58/55.

G.P.-S.14242—1947-8—5,000.

U.D.J. 445.
Late S.C. 7.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(CAPE PROVINCIAL DIVISION).
AFDELING).

APPEAL IN CRIMINAL CASE.
APPÈL IN KRIMINELE SAAK.

JOHN LENHARI

Appellant.

versus

THE QUEEN.

Respondent.

Appellant's Attorney K.K.K.S. *Respondent's Attorney*
Prokureur van Appellant *Prokureur van Respondent*

Appellant's Advocate L. Lazar *Respondent's Advocate* W.S. McEwan
Advokaat van Appellant *Advokaat van Respondent*

Set down for hearing on: Friday 9th Dec, 1955 (I/C)
Op die rol geplaas vir verhoor op: 9th (appeal part-heard)

I-1,2,6,9,11.

9.45 – 12.50. }
2.15 – 4.20. } – C.A.V.

→ Appeal dismissed.

Conviction, Ct. Schreiner, Steyn, de Villiers et Hall JJ.A. Registrar 8/12/55

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

JOHN LEKHARI Appellant

&

JOHANNESBURG MUNICIPALITY Respondent

CORAM : Centlivres C.J., Schreiner, Steyn, de Villiers et Hall.

Heard : 4th November 1955. Delivered : 3-12-55

J U D G M E N T

CENTLIVRES C.J. :- I need not repeat the facts which are set out in the judgment of my brother Schreiner.

For the sake of convenience I set out the Afrikaans text of Regulation 14. It is as follows :-

" Enige persoon wat versuim of weier om enige bedrag wat hy skuldig is onder hierdie regulasies te betaal binnen een maand vanaf die datum waarop dit betaalbaar is, sal aan oortreding skuldig wees, en sal by veroordeling deur die hof gelas word die bedrag te betaal wat bevind is dat hom skuldig te wees binne sodanige tydperk as die order sal voorskryf, of by wanbetaling soos gelas sal hy bloot staan aan gevangenisstraf met of sonder harde pad van 'n tydperk een maand nie te bo gaande, onder voorbehoud dat geen boete of gevangenisstraf kansellering van die skuld sal tengevolge hê nie, of sal belet om die bedrag deur sodanige persoon verskuldig by regterlike vonnis te verkry, en mits dat niemand sal veroordeel word tot 'n twede termyn van gevangenisstraf weens versuim dieselfde skuld te betaal. "

I do not think that there can be any doubt as to the meaning and effect of the first part of the regulation which ends with the word "offence" and „oortreding" in the two texts respectively. Clearly a person who fails to pay the rent within the prescribed time commits an offence and it would be no defence on his part were he to pay the rent after that time and before he is summoned to answer a charge of having contravened the regulation. For such an offence he becomes liable to be fined in terms of regulation 40.

It will be noted that the words "and/or" in the English text appear simply as "of" in the Afrikaans text. In regard to regulations which are published in both official languages there is no statutory provision (such as we find in Sections 67 and 91 of the South Africa Act in respect of Acts of Parliament and Provincial Ordinances respectively) which provides what construction should be placed on regulations where there is a conflict between the two official texts. Each text has therefore equal validity. That being so, it is the duty of the Court, if possible, to adopt an interpretation of which both texts are capable. See Rex v Alberts (1942 A.D. 135 at p. 140). The word "of" in the Afrikaans text seems to me to be inappropriate : a better word would be the word "en". In the English text it was quite

unnecessary to put a stroke after "and" and to add "or". Reading both texts together I think that this Court would be justified in reading „en" for the word „of" in the Afrikaans text in order to give a common meaning to both texts and to carry out what appears to have been the intention of the Legislator. In doing this, the Court will not be going as far as it went in Fernandez v South African Railways (1926 A.D. 60 at p. 66) where the regulation was apparently only in English and where Solomon J.A. said : "In order to make the regulation intell-"igible," (we should) "hold that the word 'or' is a mistake "for 'on', and so give effect to what I am satisfied was the "real intention of the framers of the regulation. " In the present case we have the advantage of having two texts of the regulations which must, if possible, be so construed as to bear the same meaning.

The words „shall be liable" and „sal hy blootstaan" are inept. They seem to suggest, if they are read with the preceding portion of the regulation, that the magistrate must first order the convicted person to pay the amount of rent which is owing within such period as the order specifies and then, if the convicted person does not pay the amount due within such period he becomes liable to be imprisoned. If this is the

correct reading then after failure to pay the amount due the convicted person must be brought before the magistrate again in order to be sentenced to imprisonment. But I do not think that the Legislator could ever have intended that such an inconvenient procedure should be followed. It seems to me that effect will be given to the intention of the legislator if we read the regulation as meaning that when an accused has failed to pay the rent within the prescribed time he is guilty of an offence and liable to be fined therefor in terms of regulation 40 and inaddition he must be ordered to pay the rent which is owing within such period as is specified in the Court's order and to undergo imprisonment not exceeding one month if he fails to pay the rent within the specified period.

It will be apparent from what I have said that the words "fine or" in the first proviso occasion me no difficulty. The Legislator clearly intended that the non-payment of rent within the prescribed period should constitute an offence. This is provided for in the first part of the regulation and the punishment for such an offence is the fine prescribed by regulation 40. The presence of the words "fine or" and „boete of" in the first proviso strengthens the view at which

I have arrived in regard to the meaning of the regulation ; otherwise no meaning can be given to those words.

The word "undergone" in the first proviso is inelegant in relation to the word "fine" but there is no such inelegance in the Afrikaans text.

Having dealt with the interpretation of regulation 14 I shall now proceed to consider whether it is, in whole or in part, ultra vires the provisions of Act 25 of 1945 under which it must be taken to have been promulgated, although it was in fact promulgated prior to the coming into operation of that Act. See Section 46(2) of the Act. The first part of the regulation ending with the word "offence" is clearly ultra vires because Sec. 38(3)(p) empowers an urban local authority to make regulations for "the imposition of penalties in respect "of the failure to pay any rents. "

