

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

(Appellate) DIVISION)
AFDELING)

APPEAL IN CRIMINAL CASE.
APPEL IN STRAFSAAK.

(Orig. not)
① Resisto Mary (Pty) Ltd
② Benjamin Mieropire

Appellant.

versus/teen

THE QUEEN

Respondent.

Appellant's Attorney
Prokureur van Appellant

Respondent's Attorney
Prokureur van Respondent

Appellant's Advocate
Advokaat van Appellant

Respondent's Advocate
Advokaat van Respondent

Set down for hearing on:

Op die rol geplaas vir verhoor op:-

Thursday, 5th Sept., 1957.

2.5.7.9.11

Mr. Miller
Mr. Brink
Mr. Miller

9.45 - 11.50
11.50 - 12.30
12.30 - 12.35

C.A.V. Modderman
REGISTRAR
9/9/57

JUDGMENT ON MONDAY, 16th SEPTEMBER, 1957.

Appeal dismissed.

Coram: Schreiner, A.C.J., de Beer, Ogilvie Thompson (Actg) Malan et Price (Actg)
J.J.A.

Modderman
REGISTRAR
11/9/57

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between :-

RESISTO DAIRY (PROPRIETARY) LTD. Appellants
and BENJAMIN SHAPIRO

and

R E G I N A Respondent

Coram : Schreiner A.C.J., De Beer, Malan JJ.A.; Price et
Ogilvie Thompson A.JJ.A.

Heard : 5th September, 1957.

Delivered : 16-9-1957

J U D G M E N T.

DE BEER, J.A. :-

I have had the advantage of reading the judgment prepared by the Acting Chief Justice, but, for the reasons to which I shall briefly refer, I find myself unable to concur in the conclusion arrived at by him.

In the stated case the question of law submitted for decision was thus formulated :-

" Whether the process of pasteurisation of
" milk on the premises of the accused in Cape
" Town does not constitute an adaptation for
" sale or use of an article within the meaning
" of Section 3(1)(iii) of Act No. 22 of 1941."

I also am prepared to accept Mr. Miller's contention that this Court is, in a stated case, precluded from investigating the question whether, on the evidence of the case, the Appellants ^{might} ~~be~~ not, after suitable amendment, properly have been charged and convicted under some other section of the Act; the more so as the Crown did not challenge the propriety of this contention.

The decision in this appeal is dependent upon the meaning to be attached to the words "the adaptation for sale or use of any article" appearing in Sub-Section 3(1)(a)(iii) of Act 22 of 1941. The Appellants contended that the words imply that unless the process of pasteurisa-

/ tion...../2.

tion results in an alteration of the milk itself then the process is not such as to make the premises a factory. Now it is common cause that pasteurisation has the following effect on the milk. I here quote from Dr. Albertyn's evidence :

" There is a slight diminution in vitamin C.
" That is the vitamin in the main that is affected.
" For all practical purposes there is no change in milk after pasteurisation as far as the chemicals (sic) are concerned.
" It does destroy the germs of tuberculosis and other pathogenic organisms."

The evidence also reveals that the main object of the process is to kill germs and organisms - which are not substantially part of the milk - whilst producing as little change as possible in the milk and that certain high grade milk can be sold in Cape Town without pasteurisation. The real difference between the raw - if I may coin the expression - and the pasteurised milk is that pasteurisation kills certain germs which are not a component part of milk, but it does not remove the killed germs from the milk. In the former case, the milk contains extraneous matter in the form of live germs; in the latter, it contains extraneous matter in the form of dead germs.

