THE STATE VERSUS.

1. GAVIN MICHAEL ANDERSON.
2. SIPHO KUBHEKA.

CASE NO:- 1/SH/371/76

DATE:- 30-8-77

PLACE:- GERMISTON
SUPREME COURT OF
SOUTH AFRICA
(TRANSVAAL PROVINCIAL
DIVISION).

Lubbe Recordings/Pta/FHV C.A. 56/77

IN THE SUPREME COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

The Magistrate,

GERMISTON.

Case No: 1/SH/371/76 30th August, 1977

1. GAVIN MICHAEL ANDERSON
2. SIPHO KUBEKO Appellants

versus

THE STATE Respondent

J U D G M E N T

ELOFF, J: This appeal arises from the successful prosecution of the two appellants on two counts. The first was of a contravention of Section 18(1)(a)(i) of the Bantu Labour Relations Regulation Act No. 48 of 1953, and the second was of a contravention of the provisions of Section 65(1)(a) of the Industrial Conciliation Act No. 28 of 1956.

There was a further charge also brought against the appellants, but in regard to that they were discharged at the close of the State case, and I need say no more about it.

The prosecution ensued in consequence of what might be described as labour unrest which occurred in the business of a company styled Heinemann Electricall, to which I shall hereinafter refer as Heinemann, and which related to the question of collective bargaining of the employees of that concern.

The history starts, as far as the evidence shows, in February of 1976, when the management of Heinemann endeavoured to establish a Liaison Committee. That proved abortive,/.....

abortive, because the elections for nomination to that Committee were boycotted. Already at that stage, the first and second appellants appeared on the scene, and had discussions with the General Manager of Heinemann, and presented a petition which they claimed had been brought on behalf of the workers, who refused to accept the Liaison or Works Committee. At that stage the appellants claimed that they were representing the workers. I should here interpose to say that according to his evidence, appellant No. 1 was at that stage the acting secretary of 1
an unregistered trade union, and that the second appellant was an organizer of that trade union.

These difficulties were not resolved, and they came to a head rather vigorously towards the close of March 1976. On Thursday the 20th March, 1976, Heinemann's notified 20 workers that they were retrenched due to a reduction in production. The evidence was that that decision had been taken some time previously, and I should say that it was suggested in a rather lengthy and vigorous cross-examination that the decision was inspired not by 2
an endeavour to achieve a reduction in production, but in order to bring about the very situation which arose thereafter, that is, that the other workers would react vigorously, thus giving the management the opportunity of dismissing them and re-employing only those who were prepared to fall in line with the policy of the management of negotiating only with a Liaison Committee of workers. Be that as it may, this suggestion was refuted, and I need say very little more about it, except in a context which I shall touch on, later on. 3

The real trouble came to a head on the next day,

Friday/.....

Friday, 26th March, 1976. On that day, at the early hour of 7 o'clock, workers arrived and congregated outside but refused to enter the premises. The general conduct of the workers on that day, and at that hour, was described by a number of witnesses, including the witness Von Lieres; a man called Edwards, from the Department of Labour; an employee called Jacobs; a further man called Brasmus, and a worker called Maralick.

The totality of their evidence, in my opinion, shows beyond reasonable doubt that the workers on that occasion refused to work. There was an atmosphere of turbulence, to put it no higher, amongst them. Certain of the workers arrived to work, but others on at least one, and possibly more occasions, endeavoured to prevent them from entering; cars were bumped, occupants were told to get out. It is true, as it was pointed out by Mr. Bizos, that certain of the workers remonstrated, and exhorted the others not to resort to violence. But the fact of the matter is that there was, putting it no higher, an atmosphere of disquiet and turbulence about the congregation of workers. This, I think, is supported by the fact that the shift workers in the bakelite section, who had commenced work at 6 o'clock of their own accord, downed tools some time after 7 o'clock. That emerges from the evidence of the witness Maralick, and I think there is little to refute his evidence. And I should also add that the atmosphere became such that the management thought it necessary to call for police attendance.

