

METRO WESTERN CAPE (PTY) LIMITED

Appellant

and

DENNIS ROBERT ROSS

Respondent

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

METRO WESTERN CAPE (PTY) LIMITED

Appellant

and

DENNIS ROBERT ROSS

Respondent

Coram: Rabie, CJ , Jansen, Trengove, Viljoen et

Boshoff, JJ A

Heard: 20 February 1986

Delivered: 26 March 1986

J U D G M E N T

BOSHOFF, J A :

This is an appeal against the judgment of

KRIEGLER...../2

KRIEGLER J in the Witwatersrand Local Division dismissing a claim for the purchase price of goods sold and delivered on the ground that the transactions involved were conducted in the course of illegal trading.

Towards the end of 1980 the respondent (defendant) obtained a concession from Consolidated Diamond Mines Limited to operate a take-away and restaurant business in Oranjemund in South West Africa. He arranged with Harry Smith, the manager of a wholesale business conducted in Kowie Cloete Street in Springbok, Namaqualand, under the style of Gelb Brothers to sell to him such supplies as he required from time to time on thirty days credit. He commenced trading under the style

of the Desert Inn towards the beginning of 1980 and purchased cigarettes, cold drinks, sweets, groceries and other foodstuffs from Gelb Brothers up to May 1981 when he ceased business. He failed to pay for the goods he purchased during the period March 1981 to May 1981 and it is common cause that he owes R25 785,44 in respect thereof.

The appellant company (plaintiff) claiming to be trading as Gelb Brothers instituted action against the respondent for payment of the purchase price of the goods so purchased by and delivered to the respondent. The respondent in his plea in effect denied that he purchased the goods from the appellant and that he owed the

appellant...../4

appellant any money.

On the date when the trial was to commence the court allowed an application for an amendment of the declaration so as to allege that a company known as Metro Cash and Carry (Proprietary) Limited (MCC) and not the appellant sold and delivered the goods to the respondent and that MCC had ceded its claim in respect of the total purchase price of the goods to the appellant. In consequence of this amendment the respondent was allowed to amend his plea to raise the defence that the claim of the appellant was unenforceable because MCC when it sold and delivered the goods to the respondent was trading illegally. The defence was based on the

following...../5

following allegations:-

- "a At all material times hereto, ie during the period March 1981 to May 1981, Metro Cash and Carry carried on business by selling or offering or exposing for sale goods, wares, food-stuffs, produce or livestock, such goods including aerated or mineral waters, cordials, syrups or other beverages of a like nature, patent and proprietary medicines and inflammable material, from or on its fixed business premises at Kowie Cloete Street, Springbok (the premises).

- b Metro Cash and Carry accordingly carried on at the premises the business of a general dealer as defined in Item 3 of the first schedule to the Registration and Licensing of Businesses Ordinance Number 15 of 1953 (Cape) as amended (the ordinance).

- c In terms of Section 3 of the ordinance

Metro Cash and Carry was prohibited from carrying on such business unless it was in possession of a certificate of registration and a licence issued to it in terms of the ordinance.

d Metro Cash and Carry was not in possession of such a certificate of registration or licence in respect of the premises at the said material times.

e In terms of Section 21 of the ordinance any person who contravenes or fails to comply with any provision of the ordinance or any condition or restriction imposed thereunder is guilty of a criminal offence.

f The goods sold by Metro Cash and Carry to the defendant in respect of which the plaintiff proceeds against the defendant comprised goods referred to in (a) above which Metro Cash and Carry sold in the course of its

business...../7

business as general dealer from or on the premises during the said material times.

g In the premises Metro Cash and Carry committed a criminal offence in carrying on business as a general dealer from the premises and each agreement of sale between Metro Cash and Carry and the defendant in respect of which the plaintiff claims from the defendant constituted a criminal offence.

h Such agreements of sale are accordingly void for illegality and unenforceable."

In subsequent correspondence between the parties the appellant admitted that, (i) at all material times, that is during the years 1980 to 1984, MCC neither applied for nor was granted any licences either in terms of the ordinance or the Licence Ordinance of 1981 authorising

or entitling MCC to carry on business as a general dealer, dealer in patent medicines or dealer in inflammable substances under the style of Gelb Brothers at the premises; (ii) MCC conducted the business referred to in (i) above during the stated period; (iii) MCC traded in fresh and preserved foodstuffs, patent medicines and inflammable substances; and (iv) the appellant applied for and was granted such a licence in each of the years in question.

