REPORTABL - 5

HH 136-02
CA 331/01

WILLIAM PETER GEORGE SYLOW
versus
THE STATE

HIGH COURT OF ZIMBABWE
ADAM AND MAVANGIRA JJ
HARARE, 25 July and 14 August, 2002

Criminal Appeal

Mr *E W W Morris* for the appellant
Mr *M Nemadire* for the respondent

ADAM J: The appellant was convicted on fourteen counts of theft by conversion. He was sentenced to five years' imprisonment, of which one year's imprisonment was suspended for five years on condition that he did not during that period commit an offence involving dishonesty for which he was sentenced to imprisonment without the option of a fine and a further two years were suspended on condition he paid $448 000 to the complainant. He appealed against the conviction and sentence. He was granted bail pending appeal, which was varied by this court to allow him to travel out of the country by the temporary release of his passport allowing him to travel between 15 December 2000 to 10 January 2001. On 27 February 2001 the respondent asked the Registrar for the matter to be placed before a judge for the estreatment of the appellant's cash bail and the calling in of the appellant's surety. On 2 March 2001 the appellant's legal practitioners wrote that the appellant had fallen ill in Switzerland but did not provide any medical certificate. On 16 March 2001 this court issued a warrant of arrest for the appellant. On 10 April 2001 the appellant's legal practitioners wrote that the appellant was still ill but that the appellant intended to return to Zimbabwe. On 12 April 2001 the respondent replied that the appellant had to come back to prosecute his appeal.

A court application was filed on ll July 2001 on the appellant's behalf, with his affidavit having been sworn in Switzerland on 22 June 2001. It should be mentioned that his founding affidavit did not attach an original medical certificate and the one attached was also not dated. The respondent filed notice of opposition (without an opposing affidavit) but with respondent's submission. Later an affidavit was filed. The appellant filed his heads of argument, which were served on the respondent. The respondent did not file its heads of argument and was barred. The matter was set down on 15 November 2001 with appearance on behalf of both parties. The matter was postponed with costs to be paid by the respondent to allow the respondent to make an application for the upliftment of the bar within three weeks of that order, failing which the court application would proceed as an unopposed matter. It appears that no application was made by the respondent, so on 17 January 2002 NDOU J ordered (a) that the appeal record be prepared no later than one month after the date of the order to enable the appellant to prosecute his appeal; (b) that on completion the appeal proceed as normal, save that should the appellant be absent from Zimbabwe he shall produce evidence of his current medical condition to the court hearing the appeal so as to enable it to determine whether or not the appeal should proceed; and (c) that the warrant of arrest of 16 March 2001 should not be enforced pending the determination of this appeal and should be deemed to have been cancelled at the conclusion of the appeal if his conviction and sentence were set aside.

The appeal was set down before GARWE JP and GUVAVA J on 14 May 2002, when the only issue that had to be determined was whether or not the matter should be postponed (since the appellant's legal practitioners had produced an unauthenticated

medical certificate) to enable the appellant to produce an authenticated medical certificate. The matter was postponed for a determination to be made whether or not the appeal could be heard in the absence of the appellant from the country. Only if this court found for the appellant would the court proceed to deal with the merits of the appeal.

At the hearing of this appeal we determined that the appeal could not be heard in the absence of the appellant from the country. These are the reasons.

In appellant's heads of argument it was submitted by his legal counsel that the appellant left the country legally and this factor puts the matter in a different light to those cases like *Mulligan* v *Mulligan* 1925 WLD 164, *Maluleke* v *Du Pont NO* 1966 RLR 620 and *S* v *Neill* 1982 (1) ZLR 142 (H). He referred to *Escom* v *Rademeyer* 1985 (2) SA 654 (T) and relied on what was said by STEGMANN J at 658 H. But STEGMANN J referred to 166-167 of *Mulligan* v *Mulligan supra* and said at 658H-I:

> "In that passage it appears that a 'fugitive from justice' may be accepted as being one who is 'wilfully avoiding the execution of the processes of the court of the land', or as one who is 'avoiding the processes of the law through flight out of the country (voluntary exile) or hiding within the jurisdiction of the court'.
>
> I turn now to consider whether the respondent is a fugitive from justice within those definitions to arrive at a conclusion it is necessary to set out the facts depicting the sequence of events placed before me."

