18, 1968

IN THE PRIVY COUNCIL No. 13 of 1968.

ON APPEAL

FROM THE APPELLATE DIVISION

OF THE HIGH COURT OF SOUTHERN RHODESIA

BETWEEN :

STELLA MADZIMBAMUTO **Appellant**

and

DESMOND WILLIAM LARDNER-BURKE
in his capacity as Minister of Justice and
of Law and Order
and
FREDERICK PHILLIP GEORGE
in his capacity as Superintendent
of Gwelo Prison **Respondents**

CASE FOR THE APPELLANT

RECORD

1. This is an Appeal from the determination of the Appellate Division of the High Court of Southern Rhodesia (Beadle, C.J., Quénet, J.P., Macdonald, J.A., Jarvis and Fieldsend, A.JJ.A.), dated 29th January 1968, that the first Respondent, acting as Minister of Justice and of Law and Order in the rebel regime set up in Southern Rhodesia on 11th November 1965, was entitled to exercise powers of detention without trial over persons in Southern Rhodesia, including the Appellant's husband, Daniel Nyamayaro Madzimbamuto, thereby, and to that extent, affirming the judgment of the General Division of the High Court of Southern Rhodesia (Lewis and Goldin, JJ.), dated 9th September 1966. Special leave to appeal to Her Majesty in Council was granted by Order in Council, dated 11th April 1968, consequent upon a report of the Judicial Committee of the Privy Council (Lord Reid, Lord Morris of Borth-y-Gest, Lord Pearce, Lord Wilberforce and Lord Pearson), dated 27th March 1968.

In pocket: Judgment, No. A.D. 1/68

In pocket: Judgment, No. GD/CIV/ 23/66

2. The main issue in this appeal is whether the Appellate Division of the High Court of Southern Rhodesia was correct in holding that the first Respondent as Minister of Justice and of Law and Order in the rebel regime established in Southern Rhodesia since 11th November 1965, is entitled to detain the Appellant's husband without trial under proclamations of emergency and regulations issued not by the lawful Government but by the

rebel regime. In the determination of this issue the following questions arise:—

(a) Whether a Southern Rhodesian court constituted under the constitution of Southern Rhodesia1961 is entitled to give any recognition whatsoever to any government in Southern Rhodesia other than the one constitutionally appointed under the 1961 Constitution, as for the time being modified by the Southern Rhodesia (Constitution) Order in Council 1965, No. 1952, made under the Southern Rhodesia Act 1965 passed by the United Kingdom Parliament on 16th November 1965.

(b) Whether a Southern Rhodesian court constituted under the 1961 Constitution is entitled to accord validity to legislative or administrative measures enacted or done otherwise than in accordance with the 1961 Constitution.

(c) Whether, in view of section 58 (1) of the 1961 Constitution which provides:

> "No person shall be deprived of his personal liberty save as may be authorised by law",

the detention of the Appellant's husband by the first Respondent can be justified by any measure which does not fall within the terms of either section 58 (2) or section 69 of the 1961 Constitution.

(d) Whether, in the light of section 56D of the 1961 Constitution, which provides that the law to be administered in Southern Rhodesia

> "shall be the law in force in the Colony of the Cape of Good Hope on the 10th day of June 1891 [i.e. the Roman-Dutch law] as modified by subsequent legislation having in Southern Rhodesia the force of law",

a court appointed under that Constitution can properly recognise as "law" the measures of an unlawful rebel regime within the territory of the court's own Sovereign, by applying the doctrine of necessity or by relying on any other rule of law.

(e) Whether, assuming that a Southern Rhodesian court can on grounds of necessity properly give effect to measures of a rebel regime passed otherwise than in accordance with the 1961 Constitution or the Southern Rhodesia (Constitution) Order in Council 1965, the measures relied on by the Respondents for the detention without trial of the Appellant's husband (viz., the various "proclamations of emergency" and "emergency regulations" issued by Mr. C.W. Dupont) can be so justified.

(f) Whether the Judicial Committee of the Privy Council should entertain an appeal from the courts of one of Her Majesty's Colonies where the rebel regime in that Colony has declared that it will ignore any Order in

Council made on a report from the Judicial Committee.

THE CONSTITUTIONAL STATUS OF SOUTHERN RHODESIA

3. The constitutional position of the territory of Southern Rhodesia is as follows:—

(a) Southern Rhodesia has, since 1923, been and continues to be a settled Colony within Her Majesty's dominions, and the Government and Parliament of the United Kingdom have responsibility for, and jurisdiction over, it.

(b) In pursuance of the powers conferred by the Southern Rhodesia (Constitution) Act 1961 of the United Kingdom Parliament, Her Majesty in Council granted to Southern Rhodesia a constitution in terms of the Southern Rhodesia (Constitution) Order in Council 1961.

(c) In terms of section 42 of the 1961 Constitution, the executive power in Southern Rhodesia is vested in Her Majesty, and may be exercised on Her Majesty's behalf by the Governor, or such other persons as may be authorised in that behalf by the Governor or by any law of the legislature. Subject to certain provisos the Governor is, by section 45 (1), to act in accordance with the advice of the Governor's Council consisting of the Prime Minister and other Ministers; but, by section 43 (1), the Ministers hold office during Her Majesty's pleasure.

(d) Section 6 of the Constitution provides that the legislature of Southern Rhodesia shall consist of Her Majesty and a Legislative Assembly.

(e) By section 105 the legislature may amend, add to or repeal any of the provisions of the Constitution other than those mentioned in section 111. Section 111 provides:

> "Full power and authority is hereby reserved to Her Majesty by Order in Council to amend, add to or revoke the provisions of sections 1, 2, 3, 5, 6, 29, 32, 42, 49 and this section . . . "

The effect of these provisions is to preclude the Southern Rhodesian legislature from dealing with (i) the office of the Governor and his powers and duties (sections 1, 2, 3 and 5); (ii) the assent to Bills by Her Majesty or by the Governor on her behalf (section 29); (iii) disallowance of Bills by Her Majesty (section 32); (iv) the prerogative power of mercy (section 49); (v) the composition of the Legislature, consisting of Her Majesty and the Legislative Assembly (section 6); and (vi) the vesting of executive authority in Her Majesty (section 42).

(f) Section 50 provides that there shall be a High Court of Southern

Rhodesia consisting of a General Division and of an Appellate Division. Section 54 (3) provides:—

> "A judge of the High Court shall not enter upon the duties of his office unless he has taken before the Governor or some person authorised by the Governor in that behalf the Oath of Allegiance and the Judicial Oath in the form set out in the First Schedule."

These oaths are as follows:—

1. "I . . . do swear that I will be faithful and bear true allegiance to her Majesty Queen Elizabeth the Second, her Heirs and Successors, according to law. So help me God."

2. "I, . . . do swear that I will well and truly serve our Sovereign Lady Queen Elizabeth the Second in the office of . . . and I will do right to all manner of people after the laws and usages of Southern Rhodesia, without fear of favour, affection or illwill. So help me God."

(g) Section 56 of the Constitution preserves the appellate jurisdiction of Her Majesty in Council, and section 71 (5) gives to aggrieved persons a right of appeal to Her Majesty in Council in cases relating to contraventions of sections 57 to 68 (the Declaration of Rights).

(h) Neither the Southern Rhodesia (Constitution) Act 1961, nor any other Act of the United Kingdom Parliament has at any time divested the United Kingdom Parliament of the power to legislate for Southern Rhodesia. The Statute of Westminster 1931 has no application to Southern Rhodesia.

(i) By section 1 of the Southern Rhodesia Act 1965 the United Kingdom Parliament declared that Southern Rhodesia

> "continues to be part of Her Majesty's dominions, and that the Government and Parliament of the United Kingdom have responsibility and jurisdiction as heretofore for and in respect of it".

THE FACTS

4. The relevant facts, shortly stated, are as follows:—

p.100, ll. 17–20 (a) On 5th November 1965, the Governor of the Colony of Southern Rhodesia, acting on the advice of his Council, lawfully proclaimed a state of emergency in Southern Rhodesia in terms of section 3 of the Emergency Powers Act (Chapter 33). In pursuance of his powers under

section 4 of that Act, the Governor promulgated regulations (the Emergency Powers (Maintenance of Law and Order) Regulations 1965) providing "for the summary arrest or detention of any person whose arrest or detention appears to the Minister [of Justice and of Law and Order] to be expedient in the public interest".

(b) On 6th November 1965, the first Respondent, then acting lawfully in his capacity as Minister of Justice and of Law and Order, issued an order detaining the Appellant's husband without trial in terms of section 21 of the said Regulations, and he was thereupon detained by the second Respondent at Gwelo Prison.

p.13, ll. 18–28; p.14, ll. 22–34. p.16, l. 13–p.17, l. 31; p.18, ll. 23–28

(c) On 11th November 1965, Mr. Ian Douglas Smith, who was then the lawful Prime Minister of Southern Rhodesia, issued together with his ministerial colleagues (including the first Respondent) a "declaration of independence" purporting to declare the territory of Southern Rhodesia to be no longer a Crown Colony but an independent sovereign state, and "giving" to the people of Southern Rhodesia a new Constitution which has come to be known as "the 1965 Constitution." In terms of the 1965 Constitution the executive functions, lawfully exercised in Southern Rhodesia by the Governor, were vested in a person designated as "the officer administering the government", who was stated to be acting "on behalf of Her Majesty Queen Elizabeth II 'as Queen of Rhodesia'." Mr. C.W. Dupont was designated to fill this position by Mr. Smith and his colleagues.

p.20, ll. 22–29; p.90, l. 40–p.91, l. 10; p.155, l. 29–p.156, l. 14

(d) On the same day, immediately after the illegal declaration of independence, Her Majesty, in terms of section 43 (1) of the 1961 Constitution, dismissed Her Majesty's Ministers in Southern Rhodesia, including the first Respondent, who thereupon ceased to exercise lawfully the powers of their respective ministerial offices under the 1961 Constitution. The Governor in communicating Her Majesty's pleasure to Her Ministers in Southern Rhodesia, issued the following statement:—

p.149, l. 8–p.150, l. 12

> "The Government have made an unconstitutional Declaration of Independence . . . . I have informed Mr. Smith and his colleagues that they no longer hold office. I call on the citizens of Rhodesia to refrain from all acts which would further the objects of the illegal authorities. Subject to that, it is the duty of all citizens to maintain law and order in this country and to carry on with their normal tasks. This applies equally to the Judiciary, the Armed services, the Police and the Public service."

p.149, l. 8–p.150, l. 12; p.151, ll. 13–31

(e) On 16th November 1965, the United Kingdom Parliament passed the Southern Rhodesia Act 1965, which provides, inter alia:—

> "1. It is hereby declared that Southern Rhodesia continues to be part of Her Majesty's dominions, and that the Government and

Parliament of the United Kingdom have responsibility and jurisdiction as heretofore for and in respect of it.

"2. – (1) Her Majesty may by Order in Council make such provision in relation to Southern Rhodesia, or persons or things in any way belonging to or connected with Southern Rhodesia, as appears to Her to be necessary or expedient in consequence of any unconstitutional action taken therein."

On 18th November 1965, in pursuance of section 2 of the Southern Rhodesia Act 1965, the Southern Rhodesia (Constitution) Order in Council 1965, No. 1952 of 1965, was made by Her Majesty in Council. The relevant provisions of this Order read:

"2. – (1) It is hereby declared for the avoidance of doubt that any instrument made or other act done in purported promulgation of any Constitution for Southern Rhodesia except as authorised by Act of Parliament is void and of no effect.

"2. (2) This section shall come into operation forthwith and shall then be deemed to have had effect from 11th November 1965.

"3. (1) So long as this section is in operation –

(a) no laws may be made by the legislature of Southern Rhodesia, no business may be transacted by the Legislative Assembly and no steps may be taken by any person or authority for the purpose of or otherwise in relation to the constitution or reconstitution of the Legislative Assembly or the election of any person to be a member thereof .....

.....

(c) Her Majesty in Council may make laws for the peace, order and good government of Southern Rhodesia, including laws having extra–territorial operation."

"4. (1) So long as this section is in operation .....

(b) sections 43, 44, 45 and 46 of the Constitution shall not have effect."

(f) In terms of section 3 (2) of the Emergency Powers Act (Chapter 33) and section 72 (2) of the 1961 Constitution, no proclamation of a state of emergency may remain in force for longer than three months, but provision is made for the renewal of a state of emergency for periods

of three months at a time. The extension of a state of emergency requires a resolution of the Legislative Assembly and a proclamation by the Governor.

(g) On 3rd February 1966, immediately before the expiry of the Governor's proclamation of a state of emergency, referred to in paragraph 4 (a) hereof, the so-called "Parliament of Rhodesia" established under the 1965 Constitution passed a resolution purporting to authorise the extension of the period of emergency, and Mr. C.W. Dupont, on 4th February 1966, acting under the title of "officer administering the government" under the 1965 Constitution, issued a proclamation purporting to extend the period of emergency for a further three months. The said Dupont also issued further regulations, entitled Emergency Powers (Maintenance of Law and Order) Regulations 1966, providing for detention without trial, including a regulation (Regulation 47(3)) which provided that any person who immediately before the date of the commencement of the 1966 Regulations was being detained in terms of the regulations promulgated by the Governor in 1965 should continue to be detained without trial.

p.22, ll. 36–46
p.23, ll. 1–15
p.23, ll. 16–21
p.100, ll. 20–37

(h) The procedure referred to in paragraph 4 (g) hereof has been repeated at three-monthly intervals, and the Appellant's husband was, until 29th January 1968, detained by virtue of the said Regulation 47(3). On that date the Appellant's husband was served with a new order under the hand of the first Respondent acting under a regulation issued by the said Dupont under the said emergency proclamations issued by him, which purports to authorise the first Respondent to order the detention of any person whose detention appears to him to be expedient in the public interest.

p.332, ll. 16–27

5. By notice of motion, dated 24th February 1966, the Appellant applied to the General Division of the High Court of Southern Rhodesia for an order:

p.2, l. 8–p.4, l. 6; p.9

(a) that the Respondents produce Daniel Nyamayaro Madzimbamuto before the court upon a date to be fixed by the court in order that the court may discharge the said Daniel Nyamayaro Madzimbamuto from custody and detention and set him at liberty; and

p.3, ll. 1–8; p.9, ll. 21–25

(b) that the Respondents pay the costs of these proceedings.

p.3, ll. 9–10; p.9, ll. 26–27

In an accompanying affidavit the Appellant stated the relevant facts set out in paragraph 4 hereof and contended that the so-called emergency proclamation and regulations, issued not by the Governor but by the said Dupont, were of no force and effect since they were not issued by a lawful authority. At the hearing of the application it was contended on her behalf that the detention of her husband was a contravention of section 58 (1) of the 1961 Constitution which provides that "no person shall be deprived of his personal liberty save as may be authorised by law".

p.4, l. 7–p.6, l. 34.
p.6, ll. 10–25

6. The application was heard before the Honourable Mr. Justice Lewis and the Honourable Mr. Justice Goldin in the General Division of the High Court of Southern Rhodesia on 28th, 29th and 30th June, 1st, 4th, 5th and 6th July, on the last day of which the Court reserved its judgment. The
pp. 12–85; pp. 177–204 Respondents had placed before the court a number of affidavits, all in the same vein, tending primarily to establish that the Ministers who had been dismissed by the Governor on 11th November 1965, had remained in office as ministers of a de facto government; that that government was generally obeyed in Southern Rhodesia; and that that government was the only effective government within the territory of Southern Rhodesia. 10
pp. 205–214 (By notice of application, dated 31st May 1966, the Appellant sought an order to have portions of the Respondents' affidavits struck out, but this application was not proceeded with). The Appellant filed replying
pp. 86–176 affidavits tending to show that the rebellion of 11th November 1965, had not succeeded and that its outcome was uncertain. The Appellant further adduced in evidence at the hearing of the application a certificate from Her Majesty's Secretary of State for Commonwealth Relations, dated 21st
G.D. Judgment, p.26, ll. 6–25 A.D. Judgment, p.26, ll. 24–34 June 1966, addressed to the Appellant's Salisbury attorneys, in the following terms:—

> "In response to your request by letter of 16th June 1966, from your London agents, Messrs Sheridan & Co., to the Treasury Solicitor for certain information with regard to Southern Rhodesia, I, The Right Honourable Arthur Bottomley, O.B.E., M.P., Her Majesty's Secretary of State for Commonwealth Relations, hereby certify as follows:— 20
>
> (a) Southern Rhodesia has, since 1923, been and continues to be a colony within Her Majesty's Dominions and the Government and Parliament of the United Kingdom have responsibility for and jurisdiction over it.
>
> (b) Her Majesty's Government in the United Kingdom does not recognise Southern Rhodesia or Rhodesia as a State either de facto or de jure. 30
>
> (c) Her Majesty's Government in the United Kingdom does not recognise any persons whomsoever as Ministers of the Government of Southern Rhodesia and does not recognise any persons purporting to be such Ministers as constituting a Government in Southern Rhodesia either de facto or de jure."

JUDGMENT OF THE GENERAL DIVISION

7. The General Division of the High Court of Southern Rhodesia gave judgment on 9th September 1966, dismissing the Appellant's application. 40
Mr. Justice Lewis (with whom Mr. Justice Goldin agreed) held that the certificate, referred to in paragraph 6 hereof, was simply confirmatory of the Southern Rhodesia Act 1965, and did not preclude a judge in
G.D. Judgment, p.32, ll. 33–35 Southern Rhodesia from reaching his own decision on whether or not those exercising powers in Southern Rhodesia constituted a de facto

government, Mr. Justice Lewis further held:—

(a) The constitution annexed to the "proclamation" of 11th November 1965, was not the lawful constitution of Southern Rhodesia, and the regime set up under it was not a lawful government and could not become a lawful government of Southern Rhodesia "until such time as the tie of sovereignty vested in Britain has been finally and successfully severed". This tie, it seems, could be severed only by the express consent of Her Majesty's Government or by its tacit acquiescence to be inferred from abandonment of any attempt to end the rebellion. Moreover, it would be inconsistent with the oaths which bound a judge holding office under the 1961 Constitution to recognise the 1965 Constitution.

G.D. Judgment, p.22, ll. 9–12

G.D. Judgment, p.22, ll. 29–39

(b) The regime exercising power in Southern Rhodesia since 11th November 1965, was, however, the only effective government of the territory and therefore "on the basis of necessity and in order to avoid chaos and a vacuum in the law" the High Court of Southern Rhodesia was bound to give effect to such measures of the effective government, both legislative and administrative, "as could lawfully have been taken by the lawful government under the 1961 Constitution for the preservation of peace and good government and the maintenance of law and order."

G.D.Judgment, p.76, l. 40–p.77, l.3

(c) The extensions of the state of emergency and the Emergency Powers (Maintenance of Law and Order) Regulations 1966 were measures falling within the above category.

G.D. Judgment, p.17, ll. 4–12

Mr. Justice Goldin, substantially agreeing with Mr. Justice Lewis, held that the court "can and should give effect to at least certain legislative measures and administrative acts, performed by virtue of power exercised under the 1965 Constitution." The learned judge based his conclusion "on the doctrine of public policy, the application of which is required, justified and rendered unavoidable in these circumstances, by necessity."

G.D. Judgment, p.95, ll. 22–25

G.D. Judgment, p.95, ll. 25–27

THE APPEAL TO THE APPELLATE DIVISION

8. By notice of appeal, dated 23rd September 1966, the Appellant appealed to the Appellate Division of the High Court of Southern Rhodesia. The Appellant advanced the following grounds of appeal:—

pp. 215–217

(a) The learned trial judges erred in recognising, what is referred to in their judgments as, "the government of this country" as being the de facto government and/or as being the government in effective control of the territory of Southern Rhodesia.

p.215, ll. 26–32

(b) Even if the learned trial judges did not err in recognising the said government as the de facto government of Southern Rhodesia and/or as being in effective control of Southern Rhodesia, they erred in holding

p.215, l. 33–p.216, l. 8

that they could recognise or give effect to certain of the legislative and administrative acts of the said government and of the "Parliament of Southern Rhodesia."

p.216, ll. 9–30 (c) Even if the learned trial judges did not err in holding that they could recognise or give effect to certain of the said legislative and administrative acts, they erred in holding that they could recognise or give effect to the following acts:–

p.216, ll. 16–22 (i) The proclamation of a state of emergency by Mr. Clifford Walter Dupont on 4th February 1966 (Proclamation No. 3 of 1966);

p.216, ll. 23–27 (ii) The making of the Emergency Powers (Maintenance of Law and Order) Regulations 1966; and

p.216, ll. 28–30 (iii) The continued detention of the Appellant's husband in terms of such Regulations.