The circumstances in which MCC came to conduct the aforementioned business for its own account under the trading licence of the appellant are the following:

The Gelb brothers had originally conducted the wholesale business at the premises. They made the business over to a company

known as Gelb Brothers (Proprietary) Limited (GB) of which Gelb Management and Holdings (Proprietary) Limited was the holding company. In 1978 or 1979 Metro Opti (Proprietary) Limited a subsidiary of MCC acquired the shares in GB. Thereafter pursuant to a resolution passed on 15 May 1979 the appellant acquired all the assets and liabilities of GB with effect from 1 March 1979. The appellant applied for and was granted a certificate of registration under the ordinance to carry on the business of a general dealer, dealer in patent medicines, and dealer in inflammable substances under the name and style of Gelb Brothers at the premises and took out the necessary trading licence to conduct such business.

Pursuant to a resolution of 28 February 1981

MCC acquired the business of the appellant as from 23 February 1980. The assets and liabilities of the appellant were made over to MCC and the appellant became a dormant company. MCC thus became the proprietor of the business in question and from then on conducted it for its own account. MCC took no steps to apply for a certificate of registration under the ordinance and was consequently also not in a position to take out a trading licence in respect of the business in its own name.

According to Smith who at all material times was the manager of the business in Springbok, the local authority annually sent the necessary application forms for the renewal of the licence to him in Springbok and

he forwarded them to the head office in Johannesburg.

The completed forms were then sent from Johannesburg

directly to the local authority. The issued licences

were then sent by the local authority to Smith in Spring-

bok. It is common cause that MCC had since 1980

annually renewed the trading licence of the business in

the name of the appellant.

The court a quo upheld the defence raised in
the amended plea and dismissed the appellant's action.

No order for costs was made because the court disapproved
of the manner in which the respondent behaved
in opposing the action.

The appellant is now challenging the correctness of the judgment of the court a quo substantially on the ground that the court erred in holding that contracts entered into in the course of his business by a trader who carried on such business without a certificate of registration and a licence issued to him in terms of the ordinance, are void.

The plea sustained by the court a quo was based on statutory illegality. Section 3 of the ordinance provides that "no person shall carry on a business unless he is in possession of a certificate of registration and a licence issued to him in terms of this ordinance." Business in this context means

a trade or occupation specified in the first schedule to the ordinance (sect 1). The trade relevant to the facts of this case is that specified as general dealer under item 3 in the first schedule. The item provides for a registration fee of R10 and a licence fee ranging from R30 to R1 000 depending on the average value of the stock on hand. In terms of the item a general dealer's licence is required by a person who carries on business by selling bartering or exchanging, or offering or exposing for sale, barter or exchange goods, wares, foodstuffs, produce or livestock from or on any fixed business premises, if any other licence is not required in terms of this ordinance for carrying

on such business, or who sells or supplies by wholesale
any medicines, drugs or poisons.

Section 21(1)(a) of the ordinance provides
that any person who contravenes or fails to comply
with any provision of the ordinance or any condition
or restriction imposed thereunder shall be guilty of
an offence and liable on conviction to a fine not
exceeding R200 or to imprisonment for a period not
exceeding 6 months or to both such fine and imprisonment.

It is a principle of our law that a thing
done contrary to the direct prohibition of the law is
generally void and of no effect; the mere prohibition

operates...../15

operates to nullify the act; Schierhout v Minister of Justice 1926 AD 99 at p 109. If therefore on a true construction of section 3 the contracts in question are rendered illegal, it can make no real difference in point of law what the other objects of the ordinance are. They are then void ab initio and a complete nullity under which neither party can acquire rights whether there is an intention to break the law or not.

The first question to consider is whether section 3 on its proper construction prohibited the making or performance of the contracts in question. Section 3 in effect provides that no person shall carry on business by selling, bartering or exchanging, or offering or

exposing for sale, barter or exchange the kind of goods specified in item 3 from or on any fixed business premises unless he is in possession of a certificate of registration and a licence issued to him in terms of the ordinance. A contravention of section 3 would thus inevitably always involve the making of a contract or conduct intended to induce a contract in respect of the specified goods from or on any fixed business premises. Such contract and conduct would be evidence of the carrying on of the business which is expressly prohibited. The language of the section indicates that it is directed, not at the making or performance of particular contracts, but at the carrying on of a

general dealer's business without a certificate of registration and a licence.

Since the section prohibits a general dealer from carrying on business by entering into particular contracts on or from fixed premises without the required certificate of registration and licence, the contracts themselves are prohibited by implication.

As a general rule a contract impliedly prohibited by statute is void and unenforceable but this rule is not inflexible or inexorable. Although a contract is in violation of a statute it will not be declared void unless such was the intention of the legislature

and this is nonetheless the rule in the case of a contract in violation of a statute which imposes a criminal sanction.

The legislative intent not to render void a contract may be inferred from general rules of interpretation.

Each case must be dealt with in the light of its own language, scope and object and the consequences in relation to justice and convenience of adopting one view rather than the other. In the case of Standard Bank

v Estate van Rhyn 1925 AD 266 Solomon JA at page 274 stated

the position as follows:-

"what we have to get at is the intention of the Legislature, and, if we are satisfied in any case that the Legislature did not intend to render the act invalid, we should

not be justified in holding that it was. As Voet (1.3.16) puts it - 'but that which is done contrary to law is not ipso jure null and void, where the law is content with a penalty laid down against those who contravene it.' Then after giving some instances in illustration of this principle, he proceeds: 'The reason of all this I take to be that in these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law.'"

See also Swart v Smuts 1971(1) SA 819(A) at pages

829C to 830C and Dhlamini en h ander v Protea Assurance

Co Ltd 1974(4) SA 906(A) at pages 913H to 914C.

The intention of the legislature must be ascertained from the statute as a whole and no single

consideration, however important it may seem to be is necessarily conclusive. In the case of McLoughlin NO v Turner 1921 AD 537 Innes CJ at page 544 in construing a prohibition in a revenue statute remarked as follows:-

"This is a revenue statute and it is a well recognised rule of construction that the mere imposition of a penalty for the purpose of protecting the revenue does not invalidate the relative transaction ... But, of course, the Legislature may prohibit or invalidate the transaction even where the sole object is to protect the revenue. And if that intention is clear effect must be given to it. But the literal meaning of the language used is not always decisive on the point."

It is now necessary to consider the whole context and purpose of the ordinance in the light of

these principles.

The purpose of the ordinance is to provide a system of control for the 54 classes of business specified in the first schedule to the ordinance by means of certificates of registration and licences issued by the local authority.

The control is exercised in respect of both the suitability of the person to be in charge of the business and the suitability of the premises from or on which the business is to be conducted or at which the goods traded in are to be stored, depending on the nature of the particular business.

A person desiring to obtain a certificate of registration must apply to the local authority for the registration of such business and the application must contain information of the plan of the premises where the business is to be carried on if the premises are still to be erected or are to be reconstructed and such other information as the local authority may desire in order to decide upon the suitability of the applicant or the premises for the carrying on of the proposed business (sect 4(1)).

Upon receipt of the application the local authority must obtain a report on the suitability from a public health point of view of the premises and enquire from

the police whether there is anything known against the owner of the business or in case of a partnership or company, each partner or director, as the case may be, and also of the manager of the business (sect 5).

A local authority must refuse the application if in its opinion the applicant or the person who will be in actual control of the business is not a fit and proper person to carry on the proposed business, whether by reason of his character, his past conduct, the uncleanliness of his habits or methods, or for any other reason (sect 6(3)b)) or if the premises are not suitable for the purposes of the proposed business, whether as regards the size, character, construction, lighting,

ventilation, accommodation or in any other respect (sect 6(3)(c)). There are a number of other stated grounds upon which an application must be refused, grounds clearly intended for the protection of the public and more specifically members of the public who will do business with the owner or the person in actual control of such a business.

When the application is granted a certificate of registration is issued to the applicant containing the full name and race of the owner of the business or in the case of a partnership or company the full name and race of each partner or director, as the case may be, and also the full name and race of the manager, if any, of the business (sect 7(1)). A local authority

which has issued a certificate of registration to any person must on application by such person and payment to it of the licence fee prescribed in the first schedule issue to such person a licence authorising him to carry on the business in respect of which such certificate was granted (sect 7A(1)). The licence lapses on the 31 st day of December of the year for which it was issued and must be renewed during the month of January next succeeding the date on which the licence lapsed. A holder of a licence who fails to renew the licence is in addition to the licence fee, liable for payment of a penalty calculated at the rate of such licence fee for every month or part of a month during which such fee remains unpaid.

The payment of the penalty does not absolve him from criminal liability arising from a failure to renew his licence nor does the fact that he has been criminally punished in connection with such a failure absolve him from liability for payment of the penalty (sect 7A(4)).

A certificate of registration lapses upon the transfer of the business to some other person (sect 12). If a new director is appointed for a company before the thirtieth day of June in any year the certificate of registration issued in respect of the business carried on by such company lapses on the thirty first day of December of the year in which such new director was appointed or if such new director was appointed after the thirtieth

day of June in any year such certificate of registration lapses on the thirty-first day of December of the following year (sect 13(1)). A certificate of registration issued to a partnership lapses upon admission of a new member to such partnership. If a member of a partnership dies or retires the certificate of registration lapses provided that the remaining partners are entitled, upon payment within one month of such change of a fee equal to one quarter of the fee ordinarily payable on application for a certificate of registration, to obtain transfer of the certificate of registration (sect 14).

In the event of the death of a person to whom a certificate of registration was issued such certificate may be transferred to the wife or husband of such person

or to the executor of his estate, subject to the payment within three months of the death of a fee equal to one quarter of the fee ordinarily payable on application for a certificate of registration. In the event of the insolvency, assignment or other form of legal disability of a person to whom a certificate of registration was issued or in the event of the winding up or placing under judicial management of a company to whom a certificate of registration was issued, such certificate may be transferred to the trustee, assignee, curator bonis, liquidator or judicial manager as the case may be, subject to the payment within 3 months of such occurrence of a fee equal to one quarter of the fee ordinarily

payable...../29

payable on application for a certificate of registration
(sect 15).

Any change in a business including the particulars specified in the certificate of registration issued in respect of that business, and the termination of any business must be reported to the local authority by the person to whom the certificate was issued. Upon receipt of such a report the local authority must amend its business register which it is enjoined to keep in terms of section 2 of the ordinance accordingly
(sect 17).

As is evident from these provisions the ordinance

is...../30

is almost exclusively concerned with the running of the businesses specified in the first schedule by suitable persons on suitable premises in the public interest. The real control is exercised by a system of registration which becomes necessary when there is some change in the ownership of the business. The annual licence is the authority to carry on business on the premises in question and is only issued to a person in possession of a certificate of registration. The licence and the certificate therefore serve different purposes.

The prohibition in section 3 is directed not at the making or performance of particular contracts but at the person who carries on business without a

certificate of registration and a licence and on a proper interpretation of the ordinance this is necessary to make the control of the local authority over the specified businesses effective in the sense envisaged in the ordinance. The ordinance does not purport to regulate the business relationship between the trader and his customer. Ordinarily there is nothing illegal in a contract of sale, barter or exchange in respect of the goods specified in item 3 and it is the person who carries on business by entering into these contracts from or on fixed business premises without a certificate of registration and a licence who breaks the law and commits an offence. Unless the customer knows that he is contracting

with a person who is committing the offence he is in all respects an innocent party to the contract. One of the objects of the ordinance is to protect members of the public, particularly members of the public who do business with a trader. The prohibition in section 3 and the penalties provided in section 21 are intended to make that protection effective.

To construe section 3 read with section 21(1)(a) as affecting contractual rights and as rendering the specific contracts concluded by the trader with his customers void and unenforceable would cause grave inconvenience and injustice to innocent members of the public. It would inevitably follow that innocent customers will be without their contractual remedies and will for

example have no claim for damages against the guilty trader in respect of defective goods sold and delivered or goods not conforming to a guarantee given in respect thereof.

As is apparent from the provisions of the ordinance a certificate of registration and a licence can lapse for different reasons, reasons which are not necessarily clear or obvious to customers. It is inconceivable that the legislature could have intended that the validity of the contracts of customers should be dependent upon such a variety of contingencies.

The question that remains is whether the legis-

lature in addition to the penalties provided in section

21(1)(a) intended to render the trader's contracts .

void and unenforceable in order to deter him from trading

in contravention of the provisions of the ordinance.

The contracts which a trader concludes in the course

of his business generally do not involve moral culpability.

The section provides penalties for the illegal trading

but it must be remembered that when a person is charged

with a criminal offence the court always has a discretion

as regards the sentence and a particular accused may

be and frequently is simply given a caution and discharge.

But in the law of contract these factors have little

weight. Either the law has been broken or it has not.

In the former event the contract may be treated as illegal and that is the end of the case. The use of contract law to supplement the deficiencies of the criminal law has serious disadvantages which outweigh any utility it has in this respect. These disadvantages are principally that contract law lacks the flexibility of criminal law in regard to punishment. A trader may therefore by sheer inadvertence or negligence fail to renew his licence and find that he has traded illegally. The sentence on a conviction could in the circumstances be trivial but if he had given credit for the purchase price of goods sold during the period he traded without a licence the consequences could be an unmerited windfall

for the purchaser and a considerable hardship for the trader utterly incommensurate with the gravity of the contravention committed by him if the contracts were to be regarded as void and unenforceable.

In the case of Pottie v Kotze 1954(3) SA

719(A) Fagan JA considered the mischief which the legislature wished to prevent by a prohibition in a certain ordinance and at page 726 -727 said:

"The usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the Legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the act by the Court will bring about, or give legal sanction

to the very situation which the Legislature wishes to prevent."

Referring to the rendering invalid of contracts as a deterrent penalty the learned judge also remarked as follows at 727 E-G :

"A further compulsory penalty of invalidity would - as the cases I have referred to show - have capricious effects the severity of which might be out of all proportion to that of the prescribed penalties, it would bring about inequitable results as between the parties concerned and it would upset transactions which, if the safeguard of an examination for roadworthiness can be enforced (as it can be under the sections I have mentioned), the Legislature could have had no reason to view with disfavour. To say that we are compelled to imply such consequences

in the provisions of sec. 13 bis seems to me to make us the slaves of maxims of interpretation which should serve us as guides and not be allowed to tyrannise over us as masters."

The ordinance provides for a penalty if a licence is not renewed after it has lapsed. It also provides for penalties to ensure that the object of the ordinance is not defeated or frustrated, the main object being to control the suitability of the persons carrying on business in the trades and occupations specified in the first schedule and the suitability of the premises from or on which they so carry on business. The control is intended to protect the public and members of the public who engage in business with such persons. The

prohibition is not against particular contracts because there are none which may be described as distinctive of a particular trade or occupation but against the carrying on of business in a particular trade or occupation. The object of the ordinance is thus not advanced by treating all contracts entered into in the course of a business of such unregistered or unlicensed trades and occupations as void. Moreover treating them as void will, as has been indicated above, result in greater inconvenience and impropriety than would follow the illegal carrying on of business.

I am consequently of the view that on a proper

construction...../40

construction of the ordinance the purpose there
of is sufficiently served by the penalties prescribed
for illegal trading. The ordinance was not intended
to render contracts entered into between a trader and
his customers void. Indeed the avoidance of the con-
tracts concluded by a trader with his customer would
cause grave inconvenience and injustice to innocent
members of the public without furthering the object
of the ordinance.

The court a quo in upholding the respondent's
plea and dismissing the appellant's action purported

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to rely on the case of Delport and another v Viljoen and

others 1953(2) SA 511(T) (Delport's case) on the basis

that it was expressly approved in the case of Dhlamini

en ander v Protea Assurance Co Ltd 1974(4) SA 906(A)

(Dhlamini's case) and decided that a person who trades

without a trading licence acts illegally and that such

illegal conduct is not only visited by criminal sanctions

but that acts performed in the course of such business

are legally void. The court a quo consequently decided

that the transactions which were concluded in the course

of the illegal trading of MCC were legally void and that

the appellant's claim for the purchase price of the goods

was unenforceable.

Counsel for the respondent endeavoured to support the judgment of the court a quo substantially on reasoning which he sought to derive from the judgments in the lastmentioned cases.

Delport's case is distinguishable and does not deal with the validity of contracts concluded during the course of illegal trading with innocent customers and in effect merely decides that the carrying on of trade is prohibited until a licence has been obtained. This decision was arrived at in the following circumstances. On the 19th February 1952 the Stilfontein Gold Mining Company was granted a mining lease over a certain piece of ground. In terms of the provisions

of the Mines Trading Amendment Act no 20 of 1941, if the owner of ground held under mining title has requested the Mining Commissioner in writing to set apart in his favour a trading site on that ground the Mining Commissioner must comply with that request provided that the business of a general dealer has been carried on on the proposed site for a continuous period of three years or longer immediately preceding the date on which the mining title was acquired, that is to say 19 February 1952 in that case. The owner of the ground made such a request to the Mining Commissioner on the strength of the fact that one Bezuidenhout had been carrying on a general dealer's business on the proposed site from

the 24th January 1949, that is to say more than three years preceding the lastmentioned date. In actual fact Bezuidenhout had applied to the licensing authorities in Klerksdorp under the Licences Consolidation Ordinance, 3 of 1932, for a certificate to enable him to take out a trading licence in respect of this particular site and the authority was granted subject to two conditions. The first was that the building on the proposed site be passed as suitable and the second was that the health of the young man who was to run the business was to be certified as satisfactory. The two conditions were complied with by the 24th February 1949 and trading on the site de facto commenced on that date. The trading licence

was however not obtained until the 4th March 1949 which meant that trading on the site was without a licence until the 4th March 1949. If trading only commenced on the 4th March 1949 then trading was not carried on on the site for a continuous period of three years and the Mining Commissioner need not have complied with the request of the owner of the ground. The Court was only concerned with the question whether for purposes of the aforementioned Act trading on the site commenced on the 24th February 1949 or the 4th March 1949. The Court, after considering the provisions of the Licences Consolidation Act, 32 of 1925, came to the conclusion that the provisions of the Act prohibited the carrying

on of a trade until a licence had been obtained and accordingly held that lawful trade on the site commenced only from the 4th March 1949 and since that was less than the required three year period the Mining Commissioner did not have to comply with the request of the owner of the land. The court in order to arrive at this conclusion referred to a passage in Craies on Statute Law at page 522 and held that the relevant Act was not a revenue statute and that it was an Act inter alia to regulate trade and the issue of trade licences was a jealously-guarded affair.

In the Dhlamini case the court was also concerned with illegal trading but the case is distinguishable

in that the court was not called upon to consider the validity of contracts concluded in the course of such trading with innocent customers. The question which the court had to consider was whether a person injured in a motor collision as a result of negligence was entitled to claim as delictual damages loss of earnings and future loss of earnings based on income derived and to be derived from her illegal trading as a hawker by selling fruit without a hawker's licence. Counsel for the respondent who resisted the claim for the damages relied upon the Delpont case and the court merely referred to it and the reasoning of that court as being a case dealing with the effect of trading which was illegal under the

provisions of the same legislation which was then
before the court. The court (at pages 913F to 915C) con-
sidered the legal principles that applied to such a
claim and after referring to authorities concluded
(at page 915B-C):-

"Skade wat bereken word volgens die
maatstaf van inkomste verkry uit 'n
aktiwiteit wat teen die goeie sedes
of wat misdadig is, sal dus nie ver-
goed word nie omdat dit teen die
publieke beleid sou wees om dit wel
te vergoed. Hierdie reël sou ook van
toepassing wees op inkomste van 'n
kleurlose statutêr verbode aktiwiteit
(kleurloos in die sin dat dit nie as
misdadig of teen die goeie sedes beskryf
kan word nie) wanneer die inkomste
van so 'n aktiwiteit nie afdwingbaar
is nie weens ongeldigheid. Vergoed-
ing van gederfde inkomste van so 'n

aard sou ook teen die publieke beleid wees. ...

Die verkoop van vrugte op sigself is volkome wettig. Indien die verkoop van vrugte onderhewig gestel word aan die besit van 'n lisensie wat op sy beurt uitgereik word met inagneming van oorwegings van openbare gesondheid, of ander oorwegings van openbare belang, sou kon bevind word dat enige verkoop van vrugte sonder lisensie ongeldig is. Indien dit die geval sou wees, sou eerste appellante (eiseres) haar eis gebaseer het op nie-regmatige inkomste, en sou haar inkomste van dieselfde aard moet beskou word as die inkomste verkry deur, bv. 'n dief, wie se inkomste as nie-regmatige inkomste beskou moet word. Dit word namens appellante toegegee. Die vraag is dus of oorwegings van openbare belang 'n rol speel by die verleen van 'n marskramerslisensie."

The court then proceeded to consider the pro-

visions...../50

visions of the legislation in terms of which a hawker's licence was issued and concluded (page 917D-E):-

"In die lig van hierdie wetgewing moet die uitreiking van 'n lisensie aan 'n marskramer m.i. beskou word as 'n handeling deur die plaaslike instansie waarby oorwegings van openbare belang en veral van volksgesondheid 'n belangrike rol speel. ...

Na my mening het die Wetgewer beoog dat daar geen handeldryf mag plaasvind deur 'n marskramer sonder lisensie nie. Om dit wel te doen is nie alleen strafbaar nie, maar, weens belangrike oorwegings van publieke beleid, behoort die gevolge van so 'n handeldryf ook nie regsgeldig te wees nie.

Na my mening was die inkomste van die eerste appellante dus nie-regmatige inkomste."

The court in this case did not intend nor purport to

decide on the validity of contracts concluded with innocent customers in the course of such illegal trading. Different considerations would have applied and it would have been necessary to construe the legislation in order to determine whether the legislature intended to render such contracts void and unenforceable. That was not necessary in the circumstances of the case. The fact that the court did not recognise income derived from illegal trading as affording a proper basis for the award of damages mainly on grounds of public policy, also appears from the case of Santam Insurance Ltd v Ferguson 1985(4) SA 843(A) in which the Dhlamini case was followed. At page 850B-D Joubert JA remarked

as follows:-

"Na my mening is dit duidelik in die lig van sy aangehaalde bepalings dat die ordonnansie nie suiwer fiskale wetgewing is nie. Die verbod om die besigheid van duikklopwerk binne die regsgebied van 'n plaaslike owerheid sonder lisensie te dryf, is ook nie 'n kleurlose statutêr verbode aktiwiteit nie aangesien oortreding van die verbod strafbaar as 'n misdryf is, soos hierbo vermeld. Dit is verder duidelik dat baie belangrike oorwegings van publieke belang met betrekking tot gesondheid, veiligheid, brandgevaar en die woongeriewe van die omgewing 'n belangrike rol speel by die uitreiking van 'n lisensie aan 'n duikklopper. Dit volg dan dat waar die besigheid van duikklopwerk sonder lisensie plaasvind die gevolge van so 'n besigheid nie regsgeldig is nie

en...../53

en dat die inkomste wat daardeur verkry word nie-regmatige inkomste is volgens die beslissing van hierdie Hof in Dhlamini en Ander v Protea Assurance Co Ltd 1974(4) SA 906 (A)..."

The Delport case and the Dhlamini case were both concerned with a contravention of the law by a particular person and in both of them public policy was the principal consideration. Having regard to the intention of the legislature as it appears from what has been said above, public policy does not demand that transactions concluded by unlicensed traders should be visited with nullity. The two cases are accordingly not applicable to the facts of the case

under consideration and the court a quo erred in relying on them in dismissing the appellant's claim for the purchase price of the goods sold and delivered to the respondent in the course of the trading without the certificate of registration and the licence.

The provisions of the ordinance did not render the contracts concluded by MCC with the respondent in the course of its illegal trading void. It was common cause that MCC sold and delivered to the respondent goods to the value of R25 785,44 for which he has not paid.

Because of the comments which the court a quo

in its judgment made about the respondent, counsel for the appellant asks that the costs in the court a quo be awarded on the attorney and client scale. The comments related mainly to the defence raised in his plea and in the affidavit with which he opposed an application for summary judgment. The defence in effect was that he did not purchase anything from the appellant and that he did not owe it anything. This turned out to be the position when the appellant subsequently amended its declaration to allege that MCC sold and delivered the goods to the respondent and that MCC ceded its claim for the purchase price thereof to the appellant. Counsel for the appellant pressed this request but faintly and

I do not consider this an appropriate case for such
an award.

In the result the appeal succeeds with costs
and the judgment of the court a quo is altered to read:-

Judgment for the plaintiff in the amount of
R25 785,44 with interest thereon at the rate
of 11 per cent per annum from the 19th November
1981 to date of payment and costs of suit.

JUDGE OF APPEAL

RABIE CJ)

JANSEN JA)

TRENGOVE JA)

VILJOEN JA)

concur