therefore to enforce that order by any means available to him under the law. Understandably, the respondent did not, nor could he, specifically counter-claim for the balance of the *roora*. He already had a judgment in his favour. What he has, however, attempted to do is, instead of enforcing his rights deriving from the order in his favour, to use that as a tool against performing a duty recognisable under customary law - namely, to take possession of and to distribute his daughter's personal items. In my view, he cannot have it both ways. The appellant has accepted the judgment of the magistrate's court that he should pay the outstanding *roora*. He has done so to a large extent from the time of his wife's death, hence the balance of the *roora* is only one bovine, four hundred dollars and the in-laws' clothing. He has done this without the respondent specifically enforcing the judgment in his favour.

Under customary practice, the payment of *roora*, or part of it, is generally deferred with the son-in-law being given ample time within which to pay it. Enforcement usually arises where the parties have either divorced, separated or the wife has died. It seems to me that, in this particular case, the respondent must be required to take possession of and to distribute his deceased daughter's personal items. That is a customary duty on him and one which he recognises. He cannot refuse to perform that duty in order to put pressure on the son-in-law to pay up the balance of the *roora*. He cannot refuse to

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perform that duty as a means to enforce a judgment in his favour when there are other means of enforcing that judgment.

In matters of this nature, I recognise that it is quite difficult to enforce any order granted to a litigant by the court. This is so because the nature of the obligation which the father assumes arising out of customary law is of a personal nature. An order for specific performance would hardly satisfy the needs of the appellant. What he needs is that the respondent should act in terms of customary law and properly distribute the deceased spouse's property. If the court were to order him to collect the deceased's property, which it can do, there is no way it can ensure that he properly distributes the property concerned. This is why disputes of this nature are best resolved by the parties themselves.

In the result, I think the proper order to grant is to require the respondent to take possession of his deceased daughter's property. The burden, for so it is regarded in the traditional view, of having that property in his possession should spur him to distribute it in an appropriate fashion. But that distribution, as shown in the text cited above, is a matter of discretion and social relationships and ought not to be regarded as enforceable at law.

Accordingly, the respondent be and is hereby ordered to take possession of and remove from the appellant's premises, all the property of appellant's deceased spouse as listed in the summons.

Gillespie J: I agree.

BARCLAYS BANK OF ZIMBABWE LTD *v* ARROW ZIP FASTENERS (PVT) LTD 1999 (2) ZLR 441

Citation	1999 (2) ZLR 441
Case No	Judgment No. HH-245-99
Court	High Court, Harare
Judge	Smith J
Heard	December 15, 1999
Judgment	December 15, 1999
Counsel	A P de Bourbon SC, for the plaintiff A J Dyke, for the respondent
Annotations	None

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Stated case

Flynote

Banking - interest - on overdraft - whether compound interest may be charged

Interest - rate - banking practice of compounding interest on a monthly basis - lawfulness of - Moneylending and Rates of Interest Act [Chapter 14:14] - s 12 - does not prevent compounding of interest

Headnote

The plaintiff bank sued for monies due as interest on overdraft facilities granted. The overdraft facility letter provided that the interest on an overdraft would be charged at 1% above the current prime lending rate. The contract also provided that the bank was entitled to calculate interest on the minimum balance by which the account was overdrawn on a daily basis, to add such sums in any one month and to debit the interest to the account. The interest was added to the outstanding balance and interest calculated on the outstanding balance, which included the previous month's interest, thereby compounding the interest. The defendant argued that the bank was not entitled to charge an overall interest exceeding that agreed in the facility letter.

Held, that s 12 of the Moneylending and Rates of Interest Act [*Chapter 14:14*] requires that every instrument of debt in respect of a loan must state that it is a loan agreement, the amount loaned, and the rate of interest to be charged. While the lender is only entitled to recover at the rate of interest specified in the agreement, the section does not prohibit the charging of compound interest.

Held, further, that the banking practice of charging compound interest on overdraft facilities has been recognised and accepted by the courts as reasonable. While interest levied on any amount never loses its character and remains interest, whether or not it has been capitalised, there is nothing in the law to prevent a lender charging interest on interest. That is the difference between simple and compound interest. It is fallacious to say that if the banks are entitled to charge compound interest, the interest must be calculated so that it equates to simple interest. The principle of charging compound interest has been settled. The banks were not obliged to levy compound interest at a rate which would, at the end of a year, equal the annual rate agreed on.

Held, further, that the defendant had operated its overdraft on that basis for several years without query. It had never queried the practice until it received legal advice. Having regard to the banking custom practised for many years and to the acceptance by the defendant of that practice for several years, the plaintiff was entitled to charge interest in the way it had.

1999 (2) ZLR p442

Cases Considered

Cases cited:

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Barclays Bank International v *Smallman* 1976 (2) RLR 163 (G); 1977 (1) SA 401 (R)

Davehill (Pty) Ltd v *Community Development Bd* 1988 (1) SA 290 (A)

Dewera Farm (Pvt) Ltd v *Zimbank Corp* 1997 (2) ZLR 47 (H)

CBZ Ltd v *MM Builders & Suppliers (Pvt) Ltd* 1996 (2) ZLR 420 (H); 1997 (2) SA 285 (Z)

Standard Bank of SA Ltd v *Oneanate Invstms (Pty) Ltd* 1995 (4) SA 510 (C)

Statutes Considered

Legislation considered:

Moneylending and Rates of Interest Act [*Chapter 14:14*], s 12(1)

Case Information

A P de Bourbon SC, for the plaintiff

A J Dyke, for the respondent

Judgment

Smith J: This is a stated case. The plaintiff (hereinafter referred to as "Barclays") granted the defendant (hereinafter referred to as "AZF") overdraft facilities. It was stated in the offer of the overdraft facilities that Barclays would charge interest on any overdraft facility granted at 1% above the prime lending rate (which was stated to be 14% *per annum* at the time) on moneys withdrawn up to the approved maximum of $2million and, where the overdraft limit was exceeded, the rate of interest would be an additional 2% *per annum* (giving an effective 16% *per annum* on such borrowings). Barclays issued summons against AZF, claiming that AZF owed it $1631424.19 in respect of the overdraft facilities granted. AZF denied that it owed Barclays that amount. It pleaded that as at 11 October 1996 it owed $34894.77, which it duly paid and thereafter closed its account.

At the pre-trial conference, after the pleadings were closed, it was accepted that the method of calculating the interest was the principal issue between the parties. It was then agreed that the parties should prepare a stated case for determination by the court.

The agreed facts are as follows. Barclays is a commercial bank, operating throughout Zimbabwe. There are six other commercial banks operating in Zimbabwe. Like the other commercial banks, Barclays operates a system of current accounts which allows a customer to deposit funds into the account and to withdraw funds to the limit of the credit. It also grants agreed overdraft facilities to a customer on agreed conditions, as do the other commercial banks. The commercial banks also, at their discretion, allow customers to overdraw on their accounts, even where there is no agreed overdraft facility. AZF was a customer of Barclays and operated a current account with it. It also obtained an overdraft facility from Barclays. The terms and conditions of the overdraft were set out in a facility letter. Many facility letters were issued, because overdraft facilities were granted over a number of years, but the principles applicable to the overdrafts were the same in each facility letter. In relation to interest, the facility letter

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stated as follows:

SMITH J

" 6. Interest Rates and Establishment Fee

6.1 Interest on overdraft will be charged at 1% above prime rate present effective 14% *per annum*.

Establishment Fee:

No establishment fee applied.

Any excess over the agreed overdraft limit will be subject to an additional interest charge of 2% *per annum* unless prior agreement of the Bank has been obtained for the excess."

In terms of one of the facility letters, AZF was granted an authorized overdraft of $2million, to expire on 30 September 1990.

In common with all the other commercial banks, it was a term of the banking contract between Barclays and AZF that Barclays would be entitled to calculate interest on the minimum balance by which the account was overdrawn on a daily basis, and to add all such sums in any one month and debit the interest so calculated to the account once a month. That interest was added to the outstanding balance on the account, and thereafter interest was calculated on the outstanding balance, which included the previous month's interest, thereby in effect compounding the interest. This practice by the commercial banks in Zimbabwe has been in use for over 80 years.

The account of AZF was operated on the basis set out above from the outset of the facility on 7 November, 1989. This it operated on the basis of interest being calculated daily, compounded and charged monthly. In August 1996, a legal practitioner acting for AZF and related companies, Mr Eastwood, advised Barclays that, in his view, the rate at which interest was charged using the basis set out above, was contrary to the agreement between the parties. He contended that the agreed rate of interest as set out in the facility letter, ie 14% or 16% *per annum*, was the actual rate that was to be applied throughout a calendar year, and therefore the actual rate used had to be less than the rate stipulated in the facility letter since the rate used must compound up to 14% or 16% *per annum* as the case may be.

Barclays rejected the method of calculation suggested by Mr Eastwood and demanded payment of the full amount outstanding in its books on the account of AZF.

Barclays contends that it is entitled, both in terms of the agreement shown in the facility letter and in terms of law, to charge the agreed rate of interest which is to be applied in terms of the customary method used by the commercial banks in applying interest rates, namely, to use that rate to calculate the interest due on the minimum daily balance overdrawn, thereby in effect compounding that interest by adding it each month to the outstanding balance. AZF contends that Barclays is bound to a situation whereby the effective monthly rate must be something less than the agreed rate, so that at

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SMITH J

the end of a financial year, the rate actually charged by Barclays against AZF is no more in total than the rate stipulated in the facility letter.