9. The Respondents originally, on 3rd October 1966, put in a notice of cross-appeal against that part of the judgments which held that the rebel regime was an unlawful government and the 1965 Constitution an unlawful constitution.

At the opening of the appeal on 30th January 1967, the Respondents, while not conceding that the General Division's ruling on this question was correct, formally abandoned the cross-appeal. However, at a second hearing of the appeal, on 9th October 1967, the Respondents, at the request of the court, made in the "points on which the Court would like to hear further argument" referred to in paragraph 10 hereof, did argue this issue. Following the Court's request, the Respondents applied, on 26th September 1967 and on 3rd October 1967, to adduce further Affidavit evidence relating to the degree of "effective control" exercised by the rebel regime as at the date of the resumed hearing before the appeal court. Additional affidavits were accordingly put in evidence by the Respondents, and by the Appellant in reply.

p.226, ll. 8–14
pp.228–229
pp.236–237
pp.231–247 and 266–321.
pp.248–264.

10. The Appellant's appeal was heard by the Appellate Division of the High Court of Southern Rhodesia (Beadle, C.J., Quénet, J.P., Macdonald, J.A., Jarvis and Fieldsend, A.JJ.A.) on 30th and 31st January, 1st, 2nd, 3rd, 6th, 7th, 8th, 9th, 10th and 11th February 1967. At the conclusion of this hearing the Court reserved its judgment. During May 1967, the Registrar of the Appellate Division of the High Court of Southern Rhodesia, on the Court's instructions, wrote to the parties informing them that the Court desired to hear further argument on certain issues. These were broadly:–

pp.218–227

p.219, l. 11–p.221, l.2 (a) (i) Whether the law of allegiance in Southern Rhodesia was English law or Roman-Dutch law.

p.221, l. 3–p.222, l. 15 (ii) What the precise nature was of the allegiance owed by

Southern Rhodesian residents prior to the 11th November 1965, and to what extent if any that allegiance had been altered after that date.

(iii) Whether, if allegiance was owed to the "Rhodesian Government" as the sovereign internal power, such allegiance was destroyed as a result of events on the 11th November 1965. — p.222, l. 16–p.223, l.32

(iv) How, if allegiance is owed to a de facto government, the Courts are to resolve the conflict between that allegiance and the allegiance owed to Her Majesty. — p.223, l.33–p.224, l.34

(b) Whether the Treason Act 1495 applied to the situation in Southern Rhodesia. — p.224, l. 35–p.226, l. 5

(c) Whether the Court a quo was right in holding that the rebel regime was not a lawful government and the 1965 Constitution not a lawful Constitution. (This is the matter referred to in paragraph 9 hereof.) — p.226, ll. 8–14

(d) Whether Regulation 47 of the Emergency Powers (Maintenance of Law and Order) Regulations 1966 was **intra vires** the Emergency Powers Act. (This point, which had no bearing on the question of the constitutional power of the first Respondent to detain the Appellant's husband, had never been raised by the Appellant at any stage of the proceedings.) — p.226, l. 30–p.227, l.15

THE JUDGMENT OF THE APPELLATE DIVISION

11. The Appellate Division heard further argument on 9th, 10th, 11th, 12th, 13th, 16th and 17th October 1967, when judgment was again reserved. Judgment was ultimately given on 29th January 1968, as Judgment No. AD.1/68. All five judges held that Regulation 47 (3) of the Emergency Powers (Maintenance of Law and Order) Regulations, which purported to authorise the continued detention of the Appellant's husband, was ultra vires section 4 of the Emergency Powers Act (Chapter 33). Accordingly, the Appellant's appeal was allowed with costs, both in the Appellate Division and in the General Division of the High Court of Southern Rhodesia. But four of the five judges, for different reasons, would have dismissed the Appellant's appeal but for their finding on Regulation 47 (3) which "is quite unrelated to the legality of the present government and would apply with equal force had there been no revolution." Moreover, the judges stated that the case was — A.D. Judgment, p.85, ll. 25–27 (Beadle, C.J.)

"a test case, the object of which is to test the status of the present Government, its capacity to declare states of emergency, to make regulations thereunder and to detain people in terms of those regulations" — A.D. Judgment, p.2, ll. 43–6 (Beadle, C.J.)

Broadly, the judges' findings on the legal status of the rebel regime and of the 1965 Constitution were as follows:—

(i) **Quénet, J.P. and Macdonald, J.A.** held that the rebel regime was the de facto and de jure government of Southern Rhodesia, and that the 1965 Constitution was the lawful constitution.

(ii) **Beadle, C.J. and Jarvis, A.J.A.** held that the rebel regime was the de facto but not the de jure government, and that it could not exceed the powers exercisable by a lawful government under the 1961 Constitution.

(iii) **Fieldsend, A.J.A.** held that the rebel regime was neither a de jure nor a de facto government; but that on the grounds of necessity certain of its measures had to be recognised, provided that they did not defeat the rights of citizens under the 1961 Constitution.

The effect of the majority judgments, it is submitted, was

(a) that the rebel regime was the de facto government of Southern Rhodesia, and

(b) that it could lawfully do whatever a lawful government might have done under the 1961 Constitution, but no more.

12. The findings of the learned Judges are summarised in greater detail below. It will be observed that in arriving at their findings on the constitutional issues, the judges felt compelled to examine the source of their own jurisdiction.

(a) **Beadle, C.J.**

(i) **The authority of the Court**

The Court originated from the 1961 Constitution and had been permitted by the illegal regime to continue to function. But, since the 1961 Constitution was in suspension (and likely to remain so), the Court did not derive its present authority from that source. On the other hand, the Court did not derive its authority from the 1965 Constitution, which was not the de jure constitution. Unless and until the regime became the de jure authority (when a Court would be constituted under the 1965 Constitution), the Court derived its authority simply from the fact that the de facto Government allowed it to function and allowed its officials to enforce judicial orders. The unprecedented circumstances demanded an unprecedented solution: "After all, as Pliny said, ' **ex Africa semper aliquid novi** ' "

A.D. Judgment, p.26, l. 19.

(ii) **The status of the regime and its measures**

The status of the regime was that of a fully de facto government in that it was in effective control of the territory and this control seemed likely to continue. At this stage, however, it could not be said that it was so firmly established as to justify a finding that its status was that of a de jure government. The regime having effectively usurped governmental powers could lawfully do anything which its predecessors could lawfully have done, but until its new constitution was firmly established and thus became the de jure constitution of the territory, its administrative and legislative acts must conform to the 1961 Constitution. The various proclamations of states of emergency were accordingly lawfully made, as were the various emergency powers regulations, with the exception of Regulation 47 (3)

A.D. Judgment, p.89, conclusions (4) (5) and (6)

(b) **Quénet, J.P.**

(i) **The authority of the Court**

The 1961 Constitution had disappeared but the "mortality" of the 1961 Constitution did not put an end to the power of the judges appointed under that Constitution. So long as judges were permitted to perform their functions, however, they must give effect to the laws and constitution of the effective government. This means neither that the Court is sitting as a Court under the 1961 Constitution nor that the judges have either "joined" the revolution or made a personal decision to accept the 1965 Constitution.

A.D. Judgment, p.96, ll. 27–30

(ii) **The status of the regime and its measures**

The regime was the country's de facto government. It had also acquired "internal de jure status." Its constitution and laws (including the emergency proclamations and regulations) had binding force and the detention orders were properly made save in so far as Regulation 47(3) was applied.

A.D. Judgment, p.109, ll. 1–7

(c) **Macdonald, J.A.**

(i) **The authority of the Court**

As the regime was in de facto control it was necessary for the Court, if it was to carry out the judicial function, to recognise and enforce the laws of the regime. The Court was exercising its power under the authority of the new regime and not under the 1961 Constitution.

A.D. Judgment, pp. 156–157

(ii) **The status of the regime and its measures**

The effect of the declaration of independence on 11th

November 1965, was to create a conflict between the allegiance owed by Southern Rhodesians to "semi-independent State of Rhodesia" and the allegiance owed by them to Great Britain. This conflict must be resolved by finding that allegiance is now owed exclusively to "the State of Rhodesia". This compels full obedience to the laws of the government actually functioning in "the State of Rhodesia." That government was a de facto government and so far as the Court was concerned also a de jure government as being the only government functioning "for the time being." The 1965 Constitution was similarly the de jure constitution and all measures passed in terms of that constitution were valid.

A.D. Judgment, p.161

(d) **Jarvis, A.J.A.**

(i) **The authority of the Court**

A.D. Judgment, p.165, l. 37–p.166, l.7

The source of the jurisdiction of the Court remained the 1961 Constitution. The regime had not usurped the functions of that Court.

(ii) **The status of the regime and its measures**

The regime was not the lawful government and the 1965 Constitution was not the lawful constitution. But the regime had effective control of the territory, which control seemed likely to continue and it thus constituted a de facto government. Legal effect therefore had to be given to such of its legislative and administrative acts as would have been lawful in the case of a lawful government governing under the 1961 Constitution. This would include the proclamations of emergency and the regulations made thereunder apart from Regulation 47 (3).

A.D. Judgment, p.169

(e) **Fieldsend, A.J.A.**

(i) **The authority of the Court**

The Southern Rhodesian Courts derived their existence and powers solely from the 1961 Constitution and could not exercise any powers other than those. It was the power and the duty of the Court to rule upon the validity of any legislation alleged to violate the constitutional rights of the citizen, and the yardstick to be applied was still the 1961 Constitution. The fact that the rebel regime had allowed the Court to sit did not constitute a new basis for its existence. The Court continued to be the Court appointed under the 1961 Constitution.

A.D. Judgment, p.171, ll. 6–12

A.D. Judgment, p.174, ll. 42–44

(ii) **The status of the regime and its measures**

The regime had not replaced the lawful Court or the Judges, and the judicial power was still exercised in the name of the lawful Sovereign. The rebel regime, not having a judicial arm, was not a de facto government. In any event, the Court appointed under the 1961 Constitution could not recognise the existence within the territory of its own jurisdiction of a rebel de facto government. However, the necessities of the factual situation required the Court to recognise acts directed to and reasonably required for the orderly running of the State, provided that the just rights of citizens under the 1961 Constitution were not defeated and provided that the act in question did not further or entrench the usurpation. The onus of proving that any act falls in this category is on the person seeking to have enforced what has been done other than in accordance with the normal law of the land. On this basis the proclamation of emergency might be upheld but it was unnecessary to consider whether the detention regulations (other than Regulation 47 (3)) would satisfy the tests laid down.

