JOHN ERASMUS v. JAN CHRISTIAN SMUTS (as Minister of Defence for the Union of South Africa).

HIGH COURT CIVIL CAUSE No. 11 OF 1942.

Service out of the jurisdiction—discretion of Court—in cases of tort the law of the Territory where action instituted applies.

In this case, the facts of which are set out in the judgment hereunder, the District Registrar gave leave to the plaintiff to issue the writ of summons against the defendant and serve it in the Union of South Africa. The defendant applied to the High Court to set aside the order of the District Registrar and the High Court acceded to the defendant's request.

Law, C.J. This is an application to set aside a Writ of Summons issued against the defendant out of the jurisdiction by leave of the District Registrar, Ndola, under his Order, dated 26th May, 1942. The action in respect of which the writ was issued is one for damages suffered by the plaintiff through the alleged negligent driving of a motor lorry by a soldier of the Union Defence Force of South Africa. The defendant is sued in his capacity of Minister of Defence of the Government of the Union of South Africa. The lorry in question is described as the property of the defendant, presumably in his above-mentioned capacity. In substance and effect, the action is against the Government of the Union of South Africa, founded on a tort alleged to have been committed by one of its servants within the jurisdiction of this Court (Order 11, Rule 1 (*ee*) of the Supreme Court, England).

2. The action being founded on a tort could not have been brought in its present form in this Court against any official of the Northern Rhodesia Government, had the lorry in question belonged to that Government. It is true that there is legislation in the Union of South Africa, the Crown Liabilities Act, 1 of 1940, which permits such actions being brought in the Courts of the Union. But the present case must be considered with regard to the law of Northern Rhodesia, in which Territory the action has been instituted, and the law of the Union of South Africa in this connection can have no application in the matter.

3. On behalf of the defendant it is argued that this application need only be considered from the point of view as to whether or not the District Registrar exercised a proper discretion in making his Order of the 26th May, 1942. In this connection reference has been made to the following decided cases:

1. *The Parlement Belge* (1879–80) 5 P., p. 197.
2. *Société Générale de Paris* v. *Dreyfus Bros.* (1885), 29 Ch. D., p. 239.
3. *Mighell* v. *Sultan of Johore* (1894), 1 Q.B., p. 149.
4. *The Hagen* (1908) P., p. 189.
5. *Statham* v. *Statham and H.H. the Gaekwar of Baroda* (1912) P., p. 192.

Mighell's and Statham's cases were decided against the plaintiffs on considerations of international law by reason of the status of the foreign defendants. In the former case the writ was set aside and in the latter the foreign defendant's name was struck out. Without the necessity of deciding the same points in the present case, it would seem that the defendant's position savours of similar immunity as that of the foreign defendants in the two cases referred to. The same considerations as in those two cases were involved in the case of the Parlement Belge. As regards the cases of the Société Générale de Paris and the Hagen, observations were made by the learned Judges concerned of the great caution and discretion which should be exercised before giving leave to issue a writ out of the jurisdiction. In my view the learned District Registrar did not exercise a proper discretion in the present case.

4. It is not proposed to discuss the other points of objection taken on behalf of the defendant, such as there being no cause of action disclosed in the writ or the absence of allegation of the defendant's responsibility for the alleged negligence of the soldier in question. Those matters can doubtless be taken into consideration when exercising discretion in giving leave to issue a writ out of the jurisdiction (see the *Société Générale de Paris* case). It is sufficient to decide this matter on the principal ground of objection which has already been discussed in the preceding paragraph.

5. For the plaintiff it is urged that the cost to and the convenience of the parties generally should be an important consideration in such cases as this (*Williams* v. *Cartwright and Others* (1895) 1 Q.B., p. 142). This may be so in certain circumstances but not, in my opinion, where the status of the defendant is the important factor for consideration.

6. For the foregoing reasons the Order of the 26th May, 1942, the Writ of Summons issued pursuant thereto, and all subsequent proceedings are hereby set aside. Plaintiff will pay defendant's costs in this action and on this application.