This brings me to the decisive question whether the process of pasteurisation constitutes an adaptation for sale or use of milk. The dictionaries referred to namely, Shorter Oxford, Webster's New International, Encyclopaedia Britannica, Funk & Wagnall, s.v. "adapt" all seem to stress as the primary meaning the alteration or modification of an article for some new or special purpose or use. And the sub-section under consideration also seems to postulate that the article itself is altered by the adaptation. At this stage I wish to refer to the reasoning of Lord Goddard C.J. in Wiltshire County Valuation Committee versus London Co-operative Society (1950 - 1 A.E.R. 937 at 938) which is

/ as/3.

as follows :-

" The liquid which enters the factory is milk,
" and it leaves the factory as milk. The only
" difference is that it is milk that has been
" passed through a filter and has been cooled.
" I cannot myself see that the mere cooling of
" of the milk turns the milk from one article
" to another. It is true that the reason why
" it is cooled is because it will travel better
" than it would if it had not been subjected
" to some cooling process, but I cannot see
" that what happens is turning an unfinished
" liquid into a finished one or anything ana-
" logous thereto."

With respect, I agree with this reasoning that filtration and cooling of milk is not adapting that milk for sale or use. Assuming then, and this is not beyond the reasonable bounds of possibility, that by some new process of filtration all extraneous matter including tuberculosis germs were to be removed from the milk, I fail to see how the more effective filtration could be said to be an adaptation for sale or use in the sense that the milk undergoes some alteration.

The Afrikaans version of the phrase - which is, in the present case, the official version - to my mind, makes the matter even clearer. "Die bewerking van 'n artikel" according to daily usage, connotes that an article is being worked on with the object of bringing about some change in the article itself. The Afrikaans Woordeboek gives as the primary meaning of "bework", ^{dit sekere veranderinge ondergaan of sodat} "aan iets werk sodat iets daaruit gemaak word." The first meaning implies that something is done to an article by which such article itself undergoes some change. The alternative meaning, to my mind, clearly rules out the process of pasteurisation and confines the operation of the phrase to those instances where something different from milk emerges from the adaptation.

Further, it does seem somewhat incongruous that the very milk which is produced and sold or used outside the confines of the Cape Town Municipality in its raw state, can be said to have been adapted for sale or use because in

/ Cape /4.

Cape Town it is first to be subjected to the pasteurisation process. It is also to be borne in mind that the primary object of pasteurisation is to kill germs whilst effecting as little change in the milk as possible. This, in itself, seems to impinge upon the argument that adapting the milk for use is to alter the milk for purposes of use. It would seem that the invention of a perfect process of pasteurisation would result in milk being produced identical with what is today being sold and used as high grade raw milk. The object, therefore, is not to produce something different or to alter it, but to restore the milk to the state which most closely resembles high grade raw milk.

The decisions, to which the Court was referred during argument, reveal a wide divergence of opinion and consequently, in a matter which is mainly one of primae impressionis, these decisions do not materially assist in the solution of the problem before us. I would, however, venture to refer to Inland Revenue Officer versus Tranent Co-operative Society Ltd. (1930 S.C. 503). In that case Lord Hunter said :-

" The process of pasteurisation is explained
" in this case. It is apparently of a simple
" character and although it removes impurities
" from the milk it does not affect any essen-
" tial alteration in the milk treated."

True, the majority of the Court, in that case, held the contrary view but, with respect, I still prefer the reasoning of Lord Hunter.

In my opinion the appeal should succeed.

E. M. de Beer.

this contention is correct and confine the further consideration of the matter to the applicability of section 3(1)(a)(iii)

Since the Act was signed in Afrikaans it is the expression "die bewerking vir verkoop of gebruik van 'n artikel" that has primarily to be considered. The possible importance of the distinction between "bewerking" and "adaptation" is that the former, as was contended for the Crown, might carry a wider meaning than the latter; it might, so it was argued, bear the sense of "working at" or "treating", without limitation to the notion of alteration or modification. The Afrikaans Woordeboek gives a number of different meanings or shades of meaning of "bework". The first is "Aan iets werk sodat dit sekere veranderinge ondergaan of sodat iets daaruit gemaak word." The notion of change is here brought out, as in the case of "adapt". That the notion of change was in the mind of the legislature is rendered more probable when the whole ~~expression~~ expression "bewerking vir verkoop of gebruik" is considered. I shall accordingly deal with the matter on the basis that "bewerking" is the same as "adaptation".