Several hundreds of people, had gathered, most of them workers, and eventually Von Lieres emerged to call upon those were in employment, to commence work, but they

refused/.....

refused, whereupon Von Lieres announced that as those workers had breached their contract, they were all dismissed, but he added an offer of re-employment on the following Monday. At the same time, the pay-out for that week was arranged, and it was announced that dismissal pay which includes holiday bonuses and unemployment benefit insurance payment would be made on the following Monday.

I should here pause to deal with the suggestion that the steps taken by Von Lieres to terminate the employment of the workers who had refused to come in, was inspired by the improper motivation of bringing about a situation that only workers who were prepared to fall in line with the management's view of dealing with collective bargaining would be re-employed. In this context it was urged by Mr. Bizos, that a stratagem had been employed, which if successfully pursued, would enable the management to ensure the re-employment only of those men who would go along with the management in their way of dealing with management and labour problems.

I do not think it necessary to express a view on that. It may possibly be that anything along these lines would be mere speculation. The matter was, in the nature of things, not fully explored; there are indications which the Magistrate interpreted certaincircumstances as going some way towards establishing that that was indeed the motivation.

To my mind, the correct way of looking at it is that whether or not this was at the back of Von Lieres' mind, it is not important. The point is that when the workers refused to work they in effect, committed what can

only/.....

only be termed as strike action, within the meaning of the word "strike" as employed in both the Statutes under which the appellant was charged, and that Von Lieres was entitled to dismiss them. The fact, if fact it is, that he had a further ulterior motive, does not detract from the legal significance of the simple fact that they refused to work, and that Von Lieres was entitled to dismiss them for that reason, whatever ulterior motivation he might have had in mind. I certainly do not wish to be understood to subscribe to the proposition that he had an ulterior motive; but I want to emphasize that in my view, there is no legal consequence that attaches to the fact that he may have had this motive which was attributed to him.

After this had been notified to the crowd, they did not disband and in fact the turbulent atmosphere remained. It was at this stage, or shortly afterwards, that the two appellants arrived on the scene. I shall later in this judgment discuss what the evidence establishes in regard to their participation in the events. I wish merely now to record that once they arrived, they moved around, the crowds seemed to look to them for leadership and guidance; they congregated amongst them and the two appellants spoke to various sections of the crowd.

Ultimately the crowd disbanded and a number of them dispersed to meet again in Alexandria Township, where they were met by the appellants, who incidentally en route also conveyed a number of the workers, including the witness Angela Maseko to Alexandria Township. There a substantial crowd once again met, and at that meeting certain things were said to which I shall refer a little later in this

judgment./.....

judgment. Suffice it to say that after the meeting was closed, there were the events of the Monday.

On that day, again, the crowd congregated; the two appellants were likewise present and on that day again, the workers declined to resume employment with Heinemann's. Again arising out of things which were said, it was alleged that the accused contravened these two sections of the Act to which I have referred.

In consequence of what was said, the prosecution was launched, and I think that before discussing the merits of the convictions I should in logical order, first of all discuss certain steps of a procedural nature which were taken, and the rulings given by the Magistrate in regard thereto.

It was said that the Magistrate committed procedural errors in regard to two stages of the proceedings. The first was said to arise in consequence of his omission to sustain a motion to quash the charge sheet.

I address myself at once to the question which was raised before us, whether the motion to quash should have been sustained. Basically, the attack on the charge sheet was that the further particulars which had been supplied by the State in consequence of a request, as amplified by a still further series of particulars, failed to substantiate the charge made.

Now, the original charge, insofar as it is relevant, attributed to the accused the commission of the sections to which I have alluded:

"In that during the period 26th March, 1976 to the 29th March, 1976, and at or near Bedfordview, Regional Division of Transvaal, the accused did wrongfully/.....

wrongfully and unlawfully instigate a strike or incite an employee or employees of the firm Heinemann Electric or other persons, to take part in or continue a strike, and/or the accused did take part in a strike or in the continuation of a strike; ... "

at a time during the currency of a determination under the Industrial Conciliation Act. The second charge was substantially to the same effect.

