

S v Coetzee: Judge Albie Sachs and issues which ‘the court is obliged to confront’

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Introduction

There is a paradox at the heart of all criminal procedure, in that the more serious the crime and the greater the public interest in securing convictions of the guilty, the more important do constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences, massively outweighs the public interest in ensuring that a particular criminal is brought to book. Hence the presumption of innocence which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system.¹

This relevant observation was made by Justice Albie Sachs in *S v Coetzee*. This case presented the Constitutional Court with the difficult question of whether the right of the accused to be presumed innocent was infringed by, *inter alia*, a statutory provision intended to ensure that a corporation, together with its officers, may be held criminally responsible for crimes committed in the furtherance of the interests of the corporation.

In South Africa the concept of corporate criminal liability is regulated mainly by section 332 of the Criminal Procedure Act.² The provision forms part of the legislation of ‘pre-Constitution’ South Africa. With the advent of the Constitution some sections of the Act have been challenged on the basis that they infringe certain Constitutional rights.³ *S v Coetzee* was yet another case where the Constitutional Court was faced

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¹*S v Coetzee* 1997 4 BCLR 437 (CC) para 220.

²Criminal Procedure Act 51 of 1977.

³For instance, s 217(1)(b), which was challenged and invalidated in *S v Zuma* 1995 2 SA 652 (CC); 1995 4 BCLR 401 (CC); 1995 1 SACR 568 (CC). The question of the validity of s 72(4) had to be determined by the Constitutional Court in *S v Singo* 2002 8 BCLR 793 (CC). While the Constitutional Court did not invalidate the section, it did however acknowledge the possibility that the provision was inconsistent with the Constitution. The Constitutional Court ordered that the potentially infringing

with determining whether sections 332(5) and 245 of the Criminal Procedure Act were in line with the Constitution. Both sections were challenged on the basis that they provide for a reverse onus, which is in violation of the presumption of innocence, as contained in section 25(3)(c) of the Interim Constitution. In this article I will focus on the role of Sachs J's separate, but concurring, judgment in the development of corporate criminal liability in South Africa.

The Constitutional Court found both provisions to be unconstitutional and declared them invalid. The decision regarding section 245 was unanimous. Section 332(5) was, however, not a unanimous decision and in passing judgment the judges made important observations and statements. The discussion will therefore be confined to section 332(5), which dealt with the criminal liability of officers together with the corporation for crimes committed in furthering the interests of the corporation.

Altogether, eleven separate judgments were delivered and these differing opinions have been described as 'sharp divisions between the judges'.⁴ I will begin by providing a brief discussion of the provisions that were challenged. I will then briefly discuss the majority decision. Thereafter, I will focus on Sachs J's judgment and highlight issues that he felt the court had an obligation to confront.

Challenged provisions

The facts that gave rise to the Constitutional Court's intervention are as follows: There was a trial in the Witwatersrand Local Division. The accused were faced with the onus of rebutting the presumption of guilt against them in terms of both section 245 and section 332(5) of the Criminal Procedure Act. They questioned the constitutionality of the two provisions as they were of the opinion that they infringed upon their Constitutional right to be presumed innocent until proven guilty.⁵ On that basis, they asked for a suspension of their case to allow for a determination as to whether the provisions were constitutional. The trial court referred the matter to the Constitutional Court in terms of section 103(1) of the Interim Constitution.

In a nutshell, section 332(5) makes it possible for the corporation itself and for its officers to be charged, prosecuted and held criminally liable for crimes committed in the process of furthering the interests of the corporation.⁶ As a juristic person the

words be read in a particular manner so as to avoid inconsistency with the Constitution.

⁴Currie and De Waal *The bill of rights handbook* (2005) (5th ed) 203. These 'sharp divisions' will be discussed below.

⁵Section 25(3)(c) of the Interim Constitution.