The validity of the second part of the regulation depends on the interpretation to be placed on par.(p) read with par. (o) of Sec. 38(3) which empowers an urban local authority to make regulations for "tariffs of fees and charges for rents ".....and the collection and recovery of such fees and "charges." It may be conceded at once that regulation 14 constitutes a convenient method for the recovery of unpaid rent

but that is no answer to the problem with which I am dealing. It must be borne in mind that "neither a municipal council nor "any other subordinate legislative body has any power to con- "fer jurisdiction or impose duties of any kind upon courts of "laws established by Act of Parliament unless such subordinate "legislative body is given power to do so by Parliament it- "self" (per Greenberg J.A. in Johannesburg City Council v Makaya, 1945 A.D. 252 at p. 256). Generally speaking there is a clear distinction between the civil and criminal jurisdiction of courts of law : unless specially authorised by Parliament to do so a court of law cannot in criminal cases give an order ~~which is equivalent to a judgment in a civil case~~ compelling an accused to pay a civil debt. The regulation purports to confer a jurisdiction on courts of law which they would otherwise not have in a criminal case and it also purports to impose a duty on such courts to order the payment of rent which is owing. The regulation would be ultra vires if an urban local authority were given express power by Parliament to pass such a regulation or if it were given implied power to do so. In the present case there is no such express power and on this part of the case the only remaining question is whether the Legislature has by implication given such a power. In my view it would be

going too far to hold that any such implication can be drawn from either Sec. 38(3)(o) of (p) or from both read together. I do not think that it can be implied from a power to make regulations for the collection and recovery, and the imposition of penalties for non-payment ~~of~~, of rent that the Legislature intended to empower urban local authorities to confer jurisdiction and impose duties on courts of law in criminal proceedings which such courts would otherwise not have. It seems to me that clearer language is required in order to imply that and urban local authority has the power to increase, ~~and~~, in criminal cases, the jurisdiction and the duties of courts of law the jurisdiction and duties of which are prescribed by Parliament ~~itself~~ itself. Nor can a power to confer ~~jurisdiction~~ jurisdiction or impose such duties be implied from the authority given at the end of Sec. 38(3) to make regulations "generally for the better carrying out of the matters "and purposes committed to the urban ~~local~~ local authority under "this Act." See Makaya's case (supra) at p. 260 and Ex parte Ngubane (1932 A.D. 21 at p. 24).

If my reading of Regulation 14 is correct viz: that an offender is liable to be fined in terms of Regulation 40 then the imposition of a period of imprisonment for failure

to pay the rent found to be owing would not be competent under Sec. 360(b) of Act 31 of 1917 (now Sec. 352(1)(b) of Act 56 of 1955). It would be competent under that section to impose a fine for non-payment of rent and to suspend the payment of the fine for a period not exceeding three years on condition that the ~~fine~~ rent is paid within the period of suspension but it would not be competent under that section to impose a period of imprisonment on failure to pay the rent within the period of suspension. It is the Regulation, and the Regulation alone, which purports not only to empower but also to compel the Court to make an order for the payment of the rent found to be owing and to impose imprisonment for failure to pay the rent within the period fixed by the Court. I know of no authority in which it has been held in a case such as this that a subordinate legislature can pass a regulation compelling a court of law to order the payment of a civil debt and on failure to pay that debt to undergo imprisonment.

In Hleka v Johannesburg City Council (1949(1) S.A. 842) this Court held that a rule (promulgated under a War Measure) which was similar to Regulation 14 was intra vires. That rule differed from Regulation 14 in that it gave a court of law a discretion to order the accused upon conviction for non-payment

of rent within the time prescribed, to pay within such period as the order might specify, the amount which was found to be owing or, in default of payment within such period, to be imprisoned for a period not exceeding one month. Under Regulation 14 the Court has no such discretion but must make the order and this is an important distinction between that case and this. One of the grounds in Hleka's case on which the rule was held to be intra vires was that the Governor-General (who was, of course, the Governor-General-in-Council) had approved of the rule, it having been pointed out on p. 849 that the powers conferred on the Governor-General by the War Measures Act (Act 13 of 1940) were practically unlimited. Other reasons were also given for upholding the rule, one of which was (see p. 855) that the series of War Measures "were conceived as a remedy for abnormal circum-"stances and to deal with people against whom the ordinary civil "remedies appeared to be ineffectual." It was held that seeing that as there was a state of emergency and abnormal circumstances prevailed it could not be said that the rules were unreasonable. In the present case Regulation 14 was not attacked on the ground that it was unreasonable but on the ground that the respondent had no power to make it. Nowhere in the judgment in Hleka's case is Makaya's case referred to, although it was quoted in argument, and it cannot be said that this Court intended to

overrule the earlier case. That being the position, it seems to me that Makaya's case is a binding authority.

I arrive at the conclusion, therefore, that that part of Regulation 14 which follows the word "offence" is ultra vires the respondent. In view of the fact that the majority of the Court take a different view it is unnecessary for me to consider whether the whole of the Regulation is ultra vires or whether it is intra vires up to the word "offence".

Ann Gattuso.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

JOHN IKHARI Appellant

and

City Council of Johannesburg
~~R E G I N A~~ Respondent

Coram:Centlivres C.J.,Schreiner,Steyn,de Villiers et Hall,JJA

Heard: 4th. November, 1955. Delivered: 3 - 12 - 1955

J U D G M E N T

SCHREINER J.A. :- The appellant was convicted ~~of~~ in ~~the~~ magistrate's court of contravening Chapter VI, Regulation 9, read with Chapter VII, Regulation 1(b)(ii) and Chapter I, Regulation 14 of the Native Location Regulations promulgated under Transvaal Administrator's Notice No. 94 of 3rd March 1925, as amended, in that, being a trader at certain shop premises in Pimville Location, he failed to pay £10. 16. -., rent, within one month from the date on which it became due. The sentence was recorded in the following terms:- "ordered to pay £10. 16. -. rent forthwith "or 14 days imprisonment with compulsory labour."

The appellant appealed to the

Transvaal/.....

Transvaal Provincial Division on several grounds, including the only ones that were argued before this Court, namely,

(a) that the whole of Regulation 14 of Chapter I, or, alternatively,

(b) that so much of the regulation as purports to direct the making of an order for payment of rent, is ultra vires the enabling provision (now section 33(3) of Act 25 of 1945).

The Transvaal Provincial Division dismissed the appeal against the conviction but, since a period had not been fixed within which payment was to be made, set aside the sentence and remitted the matter to the magistrate to pass sentence afresh. Leave was, however, granted to appeal to this Court.

Chapter VI Regulation 9 provides that traders in locations shall pay their rent monthly in advance by the 7th of the month and that if it is not duly paid Chapter I Regulation 14 is to apply; Chapter VII Regulation 1(b)(ii) provides for the tariff of rentals.

Chapter VII Regulation 14 reads:-

"Any person failing or refusing to pay any sum for which he is liable under these regulations within one month from the date on which it becomes due shall be guilty of an offence, and, upon conviction, shall be ordered by the Court to pay the amount which is found to be owing by him within such

period as the order shall specify, and/or, in default of payment as ordered shall be liable to be imprisoned with or without hard labour for a period not exceeding one month; provided that no fine or imprisonment undergone shall have the effect of cancelling the liability or barring an action for the recovery of the amount due by such person; and provided that no person shall be sentenced to a second term of imprisonment in respect of failing to pay the same debt."

There is a general penalty regulation (no. 40) which provides that breaches of the regulations for which no penalty is expressly provided are to be punishable by a maximum ~~penal~~ fine of £2 for a first offence and £5 for subsequent offences.

