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N v H

JOSEF TIETIES and THE STATE

SMALBERGER, JA :-

620/88
N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JOSEF TIETIES Appellant

and

THE STATE Respondent

CORAM: HOEXTER, BOTHA, SMALBERGER, MILNE, et F H GROSSKOPF, JJA

HEARD: 24 NOVEMBER 1989

DELIVERED: 1 MARCH 1990

J U D G M E N T

SMALBERGER, JA :-

This appeal concerns the proper interpretation of s 123 (b) of Act 51 of 1977 ("the Act"). In particular it raises the question whether an attorney-general is competent to convert the

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proceedings at a criminal trial in a magistrate's or regional court into a preparatory examination after conviction.

The appellant originally appeared before a magistrate at Stampriet in terms of s 119 of the Act. He was charged with the murder of his wife ("the deceased"). He pleaded not guilty to the charge, whereupon he was questioned by the magistrate under the provisions of s 115 of the Act. The appellant made a detailed statement in which he set out his version of the events immediately preceding the deceased's death. Thereafter the proceedings were adjourned pending the decision of the attorney-general. In due course the attorney-general directed that the appellant be tried in the magistrate's court at Stampriet on a charge of culpable homicide. (It is common cause that at the time there was no regional court in South West

Africa.) The trial duly proceeded, and at its conclusion the appellant was convicted of culpable homicide. The presiding magistrate found, on the evidence, that the appellant had unlawfully and intentionally killed the deceased (and was thus guilty of murder), but convicted him of culpable homicide on the strength of the decision of this Court in S v Ngubane 1985 (3) SA 677 (A).

After the appellant had been convicted, but before sentence was passed, the State prosecutor, acting on prior instructions obtained from the attorney-general, caused the proceedings to be converted into a preparatory examination. In issuing the necessary instruction to convert the proceedings into a preparatory examination the attorney-general purported to act in terms of s 123(b) of the Act. The preparatory examination proceedings were concluded

without any further evidence having been lead. In due course the attorney-general elected to arraign the appellant for trial in the Supreme Court of South West Africa on a charge or murder. The appellant eventually appeared before HENDLER, J. No special plea was entered, and the trial proceeded in the normal way. At its conclusion the appellant was duly convicted of murder with extenuating circumstances, and sentenced to 7 years' imprisonment. He was later granted leave to appeal to this Court by the judge a quo. Such leave was limited to issues surrounding the competence of the attorney-general to convert the original trial into a preparatory examination after the appellant's conviction. It is not disputed that the evidence at the trial before HENDLER, J, established that the appellant was in fact guilty of murder.

The relevant provisions of s 123 of the Act read as follows:

> "If an attorney-general is of the opinion that it is necessary for the more effective administration of justice -
>
> (a) .....
>
> (b) that a trial in a magistrate's court or a regional court be converted into a preparatory examination, he may at any stage of the proceedings, but before sentence is passed, instruct that the trial be converted into a preparatory examination."

On a literal interpretation thereof the meaning of s 123 (b) would seem to be clear. The words "before sentence is passed" signify that the attorney-general (once he has formed the required opinion) may instruct that the proceedings be converted into a preparatory examination at any stage prior to sentence - which necessarily implies the power to do so both before and after conviction. The crisp issue is whether this is what the legislature intended, or

whether it only had in mind to empower the attorney-general to act in the manner prescribed by s 123 (b) before and not after conviction. To arrive at the latter conclusion would necessarily involve substituting the words "before conviction" for the words "before sentence is passed" in s 123 (b). This would not only amount to a radical departure from the literal meaning of the actual words used, but in effect constitute a redrafting of s 123 (b). Does our law permit such a course?

The primary rule in the construction of statutory provisions is to ascertain the intention of the legislature. In order to do so one attributes to the words of a statute their ordinary, literal, grammatical meaning. Where the language of a statute, so viewed, is clear and unambiguous effect must be given thereto, unless to do so "would lead to

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absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account ....." (per INNES, CJ, in Venter v R 1907 TS 910 at 915). (See also Shenker v The Master and Another 1936 AD 136 at 142; Summit Industrial Corporation v Claimants Against the Fund Comprising the Proceeds of the Sale of the MV Jade Transporter 1987 (2) SA 583 (A) at 596 G - H.) Where the ordinary grammatical meaning of the words used would not reflect the legislature's true intention (as gleaned from other relevant considerations) "it is within the powers of a court to modify the language of a statutory provision where this is necessary to give effect to what was clearly the legislature's intention" (per SCHREINER,

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JA, in Durban City Council v Gray 1951 (3) SA 568 (A) at 580 B). (See also the remarks of WARD, J, in Skinner v Palmer 1919 WLD 39 at 44 that "if a proper case arose the Court could delete one word and read in another. But the Court will not reject a word of clear meaning unless it is forced to do so".) Before a court can modify or alter the words of a statute in terms of the above principles "the intention of the legislature must be clear, and not a mere matter of surmise or probability" (per DE VILLIERS, JA in Shenker v The Master (supra) at 143). One must heed the warning of CORBETT, JA, in the Summit Industrial Corporation case (supra) at 596 J - 597 B that "it is dangerous to speculate on the intention of the Legislature (see eg the reference in Savage v Commissioner for Inland Revenue 1951 (4) SA 400 (A) at 409 A) and the Court should be cautious about thus

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departing from the literal meaning of the words of a statute (see remarks of SOLOMON, JA, in Dadoo Ltd and Others v Krugersdorp Municipal Council 1920 AD 530 at 554-5). It should only do so where the ~~contrary~~ legislative intent is clear and indubitable (see Du Plessis v Joubert 1968 (1) SA 585 (A) at 594 - 5.)" Or in the words of DAVIS, J, in De Villiers v Cape Law Society 1937 CPD 428 at 432 "I must .... be certain that the result of any alteration that I may make will be to carry out the intention of the lawgiver ..... It is not enough to come to the conclusion that the amendment 'probably' expresses the intention : in my opinion the Court must be certain that it does so : otherwise, as Ulpian says, it is better to adhere to the strict wording of the law".

It follows from the above principles that whereas a court may in appropriate cases depart from

the ordinary meaning of the words used in a statute, or even modify or alter such words, it may only do so where this is necessary to give effect to what can with certainty be said to be the true intention of the legislature. Once such intention has been established the court should not hesitate to give effect thereto. The correct approach in this regard is, in my view, that set out in Steyn: Die Uitleg van Wette: 5th Edition: p 68 as follows:-

> "Binne die beperkte gebied waarin die afwykende wetgewende wil wel met sekerheid vasgestel kan word, bestaan daar egter geen genoegsame rede om terug te deins vir 'n woordverandering wat daardie wil sal uitvoer nie. Die beswaar dat dit nie die taak van die regbank is om wette te maak nie, vloei voort uit 'n foutiewe opvatting aangaande die werklike aard van 'n wet. Die mening van Donellus dat die wil, en nie die woord nie, die wet maak, lyk gesond. Vir wie daardie mening onderskryf, tree 'n hof nie wetgewend op as hy woordwysigende uitleg toepas nie, maar wel wanneer hy 'n woord wat nie die bedoeling weergee nie en daarom geen wet is nie, tot wet verhef."

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The principles enunciated above have been consistently followed and applied in our courts. Instances thereof are to be found in the cases conveniently collected and referred to in Steyn op cit at pp 58 - 61, including footnote 133. It is clear from these principles, and the cases that have applied them, that provided it can be indisputably established that the legislature intended something different from the ordinary meaning conveyed by the words used in a statutory enactment, a departure from such meaning is justified, even if it involves an alteration or substitution of the words used. The key requirement is that the legislature's contrary intention must be clearly established with regard to such circumstances as the court may properly take into account. If therefore it can be established in the present matter that the legislature intended no more than that the

attorney-general should have the power to convert a trial into a preparatory examination before but not after conviction, effect can be given thereto by reading the words "before sentence is passed" as "before conviction".

Prior to the enactment of s 123 (b) of the Act the procedure for converting a trial into a preparatory examination was governed by s 93 of the Magistrates' Courts Act 32 of 1944, the relevant provisions of which read:

> "(1) When in the course of any trial it appears that the offence under trial is from its nature or magnitude only subject to the jurisdiction or more proper for the cognizance of a superior court,, or when the public prosecutor so requests, the presiding judicial officer shall stop the trial, and the proceedings shall thereupon be those of a preparatory examination.
>
> (2) If upon conviction of an accused person after summary trial it is

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> brought to the notice of the presiding judicial officer before sentence is passed, that the accused has previous convictions which in the opinion of that officer, would justify a sentence in excess of his jurisdiction he may set aside his finding ..... and the proceedings shall thereupon be deemed to have been a preparatory examination .....
>
> (3) ....."

As appears from the provisions of s 93 (1), the attorney-general (acting through the public prosecutor) could at any stage during the course of a trial in a magistrate's or regional court request the presiding magistrate to stop the trial and convert it into a preparatory examination. The request could be made without the necessity for stating any reasons, and the magistrate was obliged to grant it (Bham v Lutge N O 1949 (3) SA 392 (T) at 396). This was the only power which the attorney-general could exercise to have

proceedings converted into a preparatory examination. Apart from the attorney-general's power in this regard, the presiding magistrate could mero motu stop a trial where it appeared that the offence charged was "from its nature or magnitude only subject to the jurisdiction or more proper for the cognizance of a superior court", in which case the trial was converted into a preparatory examination. The powers conferred upon an attorney-general and presiding magistrate respectively under s 93 (1) arose "in the course of any trial". The word "trial" in similarly worded earlier enactments was widely held to mean the proceedings before the pronouncement by the presiding magistrate of his verdict i e, before conviction or acquittal. (See R v Boon 1912 T P D 1136 at 1138/9; R v Kissing 1926 SWA 61 at 62; R v Keeves 1926 A D 410 at 413, 415, 418; R v Mcingwane 1930 EDL 244.) It was clearly

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used in the same sense in s 93 (1). Thus an attorney-general could only request that proceedings be stopped before conviction, but not thereafter.

The only circumstances in which the proceedings after conviction could be converted into a preparatory examination were those provided for in s 93 (2). The provisions of that subsection could only be invoked where in the opinion of the presiding magistrate the previous convictions of the accused were such that a sentence was justified in excess of the magistrate's jurisdiction. They were therefore relevant only to the question of sentence. Furthermore, provision was specifically made for a magistrate invoking the provisions of s 93 (2) after conviction to "set aside his finding" (i e, the conviction).

Section 123 (b) of the Act brought about a number of changes in the position as it previously existed. It is now only an attorney-general who may take action which results in a trial being converted into a preparatory examination. A magistrate is bereft of the authority he previously had under s 93 (1) of the Magistrates' Courts Act to convert, mero motu, a trial into a preparatory examination before conviction. Nor can he act, after conviction, in the manner previously authorised by s 93 (2). He can, however, achieve the same result by invoking the provisions of s 114 and s 116 of the Act, and committing an accused to a regional court for sentence, but this does not require the conviction to be set aside.

There are a number of pertinent considerations which in my view point inexorably to the

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conclusion that despite the wording of s 123(b) of the Act the legislature did not intend to clothe an attorney-general with authority to instruct that a trial be converted into a preparatory examination after conviction. At no stage prior to the enactment of s 123 (b) was an attorney-general so empowered. He could only take steps to convert a trial into a preparatory examination before conviction. There is no apparent reason why the attorney-general's powers in this respect should have been extended to the stage beyond conviction. There have been no radical changes or developments in the criminal procedure system which necessitate this. As I have pointed out, in relation to problems of sentencing that might arise in a magistrate's court, the position is satisfactorily dealt with by sections 114 and 116 of the Act. Nor would there normally be any need, for the proper

exercise by an attorney-general of his powers under s 123 (b), for such powers to be exercised after conviction. Hiemstra: Suid-Afrikaanse Strafproses: 4th Edition, at p 302 mentions two instances where an attorney-general can utilise the provisions of s 123 (b). They are :

(a) Where he adjudges the offence to be too serious to be tried in an inferior court. He can then convert the trial into a preparatory examination, and thereafter invoke the provisions of s 139 of the Act to bring the matter before a superior court for trial.