⁶Section 332(5) of the Criminal Procedure Act 51 of 1977 states as follows:

Where an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body, shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence, and that he could not have prevented it, and shall be liable to prosecution therefore, either jointly with the corporation or apart therefrom, and shall on conviction be personally liable to punishment therefore.

corporation acts through its officers, namely, its directors and its employees. When the officers' actions are criminal, their guilt is imputed to the corporation.⁷

In this manner, where the corporation was convicted in terms of section 332(1), a director or servant of the corporation was presumed to be guilty of the same offence.⁸ The provision of section 332(5) read together with section 332(1) is clearly an anomaly as under normal circumstances the onus is on the prosecution to prove that an offence was committed by the accused. Here, however, the director or servant of the corporation could be prosecuted jointly with the corporation, or could be charged and prosecuted for the same offence in a separate criminal action, and upon failure to prove that he did not participate in the offence and could not have prevented it, the director or servant could be found guilty of the offence.

Both sections 332(5) and 245 created what has been referred to in *S v Coetzee* as a reverse onus. It is a reverse onus in the sense that:

- (i) instead of being presumed innocent,⁹ as long as it is clear that an offence has been committed, the accused is presumed to be guilty;
- (ii) having been presumed guilty, the onus then lies on the accused to prove his or her innocence by rebutting the presumption.

The Constitutional Court declared both section 332(5) and section 245 to be invalid and to be of no force and effect. As stated above, although the Justices were in agreement regarding section 245, they did not agree about section 332(5). In their various judgments they raised important points and Sachs J stressed the fact that there were certain issues¹⁰ which the court was obliged to confront. Before going on to discuss Sachs J's judgment it will be useful to provide a brief history of section 332(5) in the courts.

Section 332(5) and the courts

The predecessors of this section are section 384(5) of the Criminal Procedure and Evidence Act, 1917 and section 381(7) of the Criminal Procedure Act, 1955. The wording of the proviso in each statute has remained essentially the same.¹¹ This provision effectively allowed for the conviction of officers within a corporation even in cases where there was reasonable doubt that the accused had nothing to do

⁷Kidd 'Corporate liability for environmental offences' (2003) 18 *SAPR/PL* 1 at 4. Farisani 'The regulation of corporate criminal liability in South Africa: A close look (part 1)' (2006) 27 *Obiter* 263 at 268.

⁸If a corporate body is therefore, liable to prosecution in terms of s 332(1), a director or servant at the time will be liable to prosecution either jointly with the corporate body or separately in terms of section 332(5) ...' in Bailes *Watch your corporation* 25.

⁹As provided by s 35 (3) (h) of the Interim Constitution.

¹⁰These issues will be outlined below.

¹¹The provision has since been part of successive Criminal Procedure Acts in substantially the same form', *S v Coetzee* (n 1) para 18.

with the offence or could not have prevented it,¹² which thus imposed a reverse onus on the accused. This is problematic, for the accused is presumed guilty instead of innocent and must prove that he or she did not take part in the commission of the offence, and that he or she could not have prevented it.

The provision has received criticism over the years and the courts have provided various interpretations of the provision.¹³ However, its validity could not be challenged during the pre-Constitutional era of parliamentary supremacy¹⁴ and the courts had no option but to enforce the section as it stood.¹⁵ This point is echoed by Langa CJ who states that despite its relevance, the Criminal Procedure Act is very much a product of 'a different constitutional era in which the legal validity of its provisions could not be questioned'.¹⁶ With the promulgation of the Constitution of South Africa¹⁷ it was imminent that section 332 (5) would face a constitutional challenge based on the reverse onus it created. This happened in *S v Coetzee*¹⁸ which specifically dealt with the infringement of section 25(3)(c) of the Interim Constitution,¹⁹ in terms of which every accused person shall have the right to a fair trial which shall include the right to be presumed innocent.²⁰

A summary of the majority decision in *S v Coetzee*

The majority decision was delivered by Langa, J, with Chaskalson, P, Mahomed, DP, Ackermann, Didcott, Kriegler, and Sachs JJ concurring. In his deliberations Langa J pointed out how often the Constitutional Court has to bring certain

¹²The effect of the provision is that if at the end of the state case that court has a reasonable doubt as to whether the accused participated in the commission of the offence or failed to prevent it, a conviction would nevertheless follow', 'Commentary on the Criminal Procedure Act' (2009) 43 *Revision Service* 33-7.

