SACHS J ABRIDGED JUDGMENT

S v Coetzee and Others

[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. 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."

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.

[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-B-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, but, rather to focused enquiry based on their responsible relation to the primary perpetrators. 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, 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, 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, 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 and the same would apply to crimes which by statute can only be committed by natural persons. 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.

[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, and successful prosecutions have been brought against companies for fraud, theft, and culpable homicide. 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 . . ."

[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.* 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:

"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.

. . . .

[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.

. . . .

["[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. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.

. . . .

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, or to prove maintenance of standards for a licensed activity, 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, 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. 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* 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. 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,[2][5] 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, 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"."

[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. 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* case, Kriegler J expressly left open the possibility that "severability in the context of constitutional law may often require special treatment". 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 ..."

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. 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. I also wish to associate

myself with the forceful comments of Madala J and Mokgoro J, 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.