THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable~~/Not Reportable~~

CASE NO. 091~~642~~/2004~~2~~

In the matter between

MELVIN PETER PAARWATER~~THE STATE~~ **Appellant**

and

SOUTH SAHARA INVESTMENTS (PTY) LTD~~NKULULEKO SIDNEY KATOO~~ **Respondent**

CORAM: ZULMAN~~HARMS~~, FARLAM ~~CAMERON, MTHIYANE, CLOETE~~ JJA
et MAYA~~JAFTA~~ AJA

HEARD: 22 FEBRUARY 2005~~2 NOVEMBER 2004~~

DELIVERED: 3 MARCH 2005~~2004~~

Summary: When is it just and equitable to wind up a company in terms of s 344 (h) of the Companies Act 61 of 1973, as amended? – onus on applicant for a final order on the return day to show, on a balance of probabilities, that the provisional winding-up order should be confirmed.~~Provisions of~~Criminal Procedure Act 51 of 1977~~ s 194 of Act 51 of 1977 – incompetency~~ incompetence ~~of a witness afflicted with mental illness or imbecility~~

~~DRAFT~~ JUDGMENT

ZULMAN JA~~JAFTA AJA~~

[1] The appellant obtained a rule provisionally winding-up the respondent. After the filing of further affidavits, the court *a quo* on the return day of the rule, discharged the rule and ordered the appellant to pay 50,1% of the costs of the proceedings. The appellant appeals to this court, with the leave of the court *a quo*, against the aforementioned order.

[2] The question on appeal is whether on the conspectus of all of the facts of the matter it is correct to conclude that it is 'just and equitable', within the meaning of s 344 (h) of the Companies Act 61 of 1973 (the Companies Act) to liquidate the respondent finally.

[3] At the outset it is important to point out that the onus rested upon the appellant in seeking a final order to satisfy the court, on a balance of probabilities, that it was indeed 'just and equitable' finally to liquidate the respondent. Furthermore, the degree of proof required when an application is made for a final order is higher than that for the grant of a provisional order. In the former case a mere *prima facie* case need be established whereas the court, before it will grant a final order, must be satisfied on a balance of probabilities, that such a case has been made out by the applicant seeking confirmation of the

provisional order. (See for example *Kalil v Decotex (Pty) Ltd and Another*[1], *Hilleke v Levy*[2] and *Braithwaite v Gilbert (Volkskas Bpk Intervening)*[3] Indeed in granting the provisional winding-up order in this matter, Foxcroft J, on the information then before him granted a provisional winding-up order on the basis that all the appellant was required to establish was a *prima facie* case.

[4] An analysis of all of the facts which were before the court *a quo* when the appellant sought a final order reveals that there were serious disputes in regard to the essential matters that the appellant was required to satisfy the court upon in order to establish that it was 'just and equitable' to wind-up the respondent. Furthermore it is important to note that the applicant, who bore the onus, as I have previously mentioned, did not seek an order referring such disputes for the hearing of oral evidence as he might have done (cf *Kalil*[4] and *Emphy and Another v Pacer Properties (Pty) Ltd*[5]). In the circumstances the following test enunciated by Corbett JA in the oft referred decision of *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited*[6] is of application:

[1] 1988 (1) SA 943 (AD) at 979 B-E.
[2] 1946 AD 214 at 219.
[3] 1984 (4) SA 717 (W) at 718 A-D.
[4] (supra) at 979 C-D.
[5] 1979 (3) SA 363 (DCLD) at 369 F – H.
[6] 1984 (3) SA 623 (A) at 634 E- 635 C.

> ‘Secondly, the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by Van Wyk J (with whom De Villiers JP and Rosenow J concurred) in *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235 E - G to B: “... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant’s affidavits justify such an order ... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.”
> ... It seems to me, however, that this formulation of the general rule particularly the second sentence thereof, requires some clarification, and perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavits which have been admitted by the respondent together with the facts alleged by the respondent, justify such an order ... In certain instances the denial by a respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact ... Moreover there may be exceptions to this general rule, as for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers...’

[5] Applying this well-known test to the facts of this matter, the following emerges:

5.1 The appellant is a director and shareholder of the respondent.

5.2 The respondent is an investment company.

5.3 The only asset of the respondent is a 90% shareholding in South African Beef (Pty) Limited (SAB).

5.4 Gideon Francois Bothma (Bothma) is also a director and a representative of the remaining shareholder of the company (the Bothma Trust).

5.5 The appellant is not a creditor of the respondent.

5.6 No creditor of the respondent, if indeed there are any, has sought to wind-up the company.

5.7 In the early part of 2002 Bothma and the appellant agreed to commence a business of purchasing, raising, slaughtering, processing and marketing of cattle and other meat products. The intended business was to be conducted by SAB which then would be jointly controlled by Bothma and the appellant. They were advised to establish a holding company and this was done, the respondent becoming that holding company.

5.8 On 2 March 2002 they also entered into a shareholders' agreement. Clause 2.2 of the agreement states that the parties 'wish to record in writing the terms and conditions applicable to their relationship as shareholders in the Company...' In clause 23 it is specifically recorded that the 'agreement does not constitute a partnership.'

5.9 Initially the appellant owned 51% of the share capital of the respondent and Bothma, through the Bothma Trust, owned the balance of the shares.

5.10 In June 2002 the appelllicant sold a portion of his shareholding to the Bothma Trust and reduced his shareholding in the respondent to 25%.

SAB received some R2 000 000,00 from another company known as Rumcortin Meat Processors (Pty) Ltd which was issued with 10% of the shareholding in SAB.

5.11 On 29 August 2002 the appellant and Bothma entered into a second shareholders' agreement which replaced the first agreement. Again this agreement contained identical provisions recording the relationship between the parties and the fact that the agreement did not constitute a partnership (clauses 2.3 and 20).

5.12 On 10 March 2003 Bothma invited the appellant to meet him to discuss the future of the business of SAB. The appellant parked in the parking area of a shopping centre and then had a discussion with Bothma in a restaurant in the centre. When the appellant returned to the parking area he found that the vehicle that he had parked earlier was no longer there. Some minutes later Bothma telephoned him on his cell phone and told him that the vehicle had been repossessed by SAB's bankers as SAB could no longer afford to pay the instalments due in respect of the vehicle.

[6] The appellant contends that the respondent is a domestic company or quasi-partnership and falls to be liquidated due to the complete breakdown of the relationship of reasonableness, good faith, trust, honesty and mutual confidence which should exist between the appellant and the respondent's other director and representative of its only other shareholder at the time, Bothma. It is upon this essential basis, relying on cases where domestic companies which were in reality partnerships or quasi partnerships, that the applicant founds his argument that it is 'just and equitable', in the particular circumstances, to wind-up the respondent. (See for example well-known cases such as *Moosa NO v Mavjee Bhawan (Pty) Ltd and Another*[7], *Ebrahimi v Westbourne Galleries Ltd*[8], *Lawrence v Lawrich Motors (Pty) Ltd*[9] and *Marshall v Marshall (Pty) Ltd and Others*[10]) This allegation is denied by the respondent in an affidavit deposed to by Bothma. More particularly Bothma states as follows in this regard:

> 'I should point out further that the relationship between myself and the applicant was not for all times relevant hereto in the nature of a partnership. We only started doing business together in about February 2002. Prior to that date we had never met each other and neither had we had any business dealings. The venture we entered into was purely that of co-directors and co-shareholders in a business to try to get a large beef processing business off the ground. It is so that we worked together as co-entrepreneurs, shareholders and directors of the various entities involved in the

[7] 1967 (3) SA 131 (T).
[8] [1972] 2 All ER 492 at 500.
[9] 1948 (2) SA 1029 (W) at 1032.
[10] 1954 (3) SA 571 (N) at 579 A-D.

> project. But we did not act as partners. This is borne out by the fact that the applicant [appellant] never made me aware of his financial problems until a fair time after the business relationship between us has taken its inception. As set out in para 8.2 of my opposing papers, the applicant only approached me in July/August 2002 with his financial difficulties, despite the fact that they had obviously been of a long and ongoing nature, as is evidenced by the contents and the dates of annexure "GB 4" to my answering papers.'

(Annexure 'GB 4' is a document which Bothma states was given to him by the appellant as indicating that the appellant was facing claims from various creditors in July and August 2002 some of whom had obtained judgments against him.) It was as a result of this financial predicament, according to Bothma, that the appellant agreed to dispose of 25.1% of his shareholding in the respondent to Bothma for an amount of R25 000,00. It is of some significance that in his founding affidavit seeking the liquidation of the respondent, the appellant merely states that with effect from 1 June 2002 he sold a portion of his shareholding in the respondent to the Bothma Trust and reduced his shareholding to 25%. He makes no mention of the fact that he was in financial difficulty at the time or what led to the sale in question. Furthermore the case subsequently, and now contended for, by the appellant to the effect that in reality the respondent was a partnership or a quasi-partnership between himself and Bothma is

not made out. I find nothing in Bothma's affidavits which indicates that what he states about the nature of the company and his relationship with the appellant are, in the words, of Corbett JA in *Plascon-Evans Paints Limited*[11] so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers. I am, notwithstanding this conflict of fact, prepared to assume, for the sake of argument, in favour of the appellant, that even if there was no partnership relationship as such there was nevertheless a quasi-partnership.

[7] The appellant also seeks to rely upon the shareholders' agreement entered into in March 2002. This shareholders agreement was, as previously stated, replaced in August 2002 by a second shareholders' agreement. In terms of the second agreement the Bothma Trust was recorded as owning 75% of the shares in the respondent. The agreement further provided for the majority of directors of the respondent to be appointed by the majority shareholder and for decisions to be taken by a majority of directors. This fact obviously detracts from the appellant's contention that there was a close relationship or partnership between

[11] 1984 (3) SA 623 (A) at 635 C.

the appellant and Bothma. It was the second shareholders' agreement which was applicable at the time of the launching of the application for winding-up.

[8] One of the grounds upon which the appellant contends that mutual trust and confidence between himself and Bothma has broken down is reliance upon the car incident referred to previously. Bothma explains in his affidavit that the repossession of the vehicle needs to be considered in its context. The context is that the appellant, despite having previously undertaken to do so, and despite having been reminded of his obligations, did not return the vehicle. The appellant did not disclose this in his papers and there is no reason to doubt Bothma's statements in regard thereto. In any event even if one were to regard this incident as evidencing some form of oppressive or more accurately surreptitious, conduct on the part of Bothma, this of itself is no reason to wind-up the company. In this latter regard Bothma states that the utilisation of the vehicle by the applicant was not a major issue at the time and points to the fact that subsequent to the removal of the vehicle he and the appellant had further meetings and discussions relating to matters concerning the respondent and SAB.

[9] The appellant refers to an incident concerning the loss of his briefcase whilst he and Bothma were overseas. Bothma makes it plain that he had nothing to do with such disappearance and points to the fact that when the appellant reported the matter to the German police he simply reported that his briefcase had been stolen and made no mention of any possible involvement of Bothma. This is a dispute of fact which it is not possible to resolve on the papers, save to point out that the applicant's statements that Bothma involved him in the matter are unsubstantiated.

[10] The appellant contends that Bothma has usurped his ownership and interest in the control of the respondent. Bothma points to the fact that the second shareholders agreement was entered into in August 2002 and signed by the parties for reasons arising from the appellant's then financial embarrassment entirely of his own and self confessed making. No mention was made whatsoever of any problem with the execution between the appellant and Bothma of the said agreement in the founding papers. Accordingly, having regard to Bothma's statements I do not believe there is any substance in the appellant's contention that Bothma 'managed to have his family, via the Bothma

Trust, take over ownership and control of the' respondentappellant'. The appellant, in my view, has failed to show on a balance of probabilities that Bothma is guilty of any of the type of conduct referred to by Lord Skerrington in *Thomson v Drysdale* 1925 SC 311, a case to which counsel for the appellant, Mr Spottiswoode, referred to in his able argument.

[11] Although the appellant states that there has been a misappropriation of funds of the respondent he offers no concrete evidence of this other than to suggest that Bothma allegedly went on a lavish spending spree in Dubai. Bothma disputes that any of the respondent's funds were used in connection with the trip that he admittedly undertook to Dubai.

[12] The appellant's' alleged fears of financial mismanagement by Bothma of the financial affairs of the respondent and the alleged misappropriation of an investment in SAB are not substantiated by any independent evidence by the appellant and in any event are disputed by Bothma.