¹³*R v Limbada* 1958 2 SA 481 (A); *S v Poole* 1975 1 SA 924 (N), *S v Klopper* 1975 4 SA 773 (A).

¹⁴In South Africa, prior to the coming into being of the Interim Constitution the doctrine of parliamentary supremacy applied. This meant that 'Parliament could make any law it wished and no person or institution (including the courts) could challenge the laws of Parliament', Currie and De Waal (n 4) 3.

¹⁵'A court could only declare an Act invalid if it had not been passed in accordance with the procedures for passing legislation that had been laid down in the Constitution. Aside from this narrow procedural review, the courts could not review Parliamentary legislation on substantive grounds', Currie and De Waal (n 4) 3.

¹⁶Paragraph 1.

¹⁷This refers to both the Interim Constitution (the Constitution of the Republic of South Africa Act 200 of 1993) and the Final Constitution (the Constitution of the Republic of South Africa, 1996).

¹⁸*S v Coetzee* (n 1).

¹⁹This is now s 35(3) of the Constitution.

²⁰...the rationale for the presumption of innocence is wide and varied. It ranges from a concern that individual rights need to be protected from the potentially coercive authority of the state to policy concerns directed at maintaining the legitimacy of the criminal-justice system and the normative force of the rules of criminal law. Despite the range of the rationale it has at its centre a recognition that the presumption of innocence is necessary to reduce the possibility of erroneous conviction' Schwikkard *Presumption of innocence* (1999) 15-16.

provisions of the legislation carried over from the previous regime into line with the Constitution.²¹ He emphasised that this, in fact, is a job that belongs with the legislature. However, the courts end up having to do it as the prosecution tends to rely on these provisions which infringe upon fundamental rights.

In an examination of section 332(5),²² he stated that the 'plain meaning' of section 332(5) is that when the prosecution has proved that a corporate body committed a crime, a person who was a director or servant of the corporate body at the time the crime was committed will be convicted.²³ The only way in which he can avoid conviction is to provide proof that he or she did not take part in the offence and could not have done anything to prevent it. He explained that the requirement by section 332(5) for the accused to provide proof that he or she did not take part in the offence and could not have prevented it, or face conviction, provides a reverse onus, and the failure to prove will result in a conviction, even though there may be reasonable doubt regarding the participation of the accused in the crime and his or her ability to have prevented the commission of the crime.²⁴

Langa J found that section 332(5) infringes upon the presumption of innocence. He explained that 'the objection which is fundamental to the reversal of onus in this case is that the provision offends against the principle of a fair trial which requires that the prosecution establish its case without assistance from the accused'.²⁵ He further explained that the aim of section 332 (5) is not to create liability without fault on the part of the accused.²⁶ Its intended aim is to ensure that directors who participate in the commission of offences or who are able to prevent the offence from being committed, but who fail to prevent their commission, should be convicted.²⁷ Fault is thus an essential element of section 332(5) and must be proven.

Langa J also referred to the Government's argument that section 332(5) is a regulatory prohibition, therefore it does not infringe upon the presumption of innocence. He found that section 332(5) was not restricted to regulatory prohibitions. Here, Langa J took into account cases in foreign jurisdictions where courts had to distinguish between 'truly criminal' and 'regulatory' offences and came to the conclusion that regardless of the category of a crime, where a reverse onus provision has the effect that an accused may be convicted even though there is reasonable doubt of guilt or innocence, the right to be presumed innocent is transgressed.²⁸ In this regard he quotes La Forest J in *Wholesale*

²¹Paragraph 1.

²²Paragraph 18.

²³Paragraph 22. Here Langa J was disagreeing with the State's averment that 'the section bears a meaning which places the burden of proving the accused's knowledge on the prosecution' para 22.

²⁴Paragraph 39.

²⁵Paragraph 40.

²⁶Paragraph 44.

²⁷Paragraphs 44-45.

²⁸Paragraph 43.

*Travel Group Inc*²⁹ in which he states that ‘...what is ultimately important are not labels (though they are undoubtedly useful), but the values at stake in the particular context’.³⁰

Having found that the provision infringed the presumption of innocence, Langa J then considered the question of whether section 332 (5) was a justifiable limitation in terms of section 33(1) of the Interim Constitution.³¹ Even though the South African Constitution allows for a limitation of rights, where such limitation is justifiable, it is of paramount importance that the reasons for such limitation must be ‘exceptionally strong’.³²

The limitation clause in the Constitution requires that the following factors be taken into account:

- the nature of the right;
- the importance of the purpose of the limitation;
- the relation between the limitation and its purpose; and
- less restrictive means to achieve the purpose.³³

Langa J took these factors into account and emphasised the importance of protecting corporate bodies and society at large from directors who fail to prevent the commission of crimes. He found that the limitation imposed by the reverse onus provision was not justifiable in terms of section 33(1) of the Interim Constitution. He further concluded that severance would not save the provision and mentioned alternative measures that could be used by the legislature to meet the objectives intended by section 332 (5) without imposing a reverse onus on the accused director in question.³⁴

²⁹342 US 246, 254-256 (1952).

³⁰*S v Coetzee* (n 1) para 43.

³¹This is now s 36(1) of the Constitution.

³²The reasons for limiting a right need to be exceptionally strong. The South African Constitution permits the limitation of rights by law but requires the limitation to be justifiable. This means that the limitation must serve a purpose that most people would regard as compellingly important. But, however important the purpose of the limitation, restrictions on rights will not be justifiable unless there is good reason for thinking that the restriction would achieve the purpose it is designed to achieve, and that there is no other “realistically available” way in which the purpose can be achieved without restricting rights’ Currie and De Waal (n 4) 164.

³³These factors were reiterated by Chaskalson P in *S v Makwanyane* 1995 3 SA 391 (CC).

³⁴I can see no reason, however, why the State could not, for example, impose appropriate statutory duties on directors and other persons associated with the corporate body, aimed at ensuring that its affairs are honestly conducted and that it is itself protected against dishonest conduct. This could be done in a variety of ways by means of appropriate legislative provisions which might, for instance, impose the duties of disclosure and reporting on the corporate body, its directors, servants and other persons involved with its affairs. There has been no suggestion that such measures, enforced through appropriate sanctions, could not accomplish as effectively the ends sought to be achieved by s 332(5) of the Act. It has further not been contended that such objectives could not be achieved without placing an onus on the accused to prove any aspect of his or her innocence in a criminal prosecution for a breach of such duty. I am accordingly not persuaded that the reverse onus provisions in s 332(5) are necessary’, *S v Coetzee* para 49.

Langa J's judgment, which reflected the majority judgment, provides a clearer understanding of the intended purpose of section 332(5) and its harsh operation upon innocent directors who cannot provide the required proof. The majority decision took into account foreign law on similar matters and looked at how the Constitutional Court dealt with the presumption of innocence on previous occasions. It is submitted that the decision was not taken lightly and in making the final ruling, the majority decision took into account a variety of factors to balance the competing rights.³⁵

A summary of Justice Sachs's judgment

Since the finding on section 245 was unanimous, Justice Sachs chose to concentrate on section 332(5). Although he concurred with the majority judgment, he expanded on the majority judgment by addressing additional issues that he felt needed to be confronted by the court. Sachs opens his judgment by providing the history of and the rationale for the enactment of section 332 and, more particularly, section 332(5).³⁶ He refers to the fact that initially there was disagreement as to whether it was proper or improper to prosecute an artificial entity which relied on natural persons to make decisions on its behalf.³⁷ The disagreement was finally laid to rest when the legislature decided to regulate corporate criminal liability via statute.³⁸

He noted the view that to merely fine companies for corporate crimes is inadequate,³⁹ as there is a need to punish the individuals within the company through whom the companies committed the crimes. This view eventually resulted in the enactment of section 332(5),⁴⁰ and it is worded in such a way that it was inevitable that it would give rise to constitutional challenge. It is no surprise that section 332(5) was the subject of various court cases prior to the Coetzee case and even prior to the Constitution.

Sachs went on to state that in his defence of the constitutionality of the provision Mr Gauntlett argued that the vicarious liability imposed by the provision amounts to 'regulatory liability and not true criminal liability'.⁴¹ As an alternative argument, Gauntlett contends that if section 332(5) indeed infringed upon the presumption of innocence as provided for in the Interim Constitution, the breach

³⁵The competing rights being the protection of society from crimes committed to further the interests of a corporation and the individual's right to a fair trial.

³⁶Paragraph 208.

³⁷*Ibid.*

³⁸For the gradual development of corporate criminal liability see Barlow 'The criminal liability of a company, its directors and its servants' (1946) 63 *SALJ* 502 and Farisani 'The regulation of corporate criminal liability in South Africa: A close look (part 1)' (2006) 27/2 *Obiter* 263 at 268 .

³⁹Paragraph 208.

⁴⁰*Id* paras 208-209.

⁴¹*Id* para 210.

was 'reasonable, justifiable and necessary'.⁴² Sachs J noted that the crux of Mr Gauntlett's argument was that section 332(5) was intended more to deter corporations from committing crimes than to punish them. For that reason he avers that it is regulatory in nature, and not punitive.⁴³

From there Sachs J identifies two issues with which the court had to deal. The first was 'whether it is possible to read section 332(5) in such a way as to restrict its ambit to regulatory offences'.⁴⁴ The second one is 'whether section 332(5) is capable of being read in such a way as merely to penalise what Mr Gauntlett referred to as reckless or inattentive stewardship of corporations'.

Is it possible to read section 332(5) in such a way as to restrict its ambit to regulatory offences?

In answer to the first question, Sachs J referred to section 332(1). It must be read together with section 332(5), and Sachs J focuses on the phrase 'any act, for which any corporate body is or was liable to prosecution'. Sachs pointed out the fact that the phrase 'any act' is too wide and that the only circumstance where a corporation would not be held liable for crimes committed by its officers is where the nature of the crime is too personal (eg, bigamy) and where the director/servant was furthering his or her own interest when the crimes were committed.⁴⁵ He further stated that: 'Proof of absence of knowledge of the offence could also enable the director to escape liability, since a director could not have prevented the offence if its existence was unknown to him or her'.⁴⁶

Sachs J found no support for reading section 332(5) in such a way as to limit its application to regulatory offences only.⁴⁷ He goes on to mention cases where corporations were held liable in terms of section 332 for crimes based on intent and negligence, such as fraud, theft and culpable homicide.⁴⁸ Sachs explained that even though we do not have a clear definition of what regulatory offences are, it is clear that section 332(5) is not limited to such offences.⁴⁹ He pointed out that the 'typical matter prosecuted, namely fraud, is clearly not a mere regulatory offence, but a particularly ugly species of white collar crime, castigated as such by society, and carrying with it the prospects of heavy terms of imprisonment'.⁵⁰ Sachs went on to say that 'for present purposes what matters is not so much the definition of regulatory offences, but an evaluation of the underlying reasons for treating them in a special

⁴²*Id* para 211.

⁴³*Id* para 212.

⁴⁴*Ibid.*

⁴⁵*Id* para 214.

⁴⁶*Ibid.*

⁴⁷*Id* para 215.

⁴⁸*Ibid.*

⁴⁹*Id* para 216.

⁵⁰*Ibid.*

way, and thereby for permitting or even requiring departure from the normal rules relating to *onus* of proof.⁵¹

He examined the American case, *Morissette v United States*,⁵² which Mr Gauntlett used to support his contention that section 332(5) is limited to regulatory offences, and Sachs J stated that, clearly, section 332(5) is not limited to regulatory offences only, but also refers to serious common law crimes that results in the guilt of the corporation being imputed to the officers of the corporation.⁵³ Such officers only escape liability if they are able to prove that they did not take part in the offence and that they could not have prevented it.⁵⁴ He observed that 'the presumption of innocence is violated, not as an overwhelming practical convenience, or to prove maintenance of standards for a licensed activity, but simply to facilitate conviction'.⁵⁵

Sachs J criticised the provision for being an instrument that is being used to:

invert the normal relationship between prosecution and defence. A nexus of easily inferred fact, which in practice would aid a finding of guilt according to the normal onus of proof criteria, is converted into a nexus of law, opening up the very real possibility of a finding of guilt followed by severe punishment, even though the trial court had real doubts on the matter.⁵⁶

He further criticised section 332(5) for being an instrument that can be applied to make the prosecution's job easier and refers to the primary aim of section 332(5) as being 'to help the prosecution get round hallowed procedural protections normally available to the accused in criminal matters'.⁵⁷

Is section 332(5) capable of being read in such a way as merely to penalise the 'reckless or inattentive stewardship' of corporations?

In dealing with the question of whether section 332(5) may be read in a manner that allows the courts to penalise the 'reckless or inattentive stewardship' of corporations Sachs reminds us that, prior to the Constitution, when the courts interpreted such provisions their interpretations 'were directed simply to determining the "intent" of the Legislature, and then to ensuring that indictments gave the accused adequate warning of the precise charges they would have to meet'.⁵⁸ In those days the courts were not allowed to choose a reasonable interpretation.⁵⁹

⁵¹*Id* para 217.

⁵²342 US 246 (1952)

⁵³Paragraph 218.

⁵⁴*Ibid.*

⁵⁵*Ibid.*

⁵⁶*Ibid.*

⁵⁷*Id* para 219.

⁵⁸*Id* para 221.

⁵⁹*Ibid.* See (n 14) and (n 15) above. Today the accepted approach is that interpretation of the law must be done in accordance with s 39(2) of the Constitution, which states that: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'. Moreover, in interpreting a statutory provision, a court with the jurisdiction to interpret legislation, must, in terms of section 172 of the Constitution, 'declare that any law or conduct that is inconsistent with the Constitution is invalid

He made reference to Schreiner JA's minority judgment in *Limbada* and stated that if that approach is reasonable, the Court has an obligation to adopt it in terms of section 35(3). He affirmed that Schreiner JA's approach 'goes a long way to establishing that the section was intended to create a new offence, or rather a new form of liability based on failure of a director to prevent corporate crime when in a position to do so'.⁶⁰

Sachs J contends that apparently the provision was:

- (i) intended as a way to make sure that directors of corporations were punished when those corporations committed crimes; and
- (ii) to ensure that the directors vigilantly keep their subordinates from committing crimes;⁶¹
- (iii) extended 'to see to it that prosecutors could more easily get round the difficulties of proof in relation to direct responsibility for the principal offence'.

Sachs regards the first two as 'legitimate purposes' and the third as an 'illegitimate purpose'.⁶²

He said that if the provision can be read down or severed in such a way that the legitimate purposes are retained and the illegitimate purpose discarded then the Court should adopt it.⁶³ He proposed the deletion of the words 'it is proved that he did not take part in the offence'.⁶⁴ Such a reading would result in the crux of the provision being 'the failure of the director to prevent the criminal activity'.⁶⁵

An important observation made by Sachs J is that with regard to the blameworthiness of the director, it is not the position of being a director that gives rise to blameworthiness, but rather the failure of a person holding that position to keep the people under his or her control from committing crimes.⁶⁶ Such failure is, according to Sachs J, 'more than a material element of the crime, it is its essence'.⁶⁷ The provision should therefore not be understood to mean that being a director of a company which has committed a crime is in itself a crime and the only way for the director to escape liability is by proving his or her innocence.⁶⁸ He avers that such an interpretation creates problems in terms of section 11(1) and section 25(3)(c).⁶⁹

to the extent of its inconsistency', Currie and De Waal (n 4) 9.

⁶⁰Paragraph 221.

⁶¹*Id* para 222.

⁶²*Ibid.*

⁶³This is in line with the premise that: 'In a constitutional state, the supremacy of the Constitution means that laws or conduct found to be inconsistent with the Constitution are invalid and that a court must declare them to be so. Constitutional supremacy does not however require the invalidation of provisions in a statute that are constitutionally valid along with the unconstitutional provisions if the former can be severed from the latter', Currie and De Waal (n 4) 199.

⁶⁴*S v Coetzee* (n 1) para 222.

⁶⁵*Ibid.*

⁶⁶*Id* para 224.

⁶⁷*Ibid.*

⁶⁸*Ibid.*

⁶⁹*Ibid.*

An analysis of Justice Sachs's judgment

Although Sachs J agreed with the majority judgment he provided his own separate judgment because he felt that there were certain issues he believed the court must confront. One of these issues was whether it is possible to read s 332(5) in such a way as to restrict its ambit to regulatory prohibitions. In keeping with the majority judgment, Sachs J concluded that section 332(5) is not limited to regulatory prohibitions. He then explained that if the provision was specifically limited to regulatory prohibitions it was likely to be justifiable, however, due to its over-breadth, it could not be justified.⁷⁰

Another issue that needed to be confronted was whether remedying the infringement by means of severance would not defeat the purpose of the law. In his judgment Sachs J explored the possibility of remedying section 332(5) by means of severance or reading down.⁷¹

Kriegler J in *Coetzee v The Republic of South Africa*⁷² lays down a two-pronged test for severance:

- (1) it must be possible to sever the part of the provision that is invalid from the rest of provision;
- (2) after doing so, that which remains of the provision must continue to give effect to the purpose of the provision.

In *S v Coetzee* Kriegler J's test was applied by the judges who felt that section 332(5) could be remedied by severance. However, they proposed both severance and reading down. Reading down is a technique of interpretation that is used where legislation can be read in two ways, ie 'as a violation of fundamental rights or, if read more restrictively, as not violating rights'.⁷³ This technique entails giving preference to the reading that will result in the non violation of fundamental rights,⁷⁴ provided that such interpretation is 'reasonably possible'.⁷⁵

It is submitted that Sachs J makes an important contribution to our jurisprudence in that, although he is not opposed to severance and reading down where necessary, he warns of the dangers of excessive reading down and excessive removal of words from provisions as this 'leaves something so tattered

⁷⁰The problem with section 332(5) is that because of its wide generic and mutable character, it serves as a deeming clause for all seasons, both for those where it is appropriate and for those where it is not. To the extent that it covers regulatory offences, it might well be justifiable, balancing out all the relevant concerns and interests, to run the risk of convicting persons about whose guilt a doubt remains. Yet it embraces common law crimes as well' para 219.

⁷¹This is in line with s 172(1) which compels courts with jurisdiction to declare whether a law is constitutional or not, to consider its validity or not.

⁷²1995 4 SA 631 (CC) para 18

⁷³Currie and De Waal (n 4) 65.

⁷⁴*Ibid.* This technique of interpretation was allowed by s 35(2) of the Interim Constitution. It continues to apply under s 39(2) of the Constitution of 1996.

⁷⁵Currie and De Waal (n 4) 66.

and insecure, that it cannot be said that effect would be given to any of the principal objects of the legislature'.⁷⁶

This is clearly an issue which the Court must confront. The court must not apply Kriegler's test lightly. It is submitted that it is important for the court to see to it that the severance of the invalid provision does not defeat the purpose of the law. In order to do this, the actual purpose of the law needs to be clear. In his judgment, Sachs J spent a considerable amount of time explaining the purpose of the provision. In the process of doing so, he put corporate criminal liability in context and explained that there is indeed a need for such liability to be present. Sachs J provides clarity regarding the rationale behind holding individuals within corporations liable together with the corporations for crimes committed to further the interests of the corporation.⁷⁷ Sachs J's decision is also important in that it emphasises the fact that 'neither the prevalence nor the offensiveness of the alleged crime can be allowed to disturb, replace or detract from the presumption of innocence'.⁷⁸

The *Coetzee* decision is a welcome development in South Africa's law of corporate criminal liability. The need for corporations and their officers to be held accountable for their criminal acts was balanced against the individual's constitutional right to be presumed innocent.