The issues for determination in this stated case are as follows:

A. Does s 12 of the Moneylending and Rates of Interest Act [*Chapter 14:14*] (hereinafter referred to as "Chapter 14:14") prohibit the application of compound interest in the customary manner in which commercial banks charge and thereby compound interest above the amount stated in the written agreement of loan?

B. Did the contract between the parties or the law require Barclays to use a rate of interest less than that stipulated in the facility letter, so that the actual rate used throughout an accounting year was no more than the rate stipulated in the facility letter?

C. What method of charging interest is Barclays entitled to use on overdraft facilities?

I will deal with each of the issues in turn.

ISSUE A

Section 12(1) of Chapter 14:14 provides as follows:

> " (1) 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."

The requirements of that section are that the instrument of debt must set out three things: firstly, that it is a loan agreement; secondly, the amount loaned; thirdly, the rate of interest which is to be charged. The section does not prohibit the charging of compound interest. Mr *Dyke* argued that it is only the rate of interest that is specified in the instrument of debt that the lender is entitled to recover from the borrower. I agree that that is the case. However that does not provide an answer to the issue. If compound interest is charged, then obviously the borrower will have to pay a great deal more in interest than he would have to pay if simple interest is charged. The section does not prohibit the charging of compound interest. The facility letter clearly sets out the rate of interest to be charged. It therefore complies with s 12(1) of Chapter 14:14. There is nothing in s 12(1) which prohibits the charging of interest in accordance with the customary manner used by commercial banks in Zimbabwe, which is compound, as opposed to simple, interest.

The answer to the question posed in Issue A is "No".

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SMITH J

ISSUE B

Both parties accept that commercial banks in this country are entitled to, and customarily, levy compound interest on overdraft facilities. That practice has been recognised and accepted by the courts. See *Barclays Bank International Ltd* v *Smallman* 1976 (2) RLR 163 (G); 1977 (1) SA 401 (R). In that case, after referring to a number of cases, Smith J concluded that it was clear that the practice of charging compound interest was long established and considered to be reasonable. It is also agreed by the parties that the relationship between them has always been conducted on the basis of the standard practice of commercial banks in Zimbabwe. The method used by commercial banks to charge interest was also approved by the court in *Commercial Bank of Zimbabwe Ltd* v *M M Builders & Supplies (Pvt) Ltd* 1996 (2) ZLR 420 (H); 1997 (2) SA 285 (Z).

Mr *de Bourbon* argued that, by charging interest at the agreed rate and calculating that interest on a daily balance, Barclays acted in terms of its agreement with AZF. Once the interest had been debited at the end of each month, AZF had the option to pay that interest. It chose not to do so. In terms of the custom between bank and customer, and thus the implied term within the contract, when AZF did not pay the interest at the end of each month further interest was charged on that debit. Mr *Dyke* conceded that Barclays and other commercial banks in Zimbabwe were entitled to levy compound interest on overdraft facilities. He argued, however that Barclays and the other banks were only entitled to levy compound interest at a rate or rates which, when applied from time to time, would have the result of applying the agreed interest rate as an effective rate. Therefore the rate of interest charged periodically must be lower than the agreed rate of interest so as to arrive at the result whereby, at the end of any given year or any period of time *pro rata*, the rate of interest charged over that year does not give rise to the result that AZF would effectively pay more than it had agreed to pay by way of interest. He submitted that should interest be levied on a compound basis at a particular rate over a period of one year, the fact of charging interest upon interest gives rise to an effective or actual rate of interest to be paid by the borrower which is higher than that which was originally charged. Therefore, in order to avoid such a result, the lender must, on a monthly basis, charge interest at a lower rate than that agreed by the parties, so that at the end of the year the interest has been paid at the agreed rate.

It is accepted that interest levied on any amount due never loses its character and remains interest, whether or not it has been capitalized - see *Standard Bank of S A Ltd* v *Oneanate Investments (Pty) Ltd* 1995 (4) SA 510

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(C) and the *Commercial Bank* case, *supra*. However, there is nothing in the law to prevent a lender charging interest on interest. That, in fact, is the difference between simple interest and compound interest. With the former, interest is not charged on interest, whereas with the latter it is. It seems to me that the fallacy in the advice given by Mr Eastwood is that he accepts that the commercial banks are entitled to charge compound interest but then he wants the interest to be

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so calculated that it in effect equates to simple interest. That cannot be. If compound interest is chargeable, then it means that the interest that is not paid at the end of the month is capitalised and interest is then charged on the capital plus the accrued interest. The principle of charging compound interest is not in issue, as the principle has been settled. In *Davehill (Pty) Ltd* v *Community Development Board* 1988 (1) SA 290 (A) at 298G-I Smalberger JA said:

> "In the course of argument Mr *Burger*, for the respondent, raised the question whether it was permissible, in the absence of agreement, to award interest on interest. He referred in this regard to *Stroebel* v *Stroebel* 1973 (2) SA 137 (T) at 139F-H. Interest on interest (compound interest) could not be claimed in Roman and Roman Dutch law (Voet *Commentarius ad Pandectas* 22.1.20 and 45.1.11; Van Leeuwen *Het Rooms-Hollands Regt* 4.7.6; Van der Linden *Regtsgeleerd Practicaal en Koopmans Handboek* 1.15.3). In our modern law this principle has become obsolete, having been abrogated by disuse. *Wessels (op cit* at 192 n 107); *Natal Bank* v *R Kuranda; A Kuranda* v *Natal Bank* 1907 TH 155 at 169-71. Compound interest may be expressly stipulated for by agreement, is commonplace today in commercial and financial dealings and has been sanctioned by our courts for many years. In principle there appears to be no reason why the right to claim interest on interest should be confined to instances regulated by agreement, and why it should not extend to the right to claim *mora* interest (which is a species of damages) on unpaid interest which is due and payable."

If one accepted the argument raised by Mr Eastwood, it would mean that at the end of the day, the lender who charged compound interest at, say, 14% *per annum,* would be paid the same amount in interest as the lender who charged simple interest at 14% *per annum*. Such an outcome would be nonsensical.

The answer to the question posed in Issue B is "No".

ISSUE C

AZF accepts that the system of charging interest that was adopted by Barclays in dealing with its account was in accordance with the practice that has been used by the commercial banks in this country for over 80 years. Furthermore, the account of AZF was operated on that basis from the outset of the overdraft facility on 7 November 1989 until August 1996. For that period of almost 7 years, AZF accepted the practice as being reasonable. It

certainly never queried it or opposed it prior to receiving the advice from Mr Eastwood. In *Deweras Farm (Pvt) Ltd* v *Zimbank Corp* 1997 (2) ZLR 47 (H), Gillespie J at 59B said:

> "*Prima facie*, it would appear, the regular charging of interest on an overdraft, at rates within the bank's discretion, is permissible : the failure to challenge any such action despite regular statements being rendered is significant."

Therefore, having regard to the custom practised by commercial banks in Zimbabwe over many years and the acceptance by AZF of the practice for some 7 years, I consider that Barclays is entitled to charge compound interest on overdraft facilities. One wonders why this is not expressly stated in the facility letters.

With regard to the question posed in Issue C, it is declared that Barclays, in common with the other commercial banks in Zimbabwe, is entitled to charge interest at an agreed rate on the daily balance in its books and to compound such interest by debiting it monthly and charging

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interest on the new balance at the agreed rate.

Scanlen & Holderness, plaintiff's legal practitioners

Kantor & Immerman, defendant's legal practitioners

ZIMBABWE BROADCASTING CORPORATION *v* FLAME LILY BROADCASTING (PVT) LTD 1999 (2) ZLR 448 (HC)

Citation	1999 (2) ZLR 448 (HC)
Case No	Judgment No. HH-249-99
Court	High Court, Harare
Judge	Smith J
Heard	December 15, 1999
Judgment	December 15, 1999
Counsel	Mrs E Parwada, for the plaintiff F Girach, for the defendant
Annotations	None

Civil trial

Flynote

Arbitration - arbitration clause in contract - effect of Arbitration Act 6 of 1996 - course of action that court must adopt

Contract - interpretation - arbitration clause - effect of

Headnote

A clause in a contract to refer a dispute to arbitration is binding on the parties and a party is not at liberty to revoke this clause at any time if he wishes to do so. There is nothing in s 4 of the Arbitration Act, 1996 that changes the common law in this regard.

Sections 3 and 4 of the Arbitration Act provide that the UNCITRAL Model Law, as modified by the Act, apply to all disputes which the parties in Zimbabwe have agreed to submit to arbitration, except those matters excluded by s 4(2) of the Act. Article 8(1) of the Model Law lays down that if the parties have agreed by contract to submit any dispute that may arise to arbitration and a dispute has arisen and one of the parties requests the court to refer the matter for arbitration, the court must stay the proceedings and refer the matter to arbitration unless the agreement is

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null and void, inoperative or incapable of being performed.

The question of whether the dispute between the parties to a contract falls within the ambit of an arbitration clause is primarily a question of interpretation of the agreement and in particular the arbitration clause.

The disputes about the contract clearly fell within the arbitration clause. There was no suggestion that the agreement between the parties was null and void, inoperative or incapable of being performed. The agreement did not relate to any of the matters excluded by s 4(2) of the Arbitration Act. One of the parties had requested that the matter be referred to arbitration, so the court was obliged to stay the proceedings and refer the matter to arbitration.