The enabling Act (No.25 of 1945), by section 38(3), empowers an urban local authority to make regulations as to

"(b) the management and control of locations.....and the maintenance of good order.....therein

(o) tariffs of fees and charges for rent.....and the collection and recovery of such fees and charges

(p) the imposition of penalties in respect of the failure to pay any rents.....

and generally for the better carrying out of the matters and purposes committed ~~by~~ to the urban local authority under this Act. "

Subsection (7) of section 38 provides that in any regulation made under the section penalties for contravention may be imposed up to the limits fixed in

section/.....

section 44, and the latter, the general penalty section of the Act, provides, in the case of a first offence, for a fine of up to £10 or imprisonment for up to two months, or to such imprisonment without the option of a fine, or to both such fine and imprisonment; for subsequent offences the maximum is raised to £25 and three months respectively.

The appellant's case rests upon the rule that without special authority from Parliament a local authority cannot make a regulation that interferes with the ordinary powers and duties of judicial officers. In Germiston Municipality v. Angehrn and Piel (1913 T.P.D. 135) it was held that a provincial council had no power to authorise a magistrate to state, for decision by the supreme court, any question of law that might arise in the course of a prosecution. The section of the ordinance which so provided constituted "an elaborate interference with the procedure and "jurisdiction of the Superior Courts of the Province"(per INNES C.J. in Gertzen's case, 1914 A.D.544 at page 556). In Johannesburg City Council v. Makaya (1945 A.D.252) the rule was applied to a regulation which purported to empower a court convicting a person found in unlawful occupation of a dwelling or site in a location, in addition to any fine it might impose, to order the ejectment of the person from the

location./.....

location. At page 255 GREENBERG J.A., who gave the judgment of the Court, said, "The jurisdiction of magistrate's "courts in the matter of punishments is conferred by section "89 of Act 32 of 1917, which provides that any person con- "victed of any offence in such court may be punished in "the manner defined in that section "and (save as specially "provided by this Act or any other law) in no other or more "severe manner'. An order for ejectment is not author - "ised by section 89(1) itself, and unless it is provided for "elsewhere in Act 32 of 1917 or by any other law, it was not "within the magistrate's powers." GREENBERG J.A. then dealt with the powers to ~~regulate~~ make regulations given to municipalities under section 23(3) of Act 21 of 1923, which corresponded to section 38(3) of Act 25 of 1945, and came to the conclusion that none of these powers, nor any power to be implied as necessarily incidental to the carrying out of any municipal function, sufficed to support a regulation empowering a magistrate's court in criminal proceedings to order the ejectment of a convicted person from a location.

It will be noticed that in Makaya's case there was no such elaborate interference with court procedure as was stated in Gertzen's case to have been involved in the section of the ordinance under consideration

in/.....

in Angehrn and Piel's case. Nor was the power to order ejectment a radical departure from the existing practice of the magistrates' courts. Those courts already possessed power under the Magistrates' Courts Act to order ejectment from a house, land or premises, but that did not cover ejectment from a location. A municipality could furthermore, by regulation under section 23(3)(q) of Act 21 of 1923, provide for summary ejectment from a location for failure to pay rent. But although the magistrates' courts already possessed or could lawfully be given by a municipality powers of a broadly similar kind to those sought to be given by the regulation in question in Makaya's case, that was not sufficient to support the regulation. There were no doubt advantages (as well, perhaps, as disadvantages) to be found in the procedure of the kind created by the regulation, and it was not contended that it was unreasonable. But because it interfered with court procedure it required legislative authority that was either express or clearly implied; as no such authority existed the regulation was ~~void~~ invalid.

The appellant contends that, tested in the same way, Regulation 14 is invalid. There

are/.....

are difficulties in construing the regulation. Up to the words "shall be guilty of an offence" there is no obvious difficulty, but in regard to what follows the procedure contemplated is not ideally clear. The expression "and/or" seems to have been employed not, as is usual, to cover both conjunction and alternation, but because the draughtsman was not sure whether "and" or "or" was more appropriate. This accords with the Afrikaans version, which uses "of" i.e. "or" alone. Then the words "shall be liable" are in their context ungrammatical and awkward. The grammar could be corrected by leaving out these words altogether, but this would not be permissible if it might alter the sense. The words suggest the possibility that the court is not directed to make a simple order that the convicted person is to pay the arrears within a specified period, failing which he is to be imprisoned for no longer than a month, but that the court is directed to order the convicted person to pay the arrears within a specified period, at the end of which he must be brought before the court again, when he may be sentenced to a period of imprisonment not exceeding one month. In my view, however, the introduction of the expression "shall be liable", unhappy though it is, does not suffice to show that a procedure in two stages was intended. If that was in fact what the regulation provided it would, I

think/.....

think, have introduced a more obviously novel form of procedure than the one which in my view was actually introduced, namely, that one order only is to be made, directing payment within a specified period and fixing a period of imprisonment, up to a month, to be undergone if payment is not made as directed. Another difficulty of construction arises out of the words "fine or" in the first proviso; the section contains no other reference to a fine, and the word "undergone" is inappropriate to a fine. Moreover, if the use of the words "fine or" had somehow to bring about the result that a fine could be imposed, the second proviso would apparently be defective, unless, which is hardly conceivable, it was intended that an unending series of fines could be imposed for failure to pay the same debt. It seems to me that one is obliged to treat as surplusage both the words "shall be liable" and the words "fine or"; they do not affect the meaning of the regulation.

The way is now clear for consideration whether the rule in Angehrn and Piel's case applies to the present provision. The appellant contended that Regulation 14 creates a new debt collecting procedure, through the medium of a criminal prosecution, and that there is no express or clearly implied authority for making this departure from ordinary court procedure.

The/.....

The respondent, apart from relying on the case of Hleka v. Johannesburg City Council (1949(1)S.A. 842), contended that all that the regulation does is, in effect, to give every person convicted under it the benefit of the existing statutory provisions for the suspension of sentence, the condition of suspension being the reasonable one that he shall pay what he owes and what it was an offence for him not to pay timeously. As such, it was argued, the regulation was sufficiently covered by the provisions of the enabling Act quoted above.

The provisions for suspension of sentences that were operative at all times material to the present matter were section 359(ii) and section 360(b) of Act 31 of 1917. Under each provision the sentence could be suspended on one or more conditions "as to compensation to be "made by the offender for damages or pecuniary loss, good "conduct or otherwise." It is relevant also to mention Chapter XIX of Act 31 of 1917 which dealt inter alia with "Compensation"; in that Chapter section 363 provided that a court convicting a person of an offence which had caused damage or loss to another might award the latter compensation; the court could use the proceedings and evidence at the trial or hear further evidence oral or on affidavit. Such orders

made/.....

made by magistrates were given the effect of civil judgments of the magistrate's court. Under subsection (1) of section 367 awards of compensation could be made subject to security de restituendo in case the reward were reversed on appeal or review, and under subsection (2) the court was expressly empowered to refer applicants for compensation to their remedy under the ordinary law.