Despite the State prosecutor's argument in favour of the reverse onus, the invalidity of section 332(5) has not hampered the prosecution of officers of corporations that have been found guilty of crimes. The current common law position is that a director may be held liable for offences committed by the corporation 'only if he took part in that crime or on the basis of vicarious liability or agency'.

The impact on our jurisprudence of the separate judgment of Sachs J in *S v Coetzee* is demonstrated by the fact that it has been referred to, with approval, by other commentators. In explaining the relationship between the presumption of innocence and the nature of the alleged crime, Bekker *et al*⁷⁹ quote an extract from the judgment of Sachs J in *S v Coetzee*. Currie and De Waal⁸⁰ quote Sachs J to show the strict manner in which the judges in *S v Coetzee*, who were anti-severance, applied the two-pronged test of Kriegler J. In the recent case of *Bothma v Els*⁸¹ Sachs J's judgment in *S v Coetzee* was specifically referred to and applied. In that case it was also stated that 'the key controlling element, as far as fairness of the trial

⁷⁶*S v Coetzee* (n 1) para 226.

⁷⁷It is vital to establish and prove that the crimes were actually committed in the process of or with a view to furthering the interests of the corporation, Burchell *Principles of criminal law* (2005) 566; Farisani 'Corporate homicide: What can South Africa learn from recent developments in English Law (2009) XLII *CILSA* 210 at 217.

⁷⁸Bekker *et al Criminal procedure handbook* (2007) (8th ed) 18.

⁷⁹*Ibid.*

⁸⁰Currie and De Waal (n 4) 203.

⁸¹*Bothma v Els* 2010 1 BCLR 1 (CC).

is concerned, would be the presumption of innocence'.⁸² In *Magajane v Chairperson, Northwest Gambling Board*⁸³ Van der Westhuizen J's explanation of the difficulties and undesirability of severance relies on what Sachs J's statements in *S v Coetzee* in this regard.⁸⁴ Although these commentators have cited different parts of Sachs J's judgment, generally, the commentators regard Sachs J's approach towards issues of severability and fair trial as worthy of emphasis.

In his separate judgment in *S v Coetzee*, Sachs J raises important issues and expands on what his colleagues have stated regarding certain aspects. In this way he made a contribution not only towards the development of the law of corporate criminal liability, but he also provides guidance on how to approach issues such as severance and the importance of the presumption of innocence as an element of what constitutes a fair trial.

Conclusion

The majority judgment in *S v Coetzee* was a landmark decision, particularly in the area of corporate criminal liability and it played an important role in the development of corporate criminal liability in South Africa. The effect of the judgment was the removal of section 332(5), and now officers of corporations who are accused of having committed crimes are given the benefit of the doubt in terms of the presumption of innocence, just like any other accused person. The onus of proving the officer's guilt lies on the prosecution.

All the judgments that were delivered in this case were important in that they each highlighted relevant issues. In the various judgments the position in foreign jurisdictions, particularly Canada, the USA and England were considered and it was made clear that in those jurisdictions the presumption of innocence is an important element of what constitutes a fair trial. What stands out about Sachs J's judgment is that although he concurred with the majority judgment, his judgment differs in so far as he aligns himself with the arguments in favour of severance. He explained in clear terms why he reached the conclusion that severance or reading down will not save the limitation of the presumption of innocence as provided for by section 332(5). Furthermore, he expanded on to the majority judgment by bringing forth issues which he felt needed to be confronted by the Court.

It is submitted that Sachs J in *S v Coetzee* made an important contribution towards, *inter alia*, the development of corporate criminal liability, the question of severability when dealing with provisions that limit other Constitutional rights and how severability should be approached with caution. In delivering his separate judgment, he indeed saw to it that such issues were confronted by the Court. Moreover, the separate decision of Sachs J is important in that it brings to our

⁸²Para 81.

⁸³2006 10 BCLR 1333 (CC).

⁸⁴*Id* para 98.

jurisprudence an emphasis on the presumption of innocence as an important element of what constitutes a fair trial. The relevance of Sachs's separate judgment is reflected by its subsequent citation in Constitutional Court judgments as well as by other commentators in their books.