(b) Where he resorts to the legally permissible tactic of converting a trial into a preparatory examination in order to remedy any shortcomings in the State case.

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Both these courses of action would normally commend themselves before conviction, thereby enabling appropriate action to be taken at that stage. The purpose of section 123 (b) would therefore not be stultified if the power to act in terms thereof could only be exercised prior to conviction.

Secondly, if s 123(b) authorises the attorney-general to act after conviction, what is to become of the conviction which has been recorded? A conviction has important consequences for as long as it stands. For one, it precludes a further trial against the person convicted in respect of the same or a similar offence based on substantially the same facts. Furthermore, in the context of the present matter, it would render inoperable or inapplicable many of the provisions relating to preparatory examinations (see s 124 et seq of the Act). Unless specific legislative

provision is made for it to be dealt with in some other manner, a conviction stands until set aside by a competent court with review or appellate jurisdiction. If, therefore, the legislature had intended the attorney-general to have the power to act under s 123(b) after conviction one would have expected specific provision to have been made for setting aside the conviction. Yet the Act, and particularly s 123(b), is completely silent on the point. It makes no specific provision for the conviction to be set aside either by the authorised act of the presiding magistrate (as was the case previously under the now repealed s 93(2) of the Magistrates' Court Act where the presiding magistrate was authorised after conviction to "set aside his finding"), or by reference to a court of review or appellate jurisdiction (as provided for in the case where s 116(3)(a) of the Act

applies).

It was contended on behalf of the respondent that the conviction would as a matter of necessary implication fall away as a result of the attorney-general's intervention. The primary function of the attorney-general is to institute prosecutions on behalf of the State. He is not, and never has been, invested with any judicial powers. The setting aside of a conviction is pre-eminently a judicial function. I cannot conceive that in enacting s 123(b) the legislature intended to clothe an attorney-general with the power to nullify a conviction in a trial regularly and properly conducted. This would constitute so drastic and radical a departure from principle and normal procedure that if the legislature so intended one would at least have expected it to deal with the matter explicitly. I would echo the view expressed by

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DIDCOTT, J, in S v Mabaso and Another 1980(2) SA 20 (N) at 22 E that "Statutes which make radical changes in the law seldom do so by mere implication, and the intention to accomplish them by such means is not easy to impute to the Legislature".

Counsel for the respondent sought to support the argument in favour of a necessary implication by reference to s 113 of the Act. That section provides that if the court at any stage of the proceedings under s 112 and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution. Section 112 covers the situation where an accused pleads guilty at a summary trial. Provided the provisions of s 112(1)(a) are satisfied, an accused may be convicted on a plea of guilty alone.

Section 113 clearly contemplates the possibility of a conviction having been recorded before the accused's plea of guilty is changed to one of not guilty. It was held in S v Lukele 1978 (4) SA 450 (T) that the alteration of a plea from guilty to not guilty in terms of s 113 automatically results in any recorded conviction falling away (as a matter of necessary implication). Although Lukele's case has subsequently been followed in a number of decisions doubts were voiced about its correctness in S v Mabaso and Another (supra) at 22 B - 24 A. (The problem which confronted DIDCOTT, J, in that case also centered on the words "before sentence is passed". He ultimately stated "No way of restricting the operation of s 113 to the period before the conviction occurs to me, I confess, unless those words are ignored altogether or read as being 'and before verdict is

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entered'. Either would be an extreme solution".) Assuming the correctness of the decision in Luleke's case, the situation there is clearly distinguishable from the present. Under s 113 one is dealing with the exercise of a judicial function by a judge, regional magistrate or magistrate in circumstances materially different from those pertaining under s 123(b). Section 113 is more readily susceptible to an implication than s 123(b). Its provisions, and the interpretation thereof, do not assist in ascertaining the legislature's intention under the enactment of s 123(b).

The third relevant consideration relates to the use of the word "trial" in s 123(b). (Contrast s 113 and various other sections where reference is made to "proceedings".) Section 123(b) refers specifically to "a trial in a magistrate's court ...."