Parliament has thus recognised the convenience of allowing a certain degree of overlapping of civil and criminal proceedings; not only may awards of compensation be made as additions to a criminal sentence but by a suspended sentence pressure may be exerted on the offender to pay what he ought to pay anyone injured by his crime. But in enacting these provisions the legislature has throughout refrained from compelling the courts to make an order of a particular kind. The magistrate exercising criminal function: has the prime duty after conviction to impose a penalty which, within the limits of his jurisdiction, appears to him to be most likely to achieve the ends of punishment. Though in what seems to him to be a proper case he may suspend a sentence on a condition that may help to secure compensation for the injured person, he clearly should not do so at the expense of the normal purposes of criminal sentences.

In contrast with these provisions

Regulation 14 takes all discretion out of the hands of the magistrate and provides that on conviction the consequence, and the only consequence, must be an order to pay, with an alternative of imprisonment if payment is not made. The magistrate's duties are reduced to fixing the period for payment and the period of imprisonment. The proceedings lose the character of normal criminal ~~xxxxxxxxx~~ procedure and assume that of debt collecting by a device which, while it may be effective and convenient, is certainly out of the ordinary.

The argument was advanced for the respondent that since the regulation could have provided for a penalty consisting of imprisonment without the option of a fine up to one month or, indeed, up to two months, the appellant cannot complain if the magistrate is required to suspend the sentence. It seems to me, however, that even if it be assumed to be necessarily in the offender's favour that the sentence imposed on him is suspended, this would not prevent the regulation from being ultra vires. Invalidity of this kind arises simply from lack of power, and if there has been an unauthorised interference with the procedure of the courts it can make no difference that convicted persons might actually benefit directly from the

provision/.....

courts permits him to be civilly imprisoned, it is obvious that the procedure of Regulation 14 is as drastic as it is no doubt cheap and efficient.

Moreover it is not clear what a magistrate, dealing with a case under Regulation 14, would have to do if issues such as prescription, estoppel or pactum de non petendo were raised in relation to the debt. It is at least possible that defences of this kind may in law leave unaffected "the amount which is found to be owing", but may provide a bar, temporary or permanent, against recovery of the debt in ordinary civil proceedings. It is unnecessary to decide what the magistrate's proper course would be in such cases; the possibility of their existence is mentioned only as supporting the view that the offender may have a real interest in not being dealt with under Regulation 14.

The case of Hloka v. Johannesburg City Council (supra) concerned the validity of a rule (no.31) of the "Rules for the Administration and Control of the "Emergency Camp for Natives,Johannesburg," which were promulgated under the powers conferred by the War Measures Act (13 of 1940). Rule 31, so far as material, read, "Any person "failing to pay any sum for which he is liable.....shall be "guilty of an offence and upon conviction may, in addition to

"any/.....

"obligations are reinforced with criminal sanctions and that "such sanctions are reasonably within the contemplation of "the empowering measure." The factors appearing from these passages are not present in the case before us and their absence would, I think, suffice to distinguish Hleka's case. But another, and at least equally cogent, ground of distinction is that Rule 31 left the option with the magistrate whether to make the order for payment of the money found to be owing. The contention that the rule interfered with the ordinary procedure of the courts seems scarcely to have been advanced; though Makaya's case was referred to in argument it was not mentioned in the judgment. The difference between Regulation 14, with the compulsory feature, and Rule 31, without it, suffices, in my view, to distinguish Hleka's case from the present one.

In regard to the above quoted provisions of section 38(3) of Act 25 of 1945, I do not propose to discuss them in detail. It seems to me to be clear that they are too general in their terms to support the contention that Parliament thereby authorised the making of such a regulation as Regulation 14. The question was raised in the course of argument whether "the collection and re-"covery of fees and charges" in paragraph (o) of section

38(3)/.....

38(3) did not point clearly to some such summary method of recovery as the method adopted. But I do not think that this question can be answered in the affirmative. Apart from regulations of a possibly unnecessary or unimportant kind such as those relating to demands and their service, one could go so far as to assume that a regulation in the form of Rule 31 in Hleka's case was contemplated by the legislature; even power to make such a regulation would not, as I have indicated, suffice to support one in the form of Regulation 14.

It remains to consider the argument advanced for the respondent that, assuming that so much of Regulation 14 as directs the magistrate what he is to do on conviction is invalid, the earlier portion may still be good, and that the case should be remitted to the magistrate's court for sentence to be imposed under the general penalty regulation. But I do not think that this would accord with what was said in Johannesburg City Council v. Chesterfield House (1952(3) S.A. 809 at page 822). It seems to me that the respondent made a regulation which was aimed at debt collection and not at punishment; it would be substituting something substantially different if part of the regulation were to be upheld in the form of one making

failure/.....

failure to pay rent an offence punishable by fine or imprisonment. I understand that it is possible to separate the good from the bad in a statute, regulation or contract when this can be done both grammatically and notionally but not otherwise (cf. Baines Motors v. Pick, 1955(1) S.A. 534 at page 541). In the present case severance of the conviction from its consequence is possible grammatically but not notionally.

For the above reasons I think that the whole of Regulation 14 is invalid. It follows that in my view the appeal must be allowed and the conviction and sentence be set aside.

O.D. Schreiner

2.12.55

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between:-

JOHN LEKHARI Appellant

and

CITY COUNCIL OF JOHANNESBURG. Respondent

Coram: Centlivres C.J., Schreiner, Steyn, de Villiers et Hall. JJ.A.

Heard: 4th. November, 1955. Delivered: 3-12-55

J U D G M E N T

STEYN J.A. :- It may be accepted, I think, that for the validity of a regulation affecting the jurisdiction or procedure of a court of law, a provision by a competent legislature authorising the regulation in express terms or by necessary implication, is required. This requirement may be inferred from the fact that the Judicature is an integral part of the State. It is the State acting through its judicial organs, and in regard to the question whether a statute affects the State, it appears to be settled law, broadly speaking, "that the Crown is not bound by a "statute unless the statute expressly binds the Crown, "or unless the Crown is bound by necessary implication." (Evans v. Schoeman N.O. 1949(1)S.A. 511 at page 577).

Although/.....

Although this rule of interpretation has not been directly applied in relation to statutes affecting the judicature, I can find no sufficient ground for dealing with such statutes as if they fall into a different category, and the reasoning in cases such as Johannesburg City Council v. Makaya (1945 A.D. 25) and Hleka v. Johannesburg City Council (1949(1) S.A. 842), does not appear to be inconsistent with its application. In both these cases, and more particularly in Makaya's case, this Court, in the absence of an express power authorising the regulation, the validity of which was in ~~pow~~ issue, concerned itself with the question whether the regulation was necessary for the effective exercise of some power explicitly conferred, or to put it in another way, whether the invalidity of the regulation would frustrate the effective exercise of the express power or defeat its object. In Makaya's case (page 260) GREENBERG J.A. expressed himself as follows : "In my opinion, it cannot be said "that the object that the Legislature had in mind when it "enacted sub-sections (b) and (m) will be defeated unless "the court, in its criminal jurisdiction, is given the pow-"er of summary ejectment, or that the appellant will not "be able to carry out its function in a reasonable way in "the absence of such jurisdiction," while in Hleka's

case/.....

case (at page 853) van den HEEVER J.A., in upholding a rule issued under War Measure No.18 of 1947, in terms somewhat similar to those of the regulation here under consideration, remarked: "The law in force before the measure was "passed was that the owner of land could sue trespassers "and have them ejected; in addition, conceivably, the health "authorities could take steps. These remedies involve de- "lays, frustration and expense, and it is unlikely that a "plaintiff could recover costs from persons such as those "whom the Legislature had in mind. It would have been "futile and impracticable to issue thousands of summonses." These remarks serve to underline the necessity which must exist before a more general power may be held to include the special power of making a rule intruding upon the functions and mechanism of courts of law, and indicate that the rule there in question would not have been upheld by virtue of any implied power, had it not been found to be necessary for the effective exercise of other powers. It should be emphasised, I think, that in order that such a power may be implied, it is not sufficient that its existence would be reasonably ancillary or incidental to the exercise of any express power, in the sense that it would be useful in giving effect to that power. It must be reasonably necessary for that purpose. The test is not mere usefulness or

convenience, but necessity. There must be a need of sufficient cogency to rebut the presumption that the Legislature, in conferring the power relied upon, intended to authorise legislation affecting the subjects of the State and not the State itself in its judicial organs. Nor must the implied power be extended beyond the requirement of the occasion. What can be dispensed with without defeating the object of the express power or preventing its exercise in a reasonably effective way, is not to be implied.

In the present case the empowering section of the Act contains no provision stating expressis verbis that an urban local authority may prescribe the legal procedure by which payment of the charges for rent or other charges which it may impose, may be enforced. But section 38(3)(o) does contain provision for ~~the making of provision for~~ the making of regulations as to "the collection "and recovery" ("die invordering en verhaal") of such charges. The Shorter Oxford English Dictionary gives the following meaning of "recovery" : "Law: The fact or pro- "cedure of gaining possession of some property or right by "a verdict or judgment of court." According to Mostert v. J. W. Jagger and Co.(Pty) Ltd (1938 C.P.D. 518 at page 522),

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"the word 'recover' has a technical meaning in law whereby "it signifies, to recover by action and by the judgment of "the court. There are cases however, on which it may be "found that the word has been used in the larger and more "popular sense of recover by any legal means, e.g.a distress". This repeats, in substance, the definition of "recover" to be found in Stroud's Judicial Dictionary. It may be said, therefore, that in a legal context, the ordinary meaning of the word is to obtain by a civil process culminating in a judgment, but it seems to be conceded that that is not the only meaning. It may also signify obtaining by any legal means, and that seems to be the more probable meaning in this section. The Act itself does not deal with the liability for rent as a purely civil matter. Under section 38(3)(p) an urban local authority may prescribe penalties (not exceeding those set out in section 44 of the Act) for the failure to pay any rents. From the provisions of section 38(3) (o) and (p) it is clear that the Legislature recognised that local authorities are faced with peculiar difficulties in regard to the payment of rent by occupants of premises in native urban areas. The object of these provisions is to enable local authorities to deal adequately with these difficulties. Having regard to the conditions

generally/.....

for the purpose of the payment of rents and other charges by legal process, suggests very strongly, if not conclusively, that the intention must have been to authorise some adjustment in the ordinary judicial procedures for the better attainment of that object. Parliament could hardly have contemplated a fatuous repetition, in the form of regulations, of procedural provisions already on the statute book. Something more than that must have been intended, if effect is to be given to the meaning of the word "recovery" in its legal context. Parliament has, I think, by the language used, in effect said that adaptations of the ordinary legal procedures to the needs of the occasion will be permissible. The limits of the permissible adjustments must be determined by the measure of reasonable necessity attending the effective exercise of the express power.

The question then is whether the adjustment sought to be effected by Regulation 14, is within those limits. In order to answer that question, it is necessary to ascertain what the regulation means. It provides that on conviction two results will follow. The one is that the court is to order the offender to pay the amount which is found to be owing by him within a period to be specified in the order. The other is that "in default of payment as

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ordered," "the offender will be liable to imprisonment for "a period not exceeding one month. This does not mean, I think, that the imprisonment is to be the penalty for a failure to carry out the order. Grammatically the imprisonment is related to the offence upon which the conviction follows in the first instance. The relevant words of the regulation read as follows : " Any person failing or refusing "to pay.....shall be guilty of an offence, and upon convic- "tion.....in default of payment as ordered, shall be liable "to be imprisoned....." It follows that, ordinarily at any rate, the sentence of imprisonment would be imposed pari passu with the making of the order. It is not necessary to decide whether that ~~would be~~ is the only course which may be adopted. It certainly ~~would be~~ would be a competent course. Where that is done, the sentence would of necessity have to be suspended to be enforced only upon failure to pay within the specified period. The sentence of imprisonment is, further, made dependent upon the order. Where, therefore, no amount is owing when sentence is to be passed, with the result that no order can be made, imprisonment cannot be imposed. For such a case no penalty is expressly provided by the regulation, and the general penalty under Regulation 40 would apply. That would explain the reference to a

fine/.....

fine in the first proviso. To explain that reference it is not necessary, I think, to invoke a double penalty, i.e. a fine for every offence against the regulation, and in addition the penalty of imprisonment. In a penal provision such as this, an interpretation which will avoid the larger penalty is to be preferred.

Although, therefore, in form the regulation refers to an order to be made, its real substance is to provide for a sentence of imprisonment to be suspended on condition of payment, within the period of suspension, of the amount found to be owing. Such a sentence would be competent, quite apart from the regulation. In effect, therefore, the regulation adds nothing to the court's jurisdiction. What it does do is to fetter the court's discretion whether or not to suspend the sentence, and whether or not to make payment of the amount owing a condition of the suspension, where the sentence is suspended. This, and no more, is the extent of the limitation placed upon the exercise of the existing competence of the court.

I have difficulty in conceiving of any lesser interference with the ordinary jurisdiction and procedure of the court, which might be considered

reasonably/.....

reasonably sufficient to meet the difficulties above referred to which section 38(3)(c) is designed to overcome. That some interference is contemplated appears to me to be clear. The introduction by this regulation of a compulsory civil feature into criminal proceedings follows, in regard to its main aspect at any rate, a pattern which Parliament, as will appear from the statutes to which I have referred, has itself employed, presumably not unnecessarily, in dealing with other ~~statute~~ situations in which the enforcement of civil liabilities in the usual way would to a large extent be frustrated. The remarks by van den HEEVER J.A., in Hloka's case, which I have quoted above, apply, I think, to a lesser but nevertheless very substantial degree also in the case of native urban areas. In respect of many debtors, the ordinary civil procedure would not only be impracticable for the purpose of the recovery of rents, but would also result in further losses to the city council, while the debtors themselves would be burdened with costs which they would be unable to pay. Designed as it appears to be, to meet this situation with no greater severity than is consistent with reasonably effective recovery, this regulation does not, I think, exceed the limits of what is necessary to carry into effect the power to deal with the collection and recovery

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of rents in these areas.

