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MOUTON AND ANOTHER v. MARTINE.

(TRANSVAAL PROVINCIAL DIVISION.)

A 1968. *August* 15; *September* 23. BEKKER, BOSHOFF and THERON, JJ.

Costs.—Party and party.—Action settled.—Agreed that plaintiff to tax bill of costs as between party and party.—Plaintiff applying for a declaratory order construing the settlement.—Court usurping the functions of the Taxing Master.—Declaratory order under sec. 19
B *(1) (c) of Act 59 of 1959.—Invalidity of.—Setting aside of an appeal.*

Respondent had sued the appellant firm of attorneys for the balance of trust moneys admittedly received by the attorneys on behalf of the client but which the attorneys maintained they were entitled to retain as remunera-
C tion. In terms of a settlement of the action it was agreed that the respondent would be entitled to tax a bill of costs as between party and party and the appellants also agreed to the taxation thereof. The respondent had thereafter applied to Court for a declaratory order construing the settlement and obtained an order (*a*) declaring that respondent's attorneys on behalf of the respondent were entitled to set down the bill of costs prepared by them before the Taxing Master on the scale as between party and party; (*b*) declaring the respondent entitled to recover from the appellants his costs
D of opposing the attorney and client bill of costs, etc., as part of the party and party costs to which the respondent was entitled; (*c*) ordering the appellants to pay the costs of the proceedings. In an appeal,
Held, that the costs referred to in the agreement fell to be taxed by the Taxing Master in accordance with Rule 70 (3) of the Uniform Rules of Court.
Held, further, that the Court *a quo* was not entitled to consider and should not have considered the declaratory order under the provisions of section
E 19 (1) (*c*) of the Supreme Court Act, 59 of 1959.
Held, further, that the Court *a quo* was also not entitled to come to the conclusion that the costs of opposition to the attorney and client bill of costs were included in the party and party costs of the action that was settled.

Appeal from a decision of CLAASSEN, J.. The facts appear from the reasons for judgment.
F *H. Rothschild, S.C.* (with him *W. A. van Deventer*), for the appellants.
W. G. Muller, S.C. (with him *A. W. Mostert*), for the respondent.

Cur. adv. vult.

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Postea (September 23rd).

BOSHOFF, J.: This is an appeal from a judgment of CLAASSEN, J., sitting in the Chamber Court in the Witwatersrand Local Division, and concerns:
H (*a*) the question whether in the particular circumstances the costs of opposition to an attorney and client bill of costs are included in the party and party costs of an action in which the client sued a firm of attorneys for the balance of trust moneys admittedly received by the attorneys on behalf of the client; and
(*b*) the nature of the order made by the learned Judge in proceedings intended by the client to be proceedings fo declaratory order.

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The relevant facts are the following:

The appellants, practising in partnership as attorneys in Johannesburg, received from a certain company for and on behalf of the respondent, who resides in England, a certain sum of money in respect of the sale of shares which belonged to the respondent, which sum of money A the respondent had instructed them to pay into his banking account in Johannesburg. The appellants did not pay the entire sum into the banking account, but retained an amount of R3,150. The respondent thereupon instituted action against the appellants and alleged that an attorney and client relationship existed between them, that the appel- B lants received the sum of R90,000 on his behalf, paid R86,850 into the banking account and failed to pay or to account to him for the balance of R3,150. The appellants in their plea in effect admitted these allegations, but denied that they had failed to account to the respondent for the sum claimed on the following grounds:

1. The appellants had agreed to act as agents and brokers on behalf C of the respondent to effect the sale of the shares and in fact sold them. It was an implied term of the agreement that they would receive a remuneration based on the customary rate payable to agents and brokers for the sale of shares, or alternatively, a reasonable remuneration. The remuneration payable to the appellants was not less than D R3,150, which sum the appellants claimed from the respondent and which sum the appellants set off against the sum claimed.

2. Alternatively to the above, in the event of the Court finding that the appellants had failed to account to the respondent for the sum claimed, the appellants had performed certain other services as well, as duly authorised attorneys for and on behalf of the respondent, and E had made certain disbursements for and on behalf of the respondent. It was an implied term of their appointment as attorneys that the respondent would pay them a fair and reasonable remuneration for their services and reimburse them for disbursements made by them, and such remuneration and disbursements amounted to not less than the sum F claimed. The bill of costs of the appellants in respect of their services had been set down for taxation after due notice to the attorneys of the respondent on the 5th and 11th May, 1967, and after such taxation the appellants would have a liquidated claim against the respondent arising out of the services rendered and disbursements made by them in a sum of not less than the amount claimed, which sum the appellants would G set off against the respondent's claim. The appellants would ask the leave of the Court to amend their pleadings so as to include a counterclaim for the balance which the respondent owed the appellants after the set off of the sum claimed. The appellants in a prayer to the plea prayed that the respondent's claim be dismissed with costs, or alter- H natively, that judgment on the respondent's claim be postponed pending taxation of the appellants' bill of costs.