STEGMANN J concluded that Rademeyer was a fugitive from justice, but since he had involuntarily been called before the court, the rule *nisi* specifically called upon him to give an answer. Rademeyer wished to do so if given the additional time he needed. It was for that reason that STEGMANN J granted a fugitive from justice *locus standi in judicio* and the rule *nisi* was extended. He also observed at 662 D-F:

> "I do not wish to be understood to hold that the principle in question can never be invoked against a defendant or respondent who happens to be a fugitive from

> justice. It may very well be that a fugitive who is a defendant does not enjoy the right ordinarily enjoyed by a defendant to institute a claim in reconvention. He may suffer other disadvantages in respect of procedural, and even substantive, rights ordinarily enjoyed by a litigant."

In *Mulligan* v *Mulligan* 1925 WLD 164, the applicant (husband) obtained a rule *nisi* operating as a temporary against the respondent (wife) to show cause why she should not be interdicted from disposing of certain property pending action. The applicant had been convicted and was on bail which was estreated. He went into hiding. On the return day the respondent took a preliminary point that the applicant was a fugitive from justice and therefore had no *locus standi in judico*. The respondent's contention was upheld and the rule discharged. DE WAAL J said at 166-168:

> "In England an outlaw 'can neither sue on his contracts nor has he any legal rights which can be enforced; while at the same time he is liable to all causes of action' ... See Wharton's *Law Lexicon, sub voce* 'Outlawry'; Outlawry is defined as 'being put out of the law for contempt in wilfully avoiding the execution of the processors of the King's Court'. Wharton says that the legal maxim applicable to the outlaw is 'Let them be answerable to all and none to them'. See also *Davis* v *Trevanion* 14 LJ QB 138; In re *Mander* 6 QB 867; and *Aldridge* v *Buller* 6 LJ Exch 151.
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> Now, it should be noted that formerly, both in England as well as Holland, a person had to be proclaimed or declared to be an outlaw or *verbanneling* by judicial process; but it is submitted that there is very little difference, if any, between a person declared to be such and a fugitive from justice, as both are outside the law for contempt in wilfully avoiding the execution of the processes of the courts of the land. Similarly, the difference, if any, is small between banishment (*ballingschap* or *verbanning*) or involuntary exile on the one hand and avoiding the processes of the law through flight out of the country (voluntary exile) or hiding within the jurisdiction of the court. In either case the person, whether he be in exile or a fugitive from justice, is not amenable to the processes of the court, and as such, in my opinion, cannot invoke the authority of the court for the purpose of establishing his legal rights. Before a person seeks to establish rights in a court of law he must approach the court with clean hands; where he himself, through his own conduct makes it impossible for the processes of the court (whether criminal or civil) to be given effect to, he cannot ask the court to set its machinery in motion to protect his civil rights and interests … Moreover it is totally inconsistent with the whole spirit of our judicial system to take

> cognisance of matters conducted in secrecy … As a fugitive from justice, he is not only amenable to the ordinary criminal and civil processes of the court, but, as far as this court is concerned, it cannot call upon him to appear in person to give evidence on oath; it cannot order his arrest in case the facts he testified to in his affidavit are proved to be false, whereas on the other hand he would be able to incept criminal proceedings for perjury proved to have been committed by his opponent.
> …
> Were the court to entertain a suit at the instance of such a litigant it would be stultifying its own process and it would, moreover, be conniving at and condoning the conduct of a person, who through his flight from justice sets law and order in defiance."

