CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 50/95

THE STATE

versus

ABRAHAM LIEBRECHT COETZEE
HENDRIK SCHALK COETZEE
PIETER LE ROUX DE BRUIN
JOHAN MARAIS

Heard on: 19 March 1996
Decided on: 6 March 1997

JUDGMENT

LANGA J:

[1] This matter is one of many which have been dealt with by this Court, in which the constitutionality of provisions of the Criminal Procedure Act 51 of 1977 (the "Act"), have been challenged. The Act plays a crucial role in the criminal justice system of this country; it is nonetheless legislation which was drafted and enacted in a different constitutional era in which the legal validity of its provisions could not be questioned. The Constitution of the Republic of South Africa Act 200 of 1993 (the "Constitution") has brought about a drastic change, not only in doing away with parliamentary sovereignty thus making all laws subject to judicial review, but also in the values which must now hold sway. The problem is that important provisions of old legislation, and in particular the Act, are being struck down because they are inconsistent with the

Constitution, leaving gaps in the law which only the legislature can fill. It is primarily the task of the legislature, and not the courts, to bring old legislation into line with the Constitution. Although understandable because of the transitional stage we are in, the continued operation of, and reliance by the prosecutors on provisions which do not reflect the new constitutional order is an unsatisfactory state of affairs. Hopefully, it will not be long before a revised Criminal Procedure Act, consistent with the Constitution, is put in place.

[2] The applicants are standing trial in the Witwatersrand Local Division of the Supreme Court *inter alia* on twelve (12) counts of fraud. At the conclusion of the prosecution's case, Marais J acceded to the applicants' request for the suspension of the trial and the referral to this Court of the constitutionality of two provisions of the Act, namely, sections 245 and 332(5).

[3] Although the propriety of the referral has been challenged by the Attorney-General, it is clear from the judgment of Marais J that he has applied his mind to the issues relevant to the referral. It was not in dispute that there were reasonable prospects of the provisions being found to be unconstitutional by this Court. Having decided, correctly in my view, that the issues referred could be decisive for the case and that it would be in the interests of justice for him to refer the matter to this Court, I am of the view that the matter is properly before us. It will be convenient to deal separately with

the challenged provisions.

Section 245

[4] The section provides thus:

> "If at criminal proceedings at which an accused is charged with an offence of which a false representation is an element, it is proved that the false representation was made by the accused, he shall be deemed, unless the contrary is proved, to have made such representation knowing it to be false."

[5] The phrase "unless the contrary is proved" means that the presumption may be rebutted by proof on a balance of probabilities.[1] Absent such proof, for example where the probabilities are evenly balanced at the end of the trial, the court would be obliged to convict, notwithstanding the existence of a reasonable doubt regarding the state of mind of the accused.

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1 *R v Oliver* 1959 (4) SA 145 (D) at 145H; *S v Isaacs* 1968 (2) SA 187 (D) at 191F; *S v Van Niekerk* 1981 (3) SA 787 (T) at 789H-790A.

[6] The presumption falls into the class of "reverse onus" provisions which have been held by this Court to infringe the right of an accused person to be presumed innocent as envisaged in section 25(3)(c) of the Constitution.[2] The function and effect of the presumption is to relieve the prosecution of the burden of proving all the elements of the offence with which the accused is charged.

[7] An essential element of crimes such as fraud and theft by false pretences is knowledge of the falsity of the representation by the person making it. The effect of the provision is that once it has been proved that the accused had made the false representation, the presumption of knowledge comes into operation and the onus of disproving it falls on the accused.

[8] It is clear that the presumption is in conflict with the long-established rule of the common law on the burden of proof that "it is always for the prosecution to prove the guilt of the accused person, and that the proof must be proof beyond a reasonable doubt."[3]

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2 See *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC); *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC); 1996 (3) BCLR 293 (CC); *Scagell and Other v Attorney-General of the Western Cape and Others* 1996 (11) BCLR 1446 (CC).

3 *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA) at para 25 citing *Woolmington v Director of Public Prosecutions* [1935] AC 462 (HL) at 481; see also *R v Benjamin* 1883 EDC 337 at 338; *R v Ndhlovu* 1945 AD 369 at 386.

The provision clearly infringes the presumption of innocence which is entrenched in section 25(3)(c) of the Constitution.

[9] The applicants contended, however, that in addition to the presumption of innocence, the section also infringed what was described as "the cluster of rights associated with it," namely, the general right to a fair trial, the privilege against self-incrimination, the right not to be a compellable witness against oneself and the right to silence. Because of the view I take that the presumption infringes the right to be presumed innocent that is protected by section 25(3)(c) of the Constitution, I do not consider it necessary to deal with the nature and scope of "the cluster of rights" or how the impugned provision impinges on those rights.

[10] What remains to be determined is whether the infringement can be said to be a permissible limitation to the right in terms of section 33(1) of the Constitution. In order to pass muster, a law which limits a right enshrined in section 25 of the Constitution must, in addition to being a law of general application, be reasonable, justifiable in an open and democratic society based on freedom and equality, and necessary.[4] The limitation must also be such that it does not negate the essence of the right in question.[5]

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4 Section 33(1)(a) and 33(1)(aa) of the Constitution.

5 Section 33(1)(b) of the Constitution.

[11] It has been held that this inquiry involves a weighing up of competing values and ultimately an assessment based on proportionality. The relevant considerations in this balancing process include "the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited, and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question."[6]

[12] The provision has its origins in section 280*bis* of the Criminal Procedure Act 56 of 1955 which was added in 1959.[7] Section 245 in the current Act is substantially similar. Its purpose is to facilitate the task of the state in the prosecution of crimes such as fraud and theft by false pretences by relieving the prosecution of the need to prove that the accused knew that the misrepresentation was false at the time that he or she made it. The presumption has been held to be applicable to instances in which the representation relates to facts which are objectively ascertainable.[8]

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6 *S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 104. See also *S v Williams and Others* 1995(3)SA 632 (CC); 1995(7) BCLR 861 (CC) at paras 58-60.

7 Section 6 of the Criminal Law Further Amendment Act 75 of 1959.

8 Courts have drawn a distinction between instances in which the misrepresentation is one pertaining to a belief on the one hand and where it relates to an objective fact on the other. See *S v Andrews* 1982 (2) SA 269 (NC) at 271F-G. The presumption is of no assistance to the prosecution in the former instance. The prosecution has to prove affirmatively that the accused did not have the belief represented at the time it was

made. See *S v Witbooi* 1971 (4) SA 138 (NC) at 140E; *S v Hassim and Another* 1976 (1) SA 508 (T) at 512A; *S v Ostilly and Others* 1977 (4) SA 699 (D) at 724B; *S v Harper and Another* 1981 (2) SA 638 (D) at 648H - 649B; *S v Van Niekerk* supra n 1 at 790A and F.

[13] There is no doubt a pressing social need for the effective prosecution of crime. Kentridge AJ, speaking for the Court in *Zuma*,[9] noted that reasonable presumptions may be required by the prosecution, in relation to certain categories of offences, to assist in this task. It must be accepted that section 245 was instituted by the legislature to facilitate the attainment of its objective to protect society. The measures taken were, however, enacted before the Constitution was in force; they must now be weighed against the rights that are guaranteed by the Constitution which puts a high premium on the values of freedom and equality.

[14] In a number of cases decided by this Court, we have emphasised the importance of the rights entrenched in section 25(3)(c) of the Constitution, which include the right to be presumed innocent, in an open and democratic society based on freedom and equality.[10] Underlying the decisions in those cases is the recognition that a consequence of the value system introduced by the Constitution is that the freedom of the individual may not lightly be taken away. Presumptions which expose an accused person to the real risk of being

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9 Supra n 3 at para 41.

10 In *Bhulwana* supra n 2 at para 24 O'Regan J described the rights enshrined in section 25(3)(c) of the Constitution as "a pillar of our system of criminal justice." See also *Zuma* supra n 3 at para 36; *Mbatha* supra n 2 at para 19. The presumption of innocence is acknowledged as a fundamental value in the criminal justice system of comparable democracies. See the remarks of Dickson CJC in *R v Holmes* (1989) 34 CRR 193 at 212 and in *R v Oakes* (1986) 26 DLR (4th) 200 at 212-3.

convicted despite the existence of a reasonable doubt as to his or her guilt are not consistent with what is clearly a fundamental value in our criminal justice system.

[15] The rationale for the provision is that it deals with matters which are peculiarly within the knowledge of the accused. Indeed, the accused is in the best position to know why he or she made a representation. It may well be that proving the state of mind of the accused in the context of a false representation presents the state with more difficulties than in other cases. However, the touchstone for justification, where section 33(1) of the Constitution requires the prevailing state interest to render a provision not only reasonable but necessary as well, is not simply the fact that an obligation to prove an element of an offence which falls peculiarly within the knowledge of the accused makes it more difficult for the prosecution to secure a conviction. The question is whether it makes it so difficult as to justify the infringement of the accused's right to be presumed innocent on the grounds of necessity. I am not persuaded that this difficulty is, in itself, sufficient to outweigh the importance of the right infringed and to justify the reversal of the onus. It is a difficulty, moreover, which is not peculiar to offences in respect of which section 245 is applicable. Discharging the burden of proof is a function which the criminal justice system requires the prosecution to perform in the normal course with regard to many common law and statutory offences.[11] It was not claimed that if all the circumstances

[11] In *Mbatha* supra n 2 at para 20, in a discussion on the difficulty of proving the mental aspect involved on a charge of possession, this Court stated: "[T]he circumstances of each case will determine whether or not the

surrounding the false representation are fully and properly investigated and presented in evidence the prosecution cannot obtain the conviction to which it might be entitled.

[16] It has not been contended that other open and democratic societies based on freedom and equality have found it necessary to resort to such an unqualified presumption for the proper enforcement of the criminal law in relation to all offences of which a false representation is an element. I am not aware of, nor have we been referred to any examples in comparable jurisdictions, where a general provision in the same context is

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elements of possession have been established. . . . The evidence need not necessarily be direct. It may be, and often is, circumstantial. . . . There will no doubt be cases in which it will be difficult to prove that a particular person . . . was in fact in possession. . . . But this is inevitably a consequence of the presumption of innocence; this must be weighed against the danger that innocent people may be convicted if the presumption were to apply. In that process the rights of innocent persons must be given precedence."

employed.[12] No good reason suggests itself why it should be necessary in this country to have such a provision if, in general, crimes involving misrepresentations are adequately dealt with in other jurisdictions without the expedient of a reverse onus provision.

[17] Section 245 makes severe inroads on the right of those who fall within its ambit to be presumed innocent. No grounds were advanced in argument to justify the infringement and I have been unable to find sufficient justification for this limitation to the constitutionally protected right. Because the provision fails to comply with the requirements of reasonableness, justifiability and necessity as required by section 33(1) of the Constitution, it follows that it is unconstitutional by reason of its inconsistency with the presumption of innocence as enshrined in section 25(3)(c) of the Constitution.

Section 332(5)

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12 For the position in the United States of America, see La Fave and Scott, Jr *Criminal Law* 2 ed (1989) 739 et seq; *People v Ashley* 42 Cal. 2d. 246 (1954) and *Nelson v United States* 227 F.2d 21(1955); in Canada, see *R v Theroux* (1993) 100 DLR (4th) 624 at 635-8; *R v Zlatic* (1993) 100 DLR (4th) 642; in England, see *R v Landy* [1981] 1 All ER 1172 (CA) and *R v Ghosh* [1982] 1 QB 1053 (CA). With regard to Australia see *Balcombe v De Simoni* [1971-1972] 126 CLR 576 at 593.

[18] Section 332(5) of the Act has its origins in the Criminal Procedure Act 31 of 1917 where it was inserted as section 348(5) of that Act. The provision has since been part of successive Criminal Procedure Acts in substantially the same form. Its wording overlaps considerably with that of the subsection dealing with the liability of members of an association, other than a corporate body, in the relevant Criminal Procedure Acts.[13] It is part of a comprehensive set of provisions contained in section 332, designed to facilitate the criminal prosecution of corporations, their directors and servants and members of associations. Section 332(5) provides as follows:

> "When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor."

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13 Section 348(7) of Act 31 of 1917; 381(7) of Act 56 of 1955; 332(7) of Act 51 of 1977.

[19] The applicants attacked the provision on the basis that it requires a director or servant of a corporate body that has committed an offence to prove, on a balance of probabilities, that he or she did not take part in the commission of the offence and could not have prevented it. It was argued that the onus cast upon the accused relates to an essential element of the offence created by the section and that the reversal of the onus meant that the accused could be convicted despite the existence of a reasonable doubt with regard to his or her guilt. This reverse onus was therefore said to violate the right to be presumed innocent as enshrined in section 25(3)(c) of the Constitution as well as the "cluster of rights associated with it."[14]

[20] The Attorney-General did not resist this line of attack but a different stance was adopted by the Government of the Republic of South Africa (the Government), which had been granted leave to intervene as a party. In the event, this intervention facilitated a fuller ventilation of the issues, which turned out to be more complex than had at first appeared to be the case.

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14 See para 9 of this judgment.

[21] The attitude of the Government was that the proper construction of the provision had to take into account the effect of the decisions in *R v Van den Berg and Another*[15] and *S v Klopper*.[16] It was claimed that the import of the subsection, in the light of those decisions, was that in respect of crimes of which intent was an element, the prosecution carries the burden of proving the elements of the offence created by section 332(5), including the fact that at the time when the offence was committed by the corporate body, the accused had knowledge of it, or, if not, that he or she deliberately refrained from acquiring that knowledge. This left the accused with the onus to disprove the presumption that he or she had taken part in the commission of the offence and that such accused could have prevented it. It was argued that because the prosecution had to prove that the accused had knowledge of the commission of the offence, the effect of the violation on the right to be presumed innocent is not severe and the limitation of the right is in any event justifiable.

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15 1955 (2) SA 338 (A) at 341A-B.

16 1975 (4) SA 773 (A) at 780A-D.

[22] I should mention immediately that I do not agree with the Government's contention that the section bears a meaning which places the burden of proving the accused's knowledge on the prosecution. That view finds no support from the language used in the subsection. On the contrary, the plain meaning of the words is that once the prosecution proves that an offence has been committed by a corporate body of which the accused was a director or servant at the time of commission, the latter can escape conviction only by proving that he or she did not take part in and could also not have prevented the commission of the offence. This is made plain by both Schreiner JA[17] and Steyn JA,[18] in separate judgments in *R v Limbada and Another.*[19] The passages we were referred to in *Van den Berg*'s and *Klopper*'s cases do not support the Government's contention either. In the former, Greenberg JA stated:[20]

> "[I]t is twice conceded that the first appellant may have been unaware of the act of the second appellant in causing the fire, and if he was so unaware, then he has proved, in terms of the sub-section, that he did not take part in the commission of the offence and could not have prevented it . . .".

The learned judge does not purport to deal with the burden of proving knowledge on the

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17 1958 (2) SA 481 (A) at 484G-H.

18 Id at 486B.

19 Id. The matter was concerned with the nature of the liability imposed by section 381(7) of Act 56 of 1955, a provision which is the predecessor of the current section 332(7) of the Act. The wording corresponds materially with that of section 332(5) of the Act, save that the former deals with the liability of members of associations and the latter targets directors and servants of a corporate body.

20 Supra n 15 at 341A-B.

part of the accused. On the contrary, the statement is based on the premise that the accused had been proved to be unaware of the offence. From that, so the judge held, it followed that he did not take part in its commission and could also not have prevented it. In *Klopper*'s case,[21] Kotze AJA stated the following:

> "Na my mening behoort sub-art. (5), wat . . . 'n vorm van strafpligtigheid oplê, op die mins verswarende wyse uitgelê te word. Ten einde 'n objektiewe vertolking te regverdig, behoort 'n kwalifikasie, soos bv. "rederlikerwyse" of "sonder nalatigheid" voor die woorde "kon verhoed het nie" ingelees te word. Sonder so 'n kwalifikasie in te voeg - waarvoor ek in 'n strafbepaling, soos hierdie, geen regverdiging kan sien nie - is dit onmoontlik om te beslis dat die Wetgewer 'n objektiewe uitleg wou voorskryf. Dit geld veral in 'n geval soos die onderhawige waar die aanklag poging tot bedrog is - 'n misdryf wat op opset berus. 'n Bevestigende antwoord op die voorbehoude regsvraag, sou inhou dat strafaanspreeklikheid op grond van *culpa* opgelê kan word t.o.v. 'n misdryf waarvan opset 'n essensiële element is. Dit is moeilik om te aanvaar."

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21 Supra n 16 at 780B-D.

The issue there was the proper test to be applied in determining whether or not it had been proved that an accused could not have prevented the commission of the offence, where such accused had not taken part in its commission. It was held that the test was subjective and that where dolus was an element of the offence, mere negligence would not be sufficient to warrant a conviction. Again the judgment was not concerned with the burden of proof with regard to the knowledge of the accused and did not purport to deal with that question. None of the other cases we were referred to supports the Government's contention in this respect.[22] I am accordingly not persuaded that the provision bears the meaning attributed to it by the Government.

[23] During argument the question was raised with counsel whether section 332(5) is reasonably capable of being interpreted as creating statutory criminal liability, subject to a special defence and, if so, whether it would still be inconsistent with the Constitution. Since the point had not been canvassed in the arguments filed, the parties were invited to submit supplementary written argument, which they subsequently did.

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22 See *S v Film Fun Holdings (Pty) Ltd and Others* 1977 (2) SA 377 (E) at 386E-H and *S v Harper and Another* supra n 8 at 641F-G.

[24] The applicants persisted in their initial argument[23] but contended that even if, on a proper construction of the provision, the onus related to an excuse, exemption or exception, the presumption of innocence would still be violated as long as the onus is concerned with an element that is essential to the verdict. It was contended in addition that inasmuch as the provision might expose the accused director or servant to the risk of a fine or imprisonment for an offence not committed by such accused but by another person, it infringed two constitutionally protected rights, namely, that of freedom and security of the person, which is protected by section 11(1) of the Constitution, and the right to property which is enshrined in section 28 of the Constitution.

[25] In its supplementary argument, the Government came out in support of the view that the effect of the provision is to create statutory criminal liability and that the onus on the accused does not relate to an essential element of the offence but to an exemption, exception, or excuse. It was contended that because the accused is only called upon to prove a defence after the offence has been established, the presumption of innocence is not breached. In the alternative, it was argued that any infringement there might be was a permissible limitation in terms of section 33(1) of the Constitution.

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23 See para 19 above.

[26] Before considering whether section 332(5) of the Act creates liability on the part of natural persons for the offences committed by such corporate bodies, I should mention that no one was prepared to defend the extension of liability to servants, as the provision does. I agree that there is no justification for including the category of "servants" in the provision and I shall proceed on the basis that the section refers only to directors. It will be convenient to deal, in the first place, with the meaning and purpose of section 332(5).

[27] In *Limbada*'s case, Steyn JA, delivering the judgment of the court observed:

> "The sub-section does not purport to create a new species of offence by superimposing the elements mentioned in it upon those of whatever offence is alleged against a member of an association of persons other than a corporate body. What it does is to deem an accused, in the circumstances described therein, to be guilty of an offence committed by another, if he does not prove that he had no part in that offence and could not have prevented it. In the circumstances so described it casts an *onus* of proof upon the accused and in effect directs the Court to find him guilty if he does not discharge that *onus*. It is essentially, therefore, an evidential provision . . . and does not bring into existence a distinct though mutable offence, having as one of its essentials the commission of some other offence."[24]

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24 Supra n 17 at 486A-C.

And further: [25]

> ". . . what the prosecution was going to rely upon was not only the active participation of each in the conduct specified but also his or her liability under sec. 381(7) in relation to the conduct of the other".

[25] Id at 487A.

[28] Schreiner JA in his concurring judgment however took the view that the section establishes a separate statutory offence.[26] This was based on the fact that the provision requires that the accused, who did not take part in the commission of the offence, should be convicted if such accused fails to prove that he or she could not have prevented it. The two views regarding the nature of the offence were the subject of comment in *Klopper*'s case. Kotze AJA, speaking for the court, was of the view that neither was inconsistent with the notion that an accused, who was not involved in the commission of the offence, nevertheless incurs liability for the offence unless such accused proves that he or she could not have prevented it.[27]

[29] The effect of Schreiner JA's construction is that an accused who has not taken part in the commission of the offence has to prove what amounts to an element of the offence created by the subsection, namely, that he or she could not have prevented the

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26 Id at 484F-H.

27 Supra n 16 at 779A-C.

commission of the offence.[28] A reverse onus of this type would of course be a clear breach of the presumption of innocence enshrined in section 25(3)(c) of the Constitution.

[30] Two questions of constitutionality arise from the view, reflected in the majority judgment in *Limbada,* that the subsection establishes liability of the director for the conduct of another and that an onus of proof is cast upon the accused, on pain of conviction if he or she fails to discharge it. The first question is whether the onus provision is a violation of the presumption of innocence protected by section 25(3)(c) of the Constitution. The second is whether the form of liability imposed on the director is an infringement of the right to freedom and security of the person, which is protected by section 11(1) of the Constitution, as well as the right to property which is enshrined in section 28. I turn now to deal with the first question.

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28 Supra n 17 at 484-5A.

[31] In a number of cases in which the constitutionality of reverse onus provisions has been considered, this Court has left open the question of the effect which a provision, which requires the accused to prove an exemption, exception or defence, has on the presumption of innocence.[29] What was decided in those cases was that presumptions which required an accused to disprove an element of the offence violated the right to be presumed innocent because they exposed the accused to the risk of a conviction despite the existence of a reasonable doubt.

[32] Applicants and the Government relied extensively in their respective arguments on decisions of Canadian courts.[30] Through these, applicants endeavoured to demonstrate that the presumption of innocence is violated where the accused is required to discharge

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29 See *Zuma* supra n 3*; Bhulwana* and *Mbatha* supra n 2. Kentridge AJ, speaking for the Court in *Zuma* at paras 41 and 42 stated: "It is important . . . to emphasise what this judgment does *not* decide. It does not decide that all statutory provisions which create presumptions in criminal cases are invalid. This Court recognises the pressing social need for the effective prosecution of crime, and that in some cases the prosecution may require reasonable presumptions to assist it in this task. Presumptions are of different types. . . . Nor does it seek to invalidate every legal presumption reversing the onus of proof. Some may be justifiable as being rational in themselves, requiring an accused person to prove only facts to which he or she has easy access, and which it would be unreasonable to expect the prosecution to disprove . . . I would also make clear that this judgment does not purport to apply to exceptions, exemptions or provisos to statutory offences, referred to in section 90 of the Criminal Procedure Act . . . ."