A.D. Judgment, p.176, ll. 27–33

A.D. Judgment, p.181, ll.7–26 and p.182, ll. 4–9

A.D. Judgment, p.193, ll. 19–22

A.D. Judgment, p.196, ll. 27–31

APPLICATION FOR LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

13. Under section 71 of the 1961 Constitution the Appellate Division has jurisdiction (either original or in the course of an appeal) to determine whether any of the provisions of sections 57 to 68 of the Constitution has been contravened in relation to a litigant. Sub-section (5) of section 71 provides:–

> "Any person aggrieved by any determination of the Appellate Division of the High Court under this section may appeal therefrom to her Majesty in Council: provided that no appeal shall lie by virtue of this sub–section from any determination that any application, or the raising of any question, is merely frivolous or vexatious."

By notice of motion dated 19th February, 1968, the Appellant applied to the Appellate Division of the High Court of Southern Rhodesia (Beadle, C.J., Quénet, J.P., Macdonald, J.A., Jarvis and Fieldsend, A.JJ.A.) for leave to appeal to Her Majesty in Council in terms of section 71(5) of the 1961 Constitution. This application was heard on 29th February 1968 and refused on the 1st March 1968, on two grounds:

pp. 323–4 and 329–330.
p.340, ll. 2–6

p.339, ll. 22–23
pp.339–354.

(a) that, although the Court's determination of the constitutional questions raised in its judgment of the 29th January 1968, was adverse to the Appellant, and although it constituted not obiter dicta but "appealable matter", it was not a determination of the question whether there had been a contravention of

p.340, ll. 10–23 (Beadle, C.J.)
p.350, ll.15–19; (Beadle, C.J.)

p.351, ll.36–38;(Quénet J.P.)
p.354, ll. 17–22;(Jarvis A.J.A.)
p.354, ll. 27–32;(Fieldsend, A.J.A.)

section 58 of the 1961 Constitution, and was thus not a determination within the meaning of section 71 (5); and

(b) (by four of the five judges, Fieldsend, A.J.A. declining to make any ruling) that in any event, in the light of the affidavit sworn by the first Respondent stating that the rebel regime of which he was a member would not recognise, enforce, or give effect to any order or decree of the Judicial Committee of the Privy Council, it would not be appropriate for the Appellate Division to make a declaration that the Appellant was entitled as of right to appeal to Her Majesty in Council. It was for Her Majesty in Council to decide whether leave should be granted.

pp.335–338

p.337, ll. 18–28

p.350, l. 32–p.351, l. 35 (Beadle, C.J.);
P.351, ll.36–38 (Quénet J.P.);
p.354, ll. 7–10 (Macdonald, J.A.);
p.354, ll. 22–25 (Jarvis A.J.A.);
p.354, ll. 33–37 (Fieldsend, A.J.A.)

Neither the Solicitor–General, who appeared for both Respondents, nor the Court suggested that the Appellant was not a "person aggrieved" within the meaning of section 71 (5) merely by reason of the fact that she was nominally the successful party in the litigation.

On 27th March 1968 the Judicial Committee of the Privy Council, in advising Her Majesty to grant the Appellant special leave to appeal, ordered that any issue as to jurisdiction should be joined to the merits on the hearing of the appeal.

SUBMISSIONS

(A) GENERAL

14. The Appellant makes three primary submissions:–

(a) Every imprisonment, save under judicial warrant, is prima facie unlawful and must be justified by the imprisoning authority. This is the rule both in English and in Roman–Dutch law; **Liversidge v. Anderson** [1942] A.C. 206, 245; **R. v. Governor of Brixton Prison; ex Parte Ahsen and others, The Times, April 10, 1968; Principal Immigration Officer v. Naryansamy** 1916 T.P.D. 274, 276; **Ganyile v. Minister of Justice** 1962 (1) S.A. 647 (E), 653–654.

(b) By section 58 (1) of the 1961 Constitution "no person shall be deprived of his personal liberty save as may be authorised by law." Section 58 (2) lists the only circumstances in which any law may authorise deprivation of liberty, subject to section 69, which makes an exception in the case of a period of "public emergency." Section 72 (2) narrowly defines the scope and limitations of a "public emergency", which under the Emergency Powers Act (Chapter 33) can be proclaimed only by the Governor.

The provisions of sections 58 (2) and 69 are exhaustive. If deprivation of liberty cannot be justified under these two sections, it cannot be justified at all.

(c) By section 56D of the 1961 Constitution the law to be administered by the High Court of Southern Rhodesia "shall be the law in force in the Colony of the Cape of Good Hope on the 10th day of June 1891, as modified by subsequent legislation having in Southern Rhodesia the force of law." The Court can, therefore, give recognition or effect only to

(i) statutes having legal effect in Southern Rhodesia, i.e., the 1961 Constitution and statutes duly enacted under that Constitution, or under previous legal Constitutions of the Colony or by or under the authority of the Parliament of the United Kingdom; and

(ii) Subject to any such statutes having legal effect in Southern Rhodesia, rules of law which were part of the common law in force in the Cape of Good Hope on 10th June 1891.

No attempt has been made by the Respondents to justify the detention without trial of the Appellant's husband under any measure which is a law within the meaning of section 56D of the 1961 Constitution, and its illegality is therefore incontestable.

(B) POSITION OF THE SOUTHERN RHODESIAN COURTS

15. Since the detention was not justified under the 1961 Constitution the Appellate Division of the High Court of Southern Rhodesia, in upholding the right of the first Respondent to detain the Appellant's husband, necessarily based its determination on something extraneous to the 1961 Constitution. In so doing, it was plainly wrong. It is submitted that a court established under, and deriving its existence solely from, a specific written Constitution cannot travel outside the boundaries of that Constitution: see Patterson, J. in **Vanhorne's Lessee v. Dorrance** 2 Dallas 304, 309 (1795). In particular, it cannot question the validity or efficacy of the constitution under which it sits, or give effect to any enactment inconsistent with it: **Luther v. Borden** 7 Howard 1 (1848); **Liyanage v. The Queen** [1967] 1 A.C. 259, 286 C. In the former case Taney, C.J. said at pp. 39—40:—

> "Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled with it. And if a State court should enter upon the inquiry proposed in this case, and should come to the conclusion that the

government under which it acted has been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question which it undertook to try. If it decides at all as a court, it necessarily affirms the existence and authority of the government under which it is exercising judicial power."

pp. 2–4

The Appellant commenced these proceedings in February 1966 in the General Division of the High Court of Southern Rhodesia, i.e., she sought a legal remedy from the court established under the 1961 Constitution. The Respondents, by their appearance to the Appellant's notice of motion, submitted unconditionally to the jurisdiction of that court. The Respondents contended in the proceedings in the lower courts that the 1965 Constitution was the Constitution for the territory and that the Court (i.e., the 1961 Court) should recognise it. By advancing this argument the Respondents were in effect suing in Her Majesty's courts for recognition of their rebellion. The Respondents did not contend that the court before which they were appearing was the court purported to be established under the 1965 Constitution; and the judges of both the lower courts (with the possible exception of Macdonald, J.A.) have throughout proceeded on the basis that they were **not** sitting as a court established under the 1965 Constitution. Under section 142 of the 1965 Constitution the validity of that Constitution "shall not be inquired into in any court." This section has at no stage been relied on by the Respondents, and both the lower courts in fact did inquire into the validity of that Constitution. The Appellate Division found by a majority (Beadle, C.J., Jarvis and Fieldsend, A.JJ.A.) that the 1965 Constitution was invalid. Beadle, C.J. stated explicitly that, had the court recognised the 1965 Constitution, "the main issues in these appeals could have been disposed of almost without argument in view of section 142 of the 1965 Constitution." And Lewis, J. in the General Division noted that the Respondents did not rely on section 142. The only authority under which the judges of both Divisions of the High Court had accepted judicial appointment and exercised judicial power was the authority conferred by the 1961 Constitution. By continuing to sit as a Court constituted under the 1961 Constitution, each Division necessarily affirmed the existence and authority of the 1961 Constitution to the exclusion of any other Constitution.

A.D. Judgment, p.53, ll. 23–25

G.D. Judgment, p.23, ll. 41–44

16. The General Division and the Appellate Division (with the exception of Fieldsend, A.J.A.) found that the illegal regime was the de facto government of Southern Rhodesia, and that some at least of its acts were, for that reason alone, entitled to recognition and enforcement by the courts. It is submitted, however, that the legal concept of the "recognition" of a de facto government is relevant only in international law: see, e.g., **Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)** [1967] 1 A.C. 853. It is not within the powers of a municipal court (and in particular of a court sitting under a written constitution) to give recognition to any government within its own territory other than one lawfully appointed under that constitution: see the judgment of Innes, C.J. in **van Deventer v. Hancke & Mossop** 1903 T.S. 401, holding that a court constituted by the British Crown could give no recognition to

governmental measures of the South African Republic in territory annexed by Britain, although the Republic had at the relevant time been in de facto control of that territory. In granting recognition to an unconstitutional and illegal regime as the government of its own territory, a court would negate its own existence and the source of its own jurisdiction. In this regard the judgment of Fieldsend, A.J.A. is adopted.

A.D. Judgment, pp. 177–182

(C) THE BINDING FORCE OF THE 1961 CONSTITUTION AND OF THE SOUTHERN RHODESIA ACT 1965.

17. (a) In any event the Court was bound by, and should have observed the provisions of, the Southern Rhodesia Act 1965 of the United Kingdom Parliament and of the Southern Rhodesia (Constitution) Order in Council 1965. Section 1 of the Act reads:–

> "1. It is hereby declared that Southern Rhodesia continues to be part of Her Majesty's dominions, and that the Government and Parliament of the United Kingdom have responsibility and jurisdiction as heretofore for and in respect of it."

Section 2 (1) of the Order in Council reads:–

> "It is hereby declared for the avoidance of doubt that any instrument made or other act done in purported promulgation of any constitution for Southern Rhodesia except as authorised by Act of Parliament is void and of no effect."

Quite apart from the provisions of the 1961 Constitution itself this Order in Council should have precluded the Southern Rhodesian courts from giving any recognition to the measures of the illegal regime.

(b) Neither the Southern Rhodesia (Constitution) Act 1961 nor any other Act of the United Kingdom Parliament has divested the United Kingdom Parliament of its power to legislate in respect of Southern Rhodesia. The Statute of Westminster 1931 did not apply to Southern Rhodesia. Accordingly Lewis, J. was correct in recognising that legislative sovereignty over Southern Rhodesia remained vested in the United Kingdom Parliament. It is submitted that Beadle, C.J. erred in holding that the United Kingdom Parliament no longer had any right to legislate for Southern Rhodesia. The convention that the Parliament of the United Kingdom would not legislate for a matter within the competence of the Southern Rhodesia legislature except with the consent of the Southern Rhodesia government could have no application in a situation where the Ministers and the legislators in Southern Rhodesia have gone into rebellion and have purported to discard the constitutional framework in relation to which alone the convention was meaningful. Nor in any event did the convention have the force of law:

G.D. Judgment, p.8, l. 49–p.9, l.4: p.21, ll. 24–27: p.33, ll. 17–21.

A.D. Judgment, p.13, l. 14–p.15, l. 24; and p. 56, ll. 33–43.

A.D. Judgment, p.13, ll. 1–10

Campbell v. Hall (1774) 1 Cowp. 204, **Sammut & Another v. Strickland** [1938] A.C. 678 (relied on by Beadle, C.J.) and **Sabally and N'Jie v. Attorney-General** [1965] 1 Q.B. 273 decided only that the grant of legislative institutions to a Settled colony limits but does not oust Her Majesty's prerogative right of legislation. **Sammut v. Strickland** is an example of the revocation by an Act of the United Kingdom Parliament of the Constitution of an internally self-governing Colony: see further the Malta (Letters Patent) Act 1959. The grant of legislative institutions by the Southern Rhodesia (Constitution) Order in Council 1961 could in no way impair the legislative competence of the United Kingdom Parliament in respect of Southern Rhodesia.

(c) Neither court regarded the Southern Rhodesia Act 1965 or the Southern Rhodesia (Constitution) Order in Council 1965 as relevant. It is submitted, however, that these statutes are not merely relevant but should have been decisive in Courts established under the 1961 Constitution, and before judges bound by the oaths set out in paragraph 3 (f) above: see Innes, J.A. in **R. v. McCLlery** 1912. A.D. 199, 218; **Nadan v. The King** [1926] A.C. 491.

G.D. Judgment, p.32, ll. 27–32 (Lewis, J.); A.D. Judgment, p.57, ll. 16–23, (Beadle, C.J.)

G.D. Judgment, p.33, l.38–p.34, l.3.

18. (a) In the General Division Lewis, J. assumed that promulgation of an Act of the United Kingdom Parliament within Southern Rhodesia was not necessary for its validity. He went on to say, however, that in regard to any subsidiary legislation (including presumably an Order in Council)"purporting to deal with the ordinary day to day government of this country"

G.D. Judgment, p.33, l.43–p.34, l.3.

> "... lack of promulgation within Rhodesia might well prove fatal to its validity. Promulgation is not necessary under English law, but it is essential to the validity of legislation under the Roman-Dutch law which is the common law of this country. The question of promulgation was not argued in these proceedings, and it is therefore unnecessary to decide that issue."

In the Appellate Division Beadle, C.J. said:-

p.25, ll. 6–17

> "Furthermore the Orders in Council dealing with Rhodesia have not been promulgated here and, again, it can be argued that for this reason they may be regarded by a local court as invalid. I do not, however, propose to examine the validity of any of these measures, nor the impact of the Colonial Laws Validity Act 1865 because I do not think their validity or applicability has any significant bearing on the law to be applied in Rhodesia today, in the revolutionary situation in which we find ourselves."

A.D. Judgment, p.57, ll. 16–23

(b) It is submitted that both the Southern Rhodesia Act 1965 and the Southern Rhodesia (Constitution) Order in Council 1965 are valid and effective within Southern Rhodesia whether or not they have been promulgated in that territory.

(c) It is correct to say that laws enacted in countries where the Roman-Dutch law is the common law are regarded as taking effect only upon promulgation:

> "By the law of Holland no statute could take effect without promulgation. So far was the principle carried that a general law was of no force in particular towns where it had not been proclaimed . . . . and the necessity for promulgation has always been recognised in our practice": **Rex v. Harrison and Dryburgh** 1922 A.D. 320, 332.

But this rule, it is submitted, is one of interpretation of the intention of the legislature, and does not constitute a limitation on its powers. The rule has therefore no application to a law enacted by the United Kingdom Parliament or by Her Majesty in Council (as distinct from a local legislature) and intended to apply to Southern Rhodesia: see **Rex. v. Offen** 1934 S.W.A. 73. In that case, in considering whether promulgation in South-West Africa was necessary to give validity in that territory to a statute of the South African Parliament passed under its powers to legislate for South-West Africa, van den Heever, J. (as he then was) said at p. 84:—

> "It seems to me to be a constitutional question which cannot be affected by a Dutch rule of interpretation, whether promulgation of a statute is essential . . . . When the South Africa Act 1909 was passed, its framers could not have intended that its powers would be limited by a rule of either the Netherlands Constitution or Roman-Dutch law. It is a matter of constitutional power and of a canon of construction. If Parliament has clearly expressed its intention that a statute shall be binding without promulgation it is binding and the canons go by the board."

It is submitted that the constitutional power of the United Kingdom Parliament to legislate for a settled colony of the United Kingdom cannot be limited by the Roman-Dutch rule of construction that a statute is ordinarily intended to take effect only upon promulgation. It is also submitted that it was clearly the intention of Parliament in enacting the Southern Rhodesia Act 1965 that Orders in Council under the Act were to be immediately effective without promulgation in Southern Rhodesia.

(d) In terms of the Colonial Laws Validity Act 1865 any provision in a colonial law inconsistent with the provisions of an Act of the United Kingdom Parliament which extends to that colony is invalid. In so far therefore as section 56D of the 1961 Constitution can be read as providing that promulgation is necessary for the validity of laws passed by, or under the authority of, the United Kingdom Parliament, it is submitted that it is repugnant to the Southern Rhodesia Act 1965 and is to that extent void.

(e) Alternatively, even if promulgation is necessary in order that either the Southern Rhodesia Act or the Southern Rhodesia (Constitution) Order in Council 1965 should have effect in Southern Rhodesia, it is submitted that there has been sufficient publication of those measures in Southern Rhodesia. Although the normal modern mode of promulgation is by publication in the official Gazette, the Roman - Dutch common law requires no specific method of promulgation. All that is required is the taking of reasonable steps to make the statute known. As appears from the judgments in the Courts below, the provisions of the Act and of the Order were well known (as is indicated by some of the affidavit evidence filed by the Respondents) in Southern Rhodesia. In the circumstances of a rebellion in which the first Respondent and his colleagues have by their conduct prevented the promulgation of these laws, such publication as there was amounts to promulgation.

p.21, ll.40–45 (Mr. Dupont); p.25, ll. 6–17 (Mr. Bosman); p.81, l. 23–p.82, l. 12 (Mr. Bruce); p.84, ll.8–41 (Mr. Greenfield); p.245, l. 1–p.246, l. 20 (Mr. Bruce); p.266, l. 37–p.267, l.4 (Mr. Bruce)

19. There is no rule of Roman - Dutch law which was in force in the Cape of Good Hope in 1891 (or since) which permits a court to override an express provision of a written constitution or of any valid statute. The supremacy of the constitution is recognised by weighty Roman - Dutch authority. See **Huber, Hedendaegsche Rechtsgeleerdheyt**, 4.7.22, and the judgment of Kotze, C.J. in the High Court of the South African Republic in **Brown v. Leyds N.O.** (1897) 4 O.R. 17 (especially at pages 27 and 30). In any event it could hardly have been the intention of the framers of the 1961 Constitution in enacting section 56D, to empower the courts to recognise any rule inconsistent with the Constitution itself. Beadle, C.J. in the Appellate Division attempted to ascertain the law in force in Southern Rhodesia by a jurisprudential analysis of the effect of a successful revolution based largely on the doctrines of Prof. Hans Kelsen. But a court established under a written constitution must find the law to be applied by reference to that constitution, and not according to "general and theoretical jurisprudential principles." It is submitted that the court cannot, on any principle known to English or Roman - Dutch law, enquire whether a revolution against its own sovereign and constitution has successfully created a new legal order. As long as it continues to sit as a court, its judges are bound in terms of their judicial oaths to apply the law as defined by the constitution under which they accepted their appointments. In so far as **The State v. Dosso** (1958) 2 P.S.C.R. 180 (Pakistan) and **Ex parte Matovu** (Uganda High Court, 1966) are in conflict with this contention, it is submitted that they were wrongly decided. (The criticism of these cases by Fieldsend, A.J.A. is respectfully adopted.) It is inconsistent with the judicial oath taken by Southern Rhodesia judges, to depart from or disregard the law of the 1961 Constitution, either in its original form or as modified under the Southern Rhodesia Act 1965. It is submitted that a departure from the clear terms of the 1961 Constitution cannot be

A.D. Judgment, p.181, ll. 7–26 (Fieldsend, A.J.A.)

A.D. Judgment, p.179, ll. 37–41

justified by resort to a "positivist approach" or by invoking "political realities" as the "governing factor". The adoption of such an approach is nothing more than a refusal, in breach of the judicial oath, to "do right ... after the laws and usages of Southern Rhodesia". In so far as the lower courts adopted such an approach they were motivated, it is respectfully submitted, by fear of the admittedly far-reaching political and social consequences of a strict and proper application of the law, namely, those which would follow from the nullification of all or many of the measures of the illegal regime. But judges, applying the English and Roman–Dutch systems of law, have repeatedly said that consequences, however drastic, must not deter a court from applying the law: see **Eshugbayi Eleko v. Officer Administering the Government of Nigeria**, [1931] A.C. 662, 670–671; **Ex parte Mwenya** [1960] 1 Q.B. 241, 308; **Sprigg v. Sigcau** [1897] A.C. 238, 246; **In re Willem Kok** [1879] Buchanan 45, 66; **Re Finestone 1902** T.S. 277, 279; **Central African Examiner (Pvt.) Ltd. v. Howman N.O. & Others** 1966 (2) S.A. 1 (S.R.) 14.

A.D. Judgment, p.47, ll. 21–25 (Beadle, C.J.)

A.D. Judgment, p.57, ll. 23–27 (Beadle, C.J.); p.95, ll. 26–32 (Quénet, J.P.)

20. The duty of the judges to apply the law in terms of their judicial oaths and oaths of allegiance is not modified by the fact that the court sits in territory under rebel control. Even if the Sovereign is ejected from part of her territory its ordinary inhabitants do not lose their duty of allegiance; nor (it is submitted) do the Queen's judges within that territory: **De Jager v. Attorney-General of Natal** [1907] A.C. 326; **R. v. Geyer** (1900) 17 C.S.C. 501. The analogy of the position of courts under belligerent occupation drawn by Beadle, C.J., is unsound. Under the Hague Regulations the belligerent occupant is recognised by the lawful sovereign as having certain rights and duties, including the maintenance of courts of law. A rebel regime does not enjoy in the eyes of its own sovereign the status which is accorded to a belligerent enemy. Fieldsend, A.J.A.'s view on this point is adopted.

A.D. Judgment, p.55, ll. 4–44

A.D. Judgment, p.187, l.41 – p.188, l.7.

21. Beadle, C.J. stated in his judgment that the situation in Southern Rhodesia was unprecedented and was not covered by any existing law and that, were the acts of the illegal regime to be invalidated, Southern Rhodesia would be "without any laws whatsoever for the day-to-day running of its affairs", or, as was stated in the General Division, non-recognition of the illegal regime would create "a vacuum in the law".

A.D. Judgment, p.24, ll. 24–28

A.D. Judgment, p.59, l.38. G.D. Judgment, p.35, l. 13 (Lewis, J.)

It is submitted that this approach is fallacious. There is no "vacuum in the law". There could be a vacuum only if the 1961 Constitution had been lawfully abrogated and no new Constitution had been lawfully created. As it is, the 1961 Constitution provides a fixed and certain legal system which can be applied by the courts. Relative to the present case, section 58 of the 1961 Constitution states a clear and precise rule by which this case can and should be decided. The situation in Southern Rhodesia may be politically unprecedented, but it is not legally without precedent. It is a plain case of unlawful executive action, and there is the most abundant authority that it is the duty of a court in Her Majesty's dominions to protect the subject against unlawful executive action. Supposing that without any purported declaration of independence the Crown had lawfully dismissed the Ministers holding office under the Crown in Southern Rhodesia, but that the first Respondent in defiance of his dismissal had purported to detain the Appellant's husband without trial, a court in Southern Rhodesia would

without question have ordered his immediate release. The court would not have been deterred by the fact (supposing it to have been so) that no other Minister of Justice and of Law and Order had been appointed who could lawfully detain the Appellant's husband. All that differs in this case is that the wrongful act was accompanied by a formal declaration of defiance. But the illegality is plain.

(D) THE STATUS OF THE REBEL REGIME

22. The above submissions are further supported by the principle that the recognition of governments, de facto or de jure, is a function exercisable only by the sovereign. The courts must defer to the sovereign in this regard because court and sovereign may not speak with different voices: **The Arantzazu Mendi** [1939] A.C. 256, 264. Accordingly the significance in the present context of the certificate of the Secretary of the State for Commonwealth Affairs is that it underlines the impropriety and impossibility of the "recognition" by the Rhodesian courts of the rebel regime as a de facto government. If one of Her Majesty's courts may not recognise a foreign government which Her Majesty refuses to recognise, still less may it recognise a rebel government within its own territory. Even if the sovereign's non-recognition of a foreign government does not require a British court to ignore all the internal acts of that government **(Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)** [1967] 1 A.C. 853, 907–908, 954) all relevant authority is against the recognition by a municipal court of any act of a rebel authority: **Ogden v. Folliott** (1790) 3 Term Rep. 726; **Dolder v. Lord Huntingfield** (1805) 11 Ves.Jun. 283 (American War of Independence cases); **Sprott v. U.S.** 20 Wallace 459, 464 (1874); **Williams v. Bruffy** 96 U.S. 176, 188 - 189 (1877) (non-recognition by U.S. Supreme Court of any act of the Confederacy during the Civil War); **van Deventer v. Hancke and Mossop** 1903 T.S. 401.

23. If it is possible for the court to inquire into the status of an illegal regime in the court's own territory (which the Appellant submits it cannot do), the following observations are respectfully made :—

A.D. Judgment, p.33, ll. 1–14

(a) Beadle, C.J. adopted the criterion for international recognition enunciated by the Secretary of State for Foreign Affairs on 21st March 1951, as cited by Lord Reid in **Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)** [1967] 1 A.C. 853, 906. This statement reads, in part:—

> "The conditions under international law for the recognition of a new regime as the de facto government of a state are that the new regime has in fact effective control over most of the State's territory and that this control seems likely to continue."

(b) It is submitted that, by modern international law criteria, a regime which does not conform to certain minimum standards of human rights is not in "effective control" so as to entitle it to recognition. The regime in Southern Rhodesia does not conform to these standards and is thus not in "effective control", as evidenced by the absence of recognition by any other state in the international community.

p.255, l.34.
p.256, l. 2.
p.256, ll. 18–35.
p.264, ll. 25–44

(c) Beadle, C.J. wrongly held that the two conditions were fulfilled in Southern Rhodesia as at 29th January 1968. Even if, as a matter of law, Beadle, C.J. was entitled to hold that the regime could be a de facto government by virtue of its being in "effective control" with a reasonable likelihood of so continuing – nevertheless the Court could not properly hold on the evidence before it,

(i) that the regime was in effective control. The control exercised was effected otherwise than by the express or implied consent of the majority of the inhabitants of Southern Rhodesia, and was imposed by force on the majority of the inhabitants of Southern Rhodesia; and

p.92, l.24–p.93, l.30; p.125, l.14–p.127, l.7; p.134, l. 20–p.135, l. 20; p.162, l.14–p.163, l.31; p.164, l.20–p.165, l.7; p.167, l.39–p.168, l.1; p.169, l.33–p.170, l. 12; p.171, ll. 20–33.

(ii) that the control seemed likely to continue. So long as the lawful sovereign actively attempts to reassert control over the territory, the municipal court sitting under the sovereign's lawfully granted constitution cannot judge whether the sovereign's efforts are likely to succeed. To form such a judgment is to involve the court in an assessment of a political situation which it is neither equipped nor authorised to do. It is not the court's function to assess the efficacy of the sovereign's efforts to restore legality; it is its duty to assist the sovereign in curbing the illegal acts of the rebel regime.

A.D. Judgment, p.101, ll. 15–24 (Quénet, J.P.); p.149, ll. 1–3 (Macdonald, J.A.); p.164, ll. 16–19 (Jarvis, A.J.A.). p.173, l. 19–p.175, l.4; p.176, ll. 19–34; p.255, ll. 26–34; p.256, l. 10–p.260, l.9; A.D. Judgment, p.179, ll. 15–32 (Fieldsend, A.J.A.)

(d) The affidavit evidence filed on behalf of the Appellant indicated the sovereign's continuing efforts to restore legality by means of economic sanctions. This was accepted by the Appellate Division. In any event, in the face of the conflicting expert evidence contained in the affidavits, the Appellate Division was not justified as a matter of fact in finding that the illegal regime was likely to continue indefinitely to remain in effective control.

A.D. Judgment, p.43, l.30– p.44, l. 22 (Beadle, C.J.); p.101, ll. 10–15 (Quénet, J.P.); p.164, ll. 1–19 (Jarvis, A.J.A.)

(e) Moreover, the regime cannot be recognised as a de facto government for the reason given by Fieldsend, A.J.A., namely, that the regime does not possess a judicial arm and is therefore not exercising all the powers of government in Southern Rhodesia.

A.D. Judgment, p.176, ll. 17–33.

(E) THE DOCTRINE OF NECESSITY

24 The judges in the General Division, and Fieldsend, A.J.A. in the Appellate Division, considered that the doctrine of "necessity" could justify the enforcement of certain measures of the illegal regime, namely, those measures necessary for the maintenance of order and good government. It is submitted:

(a) **that the doctrine of necessity has no application and cannot be used to validate the measures of the illegal regime in Southern Rhodesia.**

(i) Under the written Constitution of Southern Rhodesia specific provision is made for the suspension of constitutional rights by reason of necessity. This provision is found in section 69 ("saving for periods of public emergency") read with the definition of "period of public emergency" in section 72(2). This specific provision cannot, it is submitted, be extended by invoking a general doctrine of necessity.

(ii) The doctrine of necessity is well established in Roman-Dutch law and its scope is reasonably well defined. If it is to be applied, notwithstanding the provisions of the 1961 Constitution, it must be applied within its proper limits. These are the limits:—

(1) Necessity may be invoked only in states of war or in grave national emergency.

(2) It may be invoked only by the lawful sovereign to protect the existing lawful order.

(3) The authority invoking the doctrine must satisfy the court of the existence of the necessity.

(4) The measures taken must be proportionate to the necessity, and no more.

See **White & Tucker v. Rudolph** (1879) Kotze 115, 124; **R. v. Bekker & Naude** (1900) 17 C.S.C. 340, 355; **Krohn v. Minister for Defence** 1915 A.D. 191, 197, 210; **Burmah Oil Co. Ltd. v. Lord Advocate** [1965] A.C. 75, 106, 115, 144, 150–151. Cf. **Digest** 50.17.162;

or alternatively,

(b) **that the doctrine cannot be invoked by the first Respondent in order to justify the detention of the Appellant's husband.**

(i) The doctrine is not available to rebels in order to justify measures taken by them to subvert the existing order and to preserve and strengthen their own illegal regime. Unlike the situation in the Cyprus case, **Attorney-General for the Republic v. Mustafa Ibrahim of Kyrenia** (1964) 3 J.S.C.1, there was no necessity in Southern Rhodesia to depart from the terms of the 1961 Constitution, which was functioning normally on 11th November 1965.

A.D. Judgment, p.183, l. 31–p.184, l.10. (Fieldsend, A.J.A.)