Cases Considered

Cases cited:

Commercial Bank of Namibia v *Trans Continental Trading (Namibia) (Pty) Ltd & Ors* 1992 (2) SA 66 (Nm)

Gralio (Pty) Ltd v *D E Claasen (Pty) Ltd* 1980 (1) SA 816 (A)

Independence Mining (Pvt) Ltd v *Fawcett Security Ops (Pvt) Ltd* 1991 (1) ZLR 268 (H)

W M Mentz & Seuns (Edms) Bpk v *Katzake* 1969 (3) SA 306 (T)

Case Information

Mrs *E Parwada*, for the plaintiff

F Girach, for the defendant

Judgment

Smith J: The plaintiff (hereinafter referred to as "ZBC") issued summons claiming from the defendant (hereinafter referred to as "Joy TV") payment in the sum of $5808665.34. The parties entered into an agreement on 13 June 1997 in terms of which Joy TV was to purchase Channel 2 airtime. In the period 13 June 1997 to 31 July 1998, Joy TV used the channel 2 airtime and also the studios and other facilities of the ZBC but has not paid the amount allegedly due in terms of the agreement. Joy TV requested further particulars, which were duly supplied. Joy TV then filed a special plea in abatement. It admitted that the parties had entered into the agreement concerned and pointed out that clause 7.4 of that agreement provides as follows:

> "All disputes under this agreement, other than those arising in terms of clause 2, shall be addressed by all parties in good faith and, failing settlement, the dispute shall be referred for arbitration and all parties shall abide the ruling given by the arbitrator."

As Joy TV had not pleaded to the claim, I ruled that there was no evidence of a dispute. Accordingly, Joy TV filed its plea. It denied being indebted to the ZBC on the following grounds. It claimed that in or about February 1998 the parties had agreed that the fee for air time fixed in

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the agreement would be reduced from $4542.89 per hour to $2664.83 and that the reduced rate would apply with effect from 1 November 1997. Furthermore, certain payments made by Joy TV in reduction of its indebtedness were not reflected in the further particulars that the ZBC had supplied. In addition, Joy TV filed a claim in reconvention for an amount in the region of $12 million. Joy TV claimed that in March 1998 it, the ZBC and a third party entered into an agreement in terms of which the third party agreed to instal a transmitter on a mast owned and managed by the ZBC in Bulawayo, which would have enabled Joy TV to have its signal received throughout Zimbabwe. ZBC, however, then refused to permit the third party to erect the transmitter or, alternatively, did nothing to facilitate the erection thereof, thus breaching its obligation in terms of clause l.3.2 of the agreement.

Mr *Girach* argued that this court was obliged, by virtue of the provisions of article 8(1) of the UNCITRAL Model Law set out in the Arbitration Act [*Chapter 7:02*], to stay these proceedings and refer the parties to arbitration. He referred the court to the case of *Independence Mining (Pvt) Ltd* v *Fawcett Security Operations (Pvt) Ltd* 1991 (1) ZLR 268 (H). Mrs *Parwada* submitted that where an agreement contained an arbitration clause, it was not peremptory that every dispute that arose between the parties had to be referred to arbitration. She relied on s 4(1) of the Arbitration Act 6 of 1996 (hereinafter referred to as "the Arbitration Act"). Where a claim was fixed, in a determinate sum requiring no more than mere calculation, the plaintiff could initiate proceedings for the recovery thereof - see *Commercial Bank of Namibia* v *Trans Continental Trading (Namibia) & Ors* 1992 (2) SA 66

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(N) and *W M Mentz & Seuns (Edms) Bpk* v *Katzake* 1969 (3) SA 306 (T). She argued that in terms of s 4(1) of the Arbitration Act it was not mandatory for every dispute that arose between two parties to be referred to arbitration. Furthermore, article 8(1) of the UNCITRAL Model Law did not apply to the instant case because that Model Law was limited in scope and application to international commercial matters. In this case, the dispute was a domestic matter. She claimed that Joy TV was not denying that it owed ZBC for air time at the rate of $4542.89 per hour from July 1997 to March 1998 and at the reduced rate thereafter. Therefore the ZBC was entitled to seek relief in terms of the contract - see *Gralio (Pty) Ltd* v *D E Claassen (Pty) Ltd* 1980 (1) SA 816 (A).

According to its long title, the Arbitration Act is an Act to give effect to domestic and international arbitration agreements and to apply, with modifications, the UNCITRAL Model Law. The UNCITRAL Model Law in its original form provides in Article 1:

> "(1) This law applies to international commercial arbitration ..."

The Model Law, as modified for Zimbabwe, is set out in a Schedule to the Arbitration Act and it omits article 1. Section 4(1) of the Arbitration Act provides as follows:

> "(1) Subject to this section, any dispute which the parties have agreed to submit to arbitration may be determined by arbitration."

Subsection (2) thereof provides that certain matters shall not be capable of determination by

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arbitration. The matters specified therein include matters such as agreements that are contrary to public policy, criminal cases and matrimonial causes or matters relating to status. Clearly, the intention of the legislature in enacting s 4 was to define the matters which could be settled by arbitration; to make it clear that it was not only commercial disputes that were capable of determination by arbitration. It could never have been the intention to undermine the common law by providing that an agreement seriously entered into by two parties to refer any dispute to arbitration could be revoked at any time by either party if it so wished. I consider that if an agreement contains an arbitration clause that provision is binding on the parties.

Section 3 of the Arbitration Act provides as follows:

" (1) Subject to sections *four* and *five,* where the place of an arbitration is in Zimbabwe, this Act and the Model Law, *as modified by this Act,* shall apply to the arbitration.

(2) Subject to sections *four* and *five,* where the place of an arbitration is not in Zimbabwe, articles 8, 9, 35 and 36 of the Model Law, as modified by this Act, shall apply to the arbitration."

Thus, whilst the Model Law, as adopted by UNCITRAL at its Eighth Session, is limited in scope and application to international commercial

arbitration cases only, that is not the case in Zimbabwe. Sections 3 and 4 of the Arbitration Act clearly provided that the Model Law, as modified by the Act, apply to all disputes which parties in this country have agreed to submit to arbitration, save for the matters specified in subs (2) of s 4. The long title to the Arbitration Act clearly says so.

In the *Independence Mining* case *supra* at 270G, Chidyausiku J said:

> "The question of whether a dispute between parties to a contract fell within the arbitration clause is primarily a question of interpretation of the agreement and in particular the arbitration clause."

After concluding that both causes of action in that case were covered by the arbitration clause he said that the court had a discretion as to whether or not the matter should be referred to arbitration. In so ruling, he was acting in accordance with the provisions of s 6(1) of the Arbitration Act [*Chapter 7:02*] which is now repealed.

In this case, it is clear from the plea filed by Joy TV that there is a dispute between the parties as to the performance of the parties under the contract. There is a dispute as to the date with effect from which the reduced rate would take effect; ZBC claims that it took effect from March 1998 whereas Joy TV claims that the date was 1 November 1997. Furthermore, in its claim in reconvention, Joy TV has introduced further disputes which relate to alleged failures on the part of ZBC to perform its obligations in terms of the agreement. In my view, it is clear that the disputes between ZBC and Joy TV fall within the purview of the arbitration clause set out in clause 7.4 of their agreement.

Article 8(1) of the Model Law provides as follows:

" (1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement

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> shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, *stay those proceedings and* refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

Since Joy TV has so requested, this court has no option but to stay proceedings under this case and refer the parties to arbitration. There is nothing in the papers to suggest that the agreement between the parties is null and void, inoperative or incapable of being performed and the agreement does not relate to any matter specified in subs (2) of s 4 of the Act.

It is therefore, ordered that proceedings in terms of ZBC's summons are stayed and the parties are referred to arbitration.

Gutu & Associates, plaintiff's legal practitioners

Stumbles & Rowe, defendant's legal practitioners

ZIMBABWE ELECTRICITY SUPPLY AUTHORITY *v* MAPOSA 1999 (2) ZLR 452 (SC)

Citation	1999 (2) ZLR 452 (SC)
Case No	Judgment No. S-114-99
Court	Supreme Court, Harare
Judge	Gubbay CJ, Ebrahim JA, Sandura JA
Heard	October 21, 1999
Judgment	December 21, 1999
Counsel	P Nherere, for the appellant S Moyo, for the respondent
Annotations	None

Civil appeal

Flynote

Arbitration - arbitrator - award - setting aside of - grounds of public policy - restrictive application of public policy defence - defence applicable only if fundamental principle of law, morality or justice is violated - error by arbitrator resulting in palpable inequity - award set aside

Headnote

The respondent, an employee of the appellant (ZESA), had been suspended from duty with pay pending investigation into disciplinary charges. After the investigation, ZESA's Board told the respondent that he had committed serious acts of misconduct which would have justified his

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suspension without pay, but offered him the opportunity to resign instead. The respondent refused to do so, and said that the Board's disciplinary committee was not competent to conduct a hearing, as the Board had prejudged his guilt. He said that an independent arbitrator should be appointed. The appellant's reaction was to suspend the respondent without pay, pending a disciplinary hearing in accordance with the code of conduct. Steps were taken to hold the disciplinary hearing, but the respondent brought proceedings in the High Court, seeking an order, among other things, that the parties appoint an independent arbitrator. The order was later granted by consent and in due course the matter was heard by the arbitrator.

Only one point was argued before the arbitrator, the lawfulness or otherwise of the respondent's suspension. The arbitrator found that the suspension was a nullity, as ZESA had failed to determine the dispute as required by the code of conduct. He ordered that ZESA pay the respondent his salary and benefits from the date of the offer of the opportunity to resign. This finding was an error, since it was based on the mistaken assumption that the communication to the respondent, offering him the opportunity to resign, constituted suspension without pay. When the respondent was later suspended without pay, he made it impossible for ZESA to proceed in terms of the code of conduct by making the application to the High Court. The arbitrator had not applied his mind to the real issue, which was the effect of the application to the High Court.

The determination was governed by the Arbitration Act [C*hapter 7:15*], in terms of which an arbitral award may only be set aside if the High Court finds, among other things, that the award is in conflict with the public policy of Zimbabwe. An award would be contrary to public policy if, among other things, it was induced or effected by fraud or corruption or was on breach of the rules of natural justice.

Held, that the original suspension with pay was not effected in terms of the code of conduct and there was no obligation on the part of ZESA to act under the code of conduct.

Held, further, that the failure by ZESA to expedite the arbitration hearing after the High Court order did not entitle the respondent to a setting aside of the suspension and to reinstatement. Once the court's order had been made, the code of conduct was no longer applicable.

Held, further, that by instituting proceedings in the High Court, the respondent had made it impossible for ZESA to comply with the code of conduct.

Held, further, that the overriding factor in relation to Article 34 of the UNCITRAL Model Law, which forms part of the Arbitration Act, is that an award must not be contrary to the public policy of Zimbabwe. Decisions of courts relating on the 1958 New York Convention relating to public policy afford persuasive guidance in interpreting the Model Law, but in the event of a direct conflict, the public policy of Zimbabwe must prevail.

Held, further, that an award would be contrary to public policy if -

(a) it was induced by fraud or corruption;

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(b) a breach of natural justice occurred.

The substantive effect of an award may also make it contrary to public policy, if, for example, it endorsed the break up of a marriage or some criminal act.

Held, further, that the approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognise the basic objective of finality in all arbitrations, and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated. An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it. The same consequences apply where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned.

Held, further, that the award made in this case bore the adverse characteristics referred to, as it enabled the respondent to take advantage of a position that he had deliberately engineered.

Held, therefore, that the award should be set aside.

Cases Considered

Cases cited:

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

Dajen (Pvt) Ltd v *Durco (Pvt) Ltd* 1998 (2) ZLR 255 (S)

Dickenson & Brown v *Fisher's Exors* 1915 AD 166

FSI Hldgs Ltd v *Rio Tinto Zimbabwe Ltd & Anor* 1997 (1) ZLR 31 (S)

Hyper Chemicals International (Pty) Ltd & Anor v *Maybaker Agrichem (Pty) Ltd & Anor* 1992 (1) SA 89 (W)

Leopard Rock Hotel Co (Pvt) Ltd v *Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S)

Leopold Lazarus Ltd (UK) v *Chrome Resources SA* (1979) 4 *Yearbook of Commercial Arbitration* 311

McKelvey v *Abrahams & Anor* 1989 (2) ZLR 251 (S)

Paklita Invstm Ltd v *Klockner East Asia Ltd* (1994) 19 *Yearbook of Commercial Arbitration* 664

Renusagar Power Co Ltd (India) v *General Electric Co (US)* (1995) 20 *Yearbook of Commercial Arbitration* 681

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

Walenn Holdings (Pvt) Ltd v *Lloyd & Anor* 1996 (2) ZLR 383 (H)

Statutes Considered

Legislation considered:

Arbitration Act [*Chapter 7:15*], articles 34 and 36

Case Information

P Nherere, for the appellant

S Moyo, for the respondent

Judgment

Gubbay CJ:

I. INTRODUCTION

On 27 March 1998 two applications were argued in the High Court before Devittie J. The one, case No. HC-1769-98, brought by the respondent ("Maposa") sought an order, pursuant to Article 35 of the Model Law contained in the First Schedule to the Arbitration Act 1996 [now *Chapter 7:15*], enforcing an arbitral award granted on 5 February 1998. The other, case No. HC-2163-98, that of the appellant Zimbabwe Electricity Supply Authority ("ZESA"), countered with a claim to have the award declared null and void and set aside.

In a judgment handed down on 9 December 1998, the learned judge dismissed both applications with costs. He rejected ZESA's argument that the award should be set aside as being in conflict with the public policy of Zimbabwe. He held that the arbitrator's error in ordering ZESA to pay Maposa's salary and benefits from 24 December 1996, albeit undisputed that Maposa had received full pay and benefits until 5 February 1997, was merely one of computation. And he pointed out that ZESA's remedy lay in requesting the arbitrator to correct the error in terms of Article 33 of the Model Law.

The order of enforcement sought by Maposa was refused for two reasons. In the first place, the award contained an error that needed to be corrected; secondly, the arbitrator had not completed the task he had been appointed to undertake since he did not determine the question of ZESA's entitlement to terminate Maposa's employment.

Both parties felt aggrieved by the outcome of the High Court proceedings. ZESA noted an appeal on the ground that the learned judge had erred in finding that it had failed to establish that the arbitral award was in conflict with the public policy of Zimbabwe. On the other hand, Maposa, in his notice of cross-appeal, relied upon a series of misdirections alleged to have been committed by the learned judge. In essence, the contention was that, having correctly refused to set aside the award, it was manifestly illogical not to accede to the prayer for its

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enforcement.

II. THE FACTUAL BACKGROUND TO THE DISPUTE

The long trail of litigation that preceded these appeals commenced on 28

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August 1996 when the chief executive of ZESA informed Maposa that he was suspended from the position of corporate services director. This communication, which took the form of an internal memorandum, was headed "Suspension from duty pending investigations". It stated that to facilitate investigations into the management of various estates and related projects by the corporate services department and ZESA's legal, financial and other obligations arising therefrom:

> "the Board has resolved that you be suspended from duty with pay, with immediate effect and until further notice. You will not be permitted to visit any ZESA establishment without specific authority from the chief executive."

Following the issue of the memorandum, ZESA's internal auditors carried out an extensive investigation into those areas where irregularity was alleged against Maposa. A draft report was compiled and handed to Maposa. He responded to it. A final report was then prepared. It was considered by ZESA's Board of Directors at a meeting convened on 18 December 1996. Thereafter, Maposa received from ZESA a letter dated 24 December 1996. It was to the effect that he had flouted rules and procedures; that he had spent and incurred large sums of money not budgeted for and approved; that there was a complete lack of transparency on his part; that he showed no respect for authority; and that he had exhibited disobedience to lawful instructions, insubordination, incompetency and unsatisfactory work performance. The concluding paragraph of the letter read:

> "It is the opinion of the Board that you committed very serious acts of misconduct which would have you suspended forthwith without pay and benefits pending a disciplinary hearing. However, in consideration of your seniority and the fact that there has been a breakdown in working relations, the Board would like to offer you an opportunity to resign from employment with ZESA. This option is open for you to consider and respond by 10 January 1997."

Maposa elected not to resign. On 8 January 1997, he wrote to ZESA's chief executive pointing out that as it was explicit from the letter of 24 December 1996 that the Board had prejudged his guilt, the disciplinary committee of the Board was not competent to conduct the hearing. The basis of the objection was that under clause 10 of ZESA's code of conduct employees of his status were to be tried by a disciplinary committee comprising three members of the Board and a fourth person appointed by the chairman of the Board.

The answer received by Maposa asserted that no question arose as to a violation of the code of conduct because no formal decision had been taken to prefer disciplinary charges.

In his written reply dated 20 January 1997, Maposa maintained the position that ZESA's Board of Directors had prejudged his guilt and that there was no possibility of receiving an impartial hearing under the procedures prescribed

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in the code of conduct. He claimed that the interests of justice demanded that the existence of any misconduct on his part should be determined by an independent arbitrator approved of by both parties.

ZESA's reaction, as expressed in its letter of 5 February 1997, was to suspend Maposa from employment with immediate effect, and without pay and benefits, pending a disciplinary hearing in accordance with the procedure set down in its code of conduct. The date of hearing and the charges were to be communicated later.

Upon suspending Maposa, ZESA was obliged in terms of s 13(2)(b) of the code of conduct to refer the matter, together with a written statement specifying the alleged misconduct, to the secretary of the disciplinary committee within ten working days, that is, by 18 February 1997. ZESA immediately took steps to arrange dates for a disciplinary hearing and its submission to the secretary was duly sent. But on 13 February 1997, before the charges were conveyed to him, Maposa instituted proceedings in the High Court under case No. HC-1394-97. He sought an order that:

1. ZESA's Board of directors or any of its organs are not entitled to play a judicial or quasi-judicial role in the termination of his employment.

2. The parties appoint an independent arbitrator to hear the dispute between them.

3. Should the parties fail to agree upon an independent arbitrator, the dispute be referred to a senior labour relations officer for determination; and thereafter, at the instance of either party, an appeal will lie to the Labour Relations Tribunal and then to the Supreme Court.

4. ZESA pay the costs of the application.

ZESA opposed the application. It persisted in the position that its Board had not prejudged the commission of misconduct by Maposa. However, on 17 June 1997, subsequent to the filing of an answering affidavit by Maposa, the High Court granted, with the consent of the parties, an order in the terms prayed for.

On 26 June 1997, Maposa conveyed certain settlement proposals to ZESA. These were rejected on 9 July 1997. A request was made for Maposa's legal practitioner to draft the arbitration agreement. This was done and submitted to ZESA on 16 July 1997, with an entreaty that it be signed by the next day. Not surprisingly, the immediate response was that inadequate time was allowed for consideration of the arbitration proposals. On 18 July 1997, another letter was dispatched to ZESA stressing the need to expedite the arbitration. No reply was forthcoming.

In the belief that ZESA was not prepared to agree to the draft deed of arbitration, on 7 August 1997 Maposa referred the dispute, not to a senior labour relations officer, but to the Labour Relations Tribunal. He sent a copy

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of the letter to ZESA. After several reminders and the receipt of all relevant documentation, on 29 September 1997 the Tribunal advised that due to a serious backlog of cases it did not anticipate being able to provide a hearing before 1999. This information caused Maposa to bring another application before the High Court on 11 November 1997, case No. HC-10915-97, for the setting aside of his suspension on the ground of delay, the payment of salary accumulated to date and an order reinstating him in employment.

ZESA did not file an opposing affidavit to the application, yet made it known to Maposa that his entitlement to the relief was disputed. Nonetheless, being of the opinion that it would take a long time for the proceedings in case No. HC-10915-97 to be decided, and taking account of the delay in obtaining a hearing from the Labour Relations Tribunal, ZESA signed the submission to arbitration on 28 November 1997. Maposa did so four days later.

Paragraph 11 of the submission referred the following issues to the arbitrator for determination:

1. the lawfulness or otherwise of the suspension;
2. whether the suspension ought to be set aside on the grounds particularised in the application filed under case No. HC-10915-97;
3. whether Maposa was guilty of misconduct in the performance of his duties; and,
4. if so, the category under ZESA's code of conduct of such misconduct for the purpose of determining the appropriate penalty.

The hearing was set down for 29 and 30 January 1998, but on the first day only the preliminary legal point concerning the lawfulness or otherwise of the suspension was argued. The arbitrator delivered his determination on 5 February 1998.

III. THE ARBITRAL AWARD

The arbitrator ruled that:

> "I find that ZESA failed to comply with s 13(2) of the code having suspended Maposa on 24 December 1996 and having failed to determine the dispute as required by law. The delay between 24 December 1996 and the hearing of this application renders the suspension inoperative. The suspension was a nullity. ZESA is bound to pay Maposa his salary and benefits together with interest from 24 December 1996 up to the hearing of this application."

The reasoning that led to the award was founded upon a mistaken appreciation by the arbitrator that ZESA had suspended Maposa without pay and benefits with effect from 24 December 1996. Starting from that premiss he concluded that ZESA had failed to comply with s 13(2)(b) of the code of conduct in that it had not referred the matter to a disciplinary hearing within ten working days of the suspension. As the delay between 24 December 1996

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and the date of the arbitration hearing (29 January 1998) rendered the suspension inoperative, ZESA was therefore obliged to pay Maposa his salary and benefits from 24 December 1996 to the date of hearing.

Plainly, Maposa had been suspended without pay and benefits on 5 February 1997, and not on 24 December 1996. The letter of 24 December 1996 merely threatened suspension. Maposa was offered the option to resign instead of facing suspension and a disciplinary hearing.

Absent this error, I think the arbitrator would have found that it was Maposa who, by commencing proceedings on 13 February 1997, had made it impossible for ZESA to proceed in terms of the code of conduct; for the relief sought and granted by consent, was that the dispute not be proceeded with under the code of conduct, but should be determined by an independent arbitrator appointed by the parties.

In the circumstances, the nature of the error made by the arbitrator, which arose from the misconception that Maposa was suspended on 24 December 1996, was the failure to apply his mind to the real issue, namely, the effect of the High Court application in case No. HC-1394-97 upon ZESA's ability to comply with s 13(2)(b) of the code of conduct.

It follows that I am unable to agree with the learned judge that the error was simply one of computation, open to rectification by virtue of Article 33 of the Model Law.

IV. THE LEGISLATION

Notwithstanding that the submission of the parties to arbitration stipulated that the determination was in terms of the Arbitration Act [*Chapter 7:02*], it is not open to doubt that it was governed by the current Act [*Chapter 7:15*], which came into force on 13 September 1996. Section 6 (4) thereof provides that the Act shall apply to every arbitral award, whether made before or after the date of its commencement.

Article 34(2) of the Model Law recites the sole grounds on which an arbitral award may be set aside by the High Court. That specified in para(b)(ii) thereof was relied upon and is relevant. It reads:

> "An arbitral award may be set aside only if -
>
> (b) the High Court finds that -
>
> (i) .....
>
> (ii) the award is in conflict with the public policy of Zimbabwe."

The original text of the UNCITRAL Model law did not amplify the meaning of "public policy" although the United Nations Commission recorded in relation to Article 34 that the term, which was also used in the New York Convention and in many other treaties, was understood to cover

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fundamental principles of law and justice in substantive as well as procedural respects. See Holtzmann and Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 914.

The Zimbabwean modification to the Model law, however, puts this particular matter beyond doubt. Article 34(5)(a) spells out what is to be regarded as in conflict with the public policy of Zimbabwe, namely if:

" (a) the making of the award was induced or effected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award."

It is made clear that these two instances are not to be taken as "limiting the generality of paragraph (2)(b)(ii) of this article".

V. THE INDIVIDUAL ISSUES DEBATED IN THE MAIN APPEAL WHICH ARISE FOR DECISION:

(1) *Whether the suspension of Maposa with pay on 28 August 1996 required ZESA to comply with s 13(2)(b) of the code of conduct and refer the matter within ten working days to the secretary of the appropriate disciplinary committee?*

Counsel for Maposa accepted that the arbitrator had erred in finding that Maposa had been suspended on 24 December 1996. He sought to argue that the error was of no significance as there had been no attempt by ZESA to comply with s 13(2)(b) of the code of conduct following the initial suspension which occurred on 28 August 1996. Accordingly, the arbitrator's conclusion that Maposa's suspension was a nullity and ZESA bound to pay his salary and benefits (though only from 5 February 1997), was substantially correct.

The argument, of course, was based on the assumption that the suspension of 28 August 1996 was in terms of ss 13(1) and (2) of the code of conduct. In other words, the suspension was effected only after an investigation had been carried out and the chief executive was satisfied that Maposa had committed a category B, C or D act of misconduct which was to pend determination by the appropriate disciplinary committee.

It is apparent to me that the internal memorandum of 28 August 1996 was not written with the object of bringing the suspension under the code of conduct; nor did it do so. It indicated that the suspension from duty *pended investigation* and was *not* as a result thereof. No mention was made of a disciplinary hearing. Indeed, the content of this memorandum is to be compared with the very different intimation given in the suspension letter of 5 February 1997.

Over the next three months or so, ZESA's internal auditors carried out an

investigation and ultimately reported to the Board. At no stage did Maposa protest that the procedure was in contravention of the code of conduct; that his suspension with pay became inoperative after the expiration of ten working days from 28 August 1996. And he made no

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attempt to return to the work place. He even submitted a written response to the report. It seems more than probable that Maposa did not believe he had been suspended in terms of the code of conduct, which as a top executive, he must have been familiar with. He appreciated the inapplicability of that procedure and that nothing done by ZESA rendered the suspension unlawful.

I am satisfied, as deposed to by ZESA's chief executive that:

> "the suspension of 28 August 1996 was not done in terms of the code of conduct and was not disciplinary. There was thus no obligation on the part of (ZESA) to do anything in terms of its code of conduct."

(2) *Even if ZESA's suspension of Maposa on 5 February 1997 was lawful, did the failure to expedite the arbitration proceedings following upon the High Court order of 17 June 1997, entitle Maposa to a setting aside of the suspension and to reinstatement in employment?*

An affirmative answer was urged upon the learned judge. In rejecting it he said:

> "The other ground relied upon, namely, that ZESA was procrastinating in finalising the arbitration procedure, is not a proper basis upon which the court can be asked to order reinstatement. The series of correspondence which took place in regard to arbitration arrangements was relied upon in an attempt to show that the legal practitioners of ZESA were not dealing with arbitration arrangements with sufficient urgency. It took five months for the parties to agree on a submission to arbitration ... I do not think that there was demonstrated a deliberate attempt on the part of ZESA to delay the arbitration. I fail, in any event, to appreciate the basis upon which the employment of deliberate delaying tactics by a party to an arbitration agreement, if indeed such was the case, can entitle the aggrieved party to what in effect amounts to a default judgment for want of prosecution."

There can be no question, as was suggested, of ZESA being obliged to act within ten working days of 17 June 1997. The relief sought by Maposa in case No. HC-1394-97 was that ZESA's Board of directors play no judicial or quasi-judicial role in the determination of the dispute pertaining to the termination of his employment; and, that the dispute be referred to an independent arbitrator. That was the order granted to which ZESA consented. Thus the dispute was no longer to be subject to the disciplinary procedures specified in the code of conduct.

I am in respectful agreement with the learned judge that the correspondence which passed between the parties subsequent to the grant of the order of 17 June 1997 does not reveal the adoption of a tactic of delay. It is true that ZESA did not act with expedition. Yet it must not be overlooked that the taking of

the necessary measures to mount a hearing before an arbitrator was then in the hands of both parties. They were now on equal footing. No longer was the sole responsibility that of ZESA, as it had been under s 13(2)(b) of the code of conduct. Moreover, a not inconsiderable part of the delay - nearly two months - resulted from the referral to the Labour Relations Tribunal. Significantly ZESA agreed to proceed to arbitration. If it had aimed to be uncooperative it could have insisted on the Labour Relations Tribunal being the adjudicating body. This would have prolonged the hearing of the dispute to some time in 1999.

Finally, I consider that the learned judge was correct in expressing the view that even if blame

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attached to ZESA for impeding an expeditious hearing by an arbitrator, such conduct would not justify a court in setting aside Maposa's suspension and ordering his reinstatement.

(3) *By instituting proceedings in case No. HC-1394-97 on 13 February 1997 did Maposa make it impossible for ZESA, which had suspended him on 5 February 1997, to comply with s 13(2)(b) of the code of conduct?*

I do not think it can be gainsaid that the effect, and indeed, the purpose, of the application to the High Court was to stay disciplinary proceedings under the code of conduct. Were it not for the existence of the application ZESA would have complied with s 13(2)(b) of the code of conduct. Once served it took no further action to set the disciplinary procedure in motion. In the words of its chief executive:

> "Before the charges could be communicated to (Maposa) and the disciplinary committee could be convened (Maposa) on 13 February 1997 instituted proceedings in this Honourable Court under case No. HC-1394-97 wherein principally he sought an order that the looming disciplinary proceedings be held before an independent arbitrator as opposed to the prescribed tribunal *viz* the disciplinary committee of the Board ...
>
> Naturally as a result of this court application and indeed by consent of the parties, disciplinary proceedings in terms of the code had to be stayed *pendente lite* the conclusion of the matter."

Maposa must have realised that after 13 February 1997 it was not possible for ZESA to set up a disciplinary committee pursuant to s 10 of the code of conduct. As a director he had to be dealt with by the disciplinary committee. Yet, the application was seeking an order precluding the Board of directors or any of its organs from playing a judicial or quasi-judicial role in the dispute. In short, the bringing of the application effectively laid a judicial hand upon ZESA.

(4) *Whether the error of the arbitrator in failing to appreciate that Maposa had only been suspended on 5 February 1997 and that it was he, who by commencing proceedings in case No. HC-1394-97 on 13 February 1997 had*

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put it beyond the power of ZESA to comply with s 13(2)(b) of the code of conduct, was such as to make the award that Maposa be paid his salary and benefits on the ground that his suspension (wrongly held to be from 24 December 1996) was inoperative, in conflict with the public policy of Zimbabwe?

The immediate objection taken by counsel for Maposa was that the application to have the arbitral award set aside, case No. HC-2163-98, omitted to identify a "conflict with the public policy of Zimbabwe" as the ground relied upon. Certainly, for some reason not easy to comprehend, the application purported to be in the nature of a review to the High Court rather than one brought pursuant to article 34(2)(b)(ii) of the Model Law. Consequently, the ground justifying an order that the award be set aside was specified as "gross unreasonableness in the decision arrived at". However, one of the particulars given of such unreasonableness was that the arbitrator had erred "in holding that ZESA did not comply with s 13(2) of the code of conduct". This was to be read in conjunction with the earlier explanatory statement of the chief executive that the application in which Maposa sought an order that the looming disciplinary

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proceedings be held before an independent arbitrator, as opposed to the disciplinary committee of the Board, caused such proceedings to be stayed. When so viewed it seems to me that the complaint by implication, sets out the factual basis for the application to set aside the award as a breach of article 34(2)(b)(ii). This is how the learned judge understood the contention and I do not think he was wrong. Accordingly, I am not persuaded that the objection raised is valid.

Under the repealed Arbitration Act [*Chapter 7:02*], the High Court could set aside an arbitral award in terms of s 12(2), wherein it was provided that:

> "Where an arbitrator or umpire has misconducted the proceedings or an arbitration or award has been improperly procured, the court may set the award aside and may award costs against any such arbitrator or umpire personally."

Thus a party seeking to set aside an arbitral award could succeed only if able to establish either misconduct on the part of the arbitrator or the fact that the award was improperly procured. The word "misconduct" was to be understood in the sense of some wrongful, dishonest or improper conduct; a *bona fide* mistake whether of law or of fact on the part of the arbitrator could not be relied upon as a ground for setting aside the award. See *Dickenson & Brown* v *Fisher's Executors* 1915 AD 166 at 176-177; *Cone Textiles (Pvt) Ltd* v *Redgment & Ors* 1983 (1) ZLR 88 (S) at 92F; *McKelvey* v *Abrahams & Anor* 1989 (2) ZLR 251 (S) at 262D-E; *Hyper Chemicals International (Pty) Ltd & Anor* v *Maybaker Agrichem (Pty) Ltd & Anor* 1992 (1) SA 89 (W) at 100B-D.

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In *Walenn Hldgs (Pvt) Ltd* v *Lloyd & Anor* 1996 (2) ZLR 383 (H), Chinhengo J said at 398B-E:

> "Mr *Morris* argued that the Arbitration Act has extended the grounds upon which an arbitral award can be challenged by including the public policy as a consideration. I must confess that I do not see how the Act so extended or increased the grounds upon which an arbitral award can be challenged beyond the grounds already recognised in our law.
>
> > 'Article 34(5) has been introduced to put beyond doubt that public policy is contravened if the award is tainted by fraud or corruption or involves a breach of the rules of natural justice eg if the parties were not treated equally or if the arbitrator was biased.'
>
> (para 5.39 in *Sourcebook of Arbitration Materials,* ed I A Donovan, A R McMillan SC and M A Masunda). I do not think therefore that *the grounds upon which arbitration awards may be challenged have been extended. They have merely been restated to put the matter beyond any doubt*" (my emphasis).

With deference to the learned judge I do not read the passage cited in para5:39 of the Sourcebook as support for the proposition he made. It simply cites the instances given in article 34(5) in which the public policy of Zimbabwe must be found to have been contravened, adding by way of obvious example that there will be a breach of natural justice where the parties were not treated equally by the arbitrator, or if he was biased.

Nor do I consider that the judgment of this court in *Dajen (Pvt) Ltd* v *Durco (Pvt) Ltd* 1998 (2) ZLR 255 (S) at 260B addressed the issue of whether article34(2)(b)(ii) has widened the grounds upon which an arbitral award may be set aside.

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The Arbitration Act [*Chapter 7:15*] applies the Model Law to all types of arbitrations, whether commercial or otherwise, domestic or international. Section 2 thereof provides that "in interpreting the Model Law regard shall be had to its international origin and to the desirability of achieving international uniformity in its interpretation and application."

Aid in the interpretation of the Model Law may be found in the *travaux préparatoires*, that is, the working documents of the United Nations Commission on International Trade (UNCITRAL) or its working group, and in its international origin. This may be traced to the 1958 New York Convention, the 1924 Geneva Convention and the 1927 Geneva Protocol. The working documents are conveniently collected in Holtzmann and Neuhaus *op cit*.

Zimbabwe is a signatory to the 1958 New York Convention, and in conformity therewith was obliged to enact legislation providing for the recognition and enforcement in Zimbabwe of arbitral awards made in a foreign country. By applying the UNCITRAL Model Law, and in particular articles 35 and 36 which relate to recognition and enforcement of arbitral awards wherever made, Zimbabwe gives effect to this obligation.

Article V(2) of the 1958 New York Convention reads:

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> "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) the recognition or enforcement of the award would be contrary to the public policy of that country."

It is obvious therefore that because of its connection with, and similarity of wording and objectives to, the UNCITRAL Model Law, decisions of courts on the 1958 New York Convention relating to public policy, afford persuasive guidance in interpreting this country's Model Law, which is the UNCITRAL Model Law with modifications. But the overriding factor in relation to the articles under consideration is that an award must not be contrary to the public policy of Zimbabwe. This means that in the event of a direct conflict, the public policy of Zimbabwe must prevail.

Public policy is an expression of vague import. Its requirements invariably pose difficult and contentious questions. See, generally, *Sasfin (Pty) Ltd* v *Beukes* 1989 (1) SA 1 (A) at 7I-9G for a useful survey of the authorities dealing with the problem. In order to ascertain the meaning of this elusive concept, in the context of the Model Law, regard is to be had to the structure of articles 34(5) and 36(3), which deal with two aspects:

(a) *Circumstances connected with the making of the award*:

As mentioned earlier, articles 34(5)(a) and 36(3)(a) of the Model Law put it beyond doubt that if:

> "... the making of the award was induced or effected by fraud or corruption, the award would be in conflict with the

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public policy of Zimbabwe."

This means that if, for example, the arbitrator was fraudulently misled or bribed by a party, the award, however innocuous *ex facie*, would be contaminated in the process of making and contrary to public policy.

Articles 34(5)(b) and 36(3)(b) also make it clear that if:

"a breach of the rules of natural justice occurred in connection with the making of the award"

that would render the award in conflict with public policy.

Natural justice embraces the requirement that there must be fairness in the procedure. Therefore, both parties must be treated equally. Each must be given a full opportunity to present his case (this is a mandatory requirement under article 18) and be afforded an opportunity of answering the case against him by meeting his opponent's evidence and contentions. See *FSI Hldgs Ltd* v *Rio Tinto Zimbabwe Ltd & Anor* 1997 (1) ZLR 31 (S).

It is also a rule of natural justice that the arbitrator must not be a judge in his own cause; nor must he act with bias against a party. He should

scrupulously disclose any interest he has in the dispute or might reasonably be thought to have. See *Leopard Rock Hotel Co (Pvt) Ltd* v *Walenn Construction (Pvt) Ltd* 1994 (1) ZLR 255 (S) at 270E-G; and generally, Christie *Business Law in Zimbabwe* at 474; Butler and Finsen *Arbitration in South Africa* at 165.

(b) *The substantive matter of the award*

The substantive effect of an award may also make it contrary to public policy. For example, an arbitral award which, after a consideration of the merits of the dispute, endorsed an agreement to break up a marriage, or the dealing in dangerous drugs or prostitution, on any view of the concept would be in conflict with the public policy of Zimbabwe.

What has to be focused upon is whether the award, be it foreign or domestic, is contrary to the public policy of Zimbabwe. If it is, then it cannot be sustained no matter that any foreign forum would be prepared to recognise and enforce it.