30 Kentridge AJ in *Zuma* at para 21, described the judgments of Canadian courts on reverse onus provisions as particularly helpful, "not only because of their persuasive reasoning, but because s 1 of the Charter has a limitation clause analogous to section 33 of the South African Constitution".

an onus on a balance of probabilities in order to avoid a conviction. What the Government set out to show was that different considerations apply where the accused is only required to prove a defence or an exemption or excuse, after a complete case for conviction has been presented by the prosecution. Firstly, so it was argued, the presumption of innocence is not implicated at all in such an instance. Secondly, it was contended that the context of the legislation is important. Where the legislation is regulatory, as distinct from being purely criminal, the strict standard employed in respect of the presumption of innocence which is relevant to criminal prohibitions is not applicable.

[33] It is necessary to deal with some of the decisions which, I consider, might provide a useful indication of the approach followed by Canadian courts in dealing with this aspect. The relevant provision in the *Canadian Charter of Rights and Freedoms* is section 11(d) which provides in part:

> "11. Any person charged with an offence has the right . . .
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

[34] The Government relied on the majority judgment in *R v Holmes*[31] for its

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[31] Supra n 10 at 201. See also the majority decision in *R v Schwartz* (1989) 39 CRR 260 at 268-9 and the reasoning of Cory J (L'Heureux-Dube J concurring) in *R v Wholesale Travel Group Inc.* (1992) 84 DLR (4th) 161 at 223-7.

submission that there was no breach of the presumption of innocence where the onus relates to a defence and not to an element of the offence. The provision in issue in that case made it an offence for anyone to be in possession, "without lawful excuse, the proof of which lies upon him" of "any instrument suitable for the purpose of breaking into any place ... under circumstances that give rise to a reasonable inference that the instrument has been used or is or was intended to be used for any such purpose. . . ." The presumption was therefore only triggered once the Crown had proved beyond a reasonable doubt facts from which such inferences could be drawn. McIntyre J, speaking for the majority of the court (with Le Dain and La Forest JJ concurring), held that the words used in the provision, "while apt in certain circumstances to do so," could not be said in the particular context of that provision to amount to a reverse onus. In his view, the presumption of innocence was not violated where the prosecution is required to prove its case beyond a reasonable doubt without the benefit of any presumption, before any need for defence arises. He ruled that the provision required the Crown to discharge the burden of proof by putting before the court "evidence covering every element of the offence of such nature that, if believed by the trier of fact and not answered, would warrant a conviction."[32] In his view, if the accused is convicted in the face of such a defence, it would not be because of any presumption of guilt but because the excuse was rejected after the commission of the offence had been proved.[33]

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32 Id at 198.

33 Id at 201.

[35] *R v Schwartz*,[34] which was also cited in support of the Government's approach, was concerned with a provision which required an accused charged with possession of a "restricted weapon" to prove that he or she was the holder of a registration certificate or permit for such weapon.[35] It was further provided that a document purporting to be a registration certificate is evidence of the statements contained therein. By a majority of five to two, the court held that, notwithstanding the fact that the accused had to bring himself or herself within the exemption and despite the words employed in the section, no reverse onus was imposed on the accused and there was no danger that he or she could be convicted despite the existence of a reasonable doubt.

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34 Supra n 31.

35 Section 106(7)(1) of the Canadian Criminal Code.

[36] We were urged by the Government to follow the majority approach in *Holmes* and to reject that adopted in the later case of *R v Whyte*.[36] The issue in the latter case was a provision which required an accused, charged with having care or control of a motor vehicle while his or her ability to drive was impaired by alcohol, to prove that he or she had not entered the vehicle for the purpose of setting it in motion, once it was proved that such accused had occupied the driver's seat of a vehicle.[37] In its judgment the court expanded the theme which had been articulated in *R v Oakes*[38] that a reverse onus provision in relation to an essential element of the offence violates the presumption of innocence because "it would be possible for a conviction to occur despite the existence of a reasonable doubt." It accepted that what the accused was required to disprove was not an essential element of the offence but that it was a fact "collateral to the substantive offence." It was held, nevertheless, that the presumption of innocence had been violated even though in this case such violation was justifiable in terms of section 1 of the Charter.

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36 (1989) 51 DLR (4th) 481.

37 Section 234 read with section 237(1)(a) of the Canadian Criminal Code.

38 Supra n 10 per Dickson CJC at 222.

Dickson CJC articulated the principle on which the finding of the violation of the right was based as follows:

> "The short answer to this argument is that the distinction between elements of the offence and other aspects of the charge is irrelevant to the s. 11(d) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence. The exact characterisation of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused."[39]

[37] The approach in *Whyte* was followed in *R v Keegstra,*[40] where a section in the Criminal Code provided that an accused, charged with the offence of promoting hatred against an identifiable group, shall not be convicted "if he establishes that the statements were true". The words "if he establishes" were characterised as imposing a reverse onus to prove a defence in the court a quo. In reaching his conclusion that the presumption of innocence was violated, Dickson CJC, writing for the majority of the court, considered various decisions on the presumption of innocence. Observing that the judgment of the court in *Holmes* had caused some confusion, he stated:

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39 Id at 493.

40 (1991) 3 CRR (2d) 193 at 205.

" . . . since *Whyte* it is clear that the presumption of innocence is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt as to guilt in the mind of the trier of fact."[41]

[41] Id at 258.

This approach has been followed in a number of other cases as well.[42]

[38] I consider that both *Holmes* and *Schwartz* are distinguishable from the present case. In both, the majority of the court reached their respective decisions on the basis that the provisions they were dealing with did not impose a reverse onus and that there was no danger that the accused could be convicted despite the existence of a reasonable doubt. Section 332(5) involves elements which have to be proved by the accused and which form the substance of the offence. In the circumstances of this case, I am of the view that the approach in *Whyte* is to be preferred in considering the effect of section 332(5) on the

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42 See for example *R v Chaulk* (1991) 1 CRR (2d) 1 in which the issue was a provision in the Criminal Code which set out a presumption of sanity "until the contrary is proved." Lamer CJC at 14, writing for the majority, concluded that the insanity defence should be characterized as "an exemption to criminal liability which is based on an incapacity for criminal intent." Adopting the reasoning in *Whyte*, he rejected the prosecution's argument that because sanity was not an essential element of the offence, the presumption of innocence was not implicated. In the course of her separate concurring judgment, Wilson J had occasion to consider the treatment of the presumption of innocence in *Holmes* and *Schwartz* and distinguished the latter on the basis that "it deals with regulated not prohibited activity" *(*at 49). She was however clearly of the view that the approach followed in *Whyte* was the appropriate one in the particular instance.

presumption of innocence. The provision imposes an onus on the accused to prove an element which is relevant to the verdict. It should make no difference in principle whether or not an offence created by a statute is formulated in a way which makes proof of certain facts an element of the offence or proof of the same facts an exemption to the offence. What matters in the end is the substance of the offence. If a provision is part of the substance of the offence and the statute is formulated in a way which permits a conviction despite the existence of a reasonable doubt in regard to that substantial part, the presumption of innocence is breached.

[39] The fact that section 332(5) requires that the accused director should, on pain of conviction, prove that he or she did not take part in the commission of the offence and could not have prevented others from doing so, even if it is formulated as an exception, has the same consequence as a reverse onus provision which relates to an essential element of the offence. Such accused will be convicted unless he or she discharges the onus; this despite the existence of a reasonable doubt with regard to such accused's participation in the offence and the ability to have prevented it.

[40] In the final analysis, whether section 332(5) creates a form of statutory liability, with a shift in onus in respect of a part thereof or a new crime with a special defence, the proof of which rests on the defence, the final effect is the same. The objection which is fundamental to the reversal of onus in this case is that the provision offends against the

principle of a fair trial which requires that the prosecution establish its case without assistance from the accused. In either event, the right of the accused to be presumed innocent is breached.

[41] It was argued on behalf of the Government that the context of the legislation is relevant to the effect which a reverse onus has on the presumption of innocence. What the submission amounted to was that a provision which would offend against the presumption of innocence when applied in a truly criminal context would not necessarily do so in a regulatory one. Section 332(5) was said to be a regulatory provision which, on that basis, did not offend against the presumption of innocence.

[42] The distinction between the "truly criminal" and "regulatory" offences has been discussed in various judgments in a number of jurisdictions. It is perhaps best articulated by Cory J in *Wholesale Travel Group Inc.*[43] in the passage quoted in paragraph 193 of the judgment of O'Regan J. In much the same vein and with regard to the justification for the difference in treatment between different categories of offences, Jackson J delivering the judgment of the US Supreme Court in *Morissette v United States* referred to the hazards which have become part of modern living as a result of industrialisation. According to him, those dangers:

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[43] Supra n 31.

> " . . . have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare. . . . The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably extract from one who assumed his responsibilities".[44]

Indeed, Canadian Courts seem to have made a number of important distinctions between offences that are "ordinary" and "regulatory", between "strict" and "absolute" liability and between offences that provide for imprisonment and those that do not. In the context of some of these categories, what looks like reverse onus provisions have been found not to be objectionable. It is not necessary to deal with these distinctions in the present context. Although some assistance might be derived from the categorisation in a proper case, I consider that it would not be safe to regard it as anything more than a broad guideline. What is clear is that section 332(5) has a very wide reach and is not limited to regulatory offences. It is a general provision of extremely broad application. It is applicable to any director or servant of a corporate body that has committed a crime; the crime in question is any possible offence which might be committed by a corporate body or any of its officials, be they directors or servants. It is applicable equally to all types of offences, be they serious or trivial, common law or statutory, "purely criminal" or regulatory. It is applicable whether the liability is absolute or strict and whether it is

[44] 342 US 246, 254-6 (1952).

based on intent or negligence on the part of the perpetrator. Because of the virtually uncircumscribed ambit of the provision with regard to offences, the penalties could also range from the trivial to the very serious and there is nothing to preclude the imposition of imprisonment. The section cannot therefore be said to be regulatory.

[43] Further, I am by no means persuaded that the mere categorisation of an offence as regulatory would necessarily have the effect of a lower standard of scrutiny as contended for by the Government. The presumption of innocence is breached whenever the effect of a reverse onus provision is such that the accused could be convicted despite the existence of a reasonable doubt as to guilt or innocence. As pointed out by La Forest J in his partially dissenting judgment in the case of *Wholesale Travel Group Inc.,* ". . . what is ultimately important are not labels (though they are undoubtedly useful), but the values at stake in the particular context."[45] Once such breach has been established, the balancing process prescribed in section 33(1) of the Constitution becomes decisive. The real question in each instance will then be whether the provision is reasonable, justifiable and necessary. It is the substance of the provision, not its form, that is decisive.

[44] In the result, I consider that the first question posed in paragraph 30 must be answered in the affirmative. The onus provision in section 332(5) offends against the right to be presumed innocent as contained in section 25(3)(c) of the Constitution. The

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45 Supra n 31at 198.

provision therefore falls to be declared unconstitutional unless it is saved by the provisions of section 33(1) of the Constitution.

[45] It is to be noted that the true purpose of section 332(5) is not the creation of criminal liability without any fault on the part of the accused director. What is intended is the conviction of those directors who either take part in the commission of the offence or are in a position to prevent it but fail to do so. Proof of fault is therefore essential to a conviction under the section. For the purposes of this judgment, it is therefore unnecessary to consider whether the creation of absolute criminal liability for an offence would be constitutionally permissible. I accordingly do not find it necessary to comment on the view expressed in paragraph 93 of the judgment of Kentridge AJ, that if an offence of absolute liability had been created, it would not in itself have given rise to any question of the unfairness of the trial in respect of such an offence.

[46] What the legislator has in substance done is to place a positive duty on the director or servant to disprove factors which are central to the offence and made a conviction the consequence of a failure to do so. The legislature is, in my view, fully entitled to place a positive duty on directors and to make the omission to discharge that duty an offence. What is in issue here is how this has been done. It is appropriate that the Court should have regard, not only to the purpose and effect of the legislation, but also to the means used to achieve its objective. What causes the provision to fall foul of the presumption of

innocence here is the effect of merely changing the form of the provision to require the accused, rather than the prosecution, to prove elements which are essential to his or her guilt or innocence. There is manifest unfairness where the legislature, having created an offence potentially entailing very grave penalties, goes on to subvert an important constitutionally protected right by requiring crucial elements of the offence to be proved or disproved by the accused on pain of conviction should the onus not be discharged. As pointed out in *Morissette,*[46] there should be a limit to the power of the legislature "to facilitate convictions by substituting presumptions for proof". In *Patterson v New York,*[47] the dissenting judges (Powell J, Brennan J and Marshall J) objected cogently to the fact that the test which was the basis of the majority judgment:

> " . . . allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case so long as it is careful not to mention the non-existence of that factor in the statutory language that defines the crime."

[47] It remains to be determined whether section 332(5) is nevertheless justifiable in terms of section 33(1) of the Constitution. The question is whether this limitation on the

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46 Supra n 44 at 275.

47 432 US 197, 223 (1977).

presumption of innocence is, in all the circumstances, reasonable, justifiable and necessary and not a negation of the essential content of any of the affected rights.[48]

[48] Section 33(1)(AA) and (b) of the Constitution.

[48] The purpose of section 332(5) is to ensure that directors who could have prevented the commission of crimes by the corporate body concerned should bear responsibility for such crimes. Directors, of course, occupy a special position of responsibility, not only in relation to the corporate body but also with regard to the public in general.[49] The state consequently has an important interest in ensuring that the affairs of corporate bodies are properly and honestly conducted. The corporate body itself has to be protected against the dishonesty and other criminal conduct of those in charge of its affairs or who are involved with them. It would not in itself be unreasonable to provide special measures to enable the prosecution to overcome the difficulty of gathering evidence about corporate activities. This would be consistent with the state's duty to protect society. The question in this case is whether the state could adequately achieve these legitimate ends by means which would not be inconsistent with the Constitution in general and section 25(3)(c) in particular.

[49] The problem of proving elements of the offence is one that is not peculiar to offences envisaged under section 332(5). It is a problem that is often encountered in the

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49 *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 85; *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 151.

criminal justice system. Where, however, special measures have to be provided to meet specific difficulties related to facilitating prosecutions, they must fit in with the requirements of the Constitution. It is not the function of this Court to prescribe to the legislature how it should seek to achieve these ends. I can see no reason however, why the state could not, for example, impose appropriate statutory duties on directors and other persons associated with the corporate body aimed at ensuring that its affairs are honestly conducted and that it is itself protected against dishonest conduct. This could be done in a variety of ways by means of appropriate legislative provisions which might, for instance, impose the duties of disclosure and reporting on the corporate body, its directors, servants and other persons involved with its affairs. There has been no suggestion that such measures, enforced through appropriate sanctions, could not accomplish as effectively the ends sought to be achieved by section 332(5) of the Act. It has further not been contended that such objectives could not be achieved without placing an onus on the accused to prove any aspect of his or her innocence in a criminal prosecution for a breach of such duty. I am accordingly not persuaded that the reverse onus provisions in section 332(5) are necessary. It follows therefore that reliance on section 33(1) of the Constitution must fail.

[50] This conclusion with regard to the effect of section 332(5) on the presumption of innocence makes it unnecessary for me to deal with the second question[50] as to whether

[50] See para 30 of this judgment.

the form of liability imposed on the director by the impugned section infringes the rights protected by sections 11(1) and 28 of the Constitution. Not much was said in argument with regard to section 28 and I propose to say even less. With regard to the effect of section 11(1), I have had respectful regard to the views and extensive research contained in the respective judgments of Kentridge AJ and O'Regan J on this difficult issue. I however consider it unnecessary for me to canvass the issue in this judgment.

The Order:

[51] I turn now to the appropriate order. The issue of whether any part of section 332(5) can legitimately be severed in order to avoid striking down the whole provision was argued by the Government. It was suggested that if the words "it is proved that" were removed, what remains would still give effect to the main objective of the statute. In *Coetzee v Government of the Republic of South Africa; Matiso and Others v The Commanding Officer, Port Elizabeth Prison and Others*,[51] Kriegler J, speaking for this Court, articulated the test as follows: " . . . first, is it possible to sever the invalid provisions and second, if so, is what remains giving effect to the purpose of the legislative scheme?" Put differently, the rule to be applied is that "where it is possible to separate the good from the bad . . . and the good is not dependent on the bad, then that part of the Statute which is good must be given effect to, provided that what remains carries out the

[51] 1995(4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 16.

main object of the Statute."[52] It is indeed true that if severance would achieve the effect of preserving the provision in a form which is consistent with the Constitution, that route must be followed. The Government suggested that the excision of the words indicated would have the effect of removing the onus of proof from the accused and placing it on the prosecution. In his judgment, Kentridge AJ proposes that the effect of excising the words "it is proved" would be to cast an evidentiary, rather than a legal burden as is the case at present, on the accused. He suggests that the effect of this change would be to keep the provision within the bounds of constitutionality. O' Regan J's judgment goes somewhat further. She suggests that the words " it is proved that he did not take part in the commission of the offence and that" should be severed. The result, according to her, would be a shift of onus from the accused to the prosecution. I agree with Kentridge AJ that the effect of the excision, as suggested by the Government and as proposed in the learned judgments of Kentridge AJ and O'Regan J, would raise the issue of whether the interpretation of the provision would be affected by the provisions of section 90 of the Act. I consider, with respect, that it would. The interpretation of the provision would have to be dictated by the language used. The effect of the "unless" clause in the truncated version would be to introduce an exception and this would immediately place the provision within the purview of section 90 of the Act. I am of the view that it is not open to the Court to assign an interpretation to the provision in order to make it constitutionally acceptable, if that interpretation is not supported by the words used. Such

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[52] Per Centlivres CJ in *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (A) at 822C-E.

an exercise would introduce more uncertainty into the interpretative task of the courts. In this case, if the suggested words are excised, the ordinary meaning of what remains would still constitute a legal burden.[53] It follows that once the truncated version cannot escape the effect of section 90 of the Act, the severance serves no useful purpose and therefore cannot be resorted to.

[52] The following order is accordingly made:

1. Sections 245 and 332(5) of the Criminal Procedure Act No 51 of 1977 are inconsistent with the Republic of South Africa Constitution Act 200 of 1993 and are, with effect from the date of this judgment, invalid and of no force or effect.

2. In terms of section 98(6) of the Constitution, this declaration of invalidity shall invalidate any application of sections 245 and 332(5) of the Criminal Procedure Act 51 of 1977 in any criminal trial in which the verdict of the trial court was or will be entered after the Constitution came into force, and in which, as at the date of this judgment, either an appeal or review is pending or the time for noting such appeal has not yet expired.

3. The matter of the State versus ABRAHAM LIEBRECHT COETZEE,

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53 *R v Shangase* 1960 (1) SA 734 (A).

HENDRIK SCHALK COETZEE, PIETER LE ROUX DE BRUIN and JOHAN MARAIS is referred back to the Witwatersrand Local Division of the Supreme Court to be dealt with in accordance with this judgment.

Kriegler J concurs in the judgment of Langa J.

CHASKALSON P:

[53] I concur in the judgments of Mahomed DP and Langa J, and in the order proposed by Langa J. I also agree with Ackermann J's analysis of the purpose of section 332(5) and with his conclusion as to the consequences this has for the severance proposed by O'Regan J.

MAHOMED DP:

[54] I have had the benefit of reading the judgments prepared by my colleagues in this matter. I agree with the order proposed by Langa J. However, in view of the different views and nuances which appear from these judgments I consider it desirable to set out very briefly my approach to some problems which have manifested themselves during and after argument in this case.

[55] I have nothing to add to the judgment of my colleague Langa J with regard to section 245 of the Criminal Procedure Act. That section is manifestly and demonstrably unconstitutional for the reasons articulated in his judgment. I also have nothing to add to the unanimous view of my colleagues that the reference to "a servant" contained in section 332(5) of the Act is indeed unconstitutional.

[56] With regard to the remaining part of section 332(5) there are two separate questions which arise. Firstly, does the section constitute an invasion of section 11 of the interim Constitution ('the Constitution')? Secondly, does the section properly interpreted constitute a breach of section 25(3)(c) of the Constitution?

[57] In his analysis of the subsection Kentridge AJ considers that section 332(5) could have been enacted without creating the qualification introduced into the subsection

beginning with the word "unless". He believes that the subsection can therefore not be open to any constitutional attack based on section 25(3) because the qualification effectively gives to an accused person an opportunity to escape the consequences which would have ensued without the qualification. On this approach section 25(3)(c) becomes irrelevant to any enquiry into the constitutionality of the impugned section. I am respectfully unable to agree with this approach. If section 332(5) was enacted without the qualification it would in my view not have survived constitutional attack. It would have been vulnerable to challenge under section 11 of the Constitution because it constituted a fundamental breach of the right to freedom and security of the person. Every director of a corporate body which had committed an offence would, himself or herself, irreversibly have been deemed guilty of the same offence, however remote be her or his connection with the offence, and however difficult it was for such a director to have knowledge of the commission of the offence or to prevent it. Such a provision would so seriously have undermined the freedom and security of every director as to offend the basic guarantee of freedom secured by section 11 of the Constitution. It would have operated in an invasive and unacceptable manner to discourage, to deter and to impede people in this country from continuing to engage in valuable entrepreneurship through the mechanisms of corporate bodies which are crucial to the effective direction of modern industrial society.

[58] If section 332(5) is to be saved from attack under section 11 it must therefore be because the qualification contained in the subsection, to which I have referred, prevents

the consequences which would otherwise have operated to invade the guarantees contained in section 11.

[59] The qualification introduced by section 332(5) is therefore fundamental to its structure and central to the proper identification of the mischief or the evil which is sought to be addressed by the legislation. The mischief targeted is not persons being directors of corporate bodies which have committed offences: it is directors who take part in the commission of the offence and directors who knew of the offence and fail to prevent it when they are able to do so. This is the real heart of the offence, the real target of the legislation, its raison d'être.

[60] Section 332(5) achieves this by requiring the accused to prove that he or she did not participate in the offence and could not have prevented it. The result is this: if at the end of the case the court has a reasonable doubt as to whether or not the accused took part in the commission of the offence by the corporate body, or a reasonable doubt as to whether or not the accused could have prevented the commission of that offence, the court would nevertheless be required to convict such an accused. Prima facie this seems to me to be a breach of the presumption of innocence contained in section 25(3) of the Constitution.