I may add that in my opinion Makaya's case does not bind this Court to the conclusion that this regulation is invalid. In that case the Court was concerned with entirely different provisions. The regulation there in question dealt with unlawful occupation and purported to empower the court, in addition to any fine it may impose, to make an order for the ejectment of the offender, not from the site occupied, but from the location, native village or hostel. It's intendment was to create a new jurisdiction. It was, moreover, sought to justify that regulation under provisions conferring general powers, in none of which any words occurred which would in their ordinary meaning include anything of the nature of ejectment. In fact, there were indications to the contrary as appears from the following passage in the judgment(page 259): "Lastly, section 23(3)(q) authorises regulations in regard to "summary ejectment from locations of persons who have not "paid rents or other charges authorised by the Act. In "these circumstances, the absence of any specific provision "in section 23(3) authorising the remedy of ejectment in "cases such as the present appears to me to be highly sig- "nificant." That immediately distinguishes Makaya's case

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from the present. Here different considerations apply, and they lead, I think, to a different conclusion.

The nature of the order to be made under this regulation, and the reference to "the amount "which is found to be owing," may conceivably give rise to the question whether it would be open to the accused to raise a defence such as prescription, estoppel or a pactum de non petendo against the making of the order, and that aspect of the matter is to some extent relevant to the present enquiry. The answer to this question, should it arise in what would be an ill-advised prosecution, would be, I think, that the ratio of the regulation being to ensure payment of what is actually payable, it will, in accordance with the rule cessante ratione legis cessat et lex ipsa, not apply where that ratio is non-existent. The words "collection and "recovery", as used in the empowering section in relation to fees and charges, cannot refer to amounts not in fact payable, and the word "due" ("betaalbaar") in that portion of the regulation which creates the offence, seems to show that notwithstanding the use of the word "owing", in the provision dealing with the order, it was not the intention of the local authority to provide for the recovery of what may be owing

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but not payable. I do not think, therefore, that these considerations point to the invalidity of the regulation.

For these reasons the appeal must, in my view, be dismissed.

L. C. Steyn.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:-

J O H N L E K H A R I . .....Appellant.

and

C I T Y C O U N C I L O F
J O H A N N E S B U R G . .....Respondent.

CORAM: Centlivres, C.J., Schreiner, Steyn, de Villiers et Hall, JJ.A.

Heard: 4th November, 1955. Delivered: 3-12-55

J U D G M E N T.

DE VILLIERS, J.A.:

In my view Regulation 14 of the Lodation Regulations of the Respondent Council which is attacked in the present appeal is not ultra vires the Respondent. The Regulation in question was promulgated by Administrator's Notice No. 94 of the 3rd March 1925 under powers claimed to be conferred in Section 23 (3) of the Native Urban Areas Act No. 21 of 1923.

The 1923 Act has now been superseded by Act 25 of 1945 and the regulations in question must in terms of the latter Act be deemed to have been passed under it.

Mr. Lazar, for the Appellant, invoked the principle laid down in the case of Johannesburg City Council versus Makaya 1945 A.D. 252 at page . That case decided that a local

authority...../2.

authority, as any other suberdinate legislative body has no power "to confer jurisdiction or impose duties of any kind upon courts of law established by act of parliament unless such subordinate legislative body is given power to do so by parliament itself".

Mr. Lazar for the Appellant contended that that portion of Regulation 14 which compels a Magistrate to order an accused person to pay his arrear rent within a specified time or suffer imprisonment is ultra vires on two grounds:-

Firstly, he contended that this part of the regulation imposes a duty upon the Magistrate in conflict with the principle anunciated in Makaya's case and quoted above.

Secondly, the order to pay the amount owing is not a fine and is an unauthorised interference with the Court's discretion in relation to punishment.

Mr. Lazar lastly contended that if the portion of Regulation 14 under discussion is invalid, the whole regulation is bad as the bad portion is not severable from the rest.

In my view Mr. Lazar's argument in the first place lays too much stress on the literal wording of the regulation in question; especially on the words "shall be ordered".

The regulation can be redrafted in a manner which

would...../3.

would in no way alter its meaning and intent. For example:-".. ..... shall be guilty of an offence and liable to be imprisoned with or without hard labour for a period not exceeding one month, but the Court shall suspend the sentence of imprisonment for a period to be fixed by the Court on condition that he pays the amount of rent found to be owing within such period".

Mr. Lazar admitted, in my view rightly so, that any order for payment of arrears that the Magistrate may make will not have the force of a civil judgment and is not in the nature of a penalty authorised under Section 44 of the Act. All that Regulation 14 does in effect, is to provide that, before any person undergoes any sentence imposed on conviction, he must be given another chance of purging his default in a specified period.

I come to the conclusion that Regulation 14 does not confer jurisdiction on the Magistrate in the sense explained in Makaya's case (supra).

In Makaya's case Greenberg J.A., who gave the judgment of the Court, in distinguishing the case of Tutu and Others versus Municipality of Kimberly 1918 G.W.L.D. pointed out that the power given in the by-law concerned in that case

"did...../4.

"did not involve the conferring of additional jurisdiction on any Court".

Regulation 14, in my view, confers no jurisdiction on the Magistrate that he did not already have under the Criminal Procedure Code, nor does it establish any new principle or procedure. In Groenewoud and Colyn versus Innesdale Municipality 1915 T.P.D.,413, a full bench of the Transvaal Provincial Division held that Section 113 of Ord. 9 of 1912, which authorised prosecutions for contraventions of Municipal by-laws by persons appointed in writing by the mayor, was not ultra vires, because "the Provincial Council is not establishing any new principle or varying the usual procedure so that the case of Angehrn and Piel versus Germiston Municipality, approved of by the Court of Appeal in Gertzen's case is not applicable".

Regulation 14 does, however, compel the Magistrate, in effect, to suspend the sentence on condition that the accused pays his arrear rent within a specified period, in every case. In this respect it may be said that it interferes with the Magistrate's discretion in the matter of punishment which the regulations may provide for under the provisions of Section 44.

Mr. Lazar contended that Section 38 (7) in limiting the penalties for contravention of a regulation to "an extent

not...../5.

not exceeding that set out in Section 44", imposed not only a quantitative but also a qualitative limitation which would exclude the addition of any qualification or condition to the authorised penalties.

I cannot agree with this contention: Section 44 lays down the maximum penalties of fines or imprisonment or both that may be provided for a contravention of a regualtion . Regulation 14 by giving an accused person time in which to pay what he owes before his sentence takes effect reduces the penalty still further, if anything.

Regulation 14, in effect, does no more than lay down a penalty of imprisonment suspended for a fixed period on condition that the accused pays the rent.

During the argument it appeared that the provision in Regulation 14 which is challenged may lead to anomalies. In my view most, if not all, of these anomalies disappear if the words "the amount which is found to be owing" are given the meaning of "found to be payable", which I think is the sense in which those words are here used.

If I am wrong in the view expressed above I am alternatively of opinion that the provision in Regulation 14 which is attacked is authorised by Section 38 (3) (o) read

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with Section 38 (3) (p) of Act 25 of 1945.

Section 38 (3) (o) empowers a local authority to make regulations inter alia for the recovery of rent.

It was contended by Mr. Lazar that regulations under this power must be confined to extra-judicial procedural matters as a preliminary to normal process of recovery by civil action in a Court of law.

It is not clear to me why Mr. Lazar limited permissible regulations for the recovery of rent to regulations in respect of steps leading up to process at law. However, he contended that a regulation like the one in question which sought to make use of a Magistrate, sitting with criminal jurisdiction, to recover arrear rent is not authorised by the general terms of this regulation.

It must be conceded that express authority in direct words to confer jurisdiction on a Magistrate to order payment of arrear rent on penalty of imprisonment is not conferred in the Act, but in my view such authority is conferred by necessary implication. The payment of rent charges by occupiers of sites in a location must be a matter of great importance to a local authority. If it is to provide the sites and the accomodation, the management and amenities, gratis, it would

constitute...../7.

constitute an intolerable financial burden and might render the provision of locations for the native inhabitants of the large urban areas beyond the means of any local authority.

If the local authority were to be limited to the ordinary civil process for the recovery of arrear rent it would run grave risk of throwing good money after bad in the majority of cases.

Regulation 14 provides the means of enquiry into a defaulting lessee's ability to pay his arrear rent without extra cost to himself or the council, and the Magistrate's order that he should pay or go to gaol is probably the only effective means of recovering the arrear rent.

Such a provision, to my mind, is so reasonably necessary to make the power, conferred on municipalities, to make regulations, for the recovery of rent, of any practical value, that power to make such a regulation must be implied.

I think it may be said that without such a power the right to make regulations for the recovery of rent would be ineffectual. Middelburg Municipality versus Gertzen 1914 A.D: 544 at page 552.

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In my view the instant case cannot in principle be distinguished from the case of Hleka versus Johannesburg City Council 1949 (1) S.A. 842 (A.D.).

It is true that the provision in Hleka's case for an order by a Magistrate on an accused person to pay his rent in a specified time or undergo imprisonment, is permissive and not compulsory, but in so far as it may be said to confer jurisdiction on a Magistrate or alters normal procedure it is similar to Regulation 14.

The fact that the regulation in Hleka's case was promulgated as an"emergency war measure" does not seem to me sufficient ground to give an interpretation of the empowering war measure as conferring a power which Section 38 (3) of Act 25 of 1945 does not confer. The war measure in question moreover contained no provision for the making of regulations for the recovery of fees and charges like Section 38 (3) of Act 25 of 1945.

In my judgment the appeal fails and must be dismissed.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION).

In the matter between:

JOHN LEKHARI ..... Appellant.

and

THE CITY COUNCIL OF JOHANNESBURG ..... Respondent.

C O R A M :- Centlivres, C.J., Schreiner, Steyn, de Villiers et Hall, JJ.A.

H E A R D :- 4th November, 1955. DELIVERED :- 3 — 12 — 1955.

J U D G M E N T.

HALL, J.A. :- Therefore The grounds upon which the correctness of the conviction is attacked by the appellant are that Regulation 14 is ultra vires on the ground that an urban local authority, such as the respondent, has no power to confer jurisdiction or impose duties upon courts of law unless power to do so has been given to it by statute, and that the regulation is so framed that it interferes with the court's discretion as to the punishment it should inflict.

In regard to these contentions it was argued on the appellant's behalf that, as the Magistrate's Court Act did not empower a magistrate to make a summary civil -

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~~order for the payment of rent, and~~ as Section 38(3) of Act 25 of 1945 did not empower a local urban authority to vest by regulation in a magistrate, in the exercise of his criminal jurisdiction, any power to ~~make any such order~~ order a person, charged with failing to pay rent, to do so, Regulation 14 is ultra vires. It was likewise argued that the regulation makes it obligatory for the court to order that the rental be paid within a specified period and that, in default of payment, it provides that imprisonment should be the only penalty which may be imposed. In these two ways it fetters the discretion of the court in relation to punishment and it is consequently ultra vires.

The authority relied upon for the support of the contention that the magistrate had no power to make an ~~civil~~ order of this kind is : Johannesburg City Council v. Makaya, 1945 A.D. 252. In that case it was held that a regulation which gave a magistrate the power to order the ejectment of a native from a location, under circumstances in which neither the Magistrate's Court Act nor the statute under which the regulation was framed gave him any such power, was ultra vires. It does not appear to me that this decision is of application in the circumstances of this case, for the reasons that the order

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for the payment of the rent is one which a magistrate has, by virtue of the Magistrate's Court Act, jurisdiction to make and that, although it might appear that the magistrate is required by the terms of the regulation to ~~give a civil judgment~~ make such an order in criminal proceedings, the real effect of that requirement is that he is obliged to do nothing more than to suspend the sentence of imprisonment which he is required to impose.

The wording of Regulation 14 requires a magistrate to order the payment by the accused of the amount found to be owing by him as an alternative to the imposition of the penalty of imprisonment. I am of opinion that the only effect of this requirement is to oblige the magistrate to make the sentence of imprisonment subject to the condition that the accused should be given the opportunity of avoiding the penalty inflicted for his default by paying the amount due. It appears to me that where a penalty is provided for the contravention of a regulation, it is not contrary to legal principles that the severity of the penalty should be tempered by a requirement that it must be imposed subject to a modification which operates in favour of the offender who has incurred it.

Section 44 of Act 25 of 1945 provides for the infliction of penalties for the contravention of a

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regulation made in terms of the Act, when no penalty is specially prescribed by the regulation. It provides, moreover, that any such contravention may be punished, in the case of a first conviction, by a sentence of two month's imprisonment without the option of a fine. By sub-section (7) of Section 38 of the Act, it is provided that provision may be made in any regulation framed under this section for the imposition of penalties for its contravention to an extent not exceeding that set out in section 44. Regulation 14 is framed in accordance with the requirements of these sections in that it makes an offender liable to a maximum penalty of one month's imprisonment and therefore does not impose a penalty which is more severe than that which the section prescribes. For this reason it appears to me that the appellant's contention that the regulation is ultra vires because it fetters the court's discretion by making a sentence of imprisonment compulsory, has no substance. In so far as the contention is concerned that it is ultra vires because it precludes the court from taking into account any mitigating factors which might operate in the accused's favour, I fail to see how the wording of the regulation can possibly be construed as preventing the court from postponing or suspending the sentence in terms of

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Section 359(ii) or 360 (b) of Act 31 of 1917. If this is the case, then this contention is likewise without substance.

The question remains whether the court can be required by a regulation to pass a sentence which is subject to a condition which has the effect of suspending the operation of the sentence. Sub-paragraph (o) of Section 38(3) of Act 25 of 1945 empowers the respondent council to make regulations for the collection and recovery of rents, and the succeeding paragraph (p) provides for the imposition of penalties for the failure to pay such rent. To my mind the power of authorisation which is conferred upon an urban local authority by sub-paragraph (o), read cojointly with the power conferred by sub-section (p) to legislate regarding the recovery of rents, is wide enough to cover an enactment of the nature of Regulation 14. Section 38(3) makes, in its 20 sub-paragraphs, provision for almost all conceivable activities which can form part of the ordinary process of the administration of a native location, and it seeks to prohibit actions which would tend to disturb or hinder proper control and interfere with the orderly administration of such locations. After laying down specific powers, it grants a general power to make regulations "for the

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better carrying out of the matters and purposes committed to the urban local authority under this Act".

The City of Johannesburg has a native population running into many hundreds of thousands and, for these poeple, it is required to find accommodation in its native locations. They are for the greater part impecunious and their mode of life is such that they acquire few possessions beyond their clothing and a few essential articles essential for domestic use. If people of this kind fail or refuse to pay their rent, the ordinary civil remedies will almost certainly prove unavailing, and the costs incurred in obtaining judgment and execution upon them must as certainly prove to be a process of throwing good money after bad. It is for this reason that it appears to me that the legislature intended to give local authorities powers to provide ~~for~~ a simple remedy in terms of which the defaulter was given the choice of paying what was due, or undergoing a period of imprisonment. That Regulation 14 might have been more happily worded, I readily concede, but the words used are, in my opinion, capable of a construction which brings them within the scope of the intention of the legislature as expressed in Section 38(3).

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A case which is similar in many of its aspects to the present one is that of Hleka v. Johannesburg City Council, 1949(1) S.A. 842 (A.). In it a Rule (31), framed in somewhat similar terms, which had been promulgated under the powers conferred by the War Measures Act (13 of 1940), was declared to be ultra vires. The rule was as follows:

> "Any person failing to pay any sum for which he is liable in terms of the provisions of this Chapter within one month from the date on which it becomes due and payable, shall be guilty of an offence and upon conviction may, in addition to any penalty the Court may impose, be ordered by the Court to pay, within such period as the order may specify, the amount which is found to be owing to him, or, in default of payment within such period, to be imprisoned for a period not exceeding one month .....".

The enabling War Measure in terms of which the regulation was promulgated was as follows:

> "Any local authority .....may establish....an emergency camp.....and may issue rules.....providing for the administration, maintenance, control, sanitation and health of the said emergency camp.
> (j) Without prejudice to the generality of the powers conferred under paragraph (i), the said rules may in particular --
> (i) provide for fees or charges to be levied in respect of any accommodation or service supplied;
> (ii) .....
> (iii) provide penalties in respect of the contravention of such rules, not exceeding on first conviction a fine of ten pounds or of imprisonment for a period of two months, or both such fine and such imprisonment, ...".

In the course of his judgment VAN DEN HEEVER, J.A. stated that it was "a fair inference from the empowering measure that its

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> author intended the Council to have the power to reinforce what are essentially civil obligations with criminal sanctions".

He added that, for the reason that War Measures were in the nature of an abnormal remedy, "it did not seem unreasonable in

> the circumstances to hold that the scheme may be frustrated unless civil obligations are reinforced with criminal sanctions and that such sanctions are reasonably within the contemplation of the empowering measure".

I am of the opinion that, while the abnormal circumstances under which the War Measures were conceived may have required the establishing of emergency camps for native squatters, it was not owing to the existence of this emergency that a provision, similar to the one which had been in operation during the previous twenty years in all the native locations in the municipal area of Johannesburg, should have been introduced into the rules which were devised for the administration of the squatter's locations. I may say, with respect, that I am ~~not~~ in entire agreement with the last paragraph of the judgment of VAN DEN HEEVER, J.A., which I have quoted above, and that I do not consider it unreasonable in the circumstances of the present case to come to the same conclusion that he did.

A further point which was raised in argument was that the making of an order "to pay the amount which is found to be owing", might possibly prejudice the accused by making it impossible for him to raise personal defences which might be available to him had he sued in a civil action, for example defences of prescription and pactum de non petendo. This argument does not seem to me to be sound. If the accused were to prove that the indebtedness for rent had been extinguished by set off, the court could neither order him to pay it nor sentence him for not doing so. While it is true that prescription, in the sense of limitation of a right of action, bars the remedy without extinguishing the debt, it would seem to be only remotely likely that, where a regulation provides a penalty for being one month is default, a prosecution under it will be based upon a claim for rent which has been owing for three years and that the operation of the regulation therefore becomes inequitable. A pactum de non petendo merely suspends the remedy. The word "owing" can likewise have the meaning "due", and, if that meaning is attributed to it where it is used in Regulation 14, any difficulty which might arise in connection with a pactum de non petendo falls away.

The first proviso to Regulation 14 is so worded

as to raise one more difficulty of interpretation, and that is as to the meaning of the words "fine or" in the sentence commencing "provided that no fine or imprisonment undergone". As there is no reference to a fine in the part of the regulation which precedes the proviso, it is necessary to find some explanation for the use of this word, for a court should be slow to come to the conclusion that a word contained in a statutory regulation is superfluous (Wellworth's Bazaars Ltd. v. Chandler's Ltd. & Others, 1947(2) S.A. ~~xx~~ p. 37 at p. 43(A.)).

Regulation 40 of the Native Location Regulations lays down that a fine not exceeding £2. shall be the punishment for the contravention of a regulation in respect of which no specific penalty has been provided. In prosecutions under Regulation 14, where the accused has paid the arrear ~~reht~~ before the proceedings have reached the stage of being ripe for judgment, payment of rent cannot be ordered nor can imprisonment for failure to pay be imposed. Nevertheless, an ~~xf~~ offence has been commited, for it is the failure to pay rent within a month after it becomes due that constitutes the offence. In that event there being no prescribed penalty, Regulation 40 comes into operation and upon conviction, a fine not exceeding

£2. can be inflicted by way of punishment. If the first proviso is read as contemplating this eventuality, the reference to a fine is appropriate and this difficulty in construing the regulation falls away.

As the language of Regulation 14 is reasonably capable of two constructions, one of which would give it validity and the other result in nullity, the doctrine ut res magis valeat quam pereat should be applied in this case (Kneen v. Minister of Labour and Another, 1945 A.D. 400 at p. 403), and the court will lean towards a construction which upholds the validity of the regulation, rather than seek one which renders it void: (Cf. Rex v. Amoils, 1948(2) S.A. 869 at p. 873 (T.)). I am of opinion that this basic canon of interpretation demands that the construction of the regulation should be that which I have placed upon it and for that reason, I think, that the appeal should be dismissed.

O.D. Hall

3.12.1955