(ii) In any event, the Respondents made no serious attempt to establish the need for a proclamation of a state of emergency, or for the detention of the Appellant's husband. They produced no

evidence, other than the **ipse dixit** of the first Respondent and the said Mr. Dupont. The necessity for powers of detention without trial, or for their use against the Appellant's husband, was not proved.

p.14, ll. 8–21; p.23, ll. 16–21; p.178, l. 20–p.179, l.8.

25. Reliance was placed by the judges in both the lower courts on decisions of the United States Supreme Court given after the American Civil War. In these decisions validity was accorded **ex post facto** to certain legislative and administrative measures of the seceding states of the Union (as distinct from measures of the Confederacy itself) in order to avert the injustice and inconvenience which would have flowed from the invalidation of the numerous transactions which had taken place between individuals in those states during the civil war, perforce under the administration of the seceding state governments. The basis of the decisions of the United States Supreme Court in these cases was the necessity, in the interests of the inhabitants of those states, of recognising as valid "acts necessary to peace and good order among citizens such, for example, as acts sanctioning and protecting marriage and domestic relations, governing the course of descents, regulating the transfer of property, real and personal, and providing remedies for injuries to person and estate . . .": **Texas v. White** 7 Wallace 700, 733 (1869). These are the acts referred to by Lord Wilberforce in **Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)** [1967] A.C. 853, 954, as "acts of everyday occurrence or perfunctory acts of administration".

These United States cases do not support the argument for the Respondents. Apart from the difficulty that the doctrine laid down in these cases does not form part of "the law in force in the Colony of the Cape of Good Hope on the 10th day of June, 1891", the cases themselves are limited in their application. They applied the above principle solely in the field of private rights and in favour of individuals, not in favour of the executive against a citizen. Moreover, no measure was held valid which was contrary to the Constitution of the United States, or in derogation of the sovereignty of the United States, or such as to defeat the constitutional rights of citizens: see, e.g. **U.S. v. Insurance Companies** 22 Wallace 99, 101 102(1874): **Williams v. Bruffy** 96 U.S. 176, 192 (1877); **Kenedy Pasture Co. v. The State** 231 S.W. 683, 691 (1921) (Texas). The action of Mr. Dupont in issuing emergency regulations providing for detention without trial impaired the constitutional rights of citizens not to be deprived of their liberty, and his assumption of powers, which can lawfully be exercised only by Her Majesty's representative, is in derogation of Her Majesty's sovereignty in Southern Rhodesia.

26. Both the judges in the General Division and Beadle, C.J. in the Appellate Division made frequent reference to passages in civilian jurists (in particular, **Grotius, De Jure Belli et Pacis**, 1.4.15) which deal with the duty of a citizen to obey a usurper ("invasor"). These passages, it is submitted, do not reflect Roman-Dutch municipal law, and in any event have no relevance to the law to be applied by the courts of the lawful sovereign exercising jurisdiction in terms of a written constitution.

G.D. Judgment, p.42, l.17–p.43, l.7; and p.44, ll. 1–10, (Lewis, J.); p.95, l. 39–p.96, l.1. (Goldin, J.)

(a) Notwithstanding the remarks in the General Division, natural law or the **jus gentium** is not part of municipal Roman-Dutch law. The law of nature or the **jus gentium** according to the leading Roman-Dutch institutional writers must be distinguished from the internal law of the state. A rule of the **jus gentium** only becomes part of the civil law if it is adopted as part of the national law: **Grotius, Introduction to the Jurisprudence of Holland,** 1.2.5–14; **Voet** 1.1.15–20; **van Leeuwen, Roman-Dutch Law,** 1.1.7–11. Cf. **Wessels, History of Roman-Dutch Law,** pp. 284–285, 291; **McCorkindale's Executors v. Bok. N.O.** (1884) 1 S.A.R. 202, 218: c.f. **Burmah Oil Co. Ltd. v. Lord Advocate** [1965] A.C. 75, 108, 128.

(b) The "rule" regarding usurpers, to be found in **Grotius, De Jure Belli et Pacis,** 1.14.5 and the other civilians, has not been adopted as part of Roman-Dutch municipal law. Apart from Grotius, the civilians, relied on by the Respondents' counsel in the lower courts, are not regarded as Roman-Dutch authorities, and **De Jure Belli et Pacis** itself is not a work on Roman-Dutch law.

(c) These writers in any event say, in effect, only that private citizens must in their own interests obey some at least of the usurper's measures and that they commit no wrong towards their lawful sovereign in so doing: see **Grotius, loc. cit.; Puffendorf, De Jure Naturae et Gentium,** 7.8.10; **Vitoria, De Potestate Civili,** N.23; **Suarez, De Legibus,** 3.10.9; **Lessius, De Justitia** 2.29 Dubitatio Ix.n.73; **Coccejus** ad **Grotius** 1.4.15. But these writings, stemming from periods when independent courts and written constitutions were not known, cannot be taken to be authority for the proposition that Her Majesty's courts, sworn to apply the law according to a written constitution, are entitled and bound to recognise and apply the illegal measures of a rebel authority.

(F) THE JURISDICTION OF HER MAJESTY IN COUNCIL

p.351, l. 40–p.354, l. 15 pp.339–354

27. The majority of the Appellate Division of the High Court of Southern Rhodesia (Macdonald, J.A. differing on this point) in refusing leave to appeal to Her Majesty in Council **(Madzimbamuto v. Lardner-Burke and another (No. 2)** (Judgment No. AD.27/68 of 1st March 1968) accepted impliedly that appeals still lay from Southern Rhodesia to Her Majesty in Council, either under section 71(5) of the 1961 Constitution or by special leave. Macdonald, J.A. was alone in stating that the right of appeal to Her Majesty in Council had been ousted, as far as he was concerned, by reason of his finding that the 1965 Constitution had become the Constitution of Rhodesia.

p.352, ll. 20–29

28. Section 71(5) of the 1961 Constitution gives the right of appeal to "any person aggrieved by any determination of the Appellate Division of the High Court under this section". In view of the decision of the Board in **Attorney-General of the Gambia v. N'Jie** [1961] A.C. 617, 634, it is submitted that the attitude of the Respondents and of the Courts, referred to in paragraph 13 hereof, that the Appellant did not cease to be a person aggrieved merely because she had been nominally the successful party, was correct. The concept of a "person aggrieved", which is to be interpreted

according to its context in a particular statute, must have a wider import in a case involving fundamental constitutional rights than it would in the ordinary criminal or civil case. Further, Beadle, C.J. in the leading judgment on the application for leave to appeal to Her Majesty in Council stated that the Court's decisions on the constitutional issues raised in the appeal were not **obiter dicta**, but "appealable matter". p.340, ll. 16–24

29. The determination, referred to in section 71(5) of the 1961 Constitution, means a determination "which concerns the question whether or not sections 57 to 68 of the Declaration of Rights have been contravened in any particular statute": **Chikwakwata v. Bosman, N.O.** 1965 (4) S.A. 57, 59, per Beadle, C.J. The Appellate Division of the High Court was, it is submitted, wrong in holding that there had been no determination concerning a question whether section 58 had been infringed. The nub of the Appellant's case was that her husband's detention without trial was not "authorised by law" as is required by section 58(1). If (which is not conceded by the Appellant) section 58 was not directly in question in the instant case, the "substance of the matter" was that the Appellant contended that the Respondents had illegally deprived her husband of his liberty and that thereby section 58(1) was infringed. In denying the Appellant's contention that the determination of the court related to a question of a breach of section 58, the Appellate Division failed to follow its own decision in **Chikwakwata v. Bosman N.O., supra.**

30. It is respectfully submitted that the Appellate Division should have granted the Appellant leave to appeal to Her Majesty in Council, either conditionally or unconditionally: see **Lopes v. Chettiar** (1968), Judgment of the Judicial Committee of the Privy Council, 20th March 1968, in which Viscount Dilhorne, delivering the reasons for the Board's report, held, approving the judgment of Beadle, C.J. in **Chikwakwata v. Bosman N.O.** 1965 (4) S.A. 57, 60, that although "leave" normally implies a discretion to give or withhold permission, the reference to leave in section 71(5) does not in the context imply any discretion. The Appellant thus had an unqualified right, subject to any order which the Appellate Division might make in relation to security for costs, to appeal to Her Majesty in Council, and the Appellate Division was wrong in refusing the Appellant's application for leave to appeal. It was the duty of the Appellate Division to grant leave in accordance with the provisions of section 71(5).

31. The Appellant respectfully submits that this Appeal to Her Majesty in Council is an appeal as of right – a right which she was wrongly denied by the Appellate Division – and not merely by virtue of the jurisdiction of Her Majesty in Council to grant petitioners special leave to appeal. In **Lopes v. Chettiar, supra,** counsel for the petitioner conceded that, once a court **a quo** had wrongly declined to grant leave to appeal, the Board could only grant special leave to appeal, which is discretionary and not as of right; and the Board, without considering whether ordinary leave to appeal was available to the petitioner, and although accepting that the court **a quo** had wrongly deprived the petitioner of an unqualified right of appeal, proceeded to

exercise a discretion in refusing special leave to appeal. No such concession is here made. It is respectfully submitted that the Judicial Committee has no discretion to refuse leave in this case.

32. If the Appellant is wrong in contending, on the basis of the decision in **Lopes v. Chettiar** supra, that this Appeal comes before the Board as of right by virtue of section 71(5), and if the Board can entertain the appeal by reason only of Her Majesty's prerogative power to grant special leave to appeal, it is submitted that the discretionary power to grant special leave to appeal was properly exercised in favour of the Appellant. The fact that the Appellant was nominally the successful party would not have affected her right to appeal under section 71(5) (since there is a distinction between the determination by the Court of the constitutional question in issue and the ultimate order of the court), and should not therefore be used as a reason for refusing to grant special leave to appeal.