[61] On my analysis of section 332(5) there is therefore a clear breach of section

25(3)(c) of the Constitution. The only way in which its constitutionality could be upheld would be if it could be justified under the limitations authorised by section 33(1) of the Constitution. In my view there is no justification for any such limitation because of the wide ambit of the purported operation of section 332(5). The offence by the corporate body for which the accused director can be held liable is not limited at all. No attempt is made to confine its operation to a limited class in which there may be sound grounds of public policy for directors of corporate bodies to maintain a high degree of circumspection, diligence and vigilance in order to protect members of the public against offences committed by corporate bodies which can have prejudicial effects on the health and wellbeing of the general community. There is no attempt in section 332(5) to limit such offences to offences of a 'regulatory' character. All offences are included whatever be their nature, whatever be their purpose and however remote be their connection with the ordinary purposes and activities of the corporate body.

[62] These conclusions make it unnecessary for me to decide whether or not the impugned subsection, on my interpretation, can successfully be challenged under section 11 of the Constitution. I would prefer to leave that question open. The question whether a statute can legitimately provide for the criminal liability of an accused person without requiring mens rea in the form of either dolus or culpa and, if so, the circumstances under which this might be permissible, raise different questions of interpretation and policy which might have to be considered in the future in the appropriate case, namely, where a

decision on these issues is necessary and the Court has heard full argument.

[63] Notwithstanding the conclusion to which I have come on my analysis of section 25(3)(c), and the limitations clause in section 33(1), I do appreciate the need for proper legislation to protect large sections of society from the injurious consequences of the conduct of corporate bodies engaged in fields of activity crucially impacting upon society and the need for effective deterrence against such activities, often conducted by directors operating under the protective shield of the corporate body. Inter alia for this reason, I have given consideration to the suggestion by Kentridge AJ (in paragraphs 107-9 of his judgment) that the impugned section can be saved simply by deleting the words "it is proved that" within the section. Kentridge AJ suggests that the effect of such a severance could be to put an evidential burden on the accused. O'Regan J, (in paragraphs 202-3 of her judgment) in turn suggests severing the words "it is proved that he did not take part in the commission of the offence and that" which, so she holds, would result in the prosecution bearing the onus of proving that an accused, who did not take part in the commission of an offence, could have prevented it.

[64] I cannot agree with either suggestion and subscribe to the view espoused by Langa J in paragraph 51 of his judgment. In arriving at that conclusion I am persuaded by the reasoning of both Langa J and Didcott J. Excision of neither set of words would materially affect the linguistic meaning or the legal effect of the subsection. It does not

say: "unless it is proved by the accused"; yet, it has always been construed by our courts as meaning this and not as meaning "unless it has been proved by the prosecution."[1] Saying that a director is deemed to be guilty unless he did not or could not have done something, does not result in the onus of proof - nor even an evidentiary burden - being cast on the prosecution in respect of participation by a director in the commission of the corporation's crime or the director's inability to have prevented such commission. I am in full agreement with Didcott J's analysis of the effect of the use of the conditional word "unless" followed by the negative. The negative formulation of an exclusion from liability which follows the deeming provision contained in the main clause is structurally an exception to the main clause, and because of this the words "it is proved" have been consistently construed by the courts as meaning "it is proved by the accused".[2] Deletion of the words "it is proved that" or of the words "it is proved that he did not take part in the commission of the offense and that" cannot logically have the result of converting an

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1 See eg, *R v Zondagh* 1931 AD 8; *R v Dekker* 1931 AD 17; *R v Beebee* 1944 AD 333; *R v Kula & Others* 1954 (1) SA 157 (A); *R v Limbada and Another* 1958 (2) SA 481 (A); *S v Klopper* 1975 (4) 773 (A); *Attorney General, Cape v Bestall* 1988 (3) SA 555 (A); *S v Blaauw* 1989 (1) SA 202 (A).

2 Id.

exception into an essential element, and of changing the meaning of the subsection from "it is proved by the accused" to "it is proved by the prosecution."

[65] There is moreover much to be said for the view that the subsection, on either truncation proposed, would trigger the application of section 90 of the Act, which in itself casts a full onus on an accused in respect of exceptions, exemptions and the like. Reading the subsection as it stands, or reading it subject to either proposed deletion, results in an accused director having to disprove the one, the other or both of the factors introduced by "unless", in order to avoid being struck by the deeming provision. In order to attain an acquittal the director bears the onus. Failure to discharge that burden, notwithstanding the existence (and persistence) of a reasonable doubt as to guilt may result in a conviction. Therein lies the unconstitutionality.

Kriegler J concurs in the judgment of Mahomed DP.

ACKERMANN J:

[66] Save for the ultimate positive conclusion which O'Regan J reaches on the question of severance in respect of section 332(5) of the Criminal Procedure Act I fully agree with her judgment in this matter. My disagreement with my learned colleague relates solely to her application of the second part of the severance test, namely, whether what is left after the severance proposed by her still gives effect to the main object of the section and her affirmative conclusion in this regard.

[67] This is not the sort of case, referred to by Kriegler J in *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others*, 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 16, which might require special treatment on the issue of severability. Here, as there, the trite test can properly be applied. What is left after the severance is a provision which in substance imposes criminal liability on the director of a corporate body for an offence committed by that corporate body in circumstances where the director, although aware of the commission of the offence and able to prevent its commission, desists from doing so. This, in my view, is for all practical purposes the same offence as that embodied in section 332(5) before severance, on the construction given in *S v Klopper* 1975 (4) SA 773 (A) at 780-1; the effect of severance merely being the removal of the reverse onus provisions.

[68] In determining what the main object of section 332(5) is, it is crucial to determine whether its provisions (ignoring the evidential effect of the reverse onus) constitute a new offence or a new substantive basis for imposing criminal liability on directors, or whether they are substantially the same as the common law. In my view they are substantially the same as, if not identical to, the common law. If an employer, being able to control a physical act of a servant of which he or she is aware and which would constitute a crime, forbears to prevent it, such forbearance constitutes an implied authority to commit the act; the employer is guilty as a socius criminis and the element of mens rea is provided by the employer's own mental condition (*R v Shikuri* 1939 AD 225 at 230-1; *R v Bennett and Co (Pty) Ltd and Another* 1941 TPD 194 at 199-200; *R v Van der Merwe* 1950 (4) SA 124 (0) at 128F-129A; *S v Claasen* 1979 (4) SA 460 (ZRA) at 463H).

[69] This principle must apply, a fortiori, to the case of a director who, having a fiduciary duty to the company in question, is aware of acts being performed which would render the company criminally liable, is in a position to prevent such acts but forbears from doing so. By such forbearance the director must likewise be taken to authorise impliedly the commission of the acts and is liable as socius criminis. In *R v Blackmore and Another* 1959 (4) SA 486 (FC) at 490H-491A the court, in an obiter dictum, was prepared to extend the principle to company directors but found it unnecessary to do so for purposes of its decision. In my view there would be a duty on the director to act to prevent the commission of acts which would render the company liable to criminal

prosecution and his intentional failure to prevent the commission of these acts, if he were in a position to do so, would render him criminally liable as a socius criminis (compare Burchell and Milton *Principles of Criminal Law* (Juta, Cape Town 1991) 84-7; Snyman *Criminal Law* 2ed (Butterworths, Durban 1989) 50-2, 266-8; *S v Timol and Another* 1974 (3) SA 233 (N) at 235G and *S v Williams en 'n Ander* 1980 (1) 60 (A) at 63D-E. The dearth of authority on the extension of this common law principle to directors is no doubt due to the fact that since the introduction into the Criminal Procedure Act 31 of 1917 of the precursor to section 332(5) prosecutors have, because of the reverse onus provisions in the statutory provisions, not found it necessary to rely on the common law to secure the conviction of directors.

[70] From the above conclusion it must follow that the main (if not the exclusive) object of the section is limited to the reversal of the onus of proof in respect of material elements of an offence and principles of criminal liability of directors which exist at common law. It is therefore impossible to conclude that a severance which does no more than to do away with the reverse onus provisions gives effect to the main objects of the section; in fact it does the reverse.

[71] In my view it is therefore not possible to sever the onus provisions from section 332(5) and I accordingly concur with the order proposed by Langa J.

DIDCOTT J:

[72] I concur in the grant of the order proposed by Langa J and in the judgment which he has written in support of that. I also agree with the judgment prepared by Mahomed DP, especially the fundamental part pertaining to the effects that sections 11(1) and 25(3)(c) of the interim Constitution have on the present case and their relationship there with each other, which I find wholly convincing. Some comments of my own will nevertheless be added to the criticisms levelled already at section 332(5) of the Criminal Procedure Act, the one that has become controversial. They concern its overbreadth and the consequences of that, as I view those topics.

[73] An obvious point at which section 332(5) goes too far, and to which several earlier judgments written in this matter have drawn attention, is found where it includes within its ambit every "servant" of the corporate body in question, a description not restricted to an employee with managerial functions or responsibilities but one so wide that it embraces the humblest and most menial worker. The word lends itself readily and on all counts, however, to severance from the rest of the subsection. So, by simply striking it out, we could have repaired the subsection if its presence there had been the only fly in the ointment. But that is not the case.

[74] The allusion to an "offence" also contributes to the width of section 332(5). The

offences which it encompasses are not confined to those committed either peculiarly or mainly by corporate bodies, to the sort that have been created for instance in order to control or regulate their affairs or the activities familiarly undertaken by them. All other crimes are covered as well, crimes which anybody else may happen to perpetrate in contravention of the common law or some statutory decree. The extra coverage is both superfluous and foreign to the store which Kentridge AJ has set in his judgment by the frequent need for such control and regulation. We cannot constrict the subsection there by using the tool of severance or resorting to a limited interpretation. A remedial qualification would have to be introduced, one tantamount to an amendment of the wording which lay beyond our competence.

[75] I come next to the respect in which the overbreadth of the section 332(5) troubles me most. Here too no narrower meaning can be achieved by either severance or a restrictive reading. Here too nothing but an amendment can accomplish that. I refer to the mention made of "any corporate body". No distinction is drawn between companies incorporated with limited liability and other corporate bodies. Nor, within the field of companies, does the subsection differentiate between public and private ones, between companies which solicit and receive money from investors and those that never do, or between companies engaged in trading, manufacturing or any other business with the public and the types that are not. All are treated alike, and in the same deep breath. The impact of the subsection is then spread further by section 332(10) of the statute, which

declares that:

> "In this section the word 'director' in relation to a corporate body means any person who controls or governs that corporate body or who is a member of a body or group of persons which controls or governs that corporate body or, where there is no such body or group, who is a member of that corporate body."

I agree with Kentridge AJ that it is quite fanciful to imagine the vice-chancellor of a university or the chairman of its council being prosecuted for the negligent driving by one of its servants of a vehicle belonging to it which was driven in the course of his or her employment there. But, between the extremes of that hypothetical situation and those much more realistic where a high level of personal responsibility can rightly be expected, lies a large area in which the prosecution of a director as defined of "any corporate body" is less far-fetched and would often be oppressive.

[76] One example will suffice, I hope, to illustrate that point. It has to do with the private ownership of individual units in blocks of flats and complexes of cluster housing that stand on single plots of land. The legal ownership of such units can be acquired only through separate sectional titles. Rights that are less than but comparable in their effects with those of legal ownership, bestowing some of its important advantages, can and have to be obtained by means of shares held in the shareblock companies which own the land and buildings. The two alternative schemes have become so popular that they amount nowadays to a substantial and significant feature of our housing scene, especially in the

bigger and more affluent urban areas. Their popularity is likely to grow in the future. The result has been, and in all probability will continue to be, the proliferation throughout the country of the bodies corporate which manage the properties owned by sectional titles and the shareblock companies controlling the properties enjoyed through them. In paragraph 98 of his judgment Kentridge AJ has expressed the view that:

> "Those who choose to carry on their activities through the medium of an artificial legal *persona* must accept the burdens as well as the privileges which go with their choice."

The owners or quasi-owners of the properties which I now have in mind make no such choice, however, since none but Hobson's sort confronts them. For in no other way can they gain titles to their dwellings. Nor do I see why that state of affairs should affect adversely those whom they appoint, by and large from their ranks, as trustees of their bodies corporate or directors of their shareblock companies. Neither kind of structure conducts any business besides the running of the property in the interests of its residents. No funds are handled by either but the ones which the holders of the units or shares are required to contribute. No dividends are paid in turn to them. Nor is any interest. Such nett profit as may accrue from the administration of the property is invariably appropriated to future expenditure or to the reduction of future contributions. Yet, despite the predominantly domestic nature of their activities, bodies corporate and shareblock companies may find themselves charged with misdeeds. Their income tax returns may not have been lodged timeously. A town planning scheme may have been contravened. A

malfunction in the lift at a block of flats may have caused its collapse and the death of a person using it for which the body in question is said to be culpable. Further examples are easily conceivable. It seems hardly fair that part-time and unpaid trustees or directors, as they certainly are on the whole, should be exposed personally to threats of criminal liability greater than the risks ordinarily run by individuals.

[77] The overbreadth of section 332(5) in the second and third respects which I have discussed, viewed alongside the analysis by Mahomed DP of its other effects, satisfies me that it would have been incompatible with section 11(1) without the qualification introduced by the word "unless"; that section 33(1) of the interim Constitution would not have preserved it in that event from nullification on the score of such incompatibility; and that, once the qualification enters the reckoning, the palpable inconsistency between it and section 25(3)(c) which then arises is likewise inexcusable under section 33(1) and accordingly invalidates it.

[78] Kentridge AJ has suggested, however, that any inconsistency with section 25(3)(c) could be remedied by the simple excision from section 332(5) of the words "it is proved that" which appear in the qualification immediately after "unless", together with the next "that". The present reverse onus would then be converted, he considers, into a mere evidential burden resting on the defence which was inoffensive to section 25(3)(c). I cannot unfortunately agree with him. The deletion which he recommends would not, in

my opinion, produce the transformation envisaged. It would make no difference at all that I can see to the meaning of section 332(5), to which the words in question contribute nothing apparent to me. The qualification postulates two material circumstances, firstly the fact that the director who is prosecuted took no part in the commission of the offence, and secondly the fact that he or she could not have prevented its commission. One side or the other has to prove either those circumstances or their converse. The prosecution would have been saddled with the onus of proving the converse had the subsection decreed that the guilt of the director was deemed "if" he or she had participated in or could have prevented the commission of the offence. But the defence would still need to prove both facts, to elevate them from postulated to actual ones, were guilt to be deemed in accordance with the severance "unless" the director did not take part in and could not have prevented the commission of the offence. That strikes me as the obvious and inescapable effect of the attenuated wording, and in particular of the conjunction "unless", followed by a notion couched in negative terms, rather than the contrary conjunction "if", used in relation to a thought expressed positively. It is a meaning so clear, to my mind, that the subsection without the words scrapped by the severance would not even rank as a provision reasonably capable of bearing an interpretation which substituted a mere evidential burden for the prevailing onus of proof. On that footing, if I am right there, section 35(2) of the interim Constitution does not enter the picture.

[79] The judgment delivered in *R v Shangase*[1] supports the construction which I have

placed on the truncated version of section 332(5) resulting from the deletion proposed. The case had to do with a statutory provision which forbade any "native" as defined to stay in an urban area for longer than a specified period "unless. . . permission so to remain has been granted to him", and declared a contravention of the prohibition to be an offence. The Appellate Division held[2] that the onus to prove the grant of permission had thus been cast on the person charged with the offence. And it did so, I underline, notwithstanding the absence from the provision in question of any such words preceding "permission" as "it is proved that". The qualification examined then was classified in the judgment, to be sure, as an exception or the like for the purposes of the statutory predecessor to section 90 of the Criminal Procedure Act. Perhaps the one in issue now would be so rateable too under section 90, in the event of and after the surgery suggested for it. But that is neither here nor there. My interpretation does not depend on a recourse to section 90. It turns on the particular wording of the residue surviving the surgery. I therefore find it unnecessary in this case to undertake a constitutional appraisal of section 90 itself.

[80] In the part of his judgment that deals with severance Kentridge AJ has relied on some Canadian decisions and on one given in an appeal emanating from Hong Kong.

Those cases, especially the latter, may well be distinguishable from the present matter on the grounds of material differences between the phraseology employed in the foreign legislation and the wording which we must construe. If the decisions cited are in point because that is not so, however, I am unwilling to follow them.

[81] Severance is also favoured by O'Regan J in the judgment which she has prepared. But she goes distinctly further than Kentridge AJ does, proposing the removal from section 332 (5) of the words "it is proved that he did not take part in the commission of the offence and that". The adoption of her suggestion would leave intact the phrase "unless... he could not have prevented it" and deem the director guilty otherwise. The effect of that exercise, she maintains, would be no burden at all resting on the defence, not even an evidential one besides any imposed elsewhere by the need to answer a *prima facie* case, but a full onus transferred to the prosecution on the issue whether the director could have prevented the offence from being committed. She obviously presupposes a factual situation where the director took no part in the commission of the crime. For his or her participation in that would have amounted in any event to a personal guilt under the common law. No occasion could then arise for the same person's guilt to be deemed on the score of an ability to have prevented the commission of the offence. Nor would it make much sense to enquire whether its perpetration was preventable by a participant in that very conduct. It follows from what I have said already about the force of "unless" combined with the negatively shaped phraseology which comes next, however, that I do

not agree with O'Regan J either. I fail to see how the abridged qualification for which she votes can rightly be construed by reading "unless" as "if", by ignoring the "not" in the clause that starts with the conjunction, and accordingly by treating the phrase as it would have run had its formulation been "if he could have prevented it". That bold course is simply not open to us, I consider, in the face of words so clear, so unambiguous and so unequivocal as those which were actually used. Such a departure from them smacks more of redrafting the subsection than of interpreting it.

[82] Nor, if the remnant left after her abridgement bore the meaning ascribed to it by O'Regan J, would it appear to pass one of the usual tests set for severability, the test prescribed in *Johannesburg City Council v Chesterfield House (Pty) Ltd*,[3] when Centlivres CJ declared:

> "The rule . . . is that where it is possible to separate the good from the bad in a statute and the good is not dependent on the bad, then that part of the statute which is good must be given effect to, provided that what remains carries out the main object of the statute... In such a case it naturally follows that it is impossible to presume that the legislature intended to pass the statute in what may prove to be a highly truncated form: this is a result of applying the rule I have suggested and is in itself not a test."

We used that test and found it to have been met in *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others.*[4] On that occasion Kriegler J, who wrote the judgment endorsed by the majority

of the Court, left room for the future evolution of some or other exception to the rule by adding the rider that "severability in the context of constitutional law may often require special treatment".[5] No reason why we should not apply the same test to section 332(5) was advanced in argument, however, or occurs to me. What we have to examine in then going ahead can hardly be "the main object of the statute", which is much too general and broad for our purposes once the Criminal Procedure Act happens to be that statute. We must look instead at the particular object of subsection (5), viewed within the setting of the whole section and with the help of any light which the rest of that may shed on it. Yet I am far from clear in my own mind how we are expected to identify the "main object" of a statutory provision that apparently has not just one object, but collateral objects of equal importance which vary in their levels, directions and thrusts. Some may consider that to be the case here. Ackermann J believes that the main object of the subsection is reversing the onus of proof in the prosecutions and on the issues covered by it. O'Regan J accepts that as a major object, but couples it with and attaches an equivalent weight to another which she deduces, the object of imposing a duty on directors to prevent their corporate bodies from committing offences whenever they can do so. I doubt that what are said to be those objects amount in truth to such. The second sounds like a consequence attributed to the operation of the subsection rather than an object of the subsection itself. The first, it seems to me on the other hand, is not so much an object as the way in which an actual and anterior one was intended to be achieved. Ends have been confused there, I venture to suggest in short, with means. Nor, once the main object of a provision is

defined as simply the enactment of that very provision, can any object ever remain after the provision disappears for effect to be given to it. The object which I therefore prefer imputing to the subsection is this. It was designed to ensure or encourage the disclosure by persons prosecuted under it of information which had a bearing on the charges, and to preclude them from hiding behind corporate veils, when the true circumstances pertaining to the internal workings of their companies or other bodies were seldom known to outsiders but usually ascertainable from them. The construction placed by Kentridge AJ on the product of his severance accomplishes that object. But the one which O'Regan J puts on the outcome of hers does not.

KENTRIDGE AJ

[83] I have had the advantage of reading the judgment of Langa J in this case. I am in full agreement with his reasons for holding section 245 of the Criminal Procedure Act 51 of 1977 ("the Act") to be unconstitutional, and with the order which he proposes insofar as it applies to that section.

[84] The question of the constitutionality of section 332(5) of the Act raises more complex issues. Langa J has fully analysed the elaborate written and oral arguments placed before us both by the applicants and the South African Government and has given a lucid account of the complex Canadian case law - case law which counsel for both parties cited generously and relied on heavily. I am indebted to these analyses, but my own approach to the issues raised differs from that of Langa J.

[85] In the course of argument we were referred by counsel to the judgments of the Appellate Division in *R v Limbada and Another,*[1] a case concerned with a subsection in an earlier Criminal Procedure Act[2] in substantially the same terms as section 332(5). In those judgments a difference of view emerged between Steyn JA, speaking for the majority, and Schreiner JA, as to the nature of the subsection. In brief, Steyn JA considered that the subsection was "essentially ... an evidential provision": it did not "bring into existence a distinct ... offence".[3] Schreiner JA on the other hand, took the view that the subsection did create a statutory offence and was not merely evidential in

effect. This difference of opinion has, however, little relevance to the present case. In *S v Klopper*[4] Kotzé AJA giving the judgment of the Appellate Division, pointed out that the issue in *R v Limbada*[5] had been merely whether the indictment against the accused had been properly drawn. He held that the relevant subsection had the effect of imposing vicarious criminal liability on the directors or servants of a corporate body. Much earlier, in *R v Smith and Others*,[6] De Villiers J had regarded it as beyond question that the subsection imposed a vicarious liability on the directors or servants of a company. In *De Wet and Swanepoel, Strafreg*[7] the learned author says that the subsection does not create a new type of offence, but undoubtedly creates a new form of liability for the offence of another. This characterisation of the subsection must, with respect, be correct. That it was the intention of the legislature to create vicarious liability appears beyond question from the language of the subsection. The "deeming" provision does not create an evidential presumption but creates and defines the new form of criminal liability. The applicants' argument to the contrary is in my view unsustainable.

[86] Liability for the crime of another is a form of strict or absolute liability, i.e. a liability imposed on an accused without personal fault on his part. As far as I am aware vicarious criminal liability is unknown to the Roman-Dutch common law.[8] But in modern statute law it is not uncommon. In South Africa, as in other countries, the complexities and the pervasiveness of commercial and industrial endeavour, and the need to control them in the public interest, have led in several instances to the creation of vicarious

criminal liabilities.[9] The main examples which come to mind are to be found in statutes regulating the handling of products which are potentially harmful either socially[10] or physically.[11] In those instances the statute permits the accused to escape an otherwise strict vicarious liability by establishing a defence that he or she had used due diligence to prevent the commission of the crime. Although this seems to be a common provision I would observe that it is in each case a matter of legislative policy. Parliament might have imposed an absolute vicarious liability for the misdeed of another without any defence or excuse being available to the accused. In such a case the State would have to prove beyond reasonable doubt all the elements giving rise to the vicarious liability including the commission of the original offence for which the accused is to be held vicariously liable. In the absence of any special defence there could be no question of any onus being placed on the accused: that would not arise. If such a statute were before this Court for constitutional scrutiny there could therefore be no question of any infringement of section 25(3) of the Constitution. The accused would be presumed innocent until the prosecution had proved all the elements necessary to give rise to the statutory criminal liability. The accused's right of silence would remain. One could not point to any factor in the statute itself impairing the fairness of the criminal trial for its contravention. The question of the legitimacy of such a statute would be a different matter. That would fall to be tested not under section 25 of the Constitution but against other provisions of the Constitution, such as section 11(1) which protects the right to freedom and security of the person.

[87] Section 332(5) of the Act reads as follows:

> "When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor."

Accordingly, if section 332(5) had omitted the words "unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it", the applicants' attack on the section, based as it was on the placing of a legal burden of proof on the accused, could not have been mounted. It could not have been submitted that the accused was liable to be convicted despite the existence of a reasonable doubt as to his guilt. The prosecution would have had to prove beyond a reasonable doubt all the elements set out in the section. By definition, no reasonable doubt as to the guilt of the accused could remain. There could thus have been no basis for an attack on the constitutionality of section 332(5) as being an impairment of the right to a fair trial under section 25(3) of the Constitution. Indeed, I understood Mr Gilbert Marcus, who presented the oral argument for the applicants, to accept that that must be so.

[88] The legislature did not in fact choose to create an absolute vicarious liability. It chose to mitigate what would otherwise have been the harshness of the provision, by

permitting an accused director or servant to escape liability upon proof, on a balance of probabilities, of the two exempting factors which I have set out in the previous paragraph. As a matter of logic and common sense I find it difficult to accept that in thus rendering the impact of the section less severe than it would otherwise have been, the legislature was thereby rendering a trial under the subsection less fair than it would otherwise have been. With all respect to the well-argued submissions of the applicants' counsel I would venture to say that this analysis of section 332(5) is a short and complete answer to the attack based on section 25(3) of the Constitution. Nonetheless, the applicants' counsel have firmly maintained that, whatever the position might have been in the absence of the exempting provisions, the inclusion of those provisions leads to the infringement of section 25(3). They submit that its effect is to permit the conviction of accused persons notwithstanding the existence of a reasonable doubt as to their guilt, a consequence which offends against the presumption of innocence. They put this argument on two alternative bases.

[89] Their first submission is that the subsection created a new offence, or at least a new criminal liability, and that an essential element of that offence or liability was that the accused must either have participated in the commission of the offence or have been able to prevent it. If, they say, that requirement were "relegated to the status of a mere exception, exemption or excuse", then the provision would mean that it was a criminal offence to be a director or servant of a corporation which had committed an offence.

That, they say, would be "absurd". I do not agree that that result must necessarily be stigmatised as absurd, given the policy of the legislature which seems to be, broadly speaking, to ensure within limits that some natural person is liable for the criminal offence of a corporate body. But in any event, one must read the subsection as it stands. It in fact expresses non-participation in, and inability to prevent, the corporation's offence as matters of exception, exemption or excuse. Reference was made to cases on section 90 of the Act and its predecessors, in particular to *R v Beebee*[12] and *R v Kula and Others.*[13] That section and those cases deal with the essentials of charge sheets or indictments where the offence charged is subject to a statutory exception, exemption or excuse. Their relevance to the present issues is in my view marginal. But whether one applies the truncation test suggested by Watermeyer CJ[14] in the former case or the broader method of construction preferred by Schreiner JA[15] in the latter, the language of the subsection leaves me in no doubt that the "unless" clause does not constitute an element which the prosecution must negative, but in terms creates an exemption or excuse which the accused may prove by way of defence. No more need be charged than that the accused was a director or servant of a corporate body which was liable to be prosecuted for a specific offence. It is then for the accused to bring himself or herself within the permitted defence. I am accordingly not in agreement with the applicants' construction that an essential element of the offence created by section 332(5) is that the accused participated in its commission or could have prevented it.[16]

[90] The applicants' second and alternative submission requires more detailed consideration. They contend, relying largely on a line of cases in the Supreme Court of Canada, that once a criminal statute contains a reverse onus provision in the sense of a provision requiring the accused to provide proof of some fact in order to escape conviction, it is irrelevant whether that onus relates to an essential element of the offence or to a defence by way of excuse or exemption. In either case the presumption of innocence is destroyed and the fairness of trial impaired. Section 11(d) of the Canadian Charter of Rights entrenches the presumption of innocence as an essential element in a criminal trial. The Supreme Court of Canada has frequently had to consider whether reverse onus provisions violated that provision of the Charter. The essence of those Canadian judgments on which the applicants rely is perhaps to be found in the following passage in the judgment of Dickson CJC in *R v Whyte*:[17]

> "The short answer to this argument [that the reverse onus provision did not relate to an essential element of the offence] is that the distinction between elements of the offence and other aspects of the charge is irrelevant to the s. 11*(d)* inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.
>
> The exact characterisation of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused."

That passage was quoted in full in the judgment of this Court in *S v Zuma and Others.*[18] Canadian courts have followed and applied it in a number of other cases.[19] The applicants argue forcefully that the principle stated by Dickson CJC applies to section 332(5). They say, in paragraph 11 of their supplementary written submissions:

> "In the present case, the reverse onus provision introduces the inevitability of conviction of the accused despite the existence of reasonable doubt whether he participated in the offence or could have prevented it. His conviction despite this reasonable doubt, violates the presumption of innocence."

[91] There seems at first sight to be much force in this submission, particularly as in this field this Court has derived much guidance from the reasoning of the Canadian courts.[20] I should point out, however, that in my judgment in *S v Zuma*, in which the other members of this Court concurred, the constitutionality of reverse onus provisions in exceptions, exemptions or provisos to statutory offences, as referred to in section 90 of the Act, was expressly left open.[21] Moreover, the above quoted passage in the judgment of Dickson CJC, clear as it is, is not to be read as if it were a praetor's formula, or a statute, to be applied to every case that could be said to fall within its language. Judges of the Canadian Supreme Court have often pointed out that the protections to be found in their Charter of Rights are to be interpreted and applied according to the context in which they may arise and not in the abstract. Thus, in *Edmonton Journal v Alberta (Attorney-General)*[22] Wilson J stressed the need for a contextual approach to Charter interpretation. She said:

> "One virtue of the contextual approach it seems to me, is that it recognises that a particular right or freedom may have a different value depending on the context."

In *R v Wholesale Travel Group Inc*.[23] La Forest J said that certain procedural protections may be constitutionally mandated in one context and not in another.[24] The context in that particular case was a statute which made it an offence to publish false or misleading advertising. The offence was one of strict liability subject to the defence of due diligence, with the legal burden of proving due diligence being on the accused. There were other aspects of the statute which complicated the case, but one of the issues was whether that reverse onus provision was in conflict with section 11(d) of the Charter. Iacobucci J, with the concurrence of at least a plurality of the Court held that it did.[25] This was not a unanimous view. Cory J with the concurrence of L'Heureux-Dubé J held that it did not. The relevant context, he said, was that the statute under attack was designed for the regulation of industry and commerce in the public interest, and was a form of public welfare legislation. He said at 224:

> "The reasons for ascribing a different content to the presumption of innocence in the regulatory context are persuasive and compelling. As with the *mens rea* issue, if regulatory mechanisms are to operate effectively, the Crown cannot be required to disprove due diligence beyond a reasonable doubt. Such a requirement would make it virtually impossible for the Crown to prove regulatory offences and would effectively prevent governments from seeking to implement public policy through regulatory means."

Later Cory J said:

> "Criminal offences have always required proof of guilt beyond a reasonable doubt; the accused cannot, therefore, be convicted where there is a reasonable doubt as to guilt. This is not so with regulatory offences, where a conviction will lie if the accused has failed to meet the standard of care required. . . . If the false advertiser, the corporate polluter and the manufacturer of noxious goods are to be effectively controlled, it is necessary to require them to show on a balance of probabilities that they took reasonable precautions to avoid the harm which actually resulted. In the regulatory context, there is nothing unfair about imposing that onus; indeed it is essential for the protection of our vulnerable society."

I shall consider in due course whether section 332(5) of the Act can be regarded as a "regulatory" statute. I should in any event point out (as did Langa J) that even outside the regulatory context the Canadian cases do not speak with one voice. In paragraph 34 of his judgment Langa J refers to *R v Holmes*.[26] There a section of a criminal statute provided that:

> "Every one who, without lawful excuse, the proof of which lies upon him, has in his possession an instrument suitable for the purpose of breaking into any place ... is guilty of a indictable offence...".

The Supreme Court held that the presumption of innocence was not violated, because the prosecution was required to prove its case beyond a reasonable doubt without the benefit of any presumption, before any need for defence arose. That, as I have pointed out above, is the position with section 332(5). McIntyre J, at 706, giving the majority judgment said:

> "If he is convicted in the face of such a defence, it is not because he has been presumed

> guilty or because the commission of the crime has not been shown, but because his excuse was rejected after proof of the commission of the offence."

I find this approach highly convincing and very much in point. In section 332(5) of the Act the primary object of the legislature was to introduce a vicarious liability for corporate crimes. If an accused is convicted under the section it will be because all the elements required by the subsection in order to give rise to that liability have been proved beyond a reasonable doubt and because the excuse provided for by the subsection has not been established. That is not to be equated with a conviction in the face of reasonable doubt as to guilt. In such a case, as in *R v Holmes,*[27] the prosecution must prove its case fully by factual evidence without the benefit of any presumption. The applicants submitted that the section created a presumption that the accused took part in the commission of the company's offence and could have prevented it. With all respect, no such presumption is to be found in section 332(5). Nor does the prosecution require to invoke such a presumption in order to succeed.

[92] I have referred in some detail to the Canadian authorities because, as I have said, they provided the main support for the submission of the applicants. I do not presume to state the law of Canada. I merely point out that the Canadian authorities taken as a whole do not provide a sure and unequivocal foundation for the applicants' submissions. Further, although they deal with offences of strict liability (which might in some cases lead to a vicarious criminal liability) I am not aware that any of them deal directly with a

statute expressly imposing a vicarious liability such as section 332(5). Their statutory context is very different. I point out further that the burden of proof imposed by section 332(5) upon the accused is substantially less than the burdens imposed upon the accused in such cases as *R v Whyte*[28], *R v Keegstra*[29] and *R v Downey*.[30] Unlike the Canadian statutes referred to in the above-mentioned cases, the subsection does not require proof of due diligence on an objective basis. At least in cases where the company's offence is one requiring a guilty intent, a director or servant will in practice escape liability on proof that he or she was genuinely unaware of the commission of the offence.[31] In relation to section 25(3) of the Constitution I do not find it necessary to decide whether section 332(5) can be accurately characterised as "regulatory", although I shall have to return to that question in a different context. It is sufficient to say that the object of the subsection is to control the activities of corporate entities by imposing a responsibility on those who control or conduct their activities, and ensuring that they do not regard themselves as beyond the reach of the criminal law if a crime is committed in the course of corporate activities. In that context, if guidance is to be found in the Canadian cases, I consider that the appropriate guides are Cory J and McIntyre J in the judgments to which I have referred.

[93] In any event I consider that the question of the constitutionality of the subsection is answered by the analysis which I have attempted in paragraphs 85 to 88 above. In brief, if an offence of absolute liability had been created, it would not in itself have given rise to any question of the unfairness of the trial of such an offence. Where the severity of such

a provision has been mitigated by allowing the accused to prove a special defence it is in my view illogical if not perverse to say that this destroys the fairness of the trial. The constitutionality of section 332(5) falls to be tested against other provisions of the Constitution, in particular section 11(1). I venture to suggest that the underlying fallacy in the argument of the applicants is that they have confused the question of the fairness of section 332(5) itself with the very different question of the fairness of a prosecution under that provision.

[94] Section 11(1) of the Constitution provides:

> "Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial."

The applicants submit that section 332(5) is an infringement of that provision of the Constitution. They say, in paragraph 13 of their supplementary written submissions:

> "Such an offence which exposes the accused to a fine or imprisonment for the conduct of others in which he did not participate and which he could not have prevented, would violate the rights to freedom and security of the person in terms of section 11(1) and property in terms of section 28 of the Constitution." (footnote omitted)

Although this submission was presented virtually as an afterthought it is a serious contention in relation to section 11(1) of the Constitution.[32] The imposition of criminal liability in the absence of a criminal intention has for some hundreds of years at least been

regarded as an abhorrent concept both in South African law and in the Anglo-American common law. Blackstone,[33] in a much cited passage, said:

> "To constitute a crime against human laws, there must be first a vicious will; and secondly an unlawful act consequent upon such vicious will."

In *Morissette v United States*[34] Jackson J said:

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." (footnote omitted)

Similarly in *Sweet v Parsley*[35] Lord Pearce said:

> "The notion that some guilty mind is a constituent part of crime and punishment goes back far beyond our common law. And at common law mens rea is a necessary element in a crime."

In *S v Qumbella*[36] Holmes JA said:

> "[T]he basic principle is that *actus non facit, reum nisi mens sit rea*. Current judicial thinking is recognising more fully the scope and operation of this fundamental rule of our law...".

Holmes JA, at 364F, went on to refer to this rule as a "fundamental principle of fairness". It is on the basis of this principle that statutes creating criminal offences will, as far as

their language permits, be interpreted as requiring the element of mens rea in some form, either subjective guilty intent or at least negligence. So too, unless the language clearly warrants it, a statute will not be interpreted as enacting vicarious criminal liability.[37] Indeed vicarious liability may entail conviction not only in the absence of a guilty mind but even when the accused has not personally committed the criminal act.

[95] In Canada section 7 of the Charter of Rights provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." In a number of Canadian cases the Supreme Court has measured offences of strict liability against that section. The applicants' reliance on these cases calls for some analysis of them. I should point out however, that in none of these cases is the statute in question in anything like the terms of section 332(5). In *Reference re s.94(2) of the Motor Vehicle Act*,[38] the Supreme Court of Canada, through Lamer J, held that absolute liability[39] and imprisonment could not be combined: to do so would not be in accordance with the principles of fundamental justice. The degree of mens rea required to comply with section 7 is related to the nature of the crime. In *R v Wholesale Travel Group Inc*.[40] the same judge (now Lamer CJC) said:

> "In *Reference re: s. 94(2) of Motor Vehicle Act, supra,* this Court held that the combination of absolute liability and possible imprisonment violates s.7 of the Charter and will rarely be upheld under s.1. This is because an absolute liability offence has the potential of convicting a person who really has done nothing wrong (*i.e*., has acted neither intentionally nor negligently).
>
> In *R. v. Vaillancourt, supra*, I stated that whenever the state resorts to the restriction of

> liberty, such as imprisonment, to assist in the enforcement of a law, even a mere provincial regulatory offence, there is, as a principle of fundamental justice, a minimum mental state (or fault requirement) which is an essential element of the offence. *Reference re: s.94(2) of Motor Vehicle Act* inferentially decided that even for a mere provincial regulatory offence *at least* negligence is required, in that *at least* a defence of due diligence must always be open to an accused *who risks imprisonment* upon conviction. The rationale for elevating *mens rea* from a presumed element ... to a constitutionally required element, was that it is a principle of fundamental justice that the penalty imposed on an accused and the stigma which attaches to that penalty and/or to the conviction itself, necessitate a level of fault which reflects the particular nature of the crime."

What this indicates, applied to our own Constitution, is that while it would in general be an infringement of section 11(1) to subject a person to the risk of imprisonment on the basis of an absolute liability without at least a defence of due diligence, nonetheless the constitutional standard may allow some degree of strict liability. In the pre-Charter case of *R v City of Sault Ste. Marie*[41] Dickson J identified three main categories of criminal offence. The first is the category of offences in which mens rea consisting of some positive state of mind must be proved by the prosecution. The third category comprises offences of absolute liability where it is not open to the accused to exculpate himself even by showing that he was free of fault. In between these is the second category of:

> "Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care."[at 181]

Section 332(5), like most cases of vicarious liability, would fall into this intermediate

category. Whether any particular provision of this sort would be an infringement of section 11(1) of the Constitution must depend on the nature of the particular statutory provision under consideration, and the weight of the burden on the accused.

[96] I have stated above in broad terms, the purpose of section 332(5). It must be said at once that the subsection does not fall within the category of regulatory offences as that term has been used by the Canadian courts. Typical examples of crimes falling within that category are offences created by statutes designed to prevent pollution of waterways, the sale of adulterated food or the distribution of dangerous drugs. Section 332(5) by contrast covers every type of criminal offence which a company might commit including crimes such as fraud, theft or culpable homicide. Some convictions under section 332(5) would carry a serious moral stigma. Nor is there any limit on the punishment which can be imposed upon a conviction under section 322(5). It is nonetheless in my view useful to examine the rationale behind the holdings of Canadian (and American) courts that it is constitutionally legitimate to impose criminal penalties on certain forms of conduct in the absence of criminal intent or even negligence on the part of the accused. The rationale appears to be a combination of the public interest in preventing antisocial conduct, the belief that criminal penalties will induce those in responsible or controlling positions to take all possible steps to avert such conduct, and the difficulty of achieving the object of the legislation if the prosecution has the burden of proving intent or negligence. Thus in *United States v Dotterweich*[42] the United States Supreme Court had to deal with a

statutory offence of shipping adulterated and misbranded drugs. In the judgment of the court[43] the following passage is to be found:

> "The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirements for criminal conduct - awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but *standing in responsible relation to a public danger.*" (My emphasis)

In *Morissette v United States*[44] the Court referred to "what have been aptly called 'public welfare offences'". Of these the Court (through Jackson J) said:

> "Hence, legislation applicable to such offences, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities."[45]

Another relevant passage is to be found in the judgment of Cory J in *R v Wholesale Travel Group Inc.*[46] He referred to what he called "the licensing concept" in the following terms:

> "The licensing concept rests on the view that those who choose to participate in regulated activities have, in doing so, placed themselves in a responsible relationship to the public generally and must accept the consequences of the responsibility. Therefore, it is said, those who engage in regulated activity should, as part of the burden of responsible conduct attending participation in the regulated field, be deemed to have

> accepted certain terms and conditions applicable to those who act within the regulated sphere. Foremost amongst these implied terms is an undertaking that the conduct of the regulated actor will comply with and maintain a certain minimum standard of care.
>
> The licensing justification is based not only on the idea of a conscious choice being made to enter a regulated field but also on the concept of control. The concept is that those persons who enter a regulated field are in the best position to control the harm which may result, and that they should, therefore, be held responsible for it."

In the same case at 221c-d Cory J returned to this theme. He said:

> "As a result of choosing to enter a field of activity known to be regulated, the regulated actor is taken to be aware of and to have accepted the imposition of a certain objective standard of conduct as a pre-condition to being allowed to engage in the regulated activity. In these circumstances, it misses the mark to speak in terms of the 'unfairness' of an attenuated fault requirement because the standard of reasonable care has been accepted by the regulated actor upon entering the regulated sphere."

At 225f-g the same judge said:

> "Quite simply, the enforcement of regulatory offences would be rendered virtually impossible if the Crown were required to prove negligence beyond a reasonable doubt. The means of proof of reasonable care will be peculiarly within the knowledge and ability of the regulated accused. Only the accused will be in a position to bring forward evidence relevant to the question of due diligence."

As I have already pointed out, *R v City of Sault Ste. Marie*[47] was a pre-Charter case. The explanation given by Dickson J for strict, including vicarious, criminal liability is nonetheless relevant and compelling. He said:[48]

> "The element of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations designed to avoid that danger. This control may be exercised by 'supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control': Lord Evershed in *Lim Chin Aik v The Queen* [1963] A.C. 160 at p. 174. The purpose, Dean Roscoe Pound has said (*Spirit of the Common Law*(1906)), is to 'put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morale'."

Later, at 181 he said:

> "The correct approach, in my opinion, is to relieve the Crown of the burden of proving *mens rea*, having regard to . . . the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged, for example, that pollution was caused by the activities of a large and complex corporation."

[97] These considerations can in my opinion be properly applied to a provision such as section 322(5), designed as it is to induce those who control corporate bodies to ensure that those bodies keep within the law. A corporate body can act and thus commit criminal offences only through human agents, but the identity of those agents cannot always be ascertained. Moreover the agent through whom the criminal offence is committed may hold a lowly position. In view of the dominant role played by corporate bodies in modern society it seems to me to be a legitimate objective of government to ensure that the

persons who control such bodies are not entirely immune from criminal liability for offences committed by servants of that body in furtherance of its objectives. An absolute liability for the crimes of the corporate body would be so extreme as to be regarded by reasonable persons as unfair or oppressive. But the subsection is not absolute. It provides a defence for the controllers of the corporate body which, as I have already pointed out, is considerably less burdensome than the requirement of proof of due diligence referred to in the Canadian cases. I see nothing unfair in placing that limited burden upon the controllers of the corporate body. They are the ones who may be expected to be aware of the internal workings of the corporation. They are the ones in the best position to give evidence of their own lack of participation and knowledge. The prosecutor does not know what goes on in the boardroom; the director does. The provision ensures or attempts to ensure that a person in the position of director of a company will understand that he has responsibility for its conduct. The inducement to responsible corporate conduct is enhanced by placing personal criminal liability on the shoulders of those in control, subject to a burden of proof not unduly difficult for the innocent to discharge. The corporation itself can be punished only by a monetary penalty, a penalty which may not seriously affect those in control. Further, what Cory J called the "licensing concept" is peculiarly appropriate to the conduct of corporate bodies and in particular limited liability companies. Counsel for the Government, Mr Jeremy Gauntlett SC, in his further written submissions said this:

> "The conduct of a director contemplated by section 332(5) is proscribed because the

> inadequately controlled (and criminal) activity of the company to which it relates redounds to the detriment of society at large. . . . Those who choose to assume a directorship have, in doing so, placed themselves in a position of responsibility not only *vis a vis* the company but in relation to the public generally. . . . They must accept the consequences of that position of responsibility. This is because they are in the best position to control the harm which may result from the activities of the company. More specifically, they must accept (indeed, for all practical purposes, they are deemed to accept) that the law requires them to control the corporate body, and otherwise discharge their duties as directors, in accordance with certain minimum standards on pain of civil ***and criminal*** liability."