An attorney and client bill of costs for R7,326.66 was drawn by the appellants. The respondent was of the view that the bill contained various items of excessive charges, a large number of items which had already been paid in full and items which were not related to attorney and client business, and is instructed his attorney to brief counsel to oppose the taxation. T espondent and one Colin Corlett of Durban,

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both material witnesses on matters to which certain items in the bill
of costs related, came to Johannesburg by air to attend the taxation.
The appellants withdrew the bill of costs from taxation and the Taxing
Master, despite opposition on behalf of the respondent, allowed the
A appellants to do so. A fresh notice of taxation was thereafter served on
the respondent's attorneys and both the respondent and Corlett had
again to come from England and Durban respectively to be present at
the taxation. The Taxing Master received evidence in connection with
the taxation of the bill of costs and on the third day of the taxation a
B settlement was reached between the parties in terms of which the bill of
costs was taxed and allowed in an amount of R226. Immediately
thereafter the parties also settled the action in which the respondent
claimed R3,150 from the appellants.

The material provisions in the settlement relating to the bill of costs
were that the whole bill of costs, which included the items upon which
C the Taxing Master had refused to adjudicate, formed the subject of the
settlement and that the amount allowed was fixed in full and final
settlement of each and every claim which the appellants had, or may
have, against the respondent for legal fees and disbursements and that
there would be no award in respect of fees for drawing the bill of costs
or attending taxation. The material provisions in the settlement relating
D to the action in effect were that the amount of R3,150, together with
an agreed sum of interest of R336.87, would be paid to the respondent,
that the respondent would be entitled to tax a bill of costs as between
party and party in respect of the action, that the appellants agree to the
taxation of such a bill of costs and that nothing in the settlement would
E prevent the appellants, if so advised, from instituting action against the
respondent for the amount of R3,150, together with interest thereon, on
the basis of a remuneration at the customary rate or, alternatively, a
reasonable remuneration for the sale of the respondent's shares as
agents and brokers on respondent's behalf.

The respondent's attorneys thereupon drew a bill of costs as between
F party and party in respect of the action and included therein all the
costs and attendances of the respondent in opposing the taxation of the
attorney and client bill of costs. They sent a copy of the bill of costs to
the appellants and informed them of the inclusion of such costs and
expressed the view that the costs involved in the taxation of the attorney
G and client bill of costs were properly included in the bill of costs as
between party and party as contemplated in the settlement for the
reason that the attorney and client bill of costs was raised as an issue in
the pleadings and that it was necessary to adjudicate on the bill of costs
as a preliminary point in the disposal of the action. They invited the
appellants to advise them which items they disputed so that the matter
H could be referred to Court before the bill of costs was presented for
taxation. The appellants replied that they did not agree with the interpretation placed on the settlement and that they did not concede that
such costs could be recovered as a matter of law. The respondent
thereupon applied to Court for an order—

(*a*) declaring that the respondent's attorneys on beh[illegible] of the respondent were entitled to present the bill of costs for tax[illegible]n on the scale

(*b*) declaring that as a matter of law each and every item included
in the bill of costs was properly included in a party and party bill of
costs between the respondent, as represented by his attorneys, and the
appellants, and arose out of the action and, furthermore, that it remained only for the Taxing Master to assess the reasonableness or A
otherwise of each such item; and

(*c*) ordering the appellants to pay the costs of the application jointly
and severally, the one paying the other to be absolved.

The appellants in their answering affidavit denied that it was ever
the intention of the parties when settling the action to include the costs B
which the respondent had incurred in connection with the taxation of
the attorney and client bill of costs in the party and party costs, and
submitted that the taxation of the bill of costs as between party and
party was the function of the Taxing Master and that, if the respondent
was dissatisfied with his decision on the matter raised, the respondent
could take it on review. The application was presented to the Court C
and indeed dealt with by it as one for the interpretation of the settlement of the action and a declaratory order thereon. It was not an
application to obtain a special order from the Court to the effect that
the costs of opposition to the taxation of the attorney and client bill of
costs be allowed by the Court to be included in the costs of the action. D

The appellants opposed the application on the ground that the Court
was not competent to entertain or, alternatively, should not entertain
the application as it was the function of the Taxing Master to tax bills
of costs, and also on the ground that the costs of opposition to the taxation did not form part of the party and party costs of the action. The
Court rejected the appellants' opposition and made an order— E

(*a*) declaring that the respondent's attorneys on behalf of the respondent are entitled to set down the bill of costs prepared by them before the Taxing Master on the scale as between party and party;

(*b*) declaring that the respondent is entitled to recover from the F
appellants his costs of opposing the attorney and client bill of costs, of securing the attendances of the witnesses and the respondent's presence, and of attorney and counsel, as part of the party and party costs to which the respondent is entitled;

(*c*) ordering the appellants to pay the costs of the proceedings.

The appellants now challenge the correctness of the judgment of G
the Court *a quo* on virtually the same grounds on which the application was originally opposed. In the settlement of the action it was
agreed that the respondent would be entitled to tax a bill of costs as
between party and party and the appellants also agreