HEUFF v MBEWE (1965) ZR 111 (SC)

SUBORDINATE COURT

EVANS SRM

17th August 1965

Flynote and Headnote

[1] Civil procedure - Privilege - State privilege for official documents sought by one party:

See [7].

[2] Criminal procedure - Privilege - State privilege for official documents sought by one party:

See [7].

[3] Evidence - Privilege - State privilege for official documents in case in which private party is suing the State:

In a case in which a private party is suing the State a stronger showing of injury to the public interest is necessary to uphold the privilege than in a case in which the State is not a party.

[4] Evidence - Privilege - State privilege for official documents in case in which State has no direct interest - burden of proof:

If the judge is in doubt as to whether a State interest justifies the withholding of documents, he must uphold the State's objection.

[5] Evidence - Privilege - State privilege for official documents in case in which State has no direct interest - in general:

A document need not be produced by the State, either on discovery or at trial, if the head of a Government department personally examines the documents and certifies in good faith and on reasonable grounds (which he must state) that disclosure of the document is contrary to public policy.

[6] Evidence - Privilege - State privilege for official documents - limited publication does not destroy privilege:

A limited publication of a document (*i.e.*, not to the public at large but rather to a few people concerned with the public issue at stake) does not destroy the State's claim of privilege.

[7] Evidence - Privilege - State privilege - procedure for determining whether privilege applies:

If State privilege is claimed for documents sought to be produced, the court can call for the documents and inspect them itself in order to verify the State's reasons for wishing them to be withheld.

[8] Evidence - Privilege - State privilege - 'public interest' defined:

The State's need for complete and candid information in order to prevent or settle trade disputes is the type of 'public interest' that can support State privilege for documents.

[9] Evidence - Privilege - State privilege for official documents - secondary evidence inadmissible if privilege upheld:

If a claim of State privilege is upheld, no secondary evidence as to the contents of documents is admissible.

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Cases cited:

(1) *Robinson v State of South Australia* (No. 2) [1931] AC 704; [1931] All ER 333.

(2) *Duncan v Cammell Laird and Co. Ltd* [1942] AC 624; [1942] 1 All ER 587.

(3) *Ellis v Home Office* [1953] 2 QB 135; [1953] 2 All ER 149.

(4) *Broome v Broome (Edmundson Cited*) [1955] 1 All ER 201; 99 SJ 114.

(5) *Grosvenor Hotel, London, Re* (No. 2) [1965] Ch. 1210; [1964] 3 All ER 354.

(6) *Wednesbury Corporation v Ministry of Housing and Local Government* [1965] 1 All ER 186; [1965] 1 WLR 261.

(7) *Beaton v Skene* (1860) 5 H.& N 838; 2 LJ Ex. 430.

(8) *Smith v East India Co.* (1841) 1 Ph. 50; 11 LJ Ch. 71.

(9) *Wadeer v East India Co.* (1856) 8 Dc. GM & G 182.

(10) *Hennessy v Wright* (1888) 21 QBD 509; 57 LJQB 530.

(11) *Home v Bentinck (Lord*) (1820) 2 Brod.& Bing. 130; (1820) Digest (Repl.) 387, 4162.

Cunningham for the prosecutor
A O R Mitchley, for the accused
Skinner, Attorney-General, for the State

Judgment

Evans SRM: In this case, N J Mbewe (hereinafter called 'the accused') is being privately prosecuted for libel, contrary to section 168 of the Penal Code, by Roeland Herman Heuff (hereinafter called 'the prosecutor'). The alleged defamatory matter was published in a letter (hereinafter referred to as 'the letter') written by the accused in his capacity as Acting General Secretary of the National Union of Commercial and Industrial Workers (hereinafter called 'the Union') on the 10th July this year to the Permanent Secretary to the Ministry of Labour and Social Development and copied to the General Manager' Chilanga, the Lusaka Area Secretary of the Union, and to the Union's Branch Secretary at Chilanga.

The prosecutor served a *subpoena duces tecum* upon the said Permanent Secretary, requiring him to produce in court the letter and certain other correspondence. The subpoena, I am told, was drawn in wide terms, and it caused the Minister of Labour and Social Development (hereinafter called 'the Minister') to file an affidavit claiming State privilege and therefore objecting to the production of the letter and other documents listed in the schedules to his affidavit. The Attorney-General appeared for the State, which, he stressed, has no other interest in these proceedings. Messrs C.J.I. Cunningham and A.O.R Mitchley of Counsel appeared for the prosecutor and accused respectively. Mr Mitchley did not, of course, take any part on the question of State privilege.

I am satisfied, upon the authorities, that the Minister's objection has been taken in proper form, and Mr Cunningham so conceded.

[1] I am informed that this is the first occasion on which State privilege has been claimed in a court in Zambia, and I think therefore that it will be convenient first to deal with the relevant law, for the undisputed exposition of which I am indebted to the learned Attorney-General.

For ease of reference, I now list the relevant authorities, most of which were quoted to me, and I shall refer to them later by shortened names:

Robinson v State of South Australia (No. 2) [1931] All ER 333;
Duncan v Cammell Laird and Co. Ltd [1942] 1 All ER 587;
Ellis v Home Office [1953] 2 All ER 149;
Broome v Broome (Edmundson cited) [1955] 1 All ER 201;
Re Grosvenor Hotel, London (No. 2) [1964] 3 All ER 354;
Wednesbury Corporation and Others v Ministry of Housing and Local Government [1965] 1 All ER 186.

I conclude from the authorities that the law is, subject to the effect of the recent *Grosvenor Hotel* case, correctly stated in paragraph 73 on pages 53 - 4 of Volume 12 of the 3rd Edition of *Halsbury's Laws of England*, from which the following is an extract:

'A document need not be produced for inspection, either on discovery or at the trial, when objection is taken by a minister, who is the political head of a government department, that disclosure of the document is contrary to public policy or detrimental to the public interest or service. The privilege may apply to documents in the possession of a private individual as well as to documents in the possession of the Crown. Privilege can attach irrespective of where a document originates or in whose custody it reposes provided that it has properly either emanated from or come into possession of some servant or agent of the Crown.

The privilege is that of the Crown and can only be claimed and waived by the authority of the minister and not by the authority of the person to whom the document relates. Secondary evidence may not be given of

documents for which this privilege is established.... And the opinion has been expressed that the same principle must apply to the exclusion of verbal evidence which, if given, would jeopardise the interest of the community.'

That is a brief statement of the law, and I now amplify it, principally by quoting from the leading cases. I am satisfied that the law relating to State privilege in Zambia is the same as that in Scotland and in countries of the Commonwealth, with the law of which (in this regard) English law has recently been brought into line by the recent cases, in the Court of Appeal, of the *Grosvenor Hotel* and *Wednesbury Corporation*.
In the *Duncan v Cammell Laird* case [1942] 1 All ER 587, in the House of Lords, Viscount Simon, L.C., said at page 588:

' This question is of high constitutional importance, for it involves a claim by the executive to restrict the material which might otherwise be available for the tribunal which is trying the case. This material one party, at least, to the litigation may desire in his own interest to make available, and without it, in some cases, equal justice may be prejudiced.'

The question for determination by me is whether the State can and should be compelled to produce in evidence in this court, in a criminal case between third parties and in which the State is said to have no interest, documents which have come into the Minister's hands in the discharge his official duties.
It was held in *Duncan v Cammell Laird* that an objection to the production of documents duly taken by the head of a government department should be treated by the court as conclusive, but, at any rate since *Robinson's* case in the Privy Council in 1931, the position has been otherwise in Commonwealth countries, and I am satisfied that, in Zambia, the law is that the objection of a Minister should not be conclusive, and that the position is as stated by Lord Denning, M.R, in the *Grosvenor Hotel* case [1964] 3 All ER 354, at pages 361 and 362:

' If the court should be of opinion that the objection is not taken in good faith, or that there are no reasonable grounds for thinking that the production of the documents would be injurious to the public interest, the court can override the objection and order production. [2] [3] [4] It can, if it thinks fit, call for the documents and inspect them itself so as to see whether there are reasonable grounds for withholding them . . It is rare indeed for the court to override the Minister's objection, but it has the ultimate power, in the interests of justice, to do so.'

In the present case, the Minister is objecting to production of a *class* of documents (which includes the letter), in respect of which the judges in the *Grosvenor Hotel* case said that the Minister should describe the nature of the class and the reason why the documents should not be disclosed. In the *Wednesbury Corporation* case [1965] 1 All ER 186, in which the same judges confirmed the views they had expressed in the *Grosvenor Hotel* case, Lord Denning said, at page 190:

' We have had all the arguments over again, and I stand by all that I said in *Re Grosvenor Hotel, London* (No. 2). I repeat that, in a case where a Minister claims privilege for a class of documents, he must justify his objection with reasons. He should describe the nature of the class and the reason why the documents should not be disclosed, so that the court itself can see whether this claim is well taken or not. The very description of the documents in the class may itself suffice, as, for instance, confidential reports on officers in the Army. There it is obvious that candour is necessary and that the documents should not be disclosed; but if it be not obvious, then reasons should be given. The Minister should consider every class of documents on its merits, and only withhold them when he is satisfied that candour can only be secured by complete confidence.'

It has repeatedly been said by the judges in the decided cases that the court will treat with the greatest respect any affidavit in proper form in which it is claimed on behalf of the Executive that a document or class of documents ought to be withheld from production and that, if it is said that the production of a document is detrimental to the public service, then it is a very strong step for the court to overrule that statement. This was emphasised by Salmon, LJ, in the *Grosvenor Hotel* case regarding privilege attaching to communications to a Minister, in particular to communications made under statutory obligation. An application to the Minister to appoint a conciliator under section 6 of the Industrial Conciliation Ordinance (Cap. 26) is not, I think, strictly a communication made

to him by virtue of a statutory obligation, but it is akin to it because the said section prescribes the statutory procedure for the appointment of a conciliator.
The court's task here is to weigh in the balance two competing interests: on the one side, the public interest, averred by the Minister, in the proper functioning of the public service; on the other side the interests of justice as between the parties in this case. This is no light task. I refer to further quotations from which I derive some help. On page 594 of the report of the *Duncan v Cammell Laird* case [1942] 1 All ER 587, Viscount Simon quoted the following words from the judgment of Pollock, CB, in *Beaton v Skene* (1860) 5 E. & N 838, at 854: 'The administration of justice is only a part of the general conduct of the affairs of any state or nation, and we think is (with respect to the production or non-production of a state paper in a court of justice) subordinate to the general welfare of the community'. In the *Duncan v Cammell Laird* case [1942] 1 All ER 587, Viscount Simon said at page 595: 'After all, the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation'. On the other hand, Morris, LJ, said in *Ellis's* case [1953] 2 All ER 149, at page 161: '[W]hen considering the public interest and what might be " injurious to the public interest". . . it seems to me that it is to be remembered that one feature and one facet of the public interest is that justice should always be done and should be seen to be done', but I here observe that Ellis was suing the Crown, which is not the position here, and [5] it must surely be more prejudicial to the interests of justice to uphold the privilege, and thereby possibly defeat a plaintiff's claim, when the State is the defendant, than it is when the State is not a party.
As I have said, the Minister's affidavit is in proper form, and I am satisfied that, in accordance with the authorities, the Minister has personally examined the relevant documents, given his reasons for objecting to production, and has stated the nature of the injury which he considers would be done to the public interest if they were disclosed. His affidavit is on record and I think the material parts of it may be summarised as follows. The letters and correspondence listed in the first schedule, including the letter, comprise an application to the Minister and other letters written in connection therewith, to exercise the statutory discretionary power vested in him by section 6 of the Industrial Conciliation Ordinance, where a trade dispute exists or is apprehended, to appoint a conciliator. The documents listed in the second and third schedules concern the like subject. For the purposes of these proceedings, Mr Cunningham has indicated that he would be content for the court to uphold the Minister's objection in regard to all the listed documents with the exception of the letter. The State's contention is that the letter forms one of a class of documents which ought to be privileged from production on the grounds of public interest because the communications sent to and from the Minister's Ministry were furnished for his information and guidance in the performance of his duties under the said Ordinance and because their utility in this respect might be prejudiced if they were furnished by persons in the knowledge that information contained in them might be disclosed to other persons or used for the purpose of legal proceedings and because such knowledge would prejudice the candour and completeness of the communications.
[6] As its title implies, the said Ordinance is concerned with conciliation, and I agree with the Attorney-General's submission that the Minister should have the fullest, freest and most complete information in order to exercise his statutory functions and that they are matters of public interest in that the prevention or settlement of existing or apprehended trade disputes are matters for the Minister to consider in the interests of the country as a whole. As to prejudice to the candour and completeness of communications being a matter of public interest and constituting a ground for protecting documents from production, several cases have been decided, for example, *Smith v East India Co.* (1841) l Ph. 50, and *Wadeer v East India Co.* (1856) 8 Dc. G.M.& G. 182, both referred to at page 592 of the report of the *Duncan v Cammell Laird* case [1942] 1 All ER 587, and this reason for non-disclosure was one of the grounds for the Court of Appeal's not overriding the Minister's objection in the *Grosvenor Hotel* case [1964] 3 All ER 354, in which at page 359, Lord Denning said:

' It [the Minister's affidavit] does not tell us why disclosure would be injurious to the public interest. But in the course of the discussion, the Attorney-General gave the reasons why. It was not because the disclosure of any of the contents of the documents would be injurious to the public interest. The Attorney-General told us that if we, the judges, saw the documents, we would not see anything in them which would be injurious to the public interest. The reason for non-disclosure was because in this class of document it was necessary to secure freedom and candour of communication. The Minister had to take his decision on the best advice and with the fullest information. He could get it only if those giving advice or information, or receiving it, could rest assured that it was confidential and would not be disclosed in any future litigation. Hence all communications with or within the Ministry should be privileged from production, even though the disclosure of their contents would not in themselves be injurious to the public interest.'

In the same case, Harman, LJ, quoted at page 365 from the judgment of Lord Lyndhurst, L.C., in the *Smith v East India Co.* case (1841) 1 Ph. 50, these words from page 54:

' Now, it is quite obvious that public policy requires . . . that the most unreserved communication should take place between the East India Company and the Board of Control, that it should be subject to no restraint or limitations; but it is also quite obvious that if, at the suit of a particular individual, those communications should be subject to be produced in a court of justice, the effect of that would be to restrain the freedom of the communications, and to render them more cautious, guarded, and reserved.'

Again, in the *Grosvenor Hotel* case, Salmon, LJ, referred to the fact that candour and freedom of expression might be impaired if the relevant documents could be ordered to be produced, and continued at page 368, accordingly their production would be so much to the prejudice of the public interest, that, however pertinent they might be to the issues in an action, they ought not to be produced'.

Upon all the authorities and having perused the Minister's affidavit and heard Counsel, I am satisfied that the claim for State privilege is well founded in law, but I have further to consider whether to inspect the documents and uphold the objection, properly weighing the competing interests. Mr Cunningham is pressing for production of the letter only, but I do not think that I can regard it in isolation because I am satisfied that it is one of a class of documents to which reference has repeatedly been made. I see no point in inspecting the original of the letter, because I have seen the copy of it on the record. It is exhibited to the prosecutor's sworn complaint and, whilst that copy is not evidence, I know its alleged contents and I shall, for the purposes of this ruling, assume that that copy is an accurate one. Certainly, as Mr Cunningham submitted, the letter forms the basis for this prosecution and, without its proper admission in evidence, it would appear that this prosecution might fail. Do the interests of the prosecutor in clearing his name, and the interests of justice in the prosecution and possible punishment of the accused for allegedly publishing defamatory matter outweigh the public interest, and the possible injury thereto? This question permits of no ready or easy answer.

[7] If I am in doubt, I should uphold the Minister's objection. This is, I think, clear from the authorities. Lord Blanesburgh in *Robinson's* case [1931] All ER 333, said at page 342: 'the judge in giving his decision as to any document will be careful to safeguard the interest of the State, and will not in any case of doubt resolve the doubt against the State without further enquiry from the Minister'. I see no point in any such further inquiry from the Minister in this case, in view of the contents of his affidavit and of the Attorney-General's submissions.

[8] It is also settled law that, if a claim for State privilege is upheld, then no secondary evidence of the contents of a privileged document is admissible, whether written or verbal - *see* the above mentioned quotation from the 12th Volume of *Halsbury's Laws of England*; *Broome v Broome* [1955] 1 All ER 201, at pages 201, 202 and 204; and the words of Devlin, J (as he then was), in *Ellis's* Case [1953] 2 All ER 149, at page 155: '. . . but no secondary evidence can be given of their contents, so that they must be treated, therefore, as being obliterated from everyone's memory'. Mr Cunningham conceded that, if the original of the letter were 'shut out', then the copies which he has would be equally shut out.

[9] The accused sent copies of the letter to three addresses. The Attorney-General contends that this circumstance should not deprive the State of the privilege claimed, and he quoted the following part of the judgment of Viscount Simon in the *Duncan v Carmmell Laird*case [1942] 1 All ER 587, at page 589:

' It was urged before us that, whatever the true principles upon which production of documents should be refused on the ground of public interest, some of these documents could not be validly withheld because they had already been produced before the tribunal of inquiry into the loss of the "Thetis", over which Bucknill, J, presided, and because some reference was made to them in his report (Cmd. 6190 of 1940). I am not convinced that in all cases a claim, validly made in other respects, to withhold documents in connection with a pending action on the ground of public policy, is defeated by the circumstance that they have been given a limited circulation at such an inquiry, for special precautions may have been taken to avoid public injury, and some portion of the tribunal's sittings may have been secret. Moreover, in point of fact, Bucknill, J, does not set out these documents *in extenso*, and there must be other entries in them which have not been reproduced. The appeal should be determined without being affected by this special circumstance.'

The Attorney-General argues that the privilege is that of the State and that, because the author of a document chooses to send copies to a few other people, the privilege should not be lost. However, in *Robinson's* case [1931] All ER 333, at page 339, Lord Blanesburgh said: 'Lastly, the privilege, the reason for it being what it is, can hardly be asserted in relation to documents the contents of which have already been published'. I have been unable to find any other authority upon this particular point, and Lord Blanesburgh's comments are not easy to reconcile with what I have already quoted from *Halsbury* concerning the privilege attaching irrespective of in whose custody the document is. In this context, 'document' includes, I think, a copy in view of the law that secondary evidence of its contents is inadmissible if it is privileged, and I think Lord Blanesburgh was referring to documents whose contents had been revealed to the public at large as opposed to (as in the present case) a few people, none of whom is disinterested in the apprehended trade dispute because one is the prosecutor's superior at Chilanga and the others are Secretaries of the Union. In the result I conclude that the privilege is not destroyed by the limited publication of the copies in this case.

All the above - mentioned cases were civil actions and, in *Duncan v Cammell Laird* [1942] 1 All ER 587, Viscount Simon said at page 591: 'The judgment of the House in the present case is limited to civil actions and the practice, as applied in criminal trials where an individual's life or liberty may be at stake, is not necessarily the same'. Quite how the practice in civil actions and criminal trials may differ, I have been unable to ascertain. I believe the principles are the same, but it may be that, in a case where the effect of upholding State privilege would be to deprive an accused person of something essential to his defence, and so prejudice his life or liberty, then the scales of the balance would be weighed against the State. That, however, is not the case here - what is at stake is the prosecutor's reputation and the trial of the accused and although the present case is a criminal one it is in substance an action for defamation, and State privilege has been established for documents in libel cases for example *Hennessy v Wright* (1888) 21 QB D. 509, and *Home v Lord William Bentinck* (1820) 22 Digest (Repl.) 387, 4162.

Having given anxious consideration to this matter, I have come to the conclusion, not without reluctance, that the claim for State privilege should be upheld. Doubtless the prosecutor may seem to be denied what is to his immediate advantage, but that is largely a private or personal consideration, and the need to try and punish the accused, if he is guilty, is a relatively minor consideration in the interests of justice. This ruling may or may not prevent justice being done as between the prosecutor and the accused (and I have an uneasy feeling that it will not appear to be done), but I regard the need to protect the interests of the country as a whole as paramount to the other interests involved in this case, and I am consequently not prepared to override the Minister's objection. The claim for State privilege against production of the documents listed in the Minister's affidavit is upheld.

Claim for privilege upheld