In my opinion, the approach to be adopted is to construe the public policy defence, as being applicable to either a foreign or domestic award, restrictively in order to preserve and recognise the basic objective of finality in all arbitrations; and to hold such defence applicable only if some fundamental principle of the law or morality or justice is violated. This is illustrated by dicta in many cases, of which the following are impressive:

In *Paklita Investment Ltd* v *Klockner East Asia Ltd*, reported in (1994) 19 *Yearbook of Commercial Arbitration* 664, the Supreme Court of Hong Kong remarked at 674:

"The public policy defence is construed narrowly and I deprecate the attempt to wheel it out on all occasions. As

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the US Court of Appeals for the 2nd Circuit said in *Parsons & Whittemore* v *RAKTA* 508 F 2d 969 (2d Cir 1974):

> '... the convention's public defence should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would *violate the forum State's most basic notions of morality and justice*'" (my emphasis).

Similarly, in *Leopold Lazarus Ltd (UK)* v *Chrome Resources SA (Switz.)*, reported in (1979) 4 *Yearbook of Commercial Arbitration* 311, the Cour de Justice, Canton of Geneva, at 312, underscored that before the defence of public policy can be upheld:

> "There must be a violation on fundamental principles of the Swiss legal order, *hurting intolerably the feeling of justice* ... This exception of public order should not be twisted in order to avoid application of international Conventions which are signed by Switzerland and which form part of Swiss Law" (my emphasis).

Finally, in *Renusagar Power Co Ltd (India)* v *General Electric Co (US)*, reported in (1995) 20 *Yearbook of Commercial Arbitration* 681, the Supreme Court of India at 702 concluded that enforcement of an award:

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> "would be refused on the grounds that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."

The difficulty, then, is not with the formulation of an appropriate and acceptable test. It is with the application of that test in an endeavour to determine whether the arbitral award should be set aside or enforcement of it denied, on the ground of a conflict with the public policy of Zimbabwe.

I am conscious, as emphasised by Sir Michael Kerr in his article entitled "Concord and Conflict in International Arbitration" published in (1997) 13 *Arbitration International* 121 at 140 that:

> "In most countries, the spirit of the New York Convention has rightly been upheld to require what a US Circuit Court of Appeals has referred to as 'its general pro-enforcement bias'."

In casu the effect of an enforcement of the arbitral award will be to allow Maposa to take advantage of a position that he deliberately engineered. Counsel for ZESA submitted that this "turns justice on its head"; the error of the arbitrator being so fundamental as to make a refusal to set aside the award, or, to permit the enforcement of it, a violation of Zimbabwe's elementary notions of justice.

It was Maposa who applied to the High Court to prevent ZESA from proceeding under the code of conduct. Having obtained the desired stay, he then protested that his suspension without pay was unlawful because the disciplinary procedure under the code of conduct was not complied with, thereby entitling him to be paid salary and benefits accumulated to date.

An award will not be contrary to public policy merely because the reasoning or conclusions of the arbitrator are wrong in fact or in law. In such a situation the court would not be justified in setting the award aside.

Under article 34 or 36, the court does not exercise an appeal power and either uphold or set

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aside or decline to recognise and enforce an award by having regard to what it considers should have been the correct decision. Where, however, the reasoning or conclusion in an award goes beyond mere faultiness or incorrectness and constitutes a palpable inequity that is so far reaching and outrageous in its defiance of logic or accepted moral standards that a sensible and fair minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award, then it would be contrary to public policy to uphold it.

The same consequence applies where the arbitrator has not applied his mind to the question or has totally misunderstood the issue, and the resultant injustice reaches the point mentioned above.

Although no moral turpitude whatsoever attached to the conduct of the arbitrator, I am satisfied that his award bears the adverse characteristics I

have referred to. It is my belief that, in the circumstances pertaining, the award made results in so palpable and substantial an injustice to ZESA that for this court to uphold it would be to sanction a conflict with the public policy of Zimbabwe.

It is for these reasons that I find myself in respectful disagreement with the decision of the learned judge that ZESA did not establish any ground which justified the setting aside of the arbitral award.

Party autonomy is a paramount feature under the arbitration regime in this country and where a court sets aside an arbitral award it may not usurp this right of the parties by remitting the matter to the arbitrator for re-determination. It must leave it to the parties to proceed as they deem fit. Therefore in the present case, although the award is to be set aside, it will be up to the appellant and the respondent to choose whether to re-approach the arbitrator and request him to decide the questions referred to in paragraphs 11.3 and 11.4 of the submission to arbitration signed on 28 November and 2 December 1997, or to arrange a fresh arbitration, or to take any other action they consider appropriate.

VI. THE CROSS APPEAL

It necessarily follows from the conclusion of this court that the arbitral award is to be set aside, that the order sought by Maposa for its enforcement under article 36(1)(b)(ii) of the Model Law, was rightly refused by the learned judge.

VII. DISPOSITION

Accordingly, the order made is that:

1. The appeal in case No. HC-2163-98 is allowed with costs.

2. The order of the High Court is set aside and substituted by the following:

" (a) The application is dismissed with costs.

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(b) The award of the arbitrator dated 5 February 1998 is set aside in terms of Article 34(2)(b)(ii) of the Model Law."

3. The cross-appeal in case No. HC-1769-98 is dismissed with costs.

Ebrahim JA: I agree.

Sandura JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

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Endnotes

1 (Popup - Popup)

See *Chiremba* v *Barkhuizen* 1998 (1) ZLR 200 (H).

2 (Popup - Popup)

High Court Rules 1971, r 110.

3 (Popup - Popup)

Whether as *bona fide* occupier, *gestor negotiorum*, or in enrichment generally (see Bartlett J in *Industrial Equity* v *Walker* 1996 (1) ZLR 269 (H)) it is not now necessary to discover.

4 (Popup - Popup)

Chapter 238 of 1974 Revised Edition of the laws.

5 (Popup - Popup)

Although it is possible she and Maggie are one and the same.

6 (Popup - Popup)

[*Chapter 5:13*] promulgated in 1985.

7 (Popup - Popup)

See *Fink* v *Fink & Anor* 1945 WLD 266; *Chiromo* v *Katsidzira* 1981 ZLR 418 (A) at 421 D; *Mashingaidze* v *Mashingaidze* 1995 (1) ZLR 219 (H) at 223D-G.

8 (Popup - Popup)

Chapter 238 of the 1974 revised edition; now the Customary Marriages Act [*Chapter 5:07*]

9 (Popup - Popup)

Juniah v *Nawa* 1949 SRN 210.

10 (Popup - Popup)

Goldin & Gelfand *African Law and Custom in Rhodesia* p 191 ans see recently *Deputy Sherriff, Harare* v *Mafakidze & Ano*r 1997 (2) ZLR 274 (H).

11 (Popup - Popup)

Ibid.

12 (Popup - Popup)

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Ibid.

13 (Popup - Popup)

Dokotera v *The Master & Ors* 1957 R&N 697 (SR) at 701E-G and 702H.

14 (Popup - Popup)

Chapter 237 of the 1974 revised edition

15 (Popup - Popup)

Ibid s 3(1)(a)(vi).

16 (Popup - Popup)

1976 RLR 1 (G) at 13E.

17 (Popup - Popup)

Section 16 of the African Marriages Act, as amended by s 16 of the Matrimonial Causes Act.

18 (Popup - Popup)

Initially by the Customery Law and Primary Courts Act 6 of 1981, which was itself repealed and replaced in part by the Customary Law and Local Courts Act [*Chapter 7:05*]. The surviving part of the old Act, renamed the Customary Law (Application) Act [*Chapter 8:05*], provided for choice of customery law until its repeal, and the promulgation of its replacement, being part of [*Chapter 7:05*], previously held in abeyance, by the Administration of Estates Amendment Act 6 of 1997. [*Chapter 7:05*] makes identical provision as to the choice of customary law, its reforming impetus being directed towards the law inheritance.

19 (Popup - Popup)

[Chapter 7:05], s53.

20 (Popup - Popup)

Mujawo v *Chogugudza* 1992 (2) ZLR 321 (S) at 329E and 330C.

21 (Popup - Popup)

See Gubbay JA in *Jenah* v *Nyemba* 1986 (1) ZLR 138 (S) at 141C-E.

22 (Popup - Popup)

By the Administration of Estates Amendment Act, s 15 (*supra* n15).

23 (Popup - Popup)

Because of the Provinsions of s 3 of the Customary Marriages Act.

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24 (Popup - Popup)

Zimnat Insurance Co Ltd v *Chawanda* 1990 (2) ZLR 143 (s).

25 (Popup - Popup)

Note 3 [*Chapter 7:05*]. See n 16 above.

26 (Popup - Popup)

See *Chapendama* v *Chapendama* 1998 (2) ZLR 18 (H) at 29A-B and 31D-F; *Mashingaidze* v *Mazomba* HH-3-99 at pp 21-22.

27 (Popup - Popup)

Mashingaidze v *Mazomba* (above) - perhaps wrongly - see below.

28 (Popup - Popup)

Mashingaidze v *Mashingaidze* 1995 (1) ZLR 219 (H) at 223D-E.

29 (Popup - Popup)

Note 23 above.

30 (Popup - Popup)

HH-147-98 (not reported).

31 (Popup - Popup)

HH-93-99 (not reported).

32 (Popup - Popup)

Note 23 above.

33 (Popup - Popup)

See *Chapeyama* (n 28 above) at 16-22.

34 (Popup - Popup)

The relevant decisions are conveniently gathered and entertainingly discussed by Lord Denning in his *Due Process of the Law* at Part 8 "The wife's Share in the Home".