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and provides that an attorney-general may "instruct that the trial be converted into a preparatory examination". As I have pointed out, "trial" under the previously applicable legislation meant the proceedings up to the time of conviction. This is the ordinary juristic sense of the word (R v Keeves (supra) at 414-5). Broadly speaking it is used in that sense throughout the Act. There is no reason why the legislature should have sought to use the word in a different sense in s 123(b). In addition, the meaning of the word "trial" as used in the preceding legislation was well settled and well recognised, and the legislature must be taken to have known what such meaning was. Yet it chose to use the word "trial" without qualification in s 123(b). This further points to the conclusion that in enacting s 123(b), the legislature had in mind the proceedings before

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and not after conviction.

Fourthly, to hold that s 123(b) empowers an attorney-general to convert proceedings into a preparatory examination after conviction would offend against certain basic tenets of our system of criminal justice. It is a fundamental principle of that system that a person should be protected from the inconvenience of repeated prosecutions in respect of the same cause of action. This principle is enshrined in the maxim nemo debet bis vexari pro una et eadem causa. To permit the conversion of proceedings into a preparatory examination after conviction would run counter to this. It will inevitably result in the accused being tried again, presumably (but not necessarily) in a different forum. Theoretically there could upon conviction again be a conversion into a preparatory examination. There would be nothing to

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preclude a succession of trials in relation to the same criminal conduct. The repetition of prosecutions is also inimical to the principle that the proper administration of justice requires finality in the criminal process - interest reipublicae ut sit finis litium. In my view the legislature must be taken not to have intended an enactment with consequences inconsistent with these fundamental principles and the policy of our criminal law (cf. R v Rose 1937 AD 467 at 476).

Finally, to permit an attorney-general to convert proceedings into a preparatory examination after conviction is to confer on him in an oblique way review or appellate jurisdiction,as this would certainly be the effect of his conduct. One instinctively recoils from such a notion, which is entirely foreign to our criminal system.

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Dissatisfaction with the outcome of a prosecution, albeit on factual or legal grounds, could result in a conviction being set aside and proceedings ultimately being commenced afresh. In this manner a challenge can be directed at factual findings, which the State would otherwise be precluded from doing. The only requirement is that in the attorney-general's opinion such a course must be "necessary for the more effective administration of justice". This is a very broad concept. Furthermore, once formed, the attorney-general's opinion would be susceptible to challenge on limited grounds only. The temptation to remedy errors or defects in the prosecution would be great. As BOTHA, JA, remarked in S v Xaba 1983 (3) SA 717 (A) at 738 H "justice also demands that the accused should not be unfairly harassed as the result of an error made in his prosecution ...."

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Having regard to the historical perspective, the context of s 123(b), particularly the failure to make provision for any conviction to be set aside, and the principles to which I have referred, the conclusion in my view is inevitable that the legislature could not have intended an attorney-general to have the power to convert the proceedings at a trial into a preparatory examination after conviction. To give effect to such intention the words "before sentence is passed" must be read as "before conviction". Although this in effect amounts to a re-drafting of s 123(b), the result is consonant with what I perceive to be the true intention of the legislature.

It follows that the appellant's conviction in the magistrate's court at Stampriet on a charge of cuplable homicide must stand. The appellant should have raised a plea of autrefois convict at his trial

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before HENDLER, J. There is authority for the proposition that an appeal of autrefois convict cannot be raised for the first time on appeal (S v Kgatlane 1978 (2) SA 10 (T)). However, in S v Mgilane 1974 (4) SA 303 (THC), MUNNIK, CJ, held that to apply the rule that a plea of autrefois acquit cannot be raised for the first time on appeal rigidly would be repugnant to fair play and justice. The same principle should, in my view, apply to a plea of autrefois convict. I accordingly hold that the appellant is not debarred from raising such plea for the first time on appeal, which in effect is what he has done.

In the result the appeal succeeds, and the following order is made:

1) The appellant's conviction of murder with extenuating circumstances, and sentence of 7 years' imprisonment, are set aside.

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2) The appellant's conviction of culpable homicide in the Magistrate's Court, Stampriet is confirmed, and the matter is remitted to that court for the imposition of a suitable sentence.

J W SMALBERGER
JUDGE OF APPEAL

HOEXTER, JA)
BOTHA, JA) CONCUR
MILNE, JA)
F H GROSSKOPF, JA)