In *S* v *Nkosi* 1963 (4) SA 87 (T) the appellant was convicted of a statutory offence and sentenced when he escaped from jail. HILL J, after referring to *Mulligan* v *Mulligan supra* said at 87-88:

> "Mr *Beale* also referred us to a number of American decisions to the said effect. In one of these cases, *Togan* v *Casaus*, reported in the second series of the American Law Reports (49 ALR 2d) p 1419, the presiding Judge at p 1423 says in regard to an appeal by a defendant who wilfully avoided the process of the Court and punishment:
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> > 'Such flagrant disobedience and contempt effectually bar him from receiving the assistance of an appellate tribunal. A party to the action cannot with right or reason, ask the aid or assistance of a court in hearing of the demands, while he stand, in attitude of contempt of legal orders and process of the courts of the State.'
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> A similar view was expressed in the case of *Woodson* v *The State*, 19 Fla.549, reported in the American Criminal Reports (Gibbons) p 477 where the head-note reads:
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> > 'An appellate court will dismiss appeal - escaped convict - An appellate court will refuse to hear a criminal case on error where the plaintiff in error has escaped and is not within the control of the court below, either actually, by being in custody, or constructively by being out on bail'."

In *Maluleke* v *Du Point NO supra*, a rule *nisi* was issued against the respondent by the General Division of the High Court which transferred the matter to the Appellate Division. The Appellate Division, having heard arguments on the issues concerning the

applicant being a fugitive from justice and of him having *locus standi*, struck the matter off the roll. The Appellate Division held that the applicant had deliberately put himself beyond the reach of the law and there was no difference, in principle, between defiance based on fear of being brought to justice and defiance, simply, from a refusal to be bound by the law. In both cases, the act of defiance was directed to placing oneself beyond the law; the law will refuse its protection to those who place themselves beyond its reach. The applicant was under an order of restriction in terms of the Law and Order (Maintenance) Act which required him to report once a week. He failed to report so a warrant of apprehension was issued against the applicant. The applicant's counsel submitted that until it was established that the restriction order was valid the allegation that he was a fugitive from justice could not be sustained. QUENET JP said at 623:

> "I do not think it necessary to examine the validity of the restriction order or of the warrant itself. The admitted facts established that the applicant fled the country or was in hiding, and that it is not possible to effect service of process upon him. It is clear, then, the applicant has deliberately put himself beyond the reach of the law. I cannot accept the suggestion that that his flight might have nothing to do with the disobedience to the restriction order. We were informed from the bar that his attorney had no information in regard to his whereabouts and had not heard from him."

FIELDSEND AJA, after referring to the passage at 166-168 in *Mulligan* v *Mulligan*, *supra*, said at 624:

> "This passage, in my view, makes it clear that the court will not entertain an action by a person who puts himself beyond the reach by going into hiding or fleeing the country without any explanation, regardless of whether or not he is in contempt of any particular order or warrant of the court."

In *S* v *Isaacs* 1968 (2) SA 184 (A) the appellant, convicted of fraud, was granted leave to appeal with his existing bail extended pending the determination of appeal. The appellant's attorneys indicated that the appellant had estreated his bail and was a fugitive

from justice. On the date set for the hearing of the appeal there was no appearance on his behalf so the court indicated it had the discretion of either striking it off the roll or dismissing the appeal for non-prosecution. The appeal was dismissed for non-prosecution.

In *S* v *Moshesh* 1973 (3) SA 962 (A) the appellant, an attorney, was convicted of theft. He was granted leave to appeal with existing bail extended pending the outcome of his appeal. The appellant's bail was withdrawn and a warrant for his arrest issued since he and his family left South Africa and it would appear the appellant was in Lesotho. On the date set for the hearing of the appeal the court said that the appellant was clearly a fugitive from justice and dismissed his appeal for non-prosecution.

