
Explanatory Note

The following explanation is given purely to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

The applicants, charged with, inter alia, twelve counts of fraud challenged the constitutionality of sections 245 and 332(5) of the Criminal Procedure Act in terms of the interim Constitution (the “Constitution”). They contended that the sections imposed an onus on an accused person which violated the right to be presumed innocent (section 25(3)(c) of the Constitution). The applicants also challenged the sections as contravening sections 11(right to freedom and security of the person) and 28 (right to property) of the Constitution.

Justice Langa, delivered the majority opinion of the court, which held that sections 245 and 332(5) were unconstitutional and could not be saved by the limitations clause (section 33(1) of the Constitution). With regard to section 245 the court was unanimous that it was unconstitutional. The decision in regard to section 332(5) was not unanimous as a number of judges adopted a different approach to the issues raised.

Section 245

Justice Langa prepared the unanimous judgment in respect of the challenge to section 245. Section 245 provides that in criminal proceedings where an accused is charged with an offence of which a false representation is an element and it is proved that the false representation was made by the accused, he/she shall be deemed to have made the representation knowing it to be false, unless the contrary is proved. The Court held that the provision clearly infringes the presumption of innocence because it requires the accused to prove, on a balance of probabilities, what is essentially an element of the offence. The Court also held that section 245 could not be saved by the limitation clause of the Constitution (section 33 (1)), which requires that the infringement be reasonable, justifiable and necessary. The fact that it is difficult for the prosecution to prove an element of the offence which falls peculiarly within the knowledge of the accused was held not to be sufficient reason to warrant overriding the right in question. As a result the Court unanimously found that the provision failed to comply with the requirements of section 33(1) of the Constitution. Section 245 was accordingly held to be invalid and of no force and effect.

Section 332(5)

Section 332 (5) provides that a servant or a director of a corporate body that has committed an offence is deemed to be guilty of that offence and personally liable to punishment unless the accused can prove on a balance of probabilities that he or she did not participate in the offence and could not have prevented it. The applicants contended that the section infringed the

presumption of innocence and the cluster of rights associated with it, the right to freedom and security of the person and the right to property. The Court was most concerned with the following issues : which rights were violated; whether the section was justifiable; and whether words could be severed from the section to render it constitutional.

Justice Langa :

Justice Langa, delivering the judgment supported by the majority, held that the section breaches the presumption of innocence in that it allows the accused to be convicted despite the existence of a reasonable doubt as to his or her guilt. As to whether the section survives the test under the limitation clause, he held that it did not. He recognised the fact that directors bear a special responsibility to society and that the state has an interest in ensuring that the affairs of a corporate body are conducted properly. He held however that these ends could adequately be achieved by means which would not be inconsistent with the Constitution. In his view, the ambit of the section was too far-reaching in that it was applicable to any possible offence, serious or minor, to any type of liability and to any type of penalty, grave or trivial.

Having come to this conclusion on the question of the presumption of innocence, Justice Langa found it unnecessary to address the challenges based on the right to freedom and security of the person and the right to property. In his opinion, the section was inconsistent with the Constitution and could not be saved. He disagreed the view that a severance of the words “it is proved that”, as proposed by Acting Justice Kentridge, or the words “it is proved that he did not take part in the commission of the offence and that”, as suggested by Justice O’Regan , would keep the section within the bounds of constitutionality. In his view, what remains after the suggested excision would be a provision that still requires the accused to discharge a legal burden of proof in respect of an important aspect of the charge in order to avoid being convicted. Justice Kriegler concurs in the judgment of Justice Langa. Chaskalson P, Mahomed DP and Didcott J, in their separate judgments, concurred in Justice Langa’s judgment and the order he proposed.

Justices Ackermann and Sachs also concurred in the order but advanced different reasons for it.

Acting Justice Kentridge :

In a dissenting judgment, Acting Justice Kentridge held that section 332(5) is not an unconstitutional infringement of section 25(3). Section 332(5) creates a vicarious liability which encompasses an exemption or excuse which the accused may prove by way of a defence. An accused director may escape liability upon proof, on a balance of probabilities, of the two exempting factors mentioned in the subsection. According to Acting Justice Kentridge it cannot be held that by rendering the impact of the section less severe than it would otherwise have been had there been strict liability, the provision thereby constituted an infringement of section 25(3).

Acting Justice Kentridge held further, that section 332(5) did not infringe section 11(1). His reasons for so finding included the fact that the section served the legitimate public purpose of ensuring that those in control of corporate entities take responsibility for preventing the commission of antisocial conduct by such entities; and that only a limited burden was imposed upon the accused. He held however, that the inclusion of the words “or servant” is not defensible

and that the words should be excised.

Acting Justice Kentridge reasoned that even if the section is unconstitutional it is capable of being salvaged through the medium of severance. In the absence of the words “unless it is proved that” the accused would only be required to present evidence that raises a reasonable doubt as to whether he or she participated in or could have prevented the commission of the offence. He held that 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.

