

SIR ETIENNE DE VILLIERS

I A Maisels QC, Johannesburg Bar

My friend and colleague Peter Schutz suggested to me that I might write a follow-up of an article by him in the October (1988) issue of *Consultus*. He pointed out to me that the information given to him was in a sense hearsay. He knew that I personally had some information. This is indeed so and I would like at the outset to say that when Peter Schutz wrote that Sir Etienne was one of the most remarkable men who ever sat on our Bench and that he had the ability to write a judgment in a complicated matter in a short time and in relatively few pages said everything that had to be said, Peter spoke truly.

My very first appearance in the Appellate Division was in 1933 in a case which, from the annotations noted against it, seems to have been referred to on many occasions: *Rex v Manasewitz* 1933 AD 165. Sir Etienne was the junior member of the Bench presided over by Wessels CJ, the other members of which were Curlewis JA, Stratford JA and Beyers JA. Anyone who reads the facts of this case will realise that I was hardly likely to meet with a friendly reception from the Court of Appeal. The appellant had been convicted in the Magistrate's Court in Witbank on 7 counts of fraud, the allegation being that as a result of his conduct the Secretary for Lands had been defrauded. An appeal was noted to the Transvaal Provincial Division (TPD). The matter came before De Wet J (as he then was and subsequently became Chief Justice) and Grindley-Ferris AJ. That Court found that if there was a fraud it was not the Secretary for Lands who had been defrauded but the Union Government and consequently set aside the conviction and sentence.

The Attorney-General of the Transvaal decided to charge the appellant again, this time with fraud to the prejudice of the Union Government. A plea of *autrefois acquit* was unsuccessful before the magistrate, who convicted the appellant. An appeal was noted against this conviction and the matter came before Tindall J and Greenberg J, two of the greatest judges before whom I ever had the privilege of appearing. Counsel who appeared for the appellant was unsuccessful and the appeal was dismissed.

I had only been at the Bar a short while when a young attorney, when I say young he was then about the same age as I was, walked into my office and asked me whether I would be prepared to go to Bloemfontein to apply for leave to appeal against the judgment of the TPD. He offered me a small fee. I do not intend discussing what it was but quite frankly I would have been prepared to go to the Appellate Division (AD) for an even lower fee, not because I had any belief in the prospects of success, but because I suppose, as most juniors did in those days and I assume today, I was anxious to appear before the AD.

Apart from the fact that the likelihood of Tindall J and Greenberg J being found to be wrong was remote, I was further discouraged, if any further discouragement was needed, by an opinion which had been given by Philip Millin KC (subsequently Mr Justice Millin of the TPD) in which Millin had stated that not merely in his opinion that an appeal would fail, but that he was not prepared even to argue the matter.

It was necessary to make an application for leave to appeal before the Court, not as may now be done by a written application for leave to appeal. My matter was not heard until the afternoon of 3 March 1933. Consequently I spent the morning listening to argument in a case of *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87. Brink KC, at that time one of the leaders at the Johannesburg Bar, was having what one would call a rough time. Those who appeared before Wessels CJ very often had what is commonly known as a "rough time", and speaking from personal experience I can only say that nobody before whom I ever appeared could give counsel a rougher passage than Wessels CJ did if he was apparently against you.

This is what I heard, *inter alia* -

Wessels CJ: "*Oh! is that your point Mr Brink?*"
Brink: "*Yes M'Lord that is the point that I have been trying to make for two days and haven't been allowed to.*"

There was an immediate explosion.

Wessels CJ: "*How dare you say such a thing! There has been far too much talking in this case already.*" (As far as I could see most of the talking had been done by Wessels CJ.)

After Wessels had let himself go as it were, Curlewis JA, in his ever courteous manner, said in a quiet voice: "No, Mr Brink, I don't think you should say things like that. This Court always listens to counsel and merely puts its difficulties to him."

Stratford JA also added a few words of disapproval of Brink's statement.