In *S* v *Neill* 1982 (1) ZLR 142 (H) the appellant was convicted of an offence under the Exchange Control Act and released on bail pending appeal against sentence. He left the country and estreated his bail. It was submitted on his behalf that the appellant could be regarded as a fugitive from justice, but this court could exercise its discretion and hear the appeal, not only because on the merits the appeal was arguable, but also because his actions could not be stigmatized as a bad example of contempt of court. This court held that the only category of person who has absolutely no right to institute proceedings at law is the fugitive from justice or outlaw. Even where the proceedings were reviewable that did not alter the situation. It also held that even if the court had a discretion to hear the appeal, this was not a proper case to exercise it, since by breaching the bail conditions the appellant had shown contempt for the laws and processes of the country. For this court to entertain his appeal it would be stultifying its own processes and conniving at and condoning the appellant's actions.

In *Chetty* v *Law Society, Transvaal* 1983 (1) SA 777 (T) the applicant sought rescission. The respondent had set a date for its Council meeting with the applicant without prior notification. The applicant failed to appear before the respondent's Council. It became generally known that the applicant had left the country and was in Botswana. The respondent applied for a rule *nisi* to be issued. The rule was confirmed after the applicant had been given more than adequate time to file his opposing affidavit. In seeking to set aside the confirmed rule, the applicant in his affidavit denied having left the country to avoid the consequences of any misconduct on his part as an attorney and gave a detailed account of the harassment he suffered at the hands of the security police which he claimed led to his decision to leave the country. O'DONOVAN J said at 780C:

> "It must however have been clear to the applicant that, through the flight out of the Republic, on the eve of a meeting that he had undertaken to attend, he avoided the processes of investigation in which the Law Society was then engaged, and any proceedings arising thereout, and the inference is in my view inescapable that this result was intended by him whatever other factors may have motivated him."

He then referred to *Mulligan* v *Mulligan supra* and said that DE WAAL J defined a fugitive as a person who is "avoiding the processes of the law through flight out of the country". He continued at 780G:

> "Counsel for the applicant contended that the principle enunciated in these cases is limited on its application to a person seeking to establish his rights in a court of law. The position of the present applicant is, so it is argued, to be contrasted because he is merely attempting to defend himself against processes of the law which has been set in motion against him … I do not consider, however, that this distinction can be validly made in the instant case.
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> The relief which he sought is rescission, and the person initiating proceedings for the relief is the applicant. An applicant seeking to have a conviction set aside, as in *S* v *Nkosi* (*supra*) or *Woodson* v *The State* 19 Fla 549, which is referred to in *S* v *Nkosi* at 88 A-B, is in a comparable position."

If I understand O'DONOVAN J correctly, he maintained that had the appellant in these proceedings filed an application for the cancellation of the warrant of arrest and the setting aside of the estreatment of his bail, the position would have been no different. The appellant would have no *locus standi in judicio* as a fugitive from justice.

In *Botes* v *Goslin* 1987 (2) SA 716 (C) litigation had been settled which was made an order of the court under which the appellant consented to judgment for an amount and undertook to pay the respondent's taxed costs. The appellant did not comply with the order and through his attorneys asked the respondent's attorneys to stay or withdraw the writ on the grounds that the respondent had become a fugitive from justice. The magistrate ruled that the appellant had not proved that the respondent was fugitive from justice and that even if he were that was irrelevant since there was no prospect at all that his presence would be required at court. The appeal was against this ruling. The respondent opposed the appeal on the basis that the magistrate was correct. He was not actively seeking any legal relief. VAN DEN HEEVER J held the magistrate's ruling as incorrect and said at 721 D-J and 722 A:

> "The basic morality in denying a fugitive from justice the assistance of the very system he refuses to submit to is elementary: a man cannot say that he is prepared to abide by the rules of society, and seek society's assistance in enforcing them, only when they favour him and when he chooses, but not when he decides that it does not suit him to do so. There was no question of the relevant fugitive perhaps having to testify in *S* v *Isaacs* 1968(2) 1 SA 184 (A) or *S* v *Nkosi* 1963 (4) SA 87 (T) nor indeed in the majority of cases referred to below. Nor is it necessary that the fugitive should have already been convicted. *Rademeyer's* case, at 661 H-I. The law will deny its protection to those who place themselves beyond its reach. *Mulligan* v *Mulligan* 1925 WLD 164 has been followed and quoted with approval for more than half a century. Goslin, by jumping bail, was avoiding the processes of the law. By assisting him with its process the court would be 'stultifying its own processes and it would, moreover, be conniving at and condoning the conduct of a person, who, through his flight from justice, sets law and order in defiance'.

> That Goslin is not asking for a court *order* is irrelevant. The court does not enforce its judgment unless the judgment creditor sets the court's machinery in motion for that purpose. That is exactly what Goslin is doing. He has asked the clerk of the *court* to authorise and require the messenger of the *court* to attach and sell the judgment debtor's property … That he has done so through his attorney is irrelevant without the additional factor such as a cession …
>
> In short, Goslin is not a passive party brought before the court by another, as was the position in eg *Rademeyer*'s case and *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A), but was himself the mover setting the court machinery in motion.
>
> I am unimpressed by the argument that Botes' hands somehow become dirty by his reliance on Goslin's conduct to escape Botes' obligations in terms of a court order. The judgment debt stands as an asset in Goslin's hands and perhaps some other creditor of Goslin may be able to take advantage of it; but Goslin himself cannot, and there is nothing improper in Botes objecting to being compelled by law to pay money to someone who has placed himself beyond the reach of the law and probably borders of the country as well."

In *Meyerson* v *Health Beverages (Pty) Ltd* 1989 (4) SA 667 (A) the respondent (as plaintiff) sued the applicant (as defendant). The applicant left South Africa in 1985 and is being sought by the South African police. The applicant sought certain amendments to his pleadings. THRING AJA said at 672 B-E and 673 A-G:

> "There seems to be considerable merit in Mr *Seligson's* contention that the applicant is, in fact, a fugitive from justice. However, in view of the conclusion to which I have come, it is not necessary for me to decide this question because I am satisfied that, even if applicant is a fugitive from justice, this does not destroy his *locus stand in judico* to approach this court for an amendment of his plea.
> The fundamental objection against a fugitive from justice from being allowed to participate in the legal process is that thereby he asks the court 'to set its machinery in motion to protect his civil rights and interests' (*Mulligan's case supra* at 167). Thus, a fugitive form justice cannot institute proceedings by, for example, issuing summons, nor can he issue a writ of execution (*Botes* v *Goslin, (supra)*).
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> It seems to me, however, that this consideration does not operate in the same way or to the same extent where the fugitive does not take the initiative, but is before the court involuntarily at the instance of another."

In *Fraind* v *Nathmann* 1991 (3) SA 837 (W) the respondent issued a summons against the applicant by having it served on a domestic servant at the applicant's residence. He obtained a default judgment. Prior to the issue of summons the applicant was arrested in terms of a writ of arrest *tamquam suspectus de fuga*. He was released because he denied that he was about to depart from South Africa. Five days later he left South Africa for Israel.

STREICHER J said at 840 H-841A:

> "The applicant is therefore a fugitive from justice and should not be allowed to 'invoke the authority of the court for the purpose of establishing his legal rights'. It does not follow, however, that he should not be allowed to defend actions instituted against him.
> …
> In *Chetty's* case, O'DONOVAN J referred to the *In re Mander* case referred to by DE WAAL J, where LORD DENMAN CJ said that an outlaw could not bring proceedings but 'if an action was brought against him the position would be different'. The difference was apparently accepted by O'DONOVAN J in *Chetty* case, also in our law, but he distinguished the *Mander* case on the basis that Chetty sought rescission and was the person initiating the proceedings. The right of a fugitive from justice to defend legal proceedings instituted against him was also recognised in *Escom* v *Rademeyer* 1985 (2) SA 654 (T) at 662 A-F."