I agree with that statement of the rationale of section 332(5).

[98] The application of the "licensing concept" to the control of companies is supported by the judgment of this Court in *Bernstein and Others v Bester and Others NNO*.[49] That case concerned a constitutional attack on the provisions of the Companies Act 61 of 1973 which provided, under sanctions, for the interrogation of directors and others having information as to the affairs of a company. In paragraph 85 of his judgment Ackermann J said:

> "The establishment of a company as a vehicle for conducting business on the basis of limited liability is not a private matter. It draws on a legal framework endorsed by the community and operates through the mobilization of funds belonging to members of that community. Any person engaging in these activities should expect that the benefits inherent in this creature of statute, will have concomitant responsibilities."[50]

Those who choose to carry on their activities through the medium of an artificial legal persona must accept the burdens as well as the privileges which go with their choice. That was also the approach of the European Court of Human Rights in *Fayed v United Kingdom*.[51] In another context, but still pertinent to the present issue, in *S v De Jager and Another*[52] Holmes JA forcefully stated that those who choose to carry on business through a limited liability company must accept the burdensome as well as the beneficial consequences of their choice.

[99] Section 332(5) has been part of our statute law since 1939. It is not unreasonable to regard those who take positions of control in corporate bodies as voluntarily subjecting themselves to the regime of company and corporation law, which must be taken to include the provisions of section 332(5). Of course, in a broad sense, the imposition of criminal liability under the subsection, a liability which could conceivably lead to imprisonment, is an impairment of their freedom. But, as O'Regan J said in *Bernstein and Others v Bester and Others NNO*,[53] not all regulatory laws or criminal prohibitions are subject to constitutional challenge in terms of section 11(1):

> "A purposive approach to section 11(1) recognises that it is aimed not at rendering constitutionally suspect all criminal prohibitions or governmental regulation. Our society, as all others in the late twentieth century, clearly requires government regulation in many areas of social life. It requires a criminal justice system based on the prohibition of criminal conduct. . . . Only when it can be shown that freedom has been limited in a manner hostile to the values of our Constitution will a breach of s 11(1) be established."

Similarly in *McKinney v University of Guelph*[54] Wilson J said that it was:

> " . . . untenable to suggest that freedom is co-extensive with the absence of government. Experience shows the contrary, that freedom has often required the intervention and protection of government against private action."

[100] In the light of these considerations I do not believe that section 332(5) can be regarded as an impairment of the freedom protected by section 11(1) of the Constitution. That legislation in my opinion constitutes a legitimate function of government in a society in which the ubiquity of corporate personality creates the danger that the corporate structure will unduly screen and protect individuals from the consequences of corporate crime. Section 332(5) is a measure designed to protect the public against that danger. It may be that section 332(5) goes further in imposing vicarious criminal liability than the statutes of other countries which we would regard as free and democratic. I would not regard that as a cause for concern, nor as a ground for constitutional attack.

[101] I have referred in the previous paragraphs to the directors or controllers of corporate bodies. Section 332(5), however, imposes vicarious liability not only on the directors of corporate bodies but on any servant. The government has conceded in its submissions that in this respect the subsection is too wide. That concession was rightly made. To servants as a class one cannot impute the choice of entering a regulated activity: nor is the element of control present. In *Reynolds v G.H. Austin & Sons Ld.*[55] Devlin J said:

> ". . . a man may be made responsible for the acts of his servants, or even for defects in his business arrangements, because it can fairly be said that by such sanctions citizens are induced to keep themselves and their organisations up to the mark. . . . But if a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged, not in punishing thoughtlessness or inefficiency, and thereby promoting the welfare of the community, but in pouncing on the most convenient victim."

That is sufficient basis for holding that the reference to servants of corporate bodies is unduly wide and does constitute a substantial impairment of freedom under section 11(1).[56]

[102] The term "director" is defined in section 332 of the Act. It is defined to mean:

> "any person who controls or governs that corporate body or who is a member of a body or group of persons which controls or governs that corporate body or, where there is no such body or group, who is a member of that corporate body."

That is a wider definition than that contained in the Companies Act. In *R v Mall & Others*[57] Caney J held that this covered de facto directors, and also persons who usurp the functions of a director: it is not limited to those who have legal and constitutional control. This view was endorsed in *S v Marks*[58] and in *S v Vandenberg and Others*.[59] That interpretation does not give rise to any difficulty. I see no reason why those who are actually in control of a corporate body should not accept the responsibilities placed upon

them inferentially by section 332(5). Caney J held also that the definition would include the directors of a holding company even though they were not directors of the subsidiary which committed the criminal offence. I do not think that Caney J intended by this to bring within the net all directors of a holding company. Such persons do not necessarily in law or in fact control the subsidiary. If, however, it is capable of that meaning it is also capable of a narrower meaning. Section 35(2) of the Constitution would then come into play. This provides:

> "No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation."

[103] A question which is possibly more difficult arises from the use of the term "corporate body" in the subsection. This term is not limited to bodies incorporated under the Companies Act. It covers for example non-trading corporate bodies which might include local authorities, universities and many other entities which are given corporate personality by statute. To some it may seem extravagant that the provisions of section 332(5) should apply to corporations which do not engage in commerce. For my part, I see no good reason why the considerations which would justify the subsection in relation to limited liability companies should not apply to every statutory corporation. It means that

those who are prepared to assume positions of control in a corporate body must accept the same responsibilities in relation to criminal conduct in the course of that body's activities as do the directors of limited liability companies. The hypothetical case has been put forward of a servant of a university who, while driving a university vehicle in the course of his employment, commits the crime of negligent driving. The university will be criminally liable under section 332(1) of the Act, and it would follow that the Vice-Chancellor of the university and the Chairman of the Council of the university would prima facie be vicariously liable for the university's crime and thus put upon their defence. As a matter of interpretation that would no doubt be so. I accept that if a provision of a statute plainly infringes the Constitution it should not be upheld simply because it is unlikely to be invoked, or because a person prosecuted under such a statute will readily obtain an acquittal. I do not, however, think it right to test the constitutionality of a criminal statute by positing an unrealistic example of a prosecution that would undoubtedly constitute an abuse of the process of the Court. Any criminal offence, even one with no legal burden of proof on the accused, might be the subject of a vexatious prosecution. I do not think that respect for the Constitution and for a culture of individual human rights is furthered by striking down legislation thought by Parliament to be necessary for the public welfare, on the basis of a far-fetched possibility that it will be abused by the prosecuting authorities. I am reminded of the words of Lord Woolf in relation to the Hong Kong Bill of Rights. He said:

"The issues involving the Hong Kong Bill should be approached with realism and good

> sense, and kept in proportion. If this is not done the Bill will become a source of injustice rather than justice and it will be debased in the eyes of the public. In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime. It must be remembered that questions of policy remain primarily the responsibility of legislature."[60] (citations omitted)

[104] I have not overlooked the fact that the term "corporate body" is capable of including non-statutory corporate bodies. In South African law, unlike English law, no Act of Parliament or of the executive is necessary to bring an artificial legal entity into being. A number of persons may combine together to form an association with a constitution which gives the association the power to hold property separately from its members, and the capacity to sue and be sued in its own name. If such a constitution is adopted, and if the objects of the association are lawful, the association becomes a body corporate or universitas.[61] In this way sporting bodies or charities or unregistered trade unions, to take some examples at random, can be brought into being and endowed with separate legal personality. The application of section 332(5) to these bodies does not in my view give rise to any special problem. The principle behind the subsection is that where an artificial legal person exists, the activities of which may be conducted in a criminal manner, some responsibility should rest on those who control it. I do not see why that principle should not apply to a sporting or charitable body. The privilege of directing the activities of an artificial legal persona carries with it a certain burden of

responsibility, including some responsibility for its crimes. In the present case, in any event, the applicants were prosecuted as directors of a company registered under the Companies Act. If in some future case a question arises as to the constitutionality of section 332(5) in relation to a common law body corporate, amongst the matters that would fall to be considered is the possibility under section 35(2) of the Constitution of "reading down" the words "corporate body" so as to limit them to statutory corporations.

[105] It follows that in my opinion section 332(5) survives the constitutional attacks made on it both under section 25 of the Constitution and under section 11(1).[62] In view of this conclusion the question of justifying any infringement of either of those sections in terms of section 33(1) of the Constitution does not arise. If, however, I am wrong on the issue of the infringement of those sections of the Constitution, I consider that section 332(5) would be justifiable under section 33(1). For the reasons which I have given for holding that the subsection did not violate the Constitution I would also conclude that the provisions are in terms of section 33(1) reasonable and justifiable in an open and democratic society based on freedom and equality. I would also hold that they are necessary, as any lesser burden of proof such as an evidential burden of proof would not achieve the legitimate aims of the legislation. It would be only too easy for an accused, for example by a bare denial, to raise some doubt whether he knew of the corporation's offence and could have prevented it. The burden of proof which would then revert to the prosecution would be in most cases well-nigh impossible to discharge. I would refer

again to the passage in the judgment of Dickson J in *R v City of Sault Ste. Marie*[63] which I have quoted in paragraph 95 above. In fact, in most of the Canadian cases relied on by the applicants, in which a reverse onus provision was held to be a violation of section 11(d) of the Charter, the violation was held to be justifiable under section 1.[64] In *S v Bhulwana; S v Gwadiso*[65] this Court said, in relation to the application of section 33(1) of the Constitution:

> "In sum, therefore, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be."

On this approach the balance comes down in favour of preserving the legislation. I reiterate that the burden imposed on accused persons under section 332(5) is substantially lighter than the burden imposed by the Canadian legislation which was the subject of the cases referred to above.

[106] In reaching this conclusion I am comforted by the fact that O'Regan J has also held (albeit on different grounds) that section 332(5) is not in conflict with section 11 of the Constitution. It is a serious matter to strike down legislation which in one form or another has, for the greater part of the century, imposed vicarious criminal liability on those who control corporate bodies. Section 332(5) in its present form was introduced into the Criminal Procedure and Evidence Act 31 of 1917 as section 384(5) by section

117 of the Companies Amendment Act 23 of 1939. It replaced and broadened section 384(1) of the 1917 Act, which was limited in its scope to the secretary, the directors, the manager and the chairman of a company. The burden of proof on each of these persons was to prove "that he was in no way a party" to the offence. That subsection applied to all offences committed by the company.[66] The 1917 Act had repealed section 33 of the Companies Act of 1909, (Transvaal), which was limited in its scope to any director, manager, secretary or other officer of a company. The burden of proof imposed on these persons was to "satisfy the Court that the default or offence was made or committed without his knowledge, authority or permission". (The section was, arguably at least, confined to offences under the Companies Act.) Although the scope of these provisions has broadened since 1909 it has been consistent legislative policy to impose a strict vicarious criminal liability on those who control companies or other corporate bodies, with a provision for exemptions which imposes on them a limited legal burden of proof. There is nothing before us to show that the operation of the present subsection or its predecessors has in practice given rise to injustices. Nor, I should add, have the provisions anything to do with the history of racial and other discrimination in this country. They were provisions enacted for the protection of the public in a society in which corporate entities played an increasingly pervasive and important role. To strike out section 332(5) would leave a considerable gap in the mechanisms available for ensuring the honest conduct of corporate institutions. I am satisfied that nothing in Chapter 3 of the Constitution requires us to take that step.

[107] In this conclusion I unfortunately differ from the majority of my colleagues. I would nonetheless respectfully suggest that even on the majority view it is unnecessary to strike down the whole of section 332(5). The applicants' complaint is based on the consideration that the subsection imposes a legal burden of proof and not merely an evidentiary burden. This legal burden of proof arises from the words "unless it is proved that". The question therefore arises whether in the absence of those words i.e. if the clause read "unless he did not take part in the commission of the offence and could not have prevented it," the burden as a matter of interpretation would be merely evidentiary. If so, the accused would then have only to raise a doubt as to those matters and the main burden of proof would remain with the prosecution. There is persuasive Commonwealth authority for this approach. In *R v Wholesale Travel Inc.*[67] the legal burden of proof on the accused arose from the words "unless he establishes that". The view of Lamer CJC[68] was that the words "he establishes that" led to a violation of section 11(d) of the Charter. Consequently he held that those words were of no force or effect and should be struck out, reducing the legal burden to an evidentiary one. His judgment was concurred in by other members of the Court. In a separate judgment McLachlin J[69] also held that the words "he establishes that" should be deleted from the statute so as to reduce the onus on the accused to an evidentiary one. That was also the remedy advocated by Dickson CJC in his minority judgment in *R v Holmes*.[70] The same remedy was adopted by the Ontario

Court of Appeal in *R v Ireco Canada II Inc*.[71] In *Attorney General of Hong Kong v Lee Kwong-kut*[72] the Privy Council had before it a Hong Kong statute penalising the handling of the proceeds of drug trafficking. The relevant section of the statute provided that it was a defence "to prove" certain matters. That clause was held to place a legal burden of proof on the accused. The Privy Council, at 973, held that in the context of the war against drug trafficking, for a defendant to bear that legal onus was "manifestly reasonable". However, if they had not come to that conclusion they would have regarded only the words "to prove" as being inconsistent with the procedural protection of the Hong Kong Bill of Rights. Lord Woolf said:

> "[I]f the words 'to prove' are removed from section 25(4) the second defendants would be no longer under a legal or persuasive burden of proof to establish the defence contained in section 25(4). Instead they would be under an evidential burden merely requiring them to raise the issue. This burden could not conceivably contravene article 11(1)." [73]

[108] In the present case the severance of the words "it is proved" would meet the tests for severability which have been laid down by the Appellate Division and adopted by this Court. The offending words would be grammatically severable and the provision which would remain would be manifestly in accordance with the main objective of the legislation. If the provision, so truncated, were to be considered standing alone it would impose only an evidentiary burden or would be at the very least be capable of being so construed. Accordingly, it should be so construed in terms of section 35(2) of the

Constitution. It is necessary however to consider whether such an interpretation would be affected by the provisions of section 90 of the Act. That section which "is unusual in that it specifically enacts a rule of statutory construction"[74] provides in relation to any statutory offence that:

> ". . . any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the law creating the offence, may be proved by the accused but need not be specified or negatived in the charge and, if so specified or negatived, need not be proved by the prosecution."

It has been authoritatively held that this provision places a legal burden of proof upon the accused[75] and, indeed, its wording hardly allows of any other interpretation. Consequently, if this section were to apply to the truncated section 332(5) the proposed severance would be ineffectual; a legal burden would remain. This is a problem which was not addressed in the Canadian cases or in the Privy Council case to which I have referred. I do not know whether there is any equivalent provision in Canadian or Hong Kong statute law, but observe that section 90 and its South African predecessors are based on nineteenth century English and Scottish statutes.[76] Moreover, those provisions apparently embody a longstanding common law rule of statutory interpretation.[77] I nonetheless do not regard section 90 as being an obstacle to the course which I have suggested. Hitherto, the pre-constitutional interpretations of section 90 and its predecessors have concentrated on the question whether any term of a statute creating an offence is indeed an exception, exemption etc. or whether it creates an element in the

offence which it is for the prosecution to negative.[78] The nature of the inquiry in every case is, however, whether the statutory provision under consideration is one to which section 90 applies. To assume that section 90 would apply to section 332(5) in its truncated form is to put the cart before the horse. If properly interpreted, that section, in its truncated form, places only an evidential burden on the accused it must follow that section 90 would have no application. The "unless" clause would ex hypothesi not constitute an exemption, exception etc which the accused must prove in terms of section 90. That section is no more than a general rule for the interpretation of statutes and cannot alter the meaning of an otherwise constitutional provision so as to render it unconstitutional.

[109] This conclusion perhaps makes it unnecessary to consider whether section 90 itself is valid in the light of the constitutional principle stated by Langa J and accepted by the majority in this case. The principle as stated in the Canadian cases of *R v Whyte*[79] and *R v Chaulk*[80] and approved by Langa J is succinctly stated in paragraph 38 of his judgment in which he says:

> "The provision imposes an onus on the accused to prove an element which is relevant to the verdict. It should make no difference in principle whether or not an offence created by a statute is formulated in a way which makes proof of certain facts an element of the offence or proof of the same facts an exemption to the offence. What matters in the end is the substance of the offence. If a provision is part of the substance of the offence and the statute is formulated in a way which permits a conviction despite the existence of reasonable doubt in regard to that substantial part, the presumption of innocence is

breached."

Those words apply with full force to section 90. Its effect upon every statutory offence to which it applies is to impose on the accused an onus to prove an element relevant to the verdict. Failure to do so may lead to a conviction notwithstanding a reasonable doubt as to the existence or otherwise of the exempting or excusing factor. If section 332(5) in its present form, as analysed by the majority of this Court, constitutes an infringement of section 25 of the Constitution then a fortiori section 90 must by its very nature also infringe it. For this reason and for the reasons which I have stated in the previous paragraph I do not believe that it is necessary for this Court to strike down the whole of section 332(5). The remedy of severability is open to it and should in my respectful opinion be adopted.

MADALA J:

[110] I have read the several judgments prepared by my colleagues in this matter. Langa J sets out the facts and the issues which arise as well as the positions taken by the parties in argument before this Court. I agree with Langa J's findings that the provisions of section 245 of the Criminal Procedure Act 51 of 1977 are unconstitutional. With regard to section 332(5) of the Act, however, I am unable to agree with him or my other colleagues and, for different reasons from those stated by Kentridge AJ, I do not find section 332(5) to be unconstitutional.

[111] I also agree with the findings of Langa J that the inclusion of the words "or servant" in section 332(5) is constitutionally not defensible, and that these words pass the severability test postulated by my brother Kriegler J in *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others.*[1] Because of the general view I take on this matter, it is unnecessary for me to consider the other portions of this section which we are asked to declare severable.

[112] The impugned section has a long history which dates back to earlier Criminal Codes in South Africa. It is the successor to section 381(5) of the Criminal Procedure Act 56 of 1955. Section 381(5), in turn, came after a provision inserted into the 1917 Criminal Procedure Act in 1939 as section 348(5) of Act 31 of 1917. There is no material

difference between these provisions. Indeed the impugned section is identical to section 381(5) of the 1955 Act in all material respects. There is also a substantial overlap between the wording of the 1977 provisions and the equivalent provisions in the 1917 and 1955 Acts dealing with the liability of members of an association, other than a corporate body, for offences committed by other members in furthering or in endeavoring to further its interests. Granted, these sections were enacted before the advent of the interim Constitution, and must, therefore, be re-assessed in order to determine whether they accord with the Constitution.

[113] Section 332(5) provides:

> "When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefor, ... and shall on conviction be personally liable to punishment therefor."

[114] It was argued on behalf of the applicants that the section is particularly far-reaching in its effect. The applicants further alleged that the section casts a burden of proof on the accused, and that it creates criminal liability where none existed before. Because of the conclusions to which I come, it is not necessary for me to consider the

latter submission. It was further argued that since an accused was required to prove some fact on a balance of probabilities to avoid conviction, the provision violated the presumption of innocence. Counsel for the applicants further submitted that by reason of the reverse onus allegedly contained in the section, an accused person was liable to be convicted despite the existence of a reasonable doubt as to his/her guilt and therefore the section was unconstitutional. I do not agree with this last submission. The mere fact that a section provides that an accused person may be convicted in circumstances in which there is a reasonable doubt is not in itself a sufficient reason for regarding such section as unconstitutional. There may be circumstances in which the reverse onus provision is necessary and justifiable.

[115] Indeed reverse onus provisions have been under scrutiny in many democracies. Kentridge AJ put it thus:

> "The legitimacy of such provisions has been considered by courts as varied as the United States Supreme Court, the Canadian Supreme Court, the Privy Council and the European Court of Human Rights (and doubtless others) in the light of provisions entrenching, in varying language, the presumption of innocence, the right to silence and the privilege against self-incrimination - a privilege not expressly referred to in section 25. The case law of these Courts - which are undoubtedly Courts of open and democratic societies - indicates that reverse *onus* provisions are by no means uncommon and are not necessarily unconstitutional. Reverse *onus* provisions in our own statute law are also not uncommon."[2]

[116] In a number of decisions handed down by this Court on the issue of reverse onus provisions it has been stated that there may be circumstances which warrant the casting of a legal burden on the accused, i.e., where it is perfectly justifiable to call upon the accused to answer.[3] This, in my view, depends largely on the nature of the offence and, perhaps more importantly, on the purpose or objective of the provision in question.

[117] It seems that to resolve the constitutional issue before us we have to answer two questions:

> (a) Does the impugned section infringe the rights guaranteed by section 25(3)(c) of the Constitution?
>
> (b) If the section does infringe the rights and freedoms guaranteed by section 25(3)(c) of the Constitution, is it justified in terms of section 33(1) and therefore not inconsistent with the Constitution?

[118] I need not deal with the arguments presented in respect of the first question, but on a consideration of all the arguments placed before us, it must be accepted that the reverse onus provision infringes the provisions of section 25(3)(c) of the Constitution.

[119] The next question for consideration, and this for me is the crucial one, is whether

section 332(5), although it violates the provisions of the Constitution, is nevertheless justified in an open and democratic society based on freedom and equality; or whether the limitation on the presumption of innocence is, in all the circumstances of this case, reasonable, justifiable, necessary and not a negation of the essential content of the right. The state, seeking to uphold such limitation, would bear the burden of its justification.

[120] In *S v Makwanyane and Another*,[4] this Court said, that the inquiry involves the weighing up of competing values and ultimately an assessment based on proportionality. Chaskalson P stated:

> "The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of s 33(1). The fact that different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case- by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of s 33(1) and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, 'the role of the Court is not to second-guess the wisdom of policy choices made by legislators'."(footnotes omitted)

[121] The requirement that the accused should prove his or her innocence appears to run counter to the presumption of innocence which is foundational in our principles of the criminal law, and of which Dickson CJC, quoting from *R v Oakes,*[5] stated in *R v Holmes*:[6]

> "The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in s. 11(d) of the *Charter*, the presumption of innocence is referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the Charter *(*see *Reference re s. 94(2) of the Motor Vehicle Act*, December 17, 1985, unreported, *per* Lamer J. [now reported [1985] 2 S.C.R 486, 18 C.R.R. 30, 23 C.C.C. (3d) 289]). The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the state of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise."

[122] I have no doubt in my mind that the presumption of innocence is a fundamental right which plays a pivotal role in our criminal justice system. However, in my view, like all other rights and freedoms guaranteed by the Constitution, this right is not absolute, but

that its value and weight will differ according to a variety of factors and circumstances against which it is pitted on the scales.

[123] In a case such as the present one, the Court should determine whether the objective of the impugned provision is of sufficient importance that it warrants overriding a constitutionally protected right or freedom. As Lord Woolf, quoting Lamer CJC in *R v Chaulk* 62 CCC (3d) 193 at 216, noted:[7]

> "The objective . . . must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important."

[124] The determination of the objective should not be divorced from a consideration of the particular context within which the provision operates. Ackermann J, made a similar observation in the case of *Ferreira v Levin NO* where he stated:

> ". . . the problem cannot be resolved in the abstract but must be confronted in the context of South African conditions and resources - political, social, economic and human."[8] (footnote omitted)

[125] We are living in times of intense corporate activity which unfortunately is often accompanied by a proliferation of serious crimes like fraud by both corporations and directors. It is, in my view, of paramount importance that the social interest of seeing to

the prosecution by the state of crimes such as fraud which are perpetrated by corporate bodies and directors be facilitated. As Ackermann J put it, the directors and other officers of the company "are the brains, eyes and ears of the company",[9] and are often the only persons who have knowledge of the workings of the company.

[126] In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing law breakers to book, and, on the other hand, the equally great public interest of ensuring that justice is manifestly done to all. In my view, it is of paramount importance that the affairs of companies and other corporate bodies and associations be conducted properly and honestly. The section under attack assists in the achievement of that objective. Windeyer J in *Rees v Kratzmann*[10] observes:[11]

> "The honest conduct of the affairs of companies is a matter of great public concern to-day."

[127] In support of this view, Ackermann J, in his judgment in *Bernstein and Others v Bester and Others NNO*[12] adds:

> "This is particularly the case in South Africa at present. Such honest conduct cannot be ensured unless dishonest conduct, when it occurs, is exposed and punished and ill-gotten gains restored to the company."

[128] I am also in agreement with Lord Denning where he observes in the case of *H. L. Bolton (Engineering) Co Ltd v TJ Graham and Sons Ltd*[13] that:

> "Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."

[129] This sentiment is shared by my colleague Goldstone JA (as he then was) in the case of *Howard v Herrigel and Another NNO*,[14] where he states:

> "At common law, once a person accepts an appointment as a director, he becomes a fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf. . . . Whether the inquiry be one in relation to negligence, reckless conduct or fraud, the legal rules are the same for all directors."

[130] It is quite clear then, that in assuming the office of director the incumbent consents to assuming the responsibility that is concomitant with such office. The steady growth of the corporate world is burdened with ever increasing sharp business practices. When other factors such as the difficulty of obtaining evidence for an offence where the information is usually within the exclusive knowledge of a few, and the high cost factor involved in implementing regulatory enforcement mechanisms are considered, the impugned provision becomes practically and objectively more justifiable.

[131] In my view the objective of this impugned provision is of such importance that it warrants the overriding of the guarantees provided in section 25(3)(c)of the Constitution.

[132] In the result I hold that the impugned section is justified in terms of section 33(1) and is therefore not unconstitutional.

MOKGORO J:

[133] I concur in the judgment of O'Regan J that sections 245 and 332(5) of the Act are unconstitutional because their reverse onus provisions are unjustifiable breaches of the presumption of innocence, guaranteed by section 25(3)(c) of the Constitution.

[134] As the precise analysis of the constitutionality of section 332(5) has led to differing positions amongst my colleagues, I will state very briefly the reasons for my conclusions regarding that section.

[135] Section 332(5) provides in relevant part that where an offence has been committed by a corporate body

> "a director . . . of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he

could not have prevented it . . .".[1]

It was argued by the applicants that the section breaches the presumption of innocence because it places the onus on the accused to establish that he or she did not take part in the commission of the offence, and that he or she could not have prevented such commission.

[136] The Government responded that section 332(5) does not breach the presumption of innocence. First, the Government argued that because the accused is required to establish an excuse, exemption or defence, rather than an element of the offence, the presumption of innocence is not infringed. Second, it argued that the presumption of innocence applies with lesser force to "regulatory" offences, as opposed to truly "criminal" offences. Finally, the Government argued that even if the presumption of innocence has been breached, that breach is justifiable under section 33(1) of the Constitution.

[137] As regards the Government's first argument, I agree with O'Regan J that the distinction between an excuse, exemption, or defence, as opposed to an element of the offence is irrelevant to the question of whether the presumption of innocence has been breached. This Court has previously held that the presumption of innocence is breached whenever an accused can be convicted despite the existence of a reasonable doubt as to his or her guilt.[2] That doubt can arise with respect to an excuse, exemption or defence, as well as with respect to an element of the offence. Because section 332(5) permits the accused to be convicted when he or she cannot prove certain facts on the balance of

probabilities, it necessarily follows that the accused can be convicted despite the existence of a reasonable doubt as to his or her guilt. Section 332(5) is therefore in breach of the presumption of innocence.

[138] As regards the Government's second argument, I agree that it is unnecessary to decide whether the presumption of innocence applies with lesser force to so-called "regulatory" offences. The reach of section 332(5) extends greatly beyond offences which might be characterised as purely "regulatory".

[139] Finally, the Government has not shown that the breach of the presumption of innocence is justifiable under section 33(1) of the Constitution. As explained by Mahomed DP, the apparent aims underlying section 332(5), namely the protection of the public from risks generated by the activities of corporate bodies, and the inculcation of high standards of behaviour in directors with respect to those activities, are entirely legitimate. Besides, corporate business activity is crucial for effective and much needed socio-economic growth. Legislation should therefore not be unduly invasive and act to stifle sound economic activity. Like my colleagues, however, I am extremely concerned also by the potential for harm which can result from corporate recklessness, dishonesty and undue exploitation. Illegal toxic waste dumping, corporate recklessness in the area of health and safety in the work environment, particularly in situations of underground mining, are not remote possibilities in this country.

[140] Despite my concerns about the dangers of corporate activity, I come to the conclusion that the breach of the presumption of innocence is not justified. The Government has failed to show, for example, that requiring the prosecution to establish all the elements of section 332(5) will result in particular difficulty in obtaining convictions. That failure becomes more egregious when one considers the breadth of section 332(5). Section 332(5) applies to *all* offences, and no attempt has been made to confine the operation of the section to situations where there is a special risk to an unsuspecting and vulnerable public.

[141] As regards the order in this case, I concur with O'Regan J that severance of certain words from section 332(5), so that the legal burden of proof is removed from the accused, is an appropriate remedy in this case.

[142] The test for whether severance is appropriate was stated by this Court in *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others*:

> "[I]f the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute."[3]

[143] As recognized in *Schachter v Canada*, the decision to sever "rests on an assumption that the legislature would have passed the constitutionally sound part of the scheme without the unsound part."[4] Further, the purpose of severance is "to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature."[5] That insight was elaborated upon by Sachs J at para 75 of *Coetzee*:

> "[I]n deciding whether the Legislature would have enacted what survives on its own, we must take account of the coming into force of the new Constitution . . . . We must, accordingly, posit a notional, contemporary Parliament dealing with the text in issue, paying attention both to the constitutional context and the moment in the country's history when the choice about severance is to be made. It is in this context that we must decide whether the good can be separated from the bad."

[144] In my view, as stated earlier, that test can be applied to make severance a viable remedy in this case. The "bad" is the imposition of a legal burden of proof on the accused. The "good" is the imposition of criminal liability on directors who do not prevent commission of offences by their corporation, when they are able to do so. The "bad," i.e. the legal burden of proof on the accused, can be removed without detracting significantly from the main objective of the section. The prosecution will still be able to obtain convictions under section 332(5) in the appropriate circumstances, although it will become more difficult (although not impossible) for them to do so.

[145] The severance proposed by O'Regan J is the removal of the words "or servant" and

"it is proved that he did not take part in the commission of the offence and that" from section 332(5). The section, as severed, would read as follows:

> "When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director . . . of the corporate body shall be deemed to be guilty of the said offence, unless . . . he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor."

[146] This truncated form of section 332(5) is *capable* of being interpreted as imposing an evidentiary burden on the accused, or indeed shifting the burden entirely on the prosecution. I do not find it necessary to decide which of those interpretations is correct, as neither infringes the presumption of innocence.

[147] Langa J considers that even this truncated form of section 332(5) imposes a legal burden on the accused. Indeed that may be a possible interpretation, and there are certainly examples in the case law of provisions prefaced by the word "unless" being interpreted to impose a legal burden on the accused.[6] Section 35(2) of the Constitution, however, is quite clear that where there are competing possible interpretations of a statute, courts are now required to "read down" the statute, i.e. to choose the interpretation which is consistent with the Constitution.[7] In my view, the course of severance, combined with

reading down the severed section, is a reasonably permissible route to follow in bringing section 332(5) in line with the Constitution.

[148] Further, I agree that we are not required by reason of section 90 of the Act to interpret the severed form of section 332(5) as imposing a legal burden of proof on the accused. Section 90 provides as follows:

> "In criminal proceedings any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the law creating the offence, may be proved by the accused but need not be specified or negatived in the charge and, if so specified or negatived, need not be proved by the prosecution."

[149] The effect of this section is that where a matter is an "exception, exemption, proviso, excuse or qualification," the legal burden with respect to that matter is imposed on the accused. Unlike Langa J, I do not consider the ability of directors to prevent the commission of offences by their corporations to be "exceptions, exemptions" etc, so as to impose the legal burden of proof on the accused.

[150] It is well established that several factors should be considered in deciding whether a matter is an "exception, exemption, proviso, excuse or qualification" for the purposes of section 90. As stated in *R v Kula*, those factors include "the grammatical shape of the provision, its context, its apparent scope and object and the practical consequences of the

competing constructions".[8]

[151] With respect, in my view it is incorrect to conclude that, simply because section 332(5) contains the word "unless", everything which follows that word must necessarily be an exception, exemption or qualification. That conclusion, based simply on the grammatical structure of the section, ignores the other factors applicable. I consider the most important factor to be the real mischief aimed at by section 332(5), which is to penalise directors who take part in the commission of an offence, or fail to prevent its commission when they are able to do so. Thus, as explained by Mahomed DP, ability to prevent the offence is not an exception to criminal liability, but lies at the heart of criminal liability.

[152] There is support in foreign case law for the conclusion that where a reverse onus provision breaches the presumption of innocence, the appropriate remedy is to amend the provision so as to remove the onus from the accused. In *R v Laba*,[9] the Canadian Supreme Court held that a provision making it an offence to trade in precious metals "unless [the accused] establishes that he is the owner or agent of the owner or is acting under lawful authority" was an unjustified breach of the presumption of innocence.[10] The remedy ordered was an amendment of the provision (using a combination of severance and "reading in") so as to impose an evidentiary burden on the accused.[11] In *Attorney-General of Hong Kong v Lee Kwong-kut* the Privy Council held the reverse onus

provision at issue to be in conformity with the presumption of innocence.[12] The court added that had it reached the opposite conclusion, it would have ordered severance of the provision so as to alter the burden of proof on the accused from a legal burden to an evidentiary burden.[13]

[153] I do not agree with Ackermann J's view that the main objective of section 332(5) is the reverse onus provision. Ackermann J's view is premised on the supposed concurrence between the common law and section 332(5), except for the reverse onus provision. He argues that because the reverse onus provision is the only substantial change to the common law made by section 332(5), it follows that "the main (if not the exclusive) object of the section is limited to the reversal of the onus of proof".[14] With respect, that analysis mistakes the *reason* for enacting a statute with the *objective* of a statute. Consider, for example, a statute enacted to codify existing law of theft, in order to simplify and make more accessible the law of theft. The main objective of the statute must surely still be to penalise theft, rather than to simplify the law of theft. Similarly, the main objective of section 332(5), *like the main objective of the common law*, is to penalise certain forms of behaviour by a director. The difference in the burden of proof between the statutory provision and the common law does not lead to a difference in their main objectives. Rather, the difference lies in the precise method of attaining that objective.

[154] Finally, the Applicants also argued, in the following terms, that section 332(5)

breaches the right to freedom and security of the person, and the right to property, guaranteed by sections 11(1) and 28 of the Constitution respectively:

> "If the requirement of participation or an ability to prevent the offence, is relegated to the status of a mere exception, exemption or excuse, then it follows that the elements of the criminal liability created under section 332(5), are merely that the accused was a director or servant of a corporation of which another director or servant committed an offence in the exercise of his powers or in the performance of his duties or in furthering or endeavouring to further the interests of the corporation. Such an offence which exposes the accused to a fine or imprisonment for the conduct of others in which he did not participate and which he could not have prevented, would violate the rights to freedom and security of the person in terms of section 11(1) and property in terms of section 28 of the Constitution."[15]

[155] The applicants seem to be arguing that participation of a director in the commission of an offence, and the ability of the director to prevent such commission, should be ignored for the purposes of determining the compliance of section 332(5) with sections 11(1) and 28 of the Constitution. Such an argument can be disposed of on the simple ground that section 332(5) must be assessed as it stands, rather than with certain parts ignored. Because the applicants have not made the argument that 332(5), in its entirety, breaches sections 11(1) and 28 of the Constitution, I will not rule on the merits of that argument.

[156] I therefore concur in the order proposed by O'Regan J.

O'REGAN J:

[157] I have had the opportunity of reading the judgments of both Langa J and Kentridge AJ. I agree with the order proposed by Langa J in respect of section 245 of the Criminal Procedure Act 51 of 1977 ("the Act") and with the reasoning that motivates that order. I cannot however support the order that he has proposed in respect of section 332(5) of the Act. My approach to the question of the constitutionality of that section is somewhat different from his and from that proposed by Kentridge AJ.

[158] Section 332(5) permits directors (and servants) of companies to be punished where the state has established that the company is guilty of an offence and a director (or servant) of that company has failed to satisfy the court upon a balance of probabilities that he or she did not participate in the offence and could not have prevented the commission of the offence. It raises two separate constitutional inquiries. The first is whether it is constitutionally legitimate for parliament to impose criminal liability on directors and servants of corporate bodies in the circumstances contemplated by section 332(5). The second is whether it is legitimate for parliament to impose upon an accused the burden of proving that he or she could not have prevented the commission of the offence rather than requiring the state to establish that the accused could have prevented its commission. This question, of course, requires us to revisit section 25(3)(c) of the interim Constitution ("the Constitution"), which has already been the subject of a series of decisions by this

Court.

[159] These are separate questions. They raise two different aspects of freedom: the first is concerned particularly with the reasons for which the state may deprive someone of freedom; and the second is concerned with the manner whereby a person is deprived of freedom. As I stated in *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at paragraphs 145-7, our Constitution recognises that both aspects are important in a democracy: the state may not deprive its citizens of liberty for reasons that are not acceptable, nor, when it deprives citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair. The two issues are related, but a constitutional finding that the reason for which the state wishes to deprive a person of his or her freedom is acceptable, does not dispense with the question of whether the procedure followed to deprive a person of liberty is fair. With respect, therefore, I cannot agree with Kentridge AJ when he states at paragraph 93 of his judgment:

> "In brief, if an offence of absolute liability had been created, it would not in itself have given rise to any question of the unfairness of the trial of such an offence. Where the severity of such a provision has been mitigated by allowing the accused to prove a special defence it is in my view illogical if not perverse to say that this destroys the fairness of the trial."

[160] I accept that an offence of absolute liability would not give rise to a challenge under the fair trial provision of the Constitution, although it may well give rise to successful challenge under section 11. However an absolute liability offence which afforded a special defence to the accused which required the accused to establish certain

facts upon a balance of probabilities would give rise to constitutional enquiries under both section 11 and section 25. As I stated above, the Constitution limits not only the reason for which the legislature may deprive a person of freedom, but also the manner in which it is done. Two separate constitutional inquiries are raised and it does not seem to me that both inquiries will, as a matter of logic and principle, reach the same result. That is because different considerations arise under each. It is my view that an affirmative answer to the first question does not dispense with any need to consider the second, although similar considerations may deserve attention in addressing both questions. If under either inquiry the provision falls foul of the established constitutional standard, and is not held to be justifiable in terms of section 33, it will be held to be invalid.

Section 11(1)

[161] I turn now to the first of the two inquiries required of us. Is section 332(5) of the Act, to the extent that it imposes criminal liability upon directors and servants of corporate bodies in certain circumstances, in breach of section 11(1) of the Constitution? Much of counsel's argument to us was concerned with the question of whether the words in subsection 332(5) "unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it" constitute an element of an offence, or an exemption or defence to the offence established in the first part of the section. In my view, this line of inquiry has little purpose in the context of an inquiry concerning a possible breach of section 11 of the Constitution. In determining whether the provision is in breach of section 11, we are required to look at the provision as a whole to determine

the circumstances in which, according to the provision, an accused person may be deprived of his or her liberty. Where the legislature creates an offence, with a special defence, the legislature is, in effect, authorising the conviction of a person once the elements of the offence have been proved and no defence exists. The overall guilt therefore lies in a consideration of both the elements of the offence and the elements of any special defence. The offence should be looked at as a whole to determine whether, on an appraisal of all the elements of the offence and the established defences, a deprivation of liberty may occur which would be in breach of section 11. In my view, the question of the burden of proof itself is not a question which should be dealt with under section 11. This question falls for consideration under section 25(3). Therefore, it does not seem to me to matter, for the purposes of the constitutional inquiry in terms of section 11, whether section 332(5) contains an offence of liability coupled with a special defence, or whether all the elements contained in section 332(5) are seen as elements of a new offence.

[162] I turn then to a consideration of section 11. The general principle of our common law is that criminal liability arises only where there has been unlawful conduct and blameworthiness or fault (the actus reus and mens rea). This principle is ordinarily expressed in the Latin maxims *actus non facit reum nisi mens sit rea* and *nulla poena sine culpa.* At common law, the fault requirement is generally met by proof of intent (dolus) in one of its recognised forms, and, in rare circumstances, by the objective requirement of negligence (culpa). (See Burchell and Milton, *Principles of Criminal Law* (Juta, Cape

Town, 1991) at 71 - 5; Snyman *Criminal Law* 2 ed (Butterworths, Durban 1989) at 25 - 9; De Wet and Swanepoel *Strafreg* 4e uitgawe (Butterworths, Durban 1985) at 103). As Kentridge AJ has mentioned in paragraph 94 of his judgment, the requirement of fault or culpability is an important part of criminal liability in our law. This requirement is not an incidental aspect of our law relating to crime and punishment, it lies at its heart. The state's right to punish criminal conduct rests on the notion that culpable criminal conduct is blameworthy and merits punishment. This principle has been acknowledged by our courts on countless occasions. For example, in *R v Wunderlich* 1912 TPD 1118, De Villiers JP held that:

> "There is no doubt that as a general rule a person is not criminally liable unless he has what is called *mens rea*. This is usually expressed by the maxim: *actus non facit reum nisi mens sit rea*. This is a sound rule, for a person is not to be subjected to the stigma and other consequences of a crime unless he had what is sometimes called a guilty mind. And from this it follows that in general a person is not criminally liable for an act or omission, unless he himself has committed or omitted the act or has authorised it." (At 1121; cited with approval in *R v Weinberg* 1939 AD 71 at 82; *Ex parte Minister of Justice: in re R v Nanabhai* 1939 AD 427 at 429.)

[163] In the last hundred years, however, the legislature has enacted many provisions which stipulate that criminal liability will arise upon proof that a person has committed, or omitted to do, a particular act. These provisions contain either no mental element and are referred to as offences of absolute liability or provide the accused with a defence of due diligence, or something similar, in which case they are referred to as offences of strict

liability (see Snyman, cited above, at 242 - 9; Burchell and Milton, cited above, at 315 - 8). The most important justification for these new forms of criminal offence is that their purpose is to ensure compliance with regulatory norms which may not otherwise be observed. Until 1994, because of the doctrine of parliamentary sovereignty, it was plain that the courts had no choice but to enforce these criminal provisions.

[164] However, such criminal liability has been criticised by academic writers in South Africa (see, for example, Burchell and Milton, cited above, at 317.) It was also disapproved of by the Viljoen Commission in its report on The Penal System of the Republic of South Africa (1976) at para 5.1.2.82:

> "In spite of the recognition in certain legal systems of the so-called strict liability offences, this Commission remains impenitent and adamant in expressing the view that strict liability offences cannot be justified in the criminal law. If the "offender" unwittingly commits an act which is prohibited by the criminal law under circumstances which totally absolve him from any blame, what is the object in punishing or even penalising him? There would, in the Commission's view, be no sense in doing so."

[165] Repugnance to the notion of criminal liability without fault is evidenced too in the reluctance of courts to interpret statutory provisions which contain no express *mens rea* requirement as not requiring mens rea. In *S v Arenstein* 1967 (3) SA 366 (A) at 381D - E, Van Winsen AJA held as follows:

> "In view of such general maxims as *nulla poena sine culpa* and *actus non facit reum nisi mens sit rea*, the Legislature, in the absence of clear and convincing indications to the contrary in the enactment in question, is presumed to have intended that violations of statutory prohibitions would not be punishable in the absence of *mens rea* in some degree or other."

(See, also, amongst other decisions, *R v H* 1944 AD 121 at 125; *S v Bernardus* 1965 (3) SA 287 (A) at 296F; *S v Oberholzer* 1971 (4) SA 602 (A) at 610H - 611A.)

[166] The principle that fault is a prerequisite for criminal liability is also present in the law of other jurisdictions. It has been repeatedly recognised as a fundamental principle of English law. In *Harding v Price* [1948] 1 KB 695 at 700, for example, Lord Goddard CJ held:

> "The general rule applicable to criminal cases is actus non facit reum nisi mens sit rea, and I venture to repeat what I said in *Brend v Wood* [(1946) 62 TLR 462 at 463]: 'It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.'"

[167] In the leading American decision, *Morissette v United States* 342 US 246 (1952) at 250, Jackson J held that:

> "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."

[168] Other jurisdictions, too, have experienced the growth of legislatively imposed strict and absolute liability. Their courts, too, have displayed hesitance in interpreting statutory provisions as imposing absolute or even strict liability. In England, the courts have taken the view that there is a presumption that mens rea is always a requirement of a criminal offence, although that presumption may be defeated by the language of a provision. In the case of *Sherras v De Rutzen* [1895] 1 QB 918 at 921, the court held that:

> "There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

Renewed vigour has been afforded to this approach by its recent restatement in a series of decisions by the House of Lords and the Privy Council. (See *Lim Chin Aik v R* [1963] AC 160 (PC) at 172; *R v Warner* [1969] 2 AC 256 (HL (E)) at 271-2; *Sweet v Parsley* [1970] AC 132 (HL (E)) at 163; *Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong* [1984] 2 All ER 503 (PC) at 507-8). Despite the frequent restatements of the rule in *Sherras*'s case, however, clear guidelines both as to the circumstances in which a court may interpret a statute as not requiring mens rea, and as to the nature of the fault

requirement that will be implied when a court is of the view that the legislature did not intend to oust a fault requirement, remain elusive.

[169] The approach in *Sherras*'s case has been adopted in several of the countries of the Commonwealth. In Australia, in addition to the presumption against strict liability, the courts have developed a defence of reasonable mistake of fact. Thus an accused, who could show that he or she held an honest and reasonable belief in the existence of circumstances, which if true would render the accused innocent of the charge, will be acquitted. (See *Maher v Musson* (1934) 52 CLR 100 at 104-5; *Thomas v* R (1937) 59 CLR 279 at 287-8; *Proudman v Dayman* (1941) 67 CLR 536 at 540; *Iannella v French* (1967-1968) 119 CLR 84 at 93-4; *R v Bush* (1974-5) 5 ALR 387; *He Kaw Teh v R* (1985) 60 ALR 449 at 455.)

[170] The New Zealand courts, too, have been reluctant to accept that parliament intends an absolute liability in the absence of an express statement to that effect. In so doing, they have considered the approach adopted in Canada, as well as that adopted in England and Australia. The difficulties that the courts in these jurisdictions have had in establishing a uniform and coherent approach to the problem are well described in a relatively recent judgment of the New Zealand Court of Appeal, *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA). Cooke P categorised the various responses by courts in England, Australia, Canada and New Zealand to statutory offences which

contain no express fault requirement. What is clear from his judgment is that although the courts have been uniformly reluctant to interpret a statutory offence which contains no express culpability requirement as entirely dispensing with culpability, they have been unable to forge a simple approach to the difficulty. That problem is, however, only of indirect relevance to our current inquiry.

[171] The courts of the United States have also shown resistance to accepting that a statutory offence dispenses with the requirement of culpability. The approach of the court was summarised by Burger CJ in *United States v US Gypsum Co* 438 US 422 (1977) where he remarked:

> "While strict-liability offenses are not unknown to the criminal law and do not invariably offend constitutional requirements, see *Shevlin-Carpenter Co v Minnesota* 218 US 57 (1910), the limited circumstances in which Congress has created and this Court has recognized such offenses, see *e.g., US v Balint* 258 US 250 (1921)*; US v Behrman* 258 US 280 (1921); *US v Dotterweich* 320 US 277 (1943); *U S v Freed* 401 US 601 (1970) attest to their generally disfavoured status. ... Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement." (At 437 - 8.)

[172] In *Morissette's* case, cited above, the Supreme Court was concerned with 18 USC § 641 which provided that "whoever embezzles, steals, purloins, or knowingly converts" government property is punishable by fine and imprisonment. Jackson J rejected the argument that the statute should be interpreted as dispensing with a mens rea requirement:

> "The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries. Such a manifest impairment of the immunities of the individual should not be extended to common-law crimes on judicial initiative." (At 263.)

[173] The Canadian Supreme Court in pre-Charter days also expressed a reluctance to endorse absolute liability. In the case of *R v City of Sault Ste. Marie* (1978) 85 DLR (3d) 161 (SCC), the court interpreted a statute which contained no express fault requirement as one which permitted a defence of due diligence to the accused.

[174] Since the adoption of the Charter, the Canadian Supreme Court has held that where a statute imposes criminal liability without any mens rea requirement (ie. absolute liability) which may result in imprisonment, it will be a breach of section 7 of the Canadian Charter of Rights and Freedoms. (See *Reference re section 94(2) of the Motor Vehicle Act* (1986) 24 DLR (4th) 536 (SCC); *R v Vaillancourt* (1988) 47 DLR (4th) 399 (SCC); *R v Wholesale Travel Group Inc*. (1992) 84 DLR (4th) 161 (SCC); *R v Nova Scotia Pharmaceutical Society* (1992) 10 CRR (2d) 34 (SCC); *R v Burt* (1987) 60 CR (3d) 372 (Sask CA); *R v Pellerin* (1990) 42 CRR 292 (Ont CA); *R v Sutherland* (1990) 55 CCC (3d) 265 (NS CA).) Section 7 of the Canadian Charter is formulated differently to

section 11 of our interim Bill of Rights. It provides that:

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[175] In *Vaillancourt*, Lamer J (as he then was) held:

> "In effect, *Reference re Motor Vehicle Act* acknowledges that, whenever the state resorts to the restriction of liberty, such as imprisonment, to assist in the enforcement of a law, even, as in *Reference re Motor Vehicle Act*, a mere provincial regulatory offence, there is, as a principle of fundamental justice, a minimum mental state which is an essential element of the offence. It thus elevated *mens rea* from a presumed element in *Sault Ste. Marie* [*R v City of Sault Ste. Marie*] to a constitutionally required element. *Reference re Motor Vehicle Act* did not decide what level of *mens rea* was constitutionally required for each type of offence, but inferentially decided that even for a mere provincial regulatory offence *at least* negligence was required, in that *at least* a defence of due diligence must *always* be open to an accused who risks imprisonment upon conviction." (At 414.)

[176] The striking degree of correspondence between different legal systems in relation to an element of fault in order to establish criminal liability reflects a fundamental principle of democratic societies: as a general rule people who are not at fault should not be deprived of their freedom by the state. This rule is the corollary of another rule which the same comparative exercise illustrates: when a person has committed an unlawful act intentionally or negligently, the state may punish them. Deprivation of liberty, without

established culpability, is a breach of this established rule. Where culpability is established, and the conduct is legitimately deemed unlawful, then no such breach arises.

[177] What is also clear however, from an examination of our law and that of foreign jurisdictions is that it is widely recognised (both in our common law and in the law of other countries) that the culpability required to establish criminal liability need not in all circumstances be evidenced by direct intent (dolus directus) on the part of the accused to commit a criminal act. In our own law other forms of intent, such as dolus eventualis, have been recognised as sufficient to meet the requirement of culpability, and in certain circumstances, the law has recognised that even negligence or culpa, can be sufficient to give rise to criminal liability. It is not necessary for the purposes of this case for us to determine the level of culpability required by section 11. Indeed the appropriate form of culpability may well be affected by the nature of the criminal prohibition as well as other factors. In addition, it should be borne in mind that significant leeway ought to be afforded to the legislature to determine the appropriate level of culpability that should attach to any particular unlawful conduct to render it criminal. It is only when the legislature has clearly abandoned any requirement of culpability, or when it has established a level of culpability manifestly inappropriate to the unlawful conduct or potential sentence in question, that a provision may be subject to successful constitutional challenge.

[178] The question that arises then is whether section 332(5) imposes a form of culpability, sufficient to justify the deprivation of freedom without giving rise to constitutional complaint. To determine the answer to this question requires a careful analysis of section 332(5).

[179] It provides that once the state has established that a company has committed an offence, an accused will bear a burden of proof to establish upon a balance of probabilities that he or she did not take part in the commission of the offence and that he or she could not have prevented its commission. The director will be liable for the offence, regardless of whether the offence is one which, at common law, contains a mens rea requirement, such as fraud or theft. Liability will arise therefore even though there has been no positive act by the accused, but merely an omission.

[180] In *S v Klopper* 1975 (4) SA 773 (A) the court was concerned with a forerunner to section 332(5), section 381(5) of Act 56 of 1955, which was in identical terms. In that case, the accused had been charged with attempted fraud on the basis of the provisions of section 381(5). At trial, the accused gave evidence to the effect that he was not aware of the offence committed. He conceded that his ignorance was due in part to his own negligence in failing to read sufficiently carefully the documents which contained the fraud which were sent to him. The Witwatersrand Local Division convicted him of fraud, but referred to the Appellate Division the question as to whether the court had been

correct in concluding that the accused's evidence did not absolve him of liability. Kotzé AJA considered the requirement imposed by section 381(5). He held that:

> "Na my mening behoort sub-art. (5), wat - soos reeds aangedui - 'n vorm van strafpligtigheid oplê, op die mins verswarende wyse uitgelê te word. Ten einde 'n objektiewe vertolking te regverdig, behoort 'n kwalifikasie, soos bv. 'redelikerwyse' of 'sonder nalatigheid' voor die woorde 'kon verhoed het nie' ingelees te word. Sonder so 'n kwalifikasie in te voeg - waarvoor ek in 'n strafbepaling, soos hierdie, geen regverdiging kan sien nie - is dit onmoontlik om te beslis dat die Wetgewer 'n objektiewe uitleg wou voorskryf." (At 780 B - D.)

[181] Accordingly, the judge held that the accused had met the onus imposed upon him by section 381(5) and set aside the conviction and sentence of the accused. In so holding, Kotzé AJA expressly rejected the view that the section requires an accused to place objective facts before the court proving, not only that he or she was not aware of the commission of the offence, but that he or she had taken reasonable steps to prevent the commission of the offence, an approach which had been adopted in *S v Salama Taxis (Pty) Ltd and Others* 1964 (1) SA 371 (C) at 376C-H and followed in *S v Poole* 1975 (1) SA 924 (N) at 934E. The rule in *S v Klopper* has been repeatedly applied. (See *S v Film Fun Holdings (Pty) Ltd and Others* 1977 (2) SA 377 (E) at 386H; *S v Deal Enterprises (Pty) Ltd and Others* 1978 (3) SA 302 (W) at 314H-315A and 315H-316A; S *v Harper and Another* 1981 (2) SA 638 (D) at 641G-H.)

[182] The nature of the liability imposed upon directors by the provision then is that they will be liable for any criminal offence committed by the company unless they can show that they did not have knowledge of it and/or that they could not have prevented it. According to the interpretation of the section in *Klopper*'s case, the test for prevention is not an objective one. Directors need not show that they exercised due diligence and care to prevent the commission of the offence, they need merely show that they could, as a matter of subjective fact, not have prevented it. In this sense, the provision as interpreted requires a form of subjective blameworthiness.

[183] Imposing criminal liability upon a director who knows of the commission of an offence by the company and who is in a position to prevent the commission of that offence but does not do so is not in any sense egregious. Actual knowledge coupled with the ability to prevent the commission of the offence by a director who is in a position of control in the corporate body renders the failure to do so sufficiently culpable to warrant criminal liability.

[184] In addition to directors, however, section 332(5) also renders "servants" liable in circumstances where they do not participate in an offence of the company, but could have prevented it. In my view, this is a legislative overreach. The class of servants includes a very wide range of persons, from those who act in a managerial capacity to those who perform menial functions only. I agree with Kentridge AJ, for the reasons given by him

at paragraph 101 of his judgment, that to impose such liability upon such a wide class of servants is in breach of section 11(1).

[185] The provisions of section 332(5) of the Act are therefore to be distinguished from the provisions of section 6(6) of the Gambling Act 51 of 1965, which we considered in *Scagell and Others v Attorney-General of the Western Cape and Others* 1996 (11) BCLR 1446 (CC) at paragraph 33. In that case the relevant section provided, in effect, that a servant who permitted the playing of a gambling game would be guilty of an offence. The prosecution thus bears the onus of establishing not only that a servant *permitted* the playing of a gambling game but also that he or she had the necessary mens rea. The differences between that provision and the one currently under consideration are therefore material. No argument was addressed to us by the state to suggest that the breach of section 11(1) caused by the inclusion of the words "or servant" in the subsection was justifiable. Indeed, it was conceded in argument that, to the extent that the section imposed liability upon servants of corporations, it was constitutionally intolerable. In the circumstances, I would hold that the words "or servant" must be severed from the section. Once that has been done, in my view, section 332(5), as it has been interpreted by the Appellate Division, is not in conflict with section 11(1) of the Constitution. I reach the same conclusion as Kentridge AJ, therefore, but for different reasons.

Section 25(3)

[186] The second question for consideration, then, is whether section 332(5) in imposing a burden of proof upon the accused is in breach of section 25(3)(c) of the Constitution. It needs to be emphasised that section 25(3) is an important constitutional right in itself. It recognises that before the state can impose a criminal sanction on a person, that person must have been afforded a fair trial. In so doing, the section focuses on the importance of procedural fairness - long a cherished value in democratic societies.

[187] In a series of cases, this court has held that where a legislative provision imposes an obligation upon an accused to establish certain facts to avoid criminal liability it constitutes a breach of the presumption of innocence as enshrined in section 25(3)(c). (See *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 33; *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 15; *S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC); 1996 (3) BCLR 293 (CC) at para 12; *S v Julies* 1996 (4) SA 313 (CC); 1996 (7) BCLR 899 (CC) at para 3; *Scagell and Others v Attorney-General of the Western Cape and Others* 1996 (11) BCLR 1446 (CC) at para 7.) It is true that this court has left open the question of whether, when a statute imposes a burden upon an accused to prove an element of a defence as opposed to the element of an offence, it will be in breach of section 25(3)(c). (See, in particular, *S v Zuma,* cited above, paragraphs 41-2.) Counsel for the government argued that that question arose for decision in this case.

[188] Counsel for the government argued that section 332(5) imposes a burden upon an accused to prove facts to establish a defence, rather than an element of the offence. This argument does not assist them. Even if the relevant portion of section 332(5) does constitute a defence rather than an element of an offence, it is my view that no distinction can satisfactorily be drawn between elements of an offence and elements of a defence for the purposes of section 25(3)(c) and, in particular, the presumption of innocence.

[189] We have stated on several occasions that the nub of the protection provided by section 25(3)(c) is to ensure that people are not convicted of an offence where a reasonable doubt exists as to their guilt. Guilt is only established when it is clear that the accused has no defence and that all the elements of the particular crime have been established. If an accused person can be convicted despite the existence of a reasonable doubt either in relation to one of the elements of the offence or one of the elements of a defence and a court is compelled to convict because of a reverse onus provision, the presumption of innocence is breached. As Dickson CJC held in *R v Whyte* (1989) 51 DLR (4th) 481 at 493:

> "The short answer to this argument is that the distinction between elements of the offence and other aspects of the charge is irrelevant to the s 11(d) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.
>
> The exact characterisation of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It

is the final effect of a provision on the verdict that is decisive."
(See also *R v Keegstra* (1991) 3 CRR (2d) 193 at 258-9.)

[190] I cannot accept, therefore, that section 332(5) would not be in breach of section 25(3)(c) of the Constitution simply because the burden imposed upon accused persons by that provision related only to a possible defence and not to an element of the crime. In my view, section 332(5) is in breach of section 25(3)(c) because an accused person may be convicted of an offence despite the existence of a reasonable doubt as to whether he or she was in fact guilty.

[191] The question remains, however, whether that breach may be justified in terms of section 33(1) of the Constitution. For the reverse onus to be held to be justifiable, we need to be persuaded that section 332(5) is reasonable, justifiable and necessary in an open and democratic society based on freedom and equality. In determining whether a provision is legitimate, the court must weigh the infringement caused against the purpose, effects and importance of the impugned provision. (*S v Makwanyane and Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 104.)

[192] Counsel argued that the purpose of section 332(5) was to impose an obligation upon directors of companies to take every precaution to ensure that companies did not commit criminal acts. Imposing a legal burden upon such a director, it was argued, would

require a director charged in terms of the provision to present objective evidence to court of the steps he or she had taken to prevent the commission of offences by the company. [193] It may well be that one of the circumstances in which it will be justifiable to impose a legal burden of proof upon an accused is when the purpose of the legal burden is to require a person diligently to take positive steps to prevent the commission of certain statutory offences. In many jurisdictions a distinction has been drawn between criminal acts that are *mala in se* and criminal acts that are *mala in re prohibita,* or as they have been, perhaps inaptly, termed in English, criminal offences proper and regulatory offences. (See for a discussion of the distinction K R Webb *Regulatory Offences, the Mental Element and the Charter: Rough Road Ahead* in 21 Ottawa Law Review 419(1989).) The reason for the distinction has perhaps been most succinctly put by Cory J in *R v Wholesale Travel Group Inc.* (1992) 84 DLR 4th 161 at 205-6 where he held that:

> "It has always been thought that there is a rational basis for distinguishing between crimes and regulatory offences. Acts or actions are criminal when they constitute conduct that is, in itself, so abhorrent to the basic values of human society that it ought to be prohibited completely. Murder, sexual assault, fraud, robbery and theft are all so repugnant to society that they are universally recognized as crimes. At the same time, some conduct is prohibited, not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being imposed upon members of society, especially those who are particularly vulnerable.
>
> The objective of regulatory legislation is to protect the public or broad segments of the public (such as employees, consumers and motorists, to name but a few) from the potentially adverse effects of otherwise lawful activity. Regulatory legislation involves a shift of emphasis from the protection of individual interests and the deterrence and punishment of acts involving moral fault to the protection of public and societal interests.

> While criminal offences are usually designed to condemn and punish past, inherently wrongful conduct, regulatory measures are generally directed to the prevention of future harm through the enforcement of minimum standards of conduct and care."

[194] Cory J then went on to hold that where regulatory offences were concerned the shift of onus to the accused would not constitute a breach of section 11(d) of the Charter which entrenches the presumption of innocence. Relying upon the distinction between criminal offences and regulatory offences, he held that:

> "[c]riminal offences have always required proof of guilt beyond a reasonable doubt; the accused cannot, therefore, be convicted where there is a reasonable doubt as to guilt. This is not so with regulatory offences, where a conviction will lie if the accused has failed to meet the standard of care required." (At 224.)

A different, and in my view, a more persuasive approach was taken in the same case by Iacobucci J who held that the considerations raised by Cory J concerning the distinction between regulatory and criminal offences was relevant not to the question of whether there had been a breach of section 11(d) but to the question of whether that breach was justifiable in terms of section 1 of the Canadian Charter which requires any breach to be a "reasonable limit ... demonstrably justified in a free and democratic society".

[195] One of the main reasons that Cory J gave for relying upon the distinction relates to the purpose that regulatory offences are meant to serve and, in particular, the purpose that imposing a legal burden upon an accused to establish due diligence in the context of such

offences may serve. Where an accused has to prove on a balance of probabilities that he or she has exercised due diligence to avoid the commission of an offence, an accused will have to produce evidence of the efforts that were made to exercise due diligence. In many situations, this will require an accused to show that steps were taken to avoid the offence. Where on the other hand the prosecution bears the legal burden to show absence of due diligence, it is the prosecution which will need the detailed evidence to establish the absence of care. An accused would then need to raise only a reasonable doubt. The implications of the different burdens in a regulatory context are clear. In the one, the accused must not only act with diligence to avoid the commission of offences, but he or she must have proof that such action was taken. If such proof is not kept, then it may not be possible to establish the necessary defence. In the other, the prosecution will need to establish a prima facie case of a failure to act diligently. Only if the state discharges such a burden, will the accused be required to rebut it by raising a reasonable doubt. The need for an accused to maintain evidence of his or her due diligence will be considerably attenuated. In such circumstances an evidential burden does not have the same effect as a legal burden, and it may not be sufficient to achieve the purposes of a regulatory statute. These considerations may well form the basis of a ground of justification under section 33(1) of our Constitution.

[196] The distinction between regulatory offences and criminal offences has been recognised in other jurisdictions as well. (See *Morissette v United States* 342 US 246,

253-62 (1952); *Sherras v De Rutzen* [1895] 1 QB 918 at 922; *Lim Chin Aik v R* [1963] AC 160 (PC) at 174; *Sweet v Parsley* [1970] AC 132 (HL) at 163E-F; *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1984] 2 All ER 503 (PC) at 507-9; *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA) at 668-9.) However as these cases illustrate, it has also been the subject of judicial discord and criticism. It is not necessary for the purposes of this case for us to resolve that discord or address those criticisms. A definitive pronouncement of the significance of such distinction for our law can await a case in which the distinction has application.

[197] For what is clear in this case, as both Langa J and Kentridge AJ note, is that section 332(5) is by no stretch of the imagination confined only to regulatory offences. It covers all offences, common law and statutory. It cannot rely for justification therefore on a distinction drawn between regulatory and criminal offences as the government sought to argue.

[198] Perhaps an even more cogent reason, however, emerges from the analysis of section 332(5) which appears at paragraph 180 to 182 above: the defence which an accused person needs to establish in terms of section 332(5) is not that he or she acted with due diligence. An accused needs to show that he or she did not have knowledge of the offence, or that he or she could not have prevented it. Such a defence does not require an accused to produce evidence to show due diligence, but provides a defence to the

negligent, as happened in *Klopper's* case, above. It is hard in these circumstances to accept that the onus contained in section 332(5) will necessarily result in legislatively desired diligent behaviour.

[199] For these reasons, it is not necessary to consider any further the basis of the distinction between regulatory and criminal offences, nor the circumstances in which a shift of onus in the context of regulatory offences will meet the requirements of section 33. The government could not point to any other reason or circumstance which would justify the infringement of section 25(3) of the Constitution that section 332(5) occasions. I am not satisfied that the objectives of the provision could not have been achieved by means less invasive of the rights afforded by section 25(3). Nor was the government able to point to a reason which would justify the subsection's application to all offences, regardless of their nature or purpose. In the circumstances, I have not been persuaded that there are grounds to find that section 332(5) is saved by the terms of section 33(1) of the Constitution.

[200] It is for these reasons, that I share the conclusion of Langa J that section 332(5) is inconsistent with the provisions of the interim Constitution. However, unlike Langa J, I am in agreement with Kentridge AJ that the unconstitutionality of the subsection can be cured by severance. The form of severance I propose is different from that proposed by Kentridge AJ and its result, in my view, is not an evidential burden as he suggests.

[201] In *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others* 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC), this Court held that:

> "Although severability in the context of constitutional law may often require special treatment, in the present case the trite test can properly be applied: if the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute. The test has two parts: first, is it possible to sever the invalid provisions and, second, if so, is what remains giving effect to the purpose of the legislative scheme?" (at paragraph 16 applying the rule in *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (A) at 822D-E.)

It seems clear, too, that the court should be loath to declare statutory provisions invalid, where the result of such declaration would be to invalidate aspects of a statutory provision which are without constitutional blemish. If it is possible to separate the constitutional from the unconstitutional without giving rise to a provision inconsonant with the original legislative scheme, that is the course the court should adopt. Two questions thus arise. Is it possible to sever the constitutional aspects of section 332(5) from the unconstitutional aspects of the section? If so, does the remainder give effect to the "purpose of the legislative scheme"? I will address each of these questions separately.

[202] In my view the following words can be severed from section 332(5): "it is proved

that he did not take part in the commission of the offence and that". The section would then read:

> "When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director ... of the corporate body shall be deemed to be guilty of the said offence, unless ... he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom and shall on conviction be personally liable to punishment therefor."

The first question to be considered in determining whether this is a valid severance is whether what remains is indeed constitutional.

[203] If the abridged provision still imposes a burden of proof upon the accused, the severance will not have succeeded in separating the good from the bad. On a bare reading of the provision as severed, it does not expressly impose a burden upon the accused. The question then arises as to whether section 90 of the Criminal Procedure Act 51 of 1977 applies. Section 90 governs the question of whether, when a burden of proof is not expressly imposed upon the accused, a provision such as the abridged provision will nevertheless by read to impose a burden on the accused. It provides that:

> "In criminal proceedings any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the law creating the offence, may be proved by the accused but need not be specified or negatived in the charge and, if so specified or negatived, need not be proved by the

prosecution."

The question that arises then is whether the portion of the provision after severance that reads "unless he could not have prevented it" is an "exception, exemption, proviso, excuse or qualification" within the terms of section 90. Section 90 has been the subject of repeated consideration by the Supreme Court of Appeal. (See, for example, *R v Zondagh* 1931 AD 8 at 16; *R v Beebee* 1944 AD 333 at 335-6; *R v Kula and Others* 1954 (1) SA 157 (A) at 159F-161H; *R v Shangase* 1960 (1) SA 734 (A) at 735C-D; *R v Moosa and Others* 1960 (3) SA 517 (A) at 532F-H; *Attorney-General, Cape v Bestall* 1988 (3) SA 555 (A) at 568A-C.) The proper approach to the application of the section has most recently been summarised in Nestadt JA's judgment in *Bestall's* case.

> "What has to be decided is whether the negative element or excusing factor forms a material part of the offence itself or whether it is merely an exclusion (to be established by the accused) from the general prohibition contained in the provision. In each case it is a question of construction of the relevant legislation. Factors used as an aid in this regard, in addition to the form in which the prohibition is cast, include the grammatical shape of the provision, its context, its apparent scope and object and the practical consequences of the competing constructions. In addition, according to the so-called 'truncation test', assistance may be derived from considering whether, if the alleged exemption be excised, what remains looks like something that the Legislature might well have intended to make an offence." (At 568A-C.)

To determine whether section 90 would have application to the abridged provisions of section 332(5), one has to determine whether the words "unless he could not have prevented it" form a material part of the offence created by section 332(5). It seems to me

that these words are a material part of the offence. The offence does not lie in being a director of a corporate body that has committed an offence, but in failing to prevent the commission of such an offence when it is possible to do so. The purpose of section 332(5) is to make it clear to directors that they are under a legal duty to prevent the company from committing offences of which they have knowledge. Knowledge that an offence is being committed coupled with the ability to prevent that commission are the crux of the offence itself. In my view, therefore, section 90 cannot apply to the abridged provision. As section 90 has no application in the case, it is not necessary to consider whether section 90 itself constitutes a breach of section 25(3) of the Constitution.

[204] Once it is found that the provision does not impose a burden on the accused, whether expressly or as a consequence of the operation of section 90, it does not seem to me that it is open to an interpretation which would impose such a burden. The Constitution now requires that where a provision is reasonably capable of an interpretation that is consistent with the Constitution, that interpretation should prevail (section 35(2)). As the abridged provision seems reasonably capable of the interpretation that it imposes a burden upon the state, it seems to me that that is the interpretation which should be given it. I come to the conclusion, therefore, that the severance would result in a constitutional provision and that the good may be severed from the bad.

[205] The further question concerning severance is whether what remains gives effect to

the purpose of the legislative scheme. In my view, it does. The purpose of the legislative scheme was twofold: to impose a legal duty upon directors and servants to take steps to prevent the commission of offences about which they knew; and to impose a legal burden upon directors and servants to establish that they did not participate in an offence committed by a company and could not have prevented it. I disagree with Ackermann J, therefore, who adopts the view that the purpose of section 332(5) was merely to shift the burden of proof to the accused in respect of two elements of an offence.

[206] The common law liability described in *R v Shikuri* 1939 AD 225 and relied upon by Ackermann J renders employers criminally liable as accomplices because of the implied authority they have given their employees to act wrongfully in particular circumstances. This liability is a different and narrower form of liability than that imposed by section 332(5). The liability created by that section is not based upon a doctrine of implied authority but upon the creation of a legal duty which binds directors and servants to take steps to prevent the commission of criminal offences by a company, where they have knowledge of them. As such it renders an omission or failure to act wrongful. This seems to have been a clear purpose of the legislature in enacting section 332(5). I cannot accept that such a duty clearly exists at common law as suggested by Ackermann J. In my view, the purpose of the legislature in enacting section 332(5) was to avoid the uncertainties of the common law liability and to impose a firm duty upon directors (and servants) of corporate bodies to take steps to prevent the commission of

criminal offences by the company where they had knowledge of such offences. If we were to declare the entire provision invalid, we would render void the duty created by the section. Whether the common law would fill the gap thus created remains uncertain. I cannot agree with Ackermann J therefore that an order for severance would be inappropriate in this case.

[207] The order I would propose in respect of section 332(5) is the following:

> 1. The words "or servant" and "it is proved that he did not take part in the commission of the offence and that" in section 332(5) of the Criminal Procedure Act are inconsistent with the Constitution and are declared to be invalid with effect from the date of this order.
>
> 2. In terms of section 98(6) of the Constitution, this declaration of invalidity shall invalidate any application of section 332(5) in its unabridged form in any criminal trial in which the verdict of the trial court was or will be entered after the Constitution came into force, and in which, as at the date of this judgment, either an appeal or review is pending or the time for noting of such appeal has not yet expired.

SACHS J:

[208] For many years a dispute existed as to whether a company, not having a mind of its own capable of forming criminal intent, could be prosecuted for a criminal offence.[1] The matter was resolved by the enactment of predecessor legislation to section 332, which expressly made companies liable to prosecution and laid down the conditions of their culpability.[2] It was felt, however, that the mere imposition of a fine to be defrayed from company resources would be an insufficient sanction. The Legislature accordingly decided that

> ". . . the public interests might require an additional sanction, viz., that the officers through whose delinquency or lack of vigilance the company became a defaulter should be made to suffer: hence the provision making the officers liable in their individual representative capacities unless they prove absence of knowledge of the contravention."[3]

In the striking words of an American court dealing with a similar matter, the danger existed that fines established to deter crime would become mere licence fees for illegitimate corporate business operations.[4]

[209] The result was the enactment of section 332(5), the constitutionality of which is under consideration in this matter. It reads as follows:

> "When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved

> that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor."

[210] Defending the constitutionality of this provision, Mr Gauntlett argued that the vicarious liability it imposed amounted to what he called 'regulatory' liability and not true criminal liability. He contended that persons who chose to assume a directorship have, in so doing, placed themselves in a position of responsibility not only vis-à-vis the company but in relation to the public generally. Accordingly, they must accept (indeed, for all practical purposes, they are deemed to accept) that the law requires them to control the corporate body, and otherwise discharge their duties as directors, in accordance with certain minimum standards on pain of civil and criminal liability. The realities and complexities of the modern corporate world, coupled with the need to protect society and all its members against the considerable harm which could result from the reckless or inattentive stewardship of corporate bodies, demanded that the conduct of directors be effectively regulated. Directors must be impelled to ensure that the conduct of corporate bodies complied with the law. Seen in this light, a provision which imputed to the directors of a corporate body liability for an offence committed by that body in cases where they did not prove on a balance of probabilities that they could not have prevented it, served an important regulatory purpose which did *not* run counter to the presumption of innocence, notwithstanding the fact that (which he accepted) in a criminal context the

same reverse of onus would violate section 25(3) of the Constitution.

[211] Mr Gauntlett's alternative argument was that if there was a breach of the presumption of innocence contained in section 25(3)(c), such breach was reasonable, justifiable and necessary, and thereby saved by section 33(1). More particularly, the objectives of section 332(5) - protecting society and all its members against the considerable harm which could result from the reckless or inattentive stewardship of corporate bodies; impelling directors to ensure that the conduct of corporate bodies complied with the law; and avoiding the loss of convictions of those who failed to do so because the facts were particularly within the knowledge of the accused - were of sufficient importance to override the right guaranteed by section 25(3)(c).

[212] The essence of his argument was that the section was intended to deter reckless or inattentive stewardship of companies, and as such essentially regulatory rather than punitive in character. If his characterisation of section 332(5) is correct, then his argument would undoubtedly carry considerable weight. The legislative purpose would be not so much to facilitate the punishment of corporate crooks as to encourage the prevention of corporate crookedness. Its aim would be to reinforce accountability of company directors, by ensuring that those in control of companies took responsibility for both the conduct and the misconduct of those whom they hired, fired and directed. As the commanding brains of corporate enterprises, they would, if called to account for their

failure to prevent company misdemeanour, be subject not to capricious targeting,[5] but, rather to focused enquiry based on their responsible relation to the primary perpetrators.[6] As the eyes, ears and spokespersons of the corporation, it could possibly not be unreasonable to infer or assume that they saw, heard and spoke proven corporate evil, rather than the reverse. Certainly it would not be unreasonable to hold them personally to account for the misdeeds of those obliged to do their bidding,[7] provided that this were done by penalising them for culpable lack of concern for keeping the company on the straight and narrow, rather than by punishing them by attributing equal guilt when such could not be proven in the ordinary way.

[213] The first question before us, then, is whether it is possible to read section 332(5) in such a way as to restrict its ambit to regulatory offences. This turns on the meaning to be given to the words "any act, for which any corporate body is or was liable to prosecution". Attempting to "read down" these words as I may,[8] I can discover neither textual nor contextual warrant for limiting them to acts or omissions relating to regulatory offences only. On the contrary, section 332(1) provides in unqualified language that:

> "For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law -
> *(a)* any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and
> *(b)* the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant, of that corporate body,

> in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body."

[214] The words "any act" are as wide as they could be. The one limitation to the scope of this section is that the corporation would not be liable for prosecution in relation to crimes committed by a director or servant for personal interest,[9] but only for those committed in furtherance of the corporation's interests. Read with section 332(5), the following further qualifications could be made: Crimes such as bigamy or rape which by their nature could only be committed by human persons would be excluded[10] and the same would apply to crimes which by statute can only be committed by natural persons.[11] Proof of absence of knowledge of the offence could also enable the director to escape liability, since a director could not have prevented the offence if its existence was unknown to him or her.[12]

[215] None of these qualifications can be seen as limiting the application of section 332(5) read with section 332(1), to regulatory offences only. On the contrary, it has been held that a corporate body can commit crimes based on intent and negligence,[13] and successful prosecutions have been brought against companies for fraud, theft, and culpable homicide.[14] It is instructive that the specimen indictment in a leading textbook on criminal law, reads as follows:

> "THAT X, charged in terms of section 332(1) of the Criminal Procedure Act 51 of 1977

> in his representative capacity as a director of the A Company Limited, a corporate body, and charged in his personal capacity, in terms of section 332(5) of the Act aforesaid, and Y, the secretary and servant of the said A Company Ltd, are guilty of the crime of fraud:
>
> IN THAT, on or about . . ., at . . ., in the district of . . ., the said Y, in the exercise of his powers . . ."[15]

[216] There is, of course, no clear definition of what are regulatory offences. Yet, whatever the term may cover, section 332(5), even read in the most strained way possible so as to favour constitutionality, cannot be limited to embracing such offences only. The typical matter prosecuted, namely, fraud, is clearly not a mere regulatory offence, but a particularly ugly species of white collar crime, castigated as such by society, and carrying with it the prospects of heavy terms of imprisonment.

[217] For present purposes what matters is not so much the definition of regulatory offences, but an evaluation of the underlying reasons for treating them in a special way, and thereby for permitting or even requiring departure from the normal rules relating to onus of proof. I would like to refer to an American case which was cited by Mr. Gauntlett in favour of upholding the section in question, but which, in my view, goes emphatically the other way. This is the matter of *Morissette v United States.*[16] Although this case dealt with the issue of whether statutory offences required intent or not, the underlying questions of legal principle were precisely the same as those in the present matter, namely, of determining when the conditions of modern society justified legislative

departure from time-honoured protections given to defendants. Given the eloquence and pertinence of the opinion of Justice Jackson (for the court), I trust I will be forgiven for quoting from it at some length:[17]

> "Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.
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> . . . .
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> [However,] [t]he industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct. Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed food, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.
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> . . . .
>
> ["[P]ublic welfare offences"] do not fit neatly into any of [the] accepted classifications of common-law offences, such as those against the state, the person, property, or public morals. Many of these offences are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize. While such offences do not threaten the security of the state in the manner of treason, they may be regarded as offences against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect, whatever the intent of the violator, the injury is the same, and the consequences are

> injurious or not according to fortuity. Hence, legislation applicable to such offences, as a matter of policy, does not specify intent as a necessary element. The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities.[18] Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.
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> . . . .
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> Stealing, larceny, and its variants and equivalents [on the other hand], were among the earliest offences known to the law that existed before legislation; they are invasions of rights of property which stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high and, when a sufficient amount is involved, the infamy is that of a felony, which, says Maitland, is ". . . as bad a word as you can give to man or thing."
>
> . . . .
>
> [W]e cannot accept [cases not requiring intent for public welfare offences] as authority for eliminating intent from offences incorporated from the common law.
>
> . . . .
>
> The Government asks us by a feat of construction radically to change the weights and balances in the scales of justice. The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries."

[218] In my view, this is a convincing line of reasoning which is directly apposite to the question before us. The same rationale justifying departure from the normal rules relating to proof of a guilty mind, could apply to deviation from the standard practice in respect of onus of proof. Conversely, the same considerations in respect of honouring proof of guilty intent in relation to common law offences such as fraud, should operate with

reference to onus of proof in such matters. Yet, common law offences of a serious nature, carrying heavy penalties and severe social disgrace, are picked up by section 332(5) and imputed to persons who are deemed guilty unless they can prove their innocence in one of the manners prescribed. The presumption of innocence is violated, not as a matter of overwhelming practical convenience,[19] or to prove maintenance of standards for a licensed activity,[20] but simply to facilitate conviction. Indeed, the very purpose of the strong deeming provision is to invert the normal relationship between prosecution and defence. A nexus of easily inferred fact, which in practice would aid a finding of guilt according to the normal onus of proof criteria, is converted into a nexus of law, opening up the very real possibility of a finding of guilt followed by severe punishment, even though the trial court had real doubts on the matter.

[219] The problem with section 332(5) is that because of its wide generic and mutable character, it serves as a deeming clause for all seasons, both for those where it is appropriate and for those where it is not. To the extent that it covers regulatory offences, it might well be justifiable, balancing out all the relevant concerns and interests, to run the risk of convicting persons about whose guilt a doubt remains. Yet it embraces common law crimes as well. Furthermore, given that regulatory offences are creatures of statute that usually contain their own specific tailor-made legislative aids to securing effective implementation,[21] prosecutors could well prefer to rely on such statutes rather than on section 332(5) when preparing their indictments. The main function of section

332(5) could, then, be to help the prosecution get round hallowed procedural protections normally available to the accused in criminal matters.

[220] Much was made during argument of the importance of combatting corporate fraud and other forms of white collar crime. I doubt that the prevalence and seriousness of corporate fraud could itself serve as a factor which could justify reversing the onus of proof. There is a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book.[22] Hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scales as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption . . . the list is unfortunately almost endless,

and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.

[221] The second question that needs to be asked is whether section 332(5) is capable of being read in such a way as merely to penalise what Mr Gauntlett referred to as reckless or inattentive stewardship of corporations. I am in full agreement with O'Regan J's reasoning on this point, as far as it goes. It should be remembered that interpretations of the section by South African courts in the pre-constitutionalism era were directed simply to determining the "intent" of the legislature, and then to ensuring that indictments gave the accused adequate warning of the precise charges they would have to meet. The courts then neither had the opportunity nor the obligation to opt for a reading which, although at first sight was not the most convincing one, nevertheless, was a reasonable one. The fact that the interpretation proposed by so distinguished a jurist as Schreiner JA in the *Limbada*[23] case was a minority one not supported in a later case by the Appellate Division, does not make it an unreasonable one. If the approach adopted is a reasonable one which could lead to preserving the constitutionality of the provision, we have no option: we are obliged to adopt it.[24] Section 35(3) does not give us an option. His approach goes a long way to establishing that the section was intended to create a new offence, or, rather, a new form of liability based on failure of a director to prevent corporate crime when in a position to do so.

[222] It seems to me that the ambit of the section was enlarged from serving as a means of ensuring, firstly, that corporation directors felt the sting when their companies broke the law, and secondly, that they took appropriate measures to prevent possible offences by those under their command, to include a third element, namely, to see to it that prosecutors could more easily get round the difficulties of proof in relation to direct responsibility for the principal offence. In my view, if a combination of reading down and severance rescues the achievement of the first two legitimate legislative purposes, while eliminating the illegitimate third one, we should adopt it. It would, of course, be absurd to require the prosecution to prove beyond reasonable doubt that the accused was innocent of the principal offence, hence the words "it is proved that he did not take part in the offence" should be deleted. That would leave as the gravamen of the offence the failure of the director to prevent the criminal activity. On the assumption that you can only prevent that of which you are aware,[25] this would not be a very powerful weapon in the hands of the prosecution. Nevertheless, one can envisage situations where there would be sufficient evidence at least to call for a reply, in terms of which directors could be compelled to testify on pain of a prima facie case against them being converted into a conclusive one by their failure to answer the case made out against them. In this respect, I am persuaded that the legislature would have preferred half a loaf to no bread at all, or, even, for that matter, half of half a loaf, if preserving such a portion kept alive one of its principal objects.

[223] As to the question of onus of proof in relation to the "unless" clause relating to failure to prevent the offence, I support the approach of looking at the substance of the offence, the mischief it was designed to combat, and the nature of the qualification, rather than relying purely on the grammatical forms employed. In *Kula*'s case,[26] van den Heever JA had the following to say on the subject:

> "To postulate "the offence" as something divorced from its actual definition is an unreal proceeding. If an area is defined in terms of what would otherwise have been a circle but by deduction of a certain segment, it seems to me notionally impossible to refer to the segment as either an additional element of or an exception to the area defined.
>
> The difficulty is that the Legislature has, in words which are deceptively simple at first blush, provided extremely elastic criteria which are purely relative. In most statutory provisions creating offences it will be necessary - save perhaps in regard to the simplest matters - to describe and define the scope of the prohibition by excepting, exempting, excluding, excusing or qualifying the persons of incidence or the *corpus delicti*, the facts. Enlarge the segment to which I have referred and it becomes difficult to say which is the notional circle, used as a term of reference and which the segment.
>
> It cannot, surely, be suggested that the matter is governed by the set phrases employed by the Legislature such as "unless" and "provided that"."[27]

[224] In the present case, I would accept that the focus of the offence lies on the segment rather than the circle from which it may be detached. The culpability of the director derives not from his/her position in the company, but from his/her failure, once in that position, to prevent a crime committed by those under his/her control. This failure is

more than a material element of the crime, it is its essence. Even if that were to overstate the case, the provision is at least reasonably capable of being read that way. To construe it as if the offence were merely to be a director of a company which has become liable for prosecution, with an escape route open to a director to prove innocence, would raise problems both under section 11(1) and section 25(3)(c). I agree with O'Regan J's illuminating analysis of the relation between the two sections, and with the interpretation she arrives at as a result of applying the techniques of reading down, which is constitutionally incumbent on us, and severance, its siamese twin.

[225] If the matter had rested there, I would have concurred fully in the judgment of O'Regan J, since I regard my judgment as being compatible with and intended to reinforce hers in terms of overall approach, both in its substantive analysis and in its treatment of severance, the two being related. Unfortunately, I discern other problems which compel me reluctantly to the conclusion that the section is irretrievable.

[226] The main one is the overbreadth of the term "any corporate body", to which Didcott J refers.[28] A supplementary one is the complicated problems in terms of section 11(1) that could arise in relation to the word "servant": should it be stitched back into the legislative cloth again, or not? If I may be forgiven for switching my metaphors from bread to clothing, I do not regard snipping here and knitting there as the exclusive function of the legislature. I believe the Constitution requires us to be creative in saving

the garment, or at least, a wearable part of it, if we can do so in a manner consistent with the purpose of the legislature as expressed in the text. But, too much reading down of too many terms, coupled with too many excisions of the text, leaves something so tattered and insecure, that it cannot be said that effect would be given to any of the principal objects of the legislature. In *Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Others*[29] case, Kriegler J expressly left open the possibility that "severability in the context of constitutional law may often require special treatment".[30] In my judgment in that matter I said that

> "[s]everability is an important concept in the context of the relations between this Court and Parliament; like "reading down", it is an instrument of judicial restraint which reduces the danger of producing an overbroad judicial reaction to overbroad legislation. ... [W]e must take account of the coming into force of the new Constitution in terms of which we receive our jurisdiction ..."[31]

We have not heard full argument on the matter, but my provisional view is that if legislation mixes constitutionally legitimate with constitutionally illegitimate objectives, then, provided that the latter are not so fundamental and pervasive as to vitiate the whole legislative scheme, we should seek to preserve the part that is constitutional. This would be consistent with the restrained adjudicatory posture enjoined on us by section 35(3) of the Constitution.[32] Yet, I feel that even applying the test most favourable to severance would not save the provision from being struck down in its entirety.

[227] I come to this conclusion with regret since I find myself in broad agreement not

only with the analytical thrust of O'Regan J's judgment, but with the overall evaluation of the issues at stake so eloquently presented by Kentridge AJ. [33] I also wish to associate myself with the forceful comments of Madala J[34] and Mokgoro J,[35] concerning the dangers represented by white collar crime and corporate disregard for the public welfare.

[228] This leaves me only to say that I agree with the well-articulated analyses of Langa J with regard to sections 245 and 332(5) respectively. I demur only to the extent that in my view his analysis of section 332(5) stops short of dealing with problems I feel this Court is obliged to confront, hence my separate judgment. With these rather elaborate qualifications, I concur in the orders he proposes.

For the appellants:	WH Trengove SC and GJ Marcus, instructed by Kok & Hendrikse.
For the State:	AJ Fourie and CTH McKelvey, instructed by the Attorney-General of the Witwatersrand Local Division of the Supreme Court.
For the Government of the Republic of South Africa:	JJ Gauntlett SC and AM Breitenbach, instructed by the State Attorney, KwaZulu-Natal.