Although the Judicial Committee of the Privy Council does not entertain appeals on abstract questions of law or on hypothetical questions, it will always entertain appeals on matters of a substantial character and of great public importance, particularly where the liberty of the subject is involved, even if the appellant has technically been the successful party in the court a quo: **Australian Consolidated Press Ltd. v. Uren** [1967] 3 W.L.R. 1338, 1348–1349. In that case the Board held that the question whether "**Rookes v. Barnard** was wrongly decided" on the issue of exemplary damages was a substantial one which affected the rights of the appellant although the appellant had been the successful party in its appeal to the High Court of Australia. It was pointed out that the word "determination" in section 3 of the Judicial Committee Act 1833 was a wide one. The Appellant and her husband in the instant case have suffered a "legal grievance" in that the court's determination has "deprived him of something . . . or wrongfully affected his title to something": **Ex parte Sidebotham** (1880) 14 Ch.D. 458, 465: **Estate Friedman v. Katzeff** 1924 W.L.D. 298, 304 - 305; **Attorney-General of the Gambia v. N'Jie** [1961] A.C. 617, 634. The first Respondent has maintained throughout these proceedings that he was entitled to order the detention without trial of the Appellant's husband; indeed, on the day on which the Appellate Division handed down its judgment, the first Respondent made a new order for the detention without trial of the Appellant's husband and still so detains him. Unless and until the determination by the Appellate Division has been declared by Her Majesty in Council to have been wrong, the first Respondent will be able to claim that the detention of the Appellant's husband has been declared lawful by the courts of Southern Rhodesia, and act accordingly.

33. The Appellate Division in **Madzimbamuto v. Lardner-Burke and another (No. 2)** (Fieldsend, A.J.A. not expressing any opinion) further declared (on a matter not properly within its province to pronounce upon) that the granting of leave to appeal would be a "**brutum fulmen**" in the face of an affidavit from the first Respondent to the effect that neither he nor his rebellious colleagues recognised any right of appeal from the Appellate Division and would not recognise a judgment of the Judicial Committee of the Privy Council. It is respectfully submitted, for the following reasons, that the Board in exercise of its discretionary powers (if, contrary to the

p.354, ll. 7–10
p.335, ll. 23–27

Appellant's submission, the jurisdiction of the Board arises only by way of special leave to appeal) should nonetheless entertain an appeal in which is sought a declaration that the Appellant's husband is being unlawfully detained without trial:—

(a) The affidavit of the first Respondent in which he states that he and his rebellious colleagues recognise the orders of the Appellate Division "on all matters within the jurisdiction conferred on it by the 1965 Constitution" and that the regime would not recognise or enforce any judgment of the Board was a gross contempt of court and should not deter the Board from performing its judicial function. p.337, ll. 18–28

(b) Although the first Respondent has indicated that he proposes to ignore any decision of the Judicial Committee of the Privy Council and would order the officers and servants of the illegal regime not to do any act or take any step to assist or enable any person to appeal to the Privy Council, there is no evidence in the case that the second Respondent, in his capacity as Superintendent of Gwelo Prison (where the Appellant's husband is presently detained), would not obey either any order made by the Governor in pursuance of any Order in Council or an order by the Courts in Rhodesia consequent upon a declaration by the Judicial Committee of the Privy Council favourable to the Appellant, and in pursuance thereof release him. In his answering affidavit sworn in these proceedings the second Respondent conspicuously refrained from asserting that he regarded himself as bound only by the 1965 Constitution. All the other deponents in their affidavits sworn on behalf of the Respondents, declare themselves in stereotyped form as recognising no other government than that illegally constituted on 11th November 1965, and effectively controlling the territory under the 1965 Constitution. The second Respondent restricted his testimony to a bald assertion that he was lawfully detaining the Appellant's husband. p.18–19

p.21, ll. 33–39 (Mr.Dupont);
p.27, ll. 11–22 (Mr.Barfoot);
p.33, ll. 38–42 (Mr.Morris);
p.35, ll. 36–42 (Mr.Davis);
p.37, ll. 38–45 (Mr.Espach);
p.40, ll. 2–9 (Mr.Cummings);
p.42, l. 45–p.43, l.5 (Mr.Phillip);
p.45, l. 40–p.46, l. 1 (Mr.Houlton);
p.48, ll. 9–15 (Mr.Heathcote);
p.50, ll. 27–33 (Mr.Webster);
p.52, ll. 39–45 (Mr.Ross);
p.55, ll. 9–16 (Mr.Nicolle);
p.57, l.41–p.48, l.1 (Mr.Grant);
p.60, ll. 8–14 (Mr.Armstrong);
p.62, ll. 37–43 (Mr.Bruce-Bond);
p.65, ll. 6–13 (Mr.Marsh);
p.67, ll. 36–42 (Mr.Parker);
p.70, ll. 5–11 (Mr.Dickinson);
p.72, ll. 36–42 (Mr.Clarke);
p.75, ll. 6–13 (Mr.Bradbury);
p.77, ll. 36–42 (Mr.Young);
p.80, ll. 8–14 (Mr.Wallis).

(c) Even if any Order in Council made consequent upon a report by the Judicial Committee favourable to the Appellant were to be ignored by those persons in authority, to whom any such Order in Council would be directed, the Judicial Committee should nevertheless make the declaration sought for the following reasons:—

(i) Whatever be the attitude of the illegal regime, the Appellant has a constitutional **right** to approach Her Majesty in Council for redress: **Ibralebbe v. The Queen** [1964] A.C. 900, 919. The unlawful and rebellious conduct of the first Respondent should not be permitted to deprive the Appellant of that right.

(ii) Jurisdiction is distinct from enforcement, and the power of enforcement is not a necessary concomitant p.19, ll. 12–14.

of the exercise of jurisdiction: **Duff Development Co. v. Kelantan Government** [1923] 1 Ch. 385, 400. The Appellant is seeking a declaration as to her legal rights. It is for Her Majesty in Council to decide upon the manner in which any advice tendered by the Judicial Committee should be enforced in Her Majesty's colony of Southern Rhodesia, and what steps are necessary for that purpose. In any event the High Court of Southern Rhodesia has jurisdiction to grant a declaratory order even if no relief consequential thereon can be claimed: High Court Act 1964, section 33.

(iii) The Southern Rhodesian courts have jurisdiction to issue interdicts, orders of mandamus and declaratory orders against the Crown, even though no enforcement of such orders is possible. The courts proceed on the basis that such judgments create a moral obligation: see the Crown Liabilities Act (Chapter 19); **Minister of Finance v. Barberton Municipal Council** 1914 A.D. 335, 346, 355. In the latter case Lord de Villiers, C.J., dealing with the similar South African Crown Liabilities Act, said, at p.346:—

> "The fact that . . . process cannot be issued against the minister should not prevent the tribunals from affording such a measure of relief as they are capable of granting."

It is submitted that the Appellant is entitled to such relief as the Judicial Committee may be able to grant her.

(iv) Even if immediate enforcement is not possible, a judgment of the Judicial Committee will not be valueless or merely academic. Her Majesty continues to assert her sovereignty over Southern Rhodesia and to take active steps to restore legality. An Order in Council may well in due course become enforceable. Certainly, the contrary cannot be assumed. Further, a judgment of the Judicial Committee will provide guidance for judicial officers and public servants who are carrying out their official duties not because they adhere to the rebellion but in obedience to the Governor's call referred to in paragraph 4(d) above.

(v) The Appellant respectfully adopts the reasoning of Fieldsend, A.J.A.:—

> "If . . . the courts were obliged to stand resolutely in the way of what may be termed a legitimate attempt to over-ride the Constitution, a **fortiori** must a court stand in the way of a blatantly illegal attempt to tear up a Constitution. If to do this is to be characterised as counter-revolutionary, surely an acquiescence in illegality must equally be revolutionary. Nothing can encourage instability more than for any revolutionary movement to know that if it succeeds in snatching power it will be entitled ipso facto to the complete support of the pre-existing judiciary in their judicial capacity. It may be a vain hope that the judgment of a court will deter a usurper, or have the effect of restoring legality, but for a court to be deterred by fear of failure is merely to acquiesce in illegality. It may be that the court's mere

presence exercises some check on an usurper who prefers to avoid a confrontation with it." A.D. Judgment, p.179, ll. 19 32

(d) If the Judicial Committee of the Privy Council, as the highest Court of Appeal for Southern Rhodesia were, in the light of the political circumstances prevailing in the territory of Southern Rhodesia, to decline to exercise its undoubted jurisdiction, a concession would have been made that in one of Her Majesty's colonies the citizen was not entitled to seek his legal remedies in the highest court for the colony.

10 The Appellant humbly submits that the determination of the Appellate Division that the first Respondent was entitled to exercise powers of detention without trial over the Appellant's husband was wrong and that this appeal should be allowed for the following, among other,

REASONS

(1) BECAUSE the proclamations of emergency and regulations under which the Appellant's husband was detained were issued not by the lawful government but by the rebel regime

(2) BECAUSE the Appellate Division constituted under the 1961 Constitution was not entitled to give any recognition to any
20 government in Southern Rhodesia other than one constitutionally appointed under the 1961 Constitution, as modified by the Southern Rhodesia Act 1965

(3) BECAUSE the Appellate Division failed to give any effect to the Southern Rhodesia Act 1965 and the Southern Rhodesia (Constitution) Order in Council 1965 made thereunder

(4) BECAUSE the Appellate Division could not properly accord validity to legislative or administrative acts enacted or done otherwise than in accordance with the 1961 Constitution

(5) BECAUSE the detention of the Appellant's husband by the first
30 Respondent was unlawful in terms of section 58(1) of the 1961 Constitution

(6) BECAUSE the detention of the Appellant's husband was not justified by any measures falling within the terms of either section 58(2) or section 69 of the 1961 Constitution

(7) BECAUSE the Appellate Division under the 1961 Constitution, applying section 56D of the 1961 Constitution, was not entitled to recognise as "law" the measures of the rebel regime within the territory of the Court's own Sovereign

(8) BECAUSE the doctrine of necessity cannot be invoked as a principle of law to give effect to the measures of the rebel regime

(9) BECAUSE, in any event, the measures relied on by the rebel regime for detaining the Appellant's husband without trial could not be justified on any proper application of the doctrine of necessity

(10) BECAUSE the determination of the Appellate Division was wrong and ought to be reversed

S. KENTRIDGE

L. J. BLOM-COOPER

No. 13 of 1968

IN THE PRIVY COUNCIL

ON APPEAL

from the Appellate Division of the
High Court of Southern Rhodesia

BETWEEN:

STELLA MADZIMBAMUTO *Appellant*

AND

DESMOND WILLIAM LARDNER-BURKE
in his capacity as Minister of Justice
and of Law and Order

AND

FREDERICK PHILLIP GEORGE
in his capacity as Superintendent
of Gwelo Prison *Respondents*

CASE FOR THE APPELLANT

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