The further particulars which were called for, related to the manner in which the appellants committed these offences, and the response was that they gathered, sat down and/or - that the appellants informed them, the workers, to gather, sit down, fight for their rights, fight the South African Police, should they try to do anything. That they must not go to work and/or must remain outside the buildings of Heinemann's Electrical, and/or that they must not accept the wages payable to them, and/or to repeat the act on the following workdays. The additional Further Particulars which were supplied just before the hearing of the motion to strike out, also added the words:

".. and/or to refuse to continue to work and/or resume work, and/or to comply with the terms and conditions of employment, that is, to attend work".

Now, to my mind the Magistrate was perfectly correct in the view that he took that the Further Particulars adequately indicated to the accused what case they were called upon to meet. The state was not called upon, in my view, to do more than convey the substance

of/.....

of what they had done; and what the Further Particulars did was to attribute to them having by word of mouth in effect told the workers not to work, and not to go to work. Further details all centred around this central averment; and I think that it must have been clear that the substance of the statements made by the appellants to the workers was that they must not go to work. The State was never, in my view, called upon to give the ipsissima verba, or to set out the various statements made from time to time by the appellants, upon which they were going to rely. I think that it was clear to the appellants when the trial commenced, that this was what they were called upon to meet, and my perusal of a very lengthy record satisfies me that at no stage could it really be said that the appellants were in any way taken by surprise, or embarrassed by the omission to specify, far more fully than was done, what the case was that they were called upon to meet.

I am not persuaded in nay way that the Magistrate erred in rejecting the motion to quash the indictment.

The second step of a procedural nature to which I must allude was the decision by the Magistrate to allow a further amendment to the charge sheet. He did that after the close of an application for discharge on the three counts with which I am now concerned, and the further count, to which I related previously.

After the conclusion of argument, and apparently just shortly before the Magistrate was about to deliver judgment, leave wassought to amend the Further Particulars by adding that in addition to exhorting the workers to do the various things which I have already mentioned, they

were also exhorted:

"to refuse to accept re-employment".

It is contended that in doing this at that late stage in the prosecution, the Magistrate exercised an improper discretion. Now, I need not quote any authority therefor that the Magistrate had the power and the discretion whether or not to allow the amendment which he allowed. It is furthermore, well settled that this Court will not interfere with such an exercise of discretion except upon well-recognized grounds.

I do not think that the Magistrate acted capriciously, or wrongly or in any way irregularly by allowing an amendment at that stage. It is not as though this further tail to the Particulars already given was such a far cry from what had already been alleged. Indeed, one might almost say that in substance that which was added was within the general framework of what had already been alleged. If the appellants were in any way inconvenienced by this, they could have sought an adjournment, and I think that the additional conduct attributed to them, was foreshadowed by the evidence which had been led without objection, up to that point.

It seems to me that it would be a mere theoretical exercise to conjure up all sorts of ways in which the appellants could have been prejudiced. I think that it would be realistic to say that there was no prejudice at all; the Magistrate exercised a proper discretion, and I am not minded to interfere with what he did in this regard, either.

That then brings me to the merits, and I think that it can be said that the Magistrate's judgment was

attacked/.....

attacked on two broad grounds. The first relates to the absence of a specific finding by him that there was a strike on any of the occasions in question. The argument which was developed in this regard was that short of such a finding it could not be said that the workers had been dismissed on that Friday. If they had not been dismissed then, so the argument ran, the accused appellants could not be charged with exhorting the accused to refuse to accept re-employment; re-employment postulates that there had been a proper termination of their employment. For that reason, it was urged, the omission by the Magistrate to find that there had been a strike precluded him from finding that the appellants had committed the offence in the manner which he found. In this regard attention was drawn thereto, that at the close of the State case, when the Magistrate refused to grant the application for discharge, he indicated that he thought that the appellants were probably guilty of that particular conduct which had been brought in by the amendment, of exhorting the workers to refuse to accept re-employment.

On this finding a whole superstructure was put up to the effect that the Magistrate had committed himself and also by implication the State, to the case that all that he appellants were called upon to meet was that they refused to accept employment, and in view of the fact that the Magistrate was not prepared to find that there was a strike, for that reason the whole substratum fell away.