STREICHER J distinguished *Chetty*'s case by indicating that in there papers had been served on Chetty and he had decided not to oppose the confirmation of the rule *nisi*. There was no irregularity in the proceedings and the order was a valid order. But before him the summons was not served on the applicant since he had the right to be served with the summons and to defend the action. If that was the case, he must also have the right to apply for the rescission of a default judgment erroneously granted against him.

It is clear from the above cases that a fugitive from justice, in a very restricted sense, is allowed *locus standi in judicio*. The appellant has estreated his bail and this court has merely indicated that the warrant of arrest issued on 16 March 2001 should not

be enforced. He cannot be said not to be a fugitive from justice. The undated medical certificate filed with his founding affidavit of 22 June 2001 (over three months after the estreatment of his bail and the issue of the warrant of arrest) did not specifically indicate that the appellant could not travel before l0 January 2001. In his founding affidavit the appellant stated that for different reasons, on which he will elaborate, he was not able to return to Zimbabwe. He averred that he was under medical surveillance and treated with anti-depressants and different medicines throughout the year 2000. He spoke of stress, the time spent in custody, the uncertainty of the hearing of his appeal and that his condition of health was deteriorating. He averred that with the increasing fear of his personal security in the political situation and for the survival of the Dental Clinic his condition worsened to such a point that on 10 January 2001, when he was supposed to return, he could not do so. He maintained that he communicated the state of his health and his incapacity to return to Zimbabwe to his legal practitioners in January 2001. The appellant did not attach a supporting affidavit from his legal practitioners. As an officer of this court his legal practitioner would have known that his client was not in a position to return and he would have sought an extension of appellant's absence from Zimbabwe if that was the case. The appellant in an attachment called "Overview" candidly states that in January 2001, fearing that a mental breakdown was imminent, he travelled to Geneva to be with his family. The appellant does indicate that he advised his legal practitioners of this from Geneva. But if that was so, his legal practitioner was obliged to inform this court. In light of this the only inference that can be drawn is that the appellant was well aware that he would be breaking the terms of his bail conditions, as it was very clear that he was not going to return to Zimbabwe by 10 January 2001. Surely if he feared a mental

breakdown the logical thing for him to have done was for his legal practitioners in January 2001 to seek a further extension of the period on the grounds that he would be out of Zimbabwe beyond 10 January 2001, supplying the necessary supporting medical certificates from medical practitioners in Zimbabwe. The appellant is a professional dentist with adequate knowledge as to what should have been done by him. The appellant, in his statement of 30 April 2001, also attached to his founding affidavit, gives a clue for his absence from Zimbabwe. He stated that he now finds himself in a situation where a warrant of arrest is issued against him. He receives hate mail threatening him and his family. His company has been robbed of all its funds and closed down. Friends and colleagues have been physically threatened and attacked and told not to assist him. His main accusers, Mr and Mrs Harvey, appear to openly ally themselves with lawless elements, so far condoned by the political establishment and police, to extort money from him and further damage him and the Dental Clinic. In this climate and against the background of increased lawlessness and the lack of police protection, he fears that his return to Zimbabwe would place him in direct danger and be most prejudicial both to his safety and health.

It would appear from the foregoing that the appellant is not in a different situation to *Chetty*'s case, where the court in that case considered him a fugitive from justice. As long as the appellant has not purged his contempt, that is, having breached the terms of his bail conditions by being out of the jurisdiction of this court, he must be regarded as a fugitive from justice. For this court to hear his appeal in his absence "would be stultifying its own processes and conniving at and condoning the appellant's actions".

Accordingly, this court declines to determine the appeal in his absence.

MAVANGIRA J: I agree.