Justice O’Regan :

Justice O’Regan considered that the challenge to the section raised two separate constitutional inquiries. The first question was whether the right to freedom and security of the person is infringed by a provision which imposes criminal liability on persons who have not committed a criminal offence themselves, but who have failed to prevent others from committing such an offence when they could have done so. She held that imposing such criminal liability upon a director is not in any sense egregious and section 332(5) is therefore consistent with section 11(1) of the Constitution.

The second question related to the presumption of innocence. On this issue Justice O’Regan agreed with Justice Langa by holding that section 332(5) is in breach of the presumption of innocence because an accused person may be convicted of an offence despite the existence of a reasonable doubt and that the provision did not pass the limitations test.

She however disagreed with Justice Langa holding that the section was capable of being saved through the medium of severance as proposed by Acting Justice Kentridge. She differed from Acting Justice Kentridge with regard to the extent of the severance, holding that the constitutionality of the provision could be saved by excising the words “it is proved that he did not take part in the commission of the offence and that”. According to Justice O’Regan, the effect of the excision would not be to change the legal burden on the accused to an evidential burden as suggested by Acting Justice Kentridge, but to shift the onus from the accused to the prosecution completely. In her view, the section thus truncated, and with the reference to “servant” removed, would not be unconstitutional. Justice Mokgoro, in a separate judgment, concurred in the judgment of O’Regan J and the order proposed by her.

Justice Ackermann :

Justice Ackermann in a separate judgment agreed with the reasoning in the judgment of Justice O’Regan, but disagreed with the order of severance as proposed by her. He concurred in the order proposed by Justice Langa.

Deputy President Mahomed :

Mahomed DP, in concurring with Justice Langa, held that with regard to section 332(5) two questions arise : first, whether the section infringes section 11 of the Constitution and second whether the section properly interpreted infringes s 25(3)(c) of the Constitution. He held that the

effect of the provision is that if at the end of the case the court has a reasonable doubt as to whether the accused participated in the offence or failed to prevent it, the court would still be required to convict the accused. Consequently, he held that this is a prima facie breach of the presumption of innocence and that there can be no justification under the limitation clause because of the wide ambit of the section. He added that these conclusions made it unnecessary for him to decide the question of an infringement of section 11. He was also of the opinion that neither of the severance options proposed by Acting Justice Kentridge and Justice O'Regan were feasible since it would not materially alter the legal effect of the section. Kriegler J concurred in the judgment. In their separate written judgments, Chaskalson P and Didcott J also concurred in the judgment of Mahomed DP.

Justice Didcott :

Justice Didcott in his judgment concurring in the judgments of Justice Langa and Deputy President Mahomed, found that ambit of the section is too wide. He raised three concerns in respect of the overbreadth of the section. Firstly, he held that the inclusion of the word "servant" is too broad as it encompasses all employees and not only those with managerial responsibilities. He agreed that the defect could be cured by severing the word, but that this is futile since the problem with the section does not end there. Secondly, he found that the allusion to an "offence" broadens the ambit of the section in that it could mean any offence and not just those committed mainly by corporate bodies. Third, he held that the reference to "any corporate body" results in a situation in which there is no distinction between corporate bodies with limited liability and other corporate bodies. He agreed with the order to declare the section unconstitutional. With regard to the proposal to excise certain words from the section, he held that the reformulation of the section proposed by Acting Justice Kentridge or Justice O'Regan did not go far enough to address the misgivings that he had with the section and that to read the section in such a way as to render it constitutional would require the Court to extend itself beyond its competence.

Justice Sachs :

Justice Sachs agreed with Justice Langa that the ambit of the section is too wide and that the right to be presumed innocent is clearly compromised. He considered whether the section is capable of being read in such a way as to narrow its ambit by having regard to the severance option proposed by Justice O'Regan. He found, however, that considering the extent of reading down and excision that would have to be made, this option was regrettably not a viable one. He expressed his agreement with the comments made by Justice O'Regan and Acting Justice Kentridge, and also those of Justices Madala and Mokgoro with regard to the dangers represented by white collar crime. He concluded by concurring in the order of Justice Langa .

Justice Madala :

Justice Madala found that section 332(5) was justifiable in terms of section 33 of the Constitution and therefore held that it was not unconstitutional, save that the reference to "servant" in the section should be removed. Public interest, the nature of the office of directors, the escalating crime rate and the difficulty in implementing enforcement mechanisms were

factors that, he considered, justified the infringement of the section 25(3)(c) right.

Justice Mokgoro :

Justice Mokgoro agreed that section 332(5) of the Act was an unjustifiable breach of the presumption of innocence, and agreed also with Justice O'Regan that the constitutionality of section 332(5) can be cured by severance as proposed by her. Justice Mokgoro noted the potential harm to the public flowing from corporate activities, particularly in the areas of environmental pollution and health and safety at work. She concluded, however, that such potential harm did not justify the breach of the presumption of innocence, as no attempt had been made to confine the operation of the section to situations where there was a special risk of harm to the public. Justice Mokgoro made no ruling with regard to sections 11(1) and 28 of the Constitution.

President Chaskalson:

Justice Chaskalson concurred in the judgment and order of Justice Langa and in the judgment of Justice Mahomed. He also agreed with Justice Ackermann's analysis of section 332(5) and with his conclusion regarding the severance proposed by Justice O'Regan.