35 (Popup - Popup)

See *Mashingaidze* v *Mashingaidze* (n 25 above).

36 (Popup - Popup)

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Chiromo v *Katsidzira* 1981 ZLR 418 (A) at 422 C-E.

37 (Popup - Popup)

At 32E-F.

38 (Popup - Popup)

1996 (1) ZLR 269 (H).

39 (Popup - Popup)

I have since been informed that the judgment was not submitted by the local reporter to the editor of the South African Law Reports.

40 (Popup - Popup)

Section 6 Customary Law and Civil Courts Act.

41 (Popup - Popup)

See n 24 above.

42 (Popup - Popup)

Being article 16 of the Convention. The same convention also enjoins member states to remove disabilities and discrimination flowing from prejudice stereotype of customary practices. See articles 2 and 5.

43 (Popup - Popup)

Muganga v *Sakupwanya* 1996 (1) ZLR 217 (S); *Muzanenhumo* v *Katunga & Ors*. 1991 (1) ZLR 182 (S).

44 (Popup - Popup)

Section 7(4)of [*Chapter 5:13*]

45 (Popup - Popup)

Compare *Mebe* v *Mebe* S-142-96 and *Diura* v *Gumbodete* S-207-96.

46 (Popup - Popup)

1973 (1) RLR 192 (A) at 194H-195A; 1973 (3) SA 118 (RA) at 119

47 (Popup - Popup)

See the definition of "marriage" ins 2 of the Customary Marriages Act [Chapter 5:07) which excludes customary marriages between an African and a non-African. Further, to which, s 3 of the Interpretation Act [Chapter 1:01] in its definition of "African" excludes people of Indian origin.

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48 (Popup - Popup)

See for instance P v C 1978 RLR 80 (A), *Mayo v Sifelani* S-13-88 at pp 3-4, S v Swart 1965 (3) SA 454 (A) and *Gate v Ngoreta & Anor* S-57-88.

49 (Popup - Popup)

Family Law in Zimbabwe supra at p 51.

50 (Popup - Popup)

1988 (2) ZLR 103 (S) at 106.

51 (Popup - Popup)

From the headnote at p 103-104.

52 (Popup - Popup)

Op cit at p 59.

53 (Popup - Popup)

1974 (2) RLR 13 (A) at 14.

54 (Popup - Popup)

See at p 36 of this volume. - *Editor.*

55 (Popup - Popup)

1997 (2) ZLR 430 (5).

56 (Popup - Popup)

As the principal appears from the headnote, which is reasonably accurate but which would more correctly refer to "a summons or pleadings" rather than " a summons or plea".

57 (Popup - Popup)

Zimbabwe Banking Corporation Ltd v *Pindi Electrical Hardware (Pvt) Ltd & Ors* 1998 (2) ZLR 210 (H).

58 (Popup - Popup)

See p 43 of this volume. The point was not relevant in *Pumpkin Construction* but was scarecely overlooked.

59 (Popup - Popup)

At pp 48-49.

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60 (Popup - Popup)

At pp 39-40.

61 (Popup - Popup)

At p 49.

62 (Popup - Popup)

See p 24 of this volume. - *Editor.*

63 (Popup - Popup)

See *Crusader Real Estate Consultancy (Pvt) Ltd* v *CABS* 1999 (1) ZLR 37 (H).- *Editor.*

64 (Popup - Popup)

In *Colonial Mutual Assurance Society Ltd v Tilsim Invstms (Pty) Ltd* 1952 (4) SA 134 (C) at 135.

65 (Popup - Popup)

(1953) 70 SALJ at 9.

66 (Popup - Popup)

Jurisdiction 2 ed by Pistorius p 97.

67 (Popup - Popup)

Act 59 of 1959, s 26(1).

68 (Popup - Popup)

Johnston v Cohen 1957 R&N 185 (SR) at 186B-C; 1957 (2) SA 277 (SR).

69 (Popup - Popup)

Refer to r 326 High Court Rules.

70 (Popup - Popup)

Law Society of Zimbabwe By-Laws SI 314/1982, s 70(2).

71 (Popup - Popup)

Scotfin Ltd v Ngomahuru (*Pvt) Ltd* 1997 (2) ZLR 567 (H) 572E-F

72 (Popup - Popup)

Ibid (n1).

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73 (Popup - Popup)

Proviso (iii) to By-Law 70(2); *Ngomahuru* case at 582C-584E.

74 (Popup - Popup)

Ngomahuru case at 584E-H.

75 (Popup - Popup)

Ngomahuru case at 580E-G and 585E-G.

76 (Popup - Popup)

Section 70(1) of SI 314/82 sub voce"trade debt"; note that the comma before "only" in para (a) is not repeated in para (b) and is obviously ungrammatical and an error.

77 (Popup - Popup)

In terms of s 106 of the Labour Relations Act [*Chapter 28:01*].

78 (Popup - Popup)

In terms of s 107 of *Chapter 28:01.*

79 (Popup - Popup)

Cargo Carriers (Pvt) Ltd v *Zambezi & Ors* 1996 (1) ZLR 613 (S) at 624B; *Zisco Ltd v Dube & Ors* 1977 (2) ZLR 172 (S) at 174F.

80 (Popup - Popup)

Section 12 of the Labour Relations (General) Regulations SI 31 of 1993.

81 (Popup - Popup)

Zimbabwe Amalgamated Railwayman's Claim v *NRZ* 1992 (1) ZLR 37 (H) at 89.

82 (Popup - Popup)

For example, *Comley v Schmidt* 1947 (2) SA 317 (E).

83 (Popup - Popup)

Rule 89 of the High Court Rules.

84 (Popup - Popup)

Wakefield v *ASA Seeds (Pvt) Ltd* 1976 (2) RLR 63 (G) at 71C-E.

85 (Popup - Popup)

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For example, as in *Wakefield supra.*

86 (Popup - Popup)

Gudza v University of Zimbabwe HH-85-95 (unreported).

87 (Popup - Popup)

Rule 81(1).

88 (Popup - Popup)

Prosser & Ors v *Zisco* Ltd HH-201-93 (unreported).

89 (Popup - Popup)

Mashave supra.

90 (Popup - Popup)

The difference between 277 and 255 plus the 28 re-employed who are not on the second list.

91 (Popup - Popup)

1997 (2) ZLR 508 (H).

92 (Popup - Popup)

3 ed p15.

93 (Popup - Popup)

Supra at p 17.

94 (Popup - Popup)

The numerous articles, policy documents and books published on this subject.

95 (Popup - Popup)

Mfolo & Ors v *Minister of Education*, *Bophuthatswana & Anor* 1992 (3) SA 181 (B).

96 (Popup - Popup)

Per Beadle AJ in *S* v *Razaro* 1979 RLR 353 (G) at 354 D-K.

97 (Popup - Popup)

Per Smith J in *S v Chawasarira* 1991 (1) ZLR 66 (H) at 69D.

98 (Popup - Popup)

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See eg *S v Mpofu (2)* 1985 (1) ZLR 285 (H) 288E-H; *S v Chawasarira* (above) at 69F.

99 (Popup - Popup)

Per Chidyausiku J (as he then was) in *S v Faku* 1997 (1) ZLR 389 (H) at 392F-G.

100 (Popup - Popup)

S v Razaro (above) at 354B-G; *S v Banda* 1984 (1) ZLR 96 (H) at 101E-G.

101 (Popup - Popup)

Cf S v Nyajena 1995 (2) ZLR 242 (H).

102 (Popup - Popup)

Per McNally JA in *S v Sharma* S-117-84; see also *S v Chari* S-230-95; *S v Chikunga* S-23-93; *S v Katsaura* 1997 (2) ZLR 102 (H) at 111G-112C.

103 (Popup - Popup)

S v *Katsaura* (above) at 111D-F.

104 (Popup - Popup)

S v Gorogodo 1988 (2) ZLR 378 (S) at 383B-D.

105 (Popup - Popup)

A-G v *Paweni Trade Corp (Pvt) Ltd & Ors* 1990 (1) ZLR 24 (S) at 43F-44B.

106 (Popup - Popup)

S v Mucherawo 1998 (1) ZLR 129 (H).

107 (Popup - Popup)

S v Katsaura (above) at 108G-109H.

108 (Popup - Popup)

See his unreported judgment in the application for provisional liquidation, HH-206-98

109 (Popup - Popup)

HH-206-98 at p 15.

110 (Popup - Popup)

Section 206 of the Companies Act [*Chapter 24:03*]; *Pillay & Anor v Liquidators, Union & Rhodesian Wholesale Ltd* 1927 SR 136 at 150.

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111 (Popup - Popup)

Henochsberg on the Companies Act 4 ed, Vol II p 583.

112 (Popup - Popup)

Service Trade Suppliers (Pvt) Ltd v *Dasco & sons (Pty) Ltd* 1962 (3) SA 424 (T) at 428.

113 (Popup - Popup)

Cf Tuckers Land & Development Corp (Pvt) Ltd v *Soja (Pty) Ltd* 1980 (3) SA 253 (W) at 257C; *Pillay supra* n 3 p150.

114 (Popup - Popup)

Henochsberg *op cit* 582; *Pillay* (*supra*, n 3) at 153.

115 (Popup - Popup)

Taitz *The Inherent Jurisdiction of the Supreme Court* p 16.

116 (Popup - Popup)

Per Roper J in *Millward v Glaser* 1950 (3) SA 547 (W) at 537.

117 (Popup - Popup)

W S Gilbert (and Sir Arthur Sullivan) "Trial by Jury".

118 (Popup - Popup)

Millward v Glaser supra (n 9) p 551.

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