Manasewitz's case came on shortly after Rosenberg KC had replied and one can imagine what I felt like having regard to the "merits" of my matter and what I expected was going to happen to me. My worst fears were realised when I got up to say that this was an application for leave to appeal. Wessels CJ interrupted me saying: "Leave, leave to appeal - you don't oppose this Mr Hoal?" Hoal KC was the Attorney-General of the Free State and I have no doubt that he intended opposing leave to appeal, but the manner in which Wessels had spoken probably led him to believe that Wessels in any event was going to throw the matter out. To say that I had a rough time is an understatement and when I sat down Wessels CJ turned to Curlewis JA who was sitting on his right and in a whisper, which I am sure could have been heard at the back of the Court, said "You don't want to hear Hoal, do you?" Curlewis JA agreed as did Stratford JA and Beyers JA when the same question was put to them. When it was put to Sir Etienne, the junior member of the Court, I witnessed what I would imagine was a most unusual, if not unique, occurrence. De Villiers JA got up, walked to the centre of the Court where Wessels was sitting and had an argument with him. I could not hear what was said, but eventually Wessels turned around and said "Oh, alright

- Yes, Mr Hoal". Hoal then argued. I attempted to reply and judgment was reserved. There were five judgments given in the matter. It should be appreciated that the full record of the case was not before the Court as the matter had come before it as an application for leave to appeal and Wessels CJ decided that the full record had to be obtained before he could pronounce upon the matter. The same view was expressed by Beyers JA. Curlewis JA dissented. He agreed with the judgment of the TPD and that the appeal should be dismissed. Stratford JA agreed with the main judgment, which really gave the *ratio decidendi* of the case, given by De Villiers JA. When the matter came before the Court of Appeal again after the record was received by it, the appeal was allowed (1934 AD 95), the judgment of the Court being given by De Villiers JA.

I am told that this case is still regarded as the leading case on *autrefois acquit* and consequently it is still referred to by law students today. The judgment given by De Villiers JA speaks for itself as an example of lucidity, brevity and logic. This was a characteristic of all judgments of his whether given in the OPD or in the AD, which I have had the privilege of reading.

I would just like to add a few words about Wessels CJ. Although he could give counsel a rough time he could also take it. That he was a great judge is beyond question. His contribution to the law, not merely as a judge, but as a writer is well-known. If he was wrong, he would rightly admit it and handsomely on occasion apologise to counsel or to a witness if he felt that he had

treated him roughly or unfairly. The great Harry Morris KC in his book *The First 40 Years* recounts an incident in the Motion Court in Johannesburg when Wessels J walked in and the Registrar was not present. Wessels J said to him "Mr Morris, bring in the Registrar" to which Harry with his unmatched wit immediately replied "dead or alive, M'Lord".

NOTE: In practical terms the final judgment of the Appellate Division amounted to the following: The Transvaal Provincial Division, in the first case, had been wrong in holding that the accused had been incorrectly convicted in the magistrate's court. The accused was, therefore, correctly convicted by the magistrate. Yet he was allowed to go free.

Gardiner AJA, in a brief judgment in which he concurred with De Villiers JA, *inter alia* made the following suggestion:

"It may be worthy of consideration whether legislation should not be introduced depriving an accused of the advantage, which he has been held to possess, that he may obtain his acquittal from a Provincial Division - an acquittal against which the Crown cannot appeal - and then subsequently may set up that the acquittal was wrong."

As far as could be ascertained, no such legislation has been introduced, presumably because it is unlikely that a similar situation will repeat itself. Be that as it may, the judgment of De Villiers JA is indeed brief and to the point.

- Editor

Proper hearing

A cunning juryman addressing the clerk of the court when administering the oath, said, "Speak up: I cannot hear what you say." - "Stop: are you deaf?" asked Baron Alderson. "Yes, of one ear." - "Then you may leave the box; for it is necessary that juryman should hear *both sides*." *Oddities of the Law*.

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