I am not minded to subscribe to this proposition. It seems to me that although the Magistrate at the close of the State case indicated that he thought that the nub of the matter was that the appellants had exhorted

the/.....

the workers to refuse to accept re-employment, he did not commit himself or the State to that view. Moreover, it seems to me to be implicit in the reasons given at the close of the entire case, that he thought that the workers had been properly dismissed. And indeed it is understandable that he would have said that, because if one reads the evidence of the appellants, it is permeated with statements by them that they were dealing with the dismissed workers. So, far from it being open, at this late stage, for the appellant to argue that there had been no proof of a proper dismissal, and no proof of a strike, it seems to me that it was generally accepted that there had been a dismissal on that Friday. That was the way in which the case proceeded.

In any event, I do not think that the views expressed by the Magistrate at the stage of the close of the State case, precludes the State from now relying on all the evidence to establish that there was indeed a strike.

But apart from that, I do not think that it matters whether there was a strike or a lock-out. The essence of the charge was that the appellants exhorted the workers to refuse to accept re-employment. It is not inconsistent with the absence of a strike, that they could have done so. It is not inconsistent with the presence of a lock-out that they could have done so, and in my view, there is no basis for the contention that short of the specific finding that there was a strike, these convictions cannot stand.

There was a further corollary added to the argument, and that is that if the appellants believed (particularly

having/.....

having regard to the fact that there was some evidence that they had studied the law bearing on the point at some stage in the events) that the dismissal was not lawful, possibly by reason of its being tainted by the improper motive to which I previously alluded, there could be no mens rea. My difficulty with that argument is that the appellants never said that they believed that the dismissal was unlawful. As I have said, they maintained consistently that there had been a dismissal, and that they wished to interpose on behalf of the workers, to achieve an improvement on the situation, and to have negotiations with the management in that regard.

The final and ultimate attack on the Magistrate's finding related to what the appellants had in fact, according to the State case, exhorted the workers to do.

In a rather short judgment the Magistrate based his findings in this regard on the evidence of Angela Maseko, who was a worker at Heinemann's and who gave evidence as to what the appellants had said. She said that on the Friday, when the appellants arrived, they moved around. The first appellant spoke in English, and the second appellant acted as his interpreter, and said at various stages that the workers did the right thing by not getting into the firm; that if they stayed away their strength would lead thereto that the factory would lose in consequence thereof; that they must sit down, and when Europeans come to ask, they must make a noise, so that they must feel hurt about it because they are sitting with strength; that (and this was in answer to a proposition on behalf of defence Counsel) Heinemann's was putting up a pretence that the workers were not needed;

and/.....

and also in response to a suggestion by counsel for the defence, that although the Managing Director thought that he could break the Union, it was not possible to break Unions, if its members stood together; and lastly, that the work was needed, and that the factory would be the losers if the work was withheld from the factory.

In regard to what occurred at the Alexandria meeting, the witness said that the second appellant addressed the crowd and by analogy to a previous episode which occurred at Bethal, where there was a boycott of potatoes produced by some group of the community, the workers of this particular union and of Heinemann's could achieve substantially the same thing. In addition, she said, they said that on the Monday the workers must not go into the factory, but remain outside, as they had done on the Friday; that if they stayed away from work they would be paid their wages. Songs were sung, and instances were quoted of the example of the Durban firm, where dismissed workers were reinstated.

In regard to the Monday, the witness said that they had said this. The first appellant said that all that he really did was to exhort the people to be calm and peaceful, and added a further few noncommittal things, and the second appellant said substantially the same.

The Magistrate, in evaluating the evidence of Angela Maseko, was very much alive to the fact that there were shortcomings in her evidence; that in regard to two episodes she had contradicted herself, and yet he decided to accept her evidence in preference to that of the appellants.

It was urged that there were contradictions

which were of such magnitude that the Magistrate should have thought it imprudent to act on her evidence.

I think that this is very much one of these cases where it is extremely difficult for me to gain the advantage which the Magistrate had, of seeing and hearing the witnesses. This is one of these cases in which not only the way in which the witness gave the evidence, but the atmosphere which prevailed when she said it, is so important. It has to be borne in mind that she was deposing to a series of discussions, and it was only by really seeing her, and being steeped in the atmosphere of the trial, that the Magistrate could form a true picture of her. As I have said, he was alive to the shortcomings which she committed; the one shortcoming he emphasized particularly, and that is that Angela had said at one stage that the appellants threatened assault to those who resumed work, and at a later stage said that they did not.

It was further pointed out that that was not the only contradiction; that there was a contrast between the evidence of Von Lieres and Angela Maseko as to the stage at which the two appellants arrived on the scene, and the stage at which the dismissal was recorded. But I think that it would be sensible to view the matter on the basis that these were trifling matters.

The Magistrate did not deal therewith, but I think that it is not improper to refer thereto, that the evidence of Angela Maseko was corroborated by that of the witness Jacobs. No reference was made in the judgment to his evidence, but it is important that in regard to at least one episode, he said that it was said by the appellants,

that/.....

that the workers must do the same on that Monday as they had done on the Friday.

Now, in regard to Maseko it was pointed out that he understood Afrikaans only, and that what he heard was that which was said by the first appellant, translated by second appellant, in Zulu, and again translated into Afrikaans. But it is not inappropriate to remark that second appellant confirmed that he acted as interpreter. The first appellant understood Afrikaans, and second appellant understood some Afrikaans, and the totality of all this seems to me to lead thereto that it was not a case of Jacobs testifying to what was hearsay, or possibly as was argued, double hearsay; it was his testifying to matters which on all the evidence had been properly interpreted.

The fact that the Magistrate did not comment on his evidence does not seem to me to attract the inference that he was in doubt as to the veracity of Jacobs. If I read Jacobs' evidence correctly it seems to me that there was no real reason to doubt that that is what took place. I cannot think of any reason why he would give this false evidence, and it seems to me that his evidence can properly be relied upon as corroboration of that of Angela Maseko.

As regards the appellants, I have read their evidence with care, and I must say that I am left with the impression that they deliberately tried to create a false impression of the part they played and, in fact, tried to underplay that part. I cannot think that in the general atmosphere that prevailed, they played the insignificant part which they claimed they played. If one has regard to the entire history of the matter, one is

left/.....

O P I N I O N

1.

Consultant is ALBERT KHOWA.

2.

Consultant was employed by HOFMAN BENSE (PTY) LIMITED from 7th January, 1971, until the 13th August, 1976.

3.

Consultant was employed mixing concrete, building scaffolding, pushing wheelbarrows and carrying various goods.

4.

We have been supplied with Government Gazette No.2132 of 19th July, 1968, containing a Building Industry Agreement. Such agreement was entered into between the Master Builders and Allied Trades Association, Durban and various trade unions which are set out in the schedule to the said Government Gazette. All parties being parties to the Industrial Council of the Building Industry, Durban. Our instructions do not contain information as to whether HOFMAN BENSE (PTY) LIMITED is a member of

the Master/

the Master Builders and Allied Trades Association, Durban but in terms of Section 48(1)(b) of the Industrial Conciliation Act 1956, the agreement was made binding upon all employers engaged in the building industry in the magisterial districts of Durban, Pinetown and Inanda. We understand that the firm of HOFMAN BENSE (PTY) LIMITED was engaged in the building industry in the magisterial district of Durban and is therefore bound by the agreement.

5.

We are instructed that Consultant was a labourer Grade II, as defined in the agreement and it would seem from studying the definition of such labourer that the services performed by Consultant would fall under such definition. Recourse to the phrases "Loading and unloading materials and goods" and "mixing concrete by hand or machine under supervision" or finally the umbrella phrase "any other work of an unskilled nature not elsewhere specified or apportioned to any other class of grade of employee" would seem to confirm our instructions.

6.

In terms of Clause 29 of the agreement, Consultant was entitled to a tea interval not exceeding ten minutes duration in the morning and in the afternoon.

We are/

We are instructed that Consultant enjoyed no such tea breaks prior to the 6th August, 1976, from which date tea intervals were provided.

7.

We are asked to advise whether the above-mentioned clause is applicable to Consultant's employment and whether HOFMAN BENSE (PTY) LIMITED is in express contravention of the agreement.

8.

The so-called Industrial Agreement is not really an agreement or contract but "a form of permitted domestic legislation which by the will of a statutory body is, by a majority vote, imposed on all members of a designated group of employers and employees, irrespective of any actual concurrence by the individuals affected and notwithstanding any positive disapproval by any such individual. Moreover, this result ensues only if and when the Minister declares an agreement binding under Section 48 of the Act. The representatives of the parties on the Council do not forge any contractual nexus." See S.A.Association of Municipal Employees (Pretoria Branch) & Anor. vs. Pretoria City Counsel, 1948(1) S.A. page 11 (T).

9.

9.

In terms of Section 48(3) of the said Act, that is the Industrial Conciliation Act, the Minister of Labour declared that such agreement would be binding upon all Bantu employed in the said industry by the employers upon whom any of the said provisions are binding in respect of employees and upon those employers in respect of Bantu in their employ.

10.

It would seem clear to us that both Consultant and HOFMAN BENSE (PTY) LIMITED are bound by the agreement and that by failing to provide Consultant with the tea breaks stipulated HOFMAN BENSE (PTY) LIMITED was in express contravention of the agreement. In terms of Section 53(1) of the Industrial Conciliation Act, No. 28 of 1956 it is an offence to contravene or fail to comply with any provision of any agreement.

11.

In our view the ordinary literal meaning should be given to the tea interval clause set out in Clause 29 of the said agreement.

12.

We are then asked to advise whether Consultant

can claim/

can claim for normal or overtime rates. Prior to dealing with this question, we would draw the attention of those instructing us to the provisions of Section 53 of the Industrial Conciliation Act whereby the Court convicting any employer shall enquire into and determine the difference between the amount which the employer pays and the amount which he would have paid if the contravention had not occurred. Thereafter in terms of Sections 54 and 55 the Court shall, after it has determined the amount underpaid, order the person so convicted to pay an amount equal to the amount so determined to an officer specified by the Court and thereafter the Court may direct that an amount which the Court deems equitable shall be paid to the employee in respect of whom the contravention or failure occurred. In terms of Section 54(3) an order of this nature shall have the effect of a civil judgment in favour of the Government of the Republic. In terms of Section 56(1)(iii) an employee is not entitled to recover by civil proceedings the amount underpaid unless the Attorney General provides a certificate stating that he declines to prosecute or the employer has been acquitted on the charge of such contravention.

13.

Reverting to the questions set out in our instructions, clause 17(7) provides for the payment of overtime to any employee who is required or permitted to work anytime out side the hours prescribed in clause 14(1). The hours provided in clause 14(1) refer to any work done

(a) on a Saturday or a Sunday;

(b) for more than five days in any one week Monday to Friday .....

(d) (i) for more than forty-three hours in any one week or for more than eight and three-fifths hours in any one day;

(ii) before 7.00 a.m. or after 5.00 p.m.

14.

We are of the opinion that any time over forty-three (43) hours in a week or for more than eight and three-fifths hours in one day would constitute overtime. It is clear from our instructions that the tea break time would not have occurred before 7.00 a.m. or after 5.00 p.m. Our instructions indicate that Consultant worked for nine (9) hours a day and five(5) days a week amounting in all to forty-five (45) hours. It would seem then that Consultant is entitled to overtime rates as set out

in clause/

in clause 17(7)(iii) and clause 18.

15.

We are then asked whether there are legal or technical objections which may hinder Consultant's chances of success.

16.

Clause 14(f) provides that no employer shall require an employee to work for a continuous period of more than five hours in any one day without an uninterrupted interval of at least one hour. It seems clear from our instructions that Consultant had an half-hour lunch break and it would seem possible that Consultant was subject an exemption granted in terms of Section 51 of the Industrial Conciliation Act. de Koch in his work on the Industrial Laws of South Africa, Second Edition, at page 20 comments on the provisions of the Factories, Machinery and Building Works Act, No. 22 of 1941 as follows:

> "Although the provisions of the Act are peremptory in requiring that an employee be given at least one hour's rest after working a continuous period of five hours, the Department of Labour generally favours the granting of exemptions from this provision, permitting a meal break of less than one hour where this is justified for special reasons (such as transport difficulties) and many such exemptions have been granted.
>
> A number of industries voluntarily allow their employees paid tea breaks,

neither in/

> either in the morning or in the afternoon or both, during work periods. This is a factor which should be taken into consideration in conjunction with others when considering the grant of exemptions from the provisions referred to."