This view lets in a consideration of certain English and Scottish cases referred to by the appellants./.....

appellants. These cases deal with derating, i.e. the relief of premises from liability to be rated. Among the relieved premises are factories, as defined, and the statutory definition, like that in section 3 of the Act, lists a large number of operations or activities. Among these is the altering, repairing, ornamenting, finishing or adapting for sale of any article. In the application of this provision a large number of cases have been decided (see Halsbury, Second Edition, Vol. 27, paragraph 877 page 441 note (1) . Most of the cases turn on whether what is done on the premises involves changing the article or merely cleaning or preserving or testing or doing something else to it, while leaving it the same article. In The Industrial Hereditament Cases, 1931 A.C. 446, LORD DUNEDIN said, at page 467, "I think " 'adapting for sale' points clearly to something being done to "the article in question which, in some way, makes it in itself a little different from what it was before." And the courts have had to decide whether in any particular case the article has been made a little different or has been left the same. A few of the cases cited by Halsbury have dealt with the pasteurisation of milk, but ~~only~~^{only} the reports of two of those cases are available. The first of these is Inland

Revenue v. Tranent Co-operative Society Ltd, 1930 S.L.T. 289,

where by a majority of two to one the Scottish Lands Valuation Appeal Court held that pasteurisation must be regarded as adapting the milk for sale. No doubt the evidence there was somewhat different from that in the present case; there was proof for instance that machinery was used. But the essential process was the same, and the decision did not turn on the nature or extent of the plant employed. In the other case, Carmathen Revenue Officer v. United Dairies (1931) 47 T.L.R. 233, the same conclusion was reached by the King's Bench Division. Both cases distinguished certain cold storage cases which had gone the other way because there the article was only stored or preserved.

Similar to the cold storage cases is Wiltshire County Valuation Committee v. London Co-operative Society, 1950 1 A.E.R. 937, where the cleaning and cooling of milk was held not to amount to adaptation for sale. At page 938, LORD GODDARD C.J. says, "The liquid which enters the factory is milk, and it leaves the factory as milk. The only difference is that it is milk that has been passed through a filter and has been cooled. I cannot myself see that the mere cooling of the milk turns the milk from one article to another. It is true that the reason why it is


"cooled/.....

"cooled is because it will travel better than it would if it
 "had not been subjected to some cooling process, But I cannot
 "see that what happens is turning an unfinished liquid into
 "a finished one or anything analogous thereto. " If the only
 effect of pasteurisation were to keep the milk fresh for a
 longer period it might be difficult to distinguish the last
 mentioned case. For whether the article is preserved by raising
 or ^{by} lowering the temperature the object and effect would only be
 preservation. But pasteurisation is intended to do and does
 more than preserve. Nor does it merely operate as a filter, ex-
 tracting foreign bodies from the milk and thereby in a measure
 cleaning it. In fact, only the life of the germs is taken away;
 their inanimate remains are still there. The milk has not been
 merely cleaned any more than it has been merely changed in tem-
 perature. It would not accord with ordinary usage to say that
 pasteurisation leaves the milk itself untouched but only des-
 troys its parasites. The original substance is the milk with
 the germs in it. We call the liquid, considered as a whole and
 without regard to its constituents, milk, unpasteurised milk.
 When it has been pasteurised we think and speak of it not as
 something less than it was before but as something that is a
 little different. It is now pasteurised milk, a safer product.

The decision of the Cape Provincial

Division was correct; the appeal is dismissed.

Malan, J.A.)
 Price A.J.A.) Concur.
 Ogilvie Thomp-)
 son A.J.A.)


 14/9/57

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

RESISTO DAIRY (PROPRIETARY) LTD. Appellants
and BENJAMIN SHAPIRO

and

R E G I N A Respondent

Coram: Schreiner A.C.J., de Beer, Malan JJ.A.; Price et Ogilvie
Thompson A.JJ.A.

Heard: 5th September, 1957.

Delivered: 16-9-1957

J U D G M E N T

SCHREINER A.C.J.:— The first^s appellant is a company which carries on a dairy business on premises within the municipal area of Cape Town, and the second appellant is one of its directors. On the premises the company pasteurises milk for sale. Alone among the cities of the Union Cape Town by regulation requires that, with the exception of certain high grade milk, all milk must be pasteurised before it is sold within the municipal area.

Under section 11(1) of the Factories, Machinery and Building Work Act (No. 22 of 1941), which I shall call "the Act", no-one may occupy a factory unless he holds a registration certificate or a provisional permit/.....

permit in respect of the factory. The appellants were charged in a magistrate's court with having, without either of these documents, occupied "a factory" as defined by "section 3 (1) (a) (iii)." They had no certificate or permit and what had to be decided was whether the pasteurisation operations made the premises a factory. The English version of section 3 (1) of the Act, so far as material, defines "factory" as

"(a) any premises on which any person performs work in connection with any business.....in any one or more of the following activities -

- (ii) the altering, repairing, renovating, ornamenting, painting, spraying, polishing, finishing, cleaning, dyeing, washing or breaking up of any article;
- (iii) the adaptation for sale or use of any article. "

The Act was signed in Afrikaans and the Afrikaans version of paragraph (iii) is, "die bewerking vir verkoop of gebruik van 'n artikel." The list of activities named in the section is a long one and others may be added by regulation. "Article" is defined in section 2 to include "any solid, liquid or gas, or combination thereof."

At the close of the Crown case, during which evidence was led as to the nature and effect of pasteurisation, the magistrate discharged the appellants. The Attorney-General appealed to the Cape Provincial Division

under/.....

under section 104 of Act 32 of 1944 and the question of law stated by the magistrate for decision was "Whether the process of pasteurisation of milk on the premises of the accused in Cape Town does not constitute an adaptation for sale or use of an article within the meaning of section 3(1)(a)(iii) of Act 22 of 1941." The Cape Provincial Division allowed the Crown's appeal and entered a verdict of guilty. As it was a test case the appellants were reprimanded and discharged. Leave was granted to appeal to this Court.

A doctor of veterinary science gave evidence that the effect of pasteurisation, i.e. heating the milk to certain temperatures for certain periods, on the water, fat and protein contents of the milk is virtually nil; but there is a slight diminution in the vitamin C, and two per cent ~~of the mineral~~ of the mineral content is rendered insoluble. Summing up, the witness said that for all practical purposes pasteurisation produces no change in milk so far as the chemical contents are concerned. But germs of disease in the milk are killed, the temperature used being high enough to kill the germs and low enough to produce as little change as possible in the milk. Pasteurisation prolongs the keeping quality of the milk; it prevents decomposition and postpones the time when the milk goes sour.

The
Broadly/.....

cluded by the magistrate in the findings of fact in the stated case framed under section 104(1) of Act 32 of 1944. Broadly speaking the appellants' contention was that the language of section 3(1)(a)(iii) connotes the alteration or modification of the article and that if the article remains unchanged the activity is not such as to make the premises a factory. The findings, so it was contended, show that, substantially, pasteurisation leaves the milk itself unchanged; killing the germs simply amounts to purifying the milk. On that view it might be thought that the appellants' argument is equivalent to saying that pasteurisation is a "cleaning" activity, which might bring it within the above quoted wording of paragraph (ii) of section 3(1)(a). If that were so the question would suggest itself whether the appeal should not fail simply because the charge might have been amended without prejudice to the appellants, so as to introduce a reference to paragraph (ii) as an alternative to paragraph (iii) on the lines followed in Rex v. Sweidan (1931 A.D. 459 at pages 462 and 463). But it was contended on behalf of the appellants that, in as much as the proceedings are based on a statement of case raising a particular question of law, this Court cannot deal with a different question of law, namely whether the activity fell also, or in the alternative, under paragraph (ii). Having regard to what was said in Attorney-General v. Devon Properties (Pty) Ltd., 1952(2) S.A. 329, (and cf. Durban North Traders v. Commissioner for Inland Revenue, 1956(4) S.A. 594), I shall assume that

this/.....