[13] The appellant in a replying affidavit annexes a copy of the current bank account of SAB at Nedbank and states that 'I endeavoured today [5 March 2003] to obtain a more recent bank statement but was advised by Nedbank that Bothma had instructed them to remove me as a signatory to the account and that I was accordingly not entitled to a

bank statement, which I previously readily obtained from time to time.' Bothma deals with this allegation by stating that he did not instruct Nedbank to remove the appellant as a signatory on the current account. Any difficulty which the appellant might have 'experienced in accessing the current account statements arose as a result of the banks own internal procedures. When I learned of these difficulties, I immediately instructed Nedbank to permit applicant access to the bank account and statements pertaining thereto at all times. This remains the position today.' The appellant's response to this in a replying affidavit is to the effect that Bothma is guilty of not referring to the call account. However, the initial allegation made by the appellant concerning alleged misconduct on the part of Bothma did not refer to the call account but referred to the current account. It was this allegation which Bothma answered. Furthermore earlier in his replying affidavit the appellant refers to a visit which he and his attorney paid to the St Georges branch of Nedbank in Cape Town in order to obtain copies of the most recent statements for both the current and call accounts. He claims that on 13 November 2003 he and his attorney were informed by 'an employee there called Jackie Alexander that when both accounts were opened on 19 February 2002, Bothma and I were joint signatories. She informed us further that from 19 March 2003, however, only Bothma was authorised by

the company to access the accounts. My attorney then telephoned Jackie Alexander to ask her whether she would make an affidavit confirming this. She told him that she did not want to get involved. I have no reason for disbelieving what Jackie Alexander told my attorney and me at the bank; she listened carefully to our requests, interrogated her computer accordingly and informed us of the results given to her by the computer system. I verily believe in the truth and correctness of what she told us'. Plainly what Jackie Alexander is alleged to have told the appellant and his attorney is hearsay. Furthermore no attempt is made by the appellant to identify precisely what position Jackie Alexander occupied at the bank. In addition it would have been a simple matter for the appellant or his attorney to request the manager of the branch of the bank to furnish an affidavit stating who the signatories were to the bank accounts at the relevant time and if he refused to do so to subpoena him. Equally there was no reason why the appellant could not have subpoenaed Jackie Alexander to give evidence or to have required oral evidence on this aspect of the matter which was plainly in dispute. To say that he had no reason to disbelieve Jackie Alexander is in my view disingenuous especially since Bothma had clearly put the matter in issue. At best for the appellant this again is a matter where there is

an unresolved dispute of fact which detracts from the appellant's ability to discharge the onus resting upon him.

[14] Suffice it to say that I am in agreement with the statement by the court *a quo* to the effect that it is not possible, on the papers, to find on a balance of probabilities that a personal relationship existed between the appellant and Bothma, which admittedly is not good, which precludes the further proper functioning of SAB and which destroys the role of new investors in funding the project of the meat processing venture. In addition it has not been established by the appellant that there is scope for coming to the conclusion that the respondent company cannot be properly managed and that the applicant and the respondent cannot deal at arms length with the co-investors in SAB.

[15] In so far as the appellant suggests that the respondent is insolvent and unable to pay its debts, there is no evidence of this whatsoever and again it is a matter which is denied by Bothma and in any event not a ground, as such, which the appellant relies upon for winding-up the respondent.

[16] In all of the circumstances I am satisfied that the court *a quo* correctly discharged the provisional order. The appeal is dismissed with costs.

~~The respondent was arraigned in the High Court (Port Elizabeth)~~ before Pillay AJ, sitting with assessors, ~~on~~ two ~~charges~~: first, of kidnapping (s 13 of the Sexual Offences Act 23 of 1957) and, second, ~~of rape and kidnapping~~(alternatively sexual intercourse with an imbecile under s 15(1)(a) of the said Act)~~.~~ After the conclusion of the state's case he closed his without testifying or calling any witnesses in his defence. ~~He was acquitted~~ on both counts~~at the conclusion of the case. He did not testify in his defence nor did he call any witnesses.~~

~~[2] During the course of the trial, the prosecution called~~ sought to call ~~the complainant, a 16 year old female. The trial court~~ judge ~~ruled that she was not competent to testify~~ in the light of the provisions of~~.~~ s 194 of the Criminal Procedure Act 51 of 1977 ('the Act'). ~~The prosecution requested that that~~ the ~~issue be reserved as a question of law. The trial court~~ judge ~~refused to do so. This led to an application to this court for leave to have the question reserved. The application was referred for oral argument and argument on the merits of the proposed appeal was allowed at the hearing. The respondent declined to participate in the hearing before this court.~~

~~[3]~~ The question formulated is –

'whether the court was correct in law in refusing the state an opportunity to present the evidence of the complainant on the charges preferred?~~The question which the prosecution sought to be reserved was whether the trial court erred in declaring that the complainant was not a competent witness.~~

~~In my view, t~~The answer~~r~~, I believe, ~~must be sought~~ not only in s 194 read in isolation but ~~from the wording of sec 194 (in terms of which the ruling was made) read with secs 192 and 193 of the Criminal Procedure Act 51 of 1977 ('the Act').~~also read in context with other provisions of the Act.

~~[4] The relevant facts are the following. The complainant lived with her parents and~~ their ~~other children at a house in Extension 3, Phillipsville, Hankey. On 13 July 2001 she was in the company of other children at the back of the house. She later went to stand at the gate in front of the house, waiting for her father who had gone to town. She disappeared and her whereabouts were unknown until the next morning when she was found with the respondent in his room. She was later taken to a doctor for a medical examination, which revealed that she had recently had sexual intercourse. A complaint was laid against the respondent who was subsequently charged.~~

~~[5] During the trial the respondent admitted that he had engaged in sexual intercourse with her. The defence~~ on the rape charge ~~raised and advanced in cross-examination on his behalf was that the intercourse was consensual.~~ and, as far as the alternative count of intercourse with an imbecile was concerned, that he did not know that she was an imbecile (*dolus* being an element of the crime).

[6] In order to prove that the respondent must have been aware of the fact that the complainant was incapable of consenting to sexual intercourse as she obviously was an imbecile, the prosecution led (apart from the evidence of members of her family) evidence of a clinical psychologist, Mr du Toit, who had examined her and prepared a report on her mental capacity. The psychologistDu Toit stated that the complainant suffered from severe mental retardation and that she could consequently be described as an imbecile. He found that as a result of the mental retardation the complainant had a 'very limited capacity to exercise her will and make choices', and that her mental age was that of a four-year-old child. The psychologistDu Toit was, however, not able to determine whether the complainant could distinguish truth from falsity.

[7] Relying on the psychologist's testimony, the trial court made the ruling alluded to abovementioned. In this regard the trial judge said:

'As authority for the proposition that the witness can be so called, [counsel for the prosecution] relies on *S v J* [1989 (1) SA 524 (A)]. Now it is true that there are sections in this judgment where the appeal court, dealing with a conviction for sexual intercourse with an imbecile, expressed regret that the complainant had not been called as a witness. I do not, however, believe that it is authority for the proposition that she can be so called.

Section 194 of the Act makes it clear that mentally incompetent persons, whether the incompetence is due to mental illness or intoxication or narcotic abuse, shall not be competent to give evidence while so afflicted or disabled.

Now the State case has been, through a senior psychologist Dr du Toit, that she is severely mentally retarded to the point where she may be described as an imbecile. She is 16 years old, but has the mental age of a 4 year old. He expressed doubt, as a trained expert, as to whether or not she can tell the difference between truth and falsehood.

In those circumstances, it seems to me to be clearly a situation governed by section 194 of the Act. There is nothing in the judgment of *S v J* to indicate that the prohibition in that section against calling an imbecile as a witness was considered.'

[8] Section 194 provides:

'No person appearing or proved to be afflicted with a mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while so afflicted or disabled.'

[9] The section must clearly be construedread in the context of sections 192 and 193 which precede it. Section 193 provides that the court before which criminal proceedings are conducted shall must decide any question concerning the competency of any witness. According to s 192 every person is competent to

~~give evidence in a criminal trial unless he or she is~~ expressly ~~excluded by the Act from doing so.~~

~~[10] Section 194 stipulates specific requirements for determining whether or not a particular witness is incompetent.~~ The history of the provision is instructive, although its wording is clear. Section 225 of the Criminal Procedure Act of 1955 had a similar provision in these terms:

'No person appearing or proved to be afflicted with idiocy, lunacy, or insanity, or labouring under any imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of reason, shall be competent to give evidence while so afflicted or disabled.'

This gave rise to interpretation problems as appears from the judgment of Jansen JA in *S v Thurston and another* 1968 (3) SA 284 (A) at 289C-F:

'Die strekking van die artikel is egter nie vanselfsprekend nie. Skynbaar (altans volgens die Afrikaanse redaksie deur die Goewerneurgeneraal onderteken) is dit nie elke geestesgebrek wat onbevoegdheid meebring nie, slegs dié waardeur die persoon "van die behoorlike gebruik van sy sinne beroof word" ("is deprived of the proper use of reason"). In wye sin kan dit seker gesê word van enige persoon met 'n geestesgebrek van een of ander aard, maar dit is beswaarlik denkbaar dat die Wetgewer dit so bedoel het - dit sou die kwalifikasie oorbodig maak behalwe ten opsigte van "verstandsverbystering voortspruitende uit dronkenskap of

andersins". Juis hierdie gedagtegang kan aanleiding gee tot 'n interpretasie wat die kwalifikasie tot laasgenoemde geval beperk. Die Engelse redaksie is veral vatbaar daarvoor. Ook in *Rex v Burger*, 1938 CPD 37, is die kwalifikasie in 'n bykans presies ooreenstemmende artikel skynbaar aldus verstaan. Daar word nie uitdruklik mee gehandel nie, maar die aanvaarding dat as 'n getuie 'n idioot is, sy sonder meer 'n onbevoegde getuie is, dui sterk daarop.'

Pursuant to the recommendations of the Botha Commission of Inquiry into Criminal Procedure and Evidence the present Act was amended to remove the uncertainty and to bring our law in conformity with other systems. (Cf the authorities referred to by Jansen JA at 289F-290E and also Wigmore *Evidence in trials at common law* (1979 ed) vol 2 para 498-499, *Bellamy* [1986] Cr App R 222, and *R v D* [2002] 2 Cr App R 36.)

[10] ~~The first requirement~~ of the section ~~is that it must appear to the trial court or be proved that the witness suffers from a~~ (a) a ~~mental illness or~~ (b) ~~that he or she labours under imbecility of mind~~ ~~due to intoxication or drugs~~ or the like~~. Secondly, it must also be established that as a direct result of such mental illness or imbecility, the witness is deprived of the proper use of his or her reason. Those~~ two ~~requirements must collectively be satisfied before a witness can be~~

disqualified from testifying on the basis of incompetencyincompetence. (see *S v Thurston and another* 1968 (3) SA 284 (A) at 289).

[11] The evidence led in the present case falls short of establishing that those requirements were met. The psychologist's evidence does not indicate that the complainant suffered from any mental illness. It merely establishes that she was, in the outdated terminology of the Act, an imbecile. Imbecility is not a mental illness and *per se* did not disqualify her as a witness. It is only imbecility induced by 'intoxication or drugs or the like' that falls within the ambit of the section (and then only when the person the witness is deprived of the proper use of his or her reason). It is also clear from the present factsevidence thus far led that the complainant was not deprived of the proper use of her reason because she had a limited mental capacity to 'exercise her will and make choices'.

[12] The trial court had a duty to properly to investigate the issue cause of her imbecility before concluding that she was incompetent. Section 193 enjoins a trial court to enquire into such this issue and decide whether a witness is in fact incompetent. This may be done by way of an enquiry whereby medical evidence on the mental state of the witness is led or by allowing the witness himself or herself to testify so that the court can observe him or her and form its own opinion on the witness's ability to testify. In the past courts in this country have

~~permitted persons suffering from mental disorders as well as imbeciles to testify subject to their being competent to do so. See *S v Thurston* (supra); *S v J* 1989 (1) SA 525 (A); *R v K* 1957 (4) SA 49 (O) and *S v Malcolm* 1999 (1) SACR 49 (SEC).~~

~~[13] That approach is in harmony with the presumption contained in s 192 to the effect that every person is a competent witness.~~ But the fact that someone is a competent witness does not mean that that person can be sworn as a witness. That raises a discrete issue, namely whether the witness understands the nature and import of the oath or affirmation, which must be dealt with under s 164 (see *S v B* 2003 (1) SACR 52 (SCA)). In addition, the intention of the state here was not to rely on the truth of the evidence of the complainant; it was to demonstrate to the court that she was an imbecile and that that fact would have been apparent to anyone – in other words, a procedure akin to an inspection *in loco*.

[14] ~~*S v J* was binding on the court *a quo* and the trial judge should have followed it. It is regrettable that, once again, it becomes necessary to repeat the warning~~ admonition ~~on the importance of lower courts following decisions of higher courts.~~ *S v J* was binding on the court *a quo* and the trial judge should have followed it. ~~In *De Kock NO and others v Van Rooyen* 2004 (2) SACR 137 (SCA) Cameron JA said at 146 f-g:~~

~~'It is necessary to repeat the admonition. Consistency, coherence, certainty and predictability in our new constitutional order require the due application of the decisions of higher Courts. Disregarding them wastes precious resources. It also imperils public understanding of the Constitution and its implications by creating an impression of incoherence, irrationality and unpredictability.'~~

~~See also *Blaauwberg Meat Wholesalers v Anglo Dutch Meats (Exports)* 2004 (3) SA 160 (SCA) para 201 and the cases there cited.~~

~~[145]~~ ~~In the circumstances of the present case I am satisfied that~~ the answer to the reserved question of law must be 'yes'. This finding then gives rise to the question 'what steps' this court should direct (s 322(4) read with s 324). T~~he ruling made by the trial court amounted to a serious irregularity. and that consequently its verdict cannot be allowed to stand. It follows that the reserved question should be answered in favour of the prosecution.~~ The state was deprived of the oportunity of leading evidence, which was palpably admissible on the plain wording of the section. The evidence was material for its case on count 2. A miscarriage of justice occurred. The accused, on the other hand, although he has had to suffer all the prejudices that follow from a trial, will not be materially prejudiced by a trial *de novo*. He has not yet testified, the trial was brief and there is no suggestion that witnesses for the defence are no longer

available. It is therefore an appropriate case to allow a new prosecution if the state is so minded. (*R v Gani* 1957 (2) SA 212 (A) 222.) However, the question reserved did not affect the acquittal on count 1 (kidnapping) and that count cannot form the subject of any retrial.

~~[15] Before concluding this judgment there are two issues to which I should refer. The first relates to the trial court allowing evidence on the complainant's previous sexual experience to be introduced into the record of the proceedings. Section 227 (2) of the Act stipulates that evidence of a complainant's sexual experience, which does not relate to the incident giving rise to the trial, may shall not be adduced without leave of the court and that such leave shall may only be granted only if the court is satisfied that it is relevant. Consistently with this provision trial courts must vigilantly protect complainants' privacy and dignity by allowing evidence of past sexual experience to be led only where the requirements of the section are met. In *S v M* 2002 (2) SACR 411 (SCA) Heher AJA said at 425j - 426b:~~

~~'One is here dealing with an issue which requires of a trial court great sensitivity and about which strongly conflicting views may be held ... There is a responsibility on practitioners and~~

the courts to uphold the spirit of the legislation. In the case with which we are concerned, all appreciation of the statutory requirements and niceties seems to have escaped the trial court.'

[16] In the present matter the requirements of s 227(2) were not complied with before the evidence pertaining to the complainant's previous sexual experience was adduced. The leading of such evidence should have been prevented.

[17] The other issue relates to the weight attached by the trial judge to the defence version which was put to state witnesses under cross-examination. It was treated as if it wereas evidence when the trial court considered its verdict on the merits. As the respondent failed to properly place his any version before the court by means of evidence, the court's verdict should have been based only on the evidence led by the prosecution only.

[18] In the result the following order is made:

1. The application for the reservation of the question of law is granted in terms of s 317(5) of the Criminal Procedure Act.

2. The reserved question of law is answered in the affirmative.

3. Under s 324 of the Act, the respondent may be retried on count 2. The appeal succeeds and the respondent's acquittal is set aside.

2. The matter is remitted to the court *a quo* for the trial to start afresh.

R H ZULMANC N JAFTA
ACTING JUDGE OF APPEAL

FARLAM

HARMS JA)
MAYA AJACAMERON JA _____)CONCUR
MTHIYANE JA)
CLOETE JA)