Our instructions do not cover whether any exemptions have been granted and the above opinion is subject to there being no such exemptions.

17.

Section 68 of the Industrial Conciliation Act provides that any agreement may be inspected or copied by any person on payment of the prescribed fee. We are of the opinion that this should cover exemptions as well. We are asked whether it is possible to invoke a procedure whereby the production of a certificate of nolle prosequi can be ordered within a stated period.

18.

Section 14 of Act No. 56 of 1955 provides that private prosecutors require such a certificate for production to the officer authorised by law to issue a summons. We are of the opinion that the learned authors of Swift's Law of Criminal Procedure, Second Edition at page 44 are correct in stating the following:

> "If an Attorney General fails timeously to grant his certificate as required by the section it seems clear that the intending prosecutor can obtain an

order on him..../

order on him either to proceed against the contemplated Accused or grant a certificate within a specified time. The Attorney General must be allowed a reasonable time within which to determine the course of action, and what is reasonable would depend on the circumstances of the case."

19.

Finally we are asked whether there are any loopholes in the Act and/or agreement which permit Consultant to institute civil proceedings without obtaining the said certificate and the loophole suggested is that the Act excludes Africans from the definition of "employee".

20.

Section 56(3) provides that any employee who has not been paid the full remuneration which he ought to have been paid in terms of any agreement which is binding upon him in terms of the Act shall not be entitled to recover from his employer by legal proceedings such unpaid amount. In terms of Section 48(3)(c) any reference to an employee in inter alia Section 56 shall be construed so as to include any"Bantu" in respect of whom any provision of any agreement has been applied. Hence the definition does not provide a means of avoiding Section 56.

21.

In regard to the question of prescription in respect of any civil claim Consultant may in due course be entitled

to bring,/

to bring, Section 13(1)(a) of the Prescription Act, No. 68 of 1969, provides that the completion of the running of prescription in any case where the creditor is prevented by any law (e.g. Section 56) from instituting action, is delayed for a year after the removal of the impedement. The effect of this is that Consultant's claim would not be defeated by a plea of prescription provided that he instituted action within one year after the issue by the Attorney General of a nolle prosequi or the acquittal of the employer.

22.

Although the Government Gazettes we were provided with cover the period from 1968 to 1971 and thereafter from 1975 to 1978, we have further been instructed that for all relevant times the agreement, a copy of which we have been provided with, was in operation.

23.

Our instructions provide further that on the 6th August, 1976, tea intervals were introduced for the first time and that thereafter Consultant was retrenched together with all the other employees that complained to the Industrial Council on the 13th August, 1976. We would draw attention to those instructing us the provisions of Section 66 of the Industrial Conciliation Act providing for the creation of the offence of victimisation.

24./

24.

Section 66(1) provides that any employer who dismisses any employee employed by him ... by reason of the fact or because he suspects or believes

(a) that that employee has given information to an Industrial Council or to a designated agent or other official of an Industrial Council ... shall be guilty of an offence.

25.

Attention is further drawn to the provisions of Section 74(13) which provides that in any prosecution under Section 66 the Accused is presumed to have dismissed an employee because he gave information to an Industrial Council unless he can prove the contrary; provided that the reason for the dismissal namely that information was given to an Industrial Council is stated in the charge sheet.

26.

Finally, we are asked to give advice on Consultant's rights together with Consultant's legal advisers to assist in the prosecution of the offences mentioned above. Consultant and/or his legal advisers would, we feel, be quite entitled to assist the Prosecutor in this matter by laying before him all the relevants facts and any legal provisions of which they are aware. Should Consultant or his legal advisers thereafter be aware of any possible

legal defect in the charge sheet or any hiatus in the evidence to be led, then we feel that Consultant or his legal advisers would be entitled to draw the attention of the Attorney General to such facts or legal provisions. For example, it would seem to us that in a prosecution for victimisation under Section 66 it would be just and equitable that the attention of the Accused should be drawn to the presumptions in Section 74.

L. Hayward
for C. Nicholson & Hayward.

Chambers,
DURBAN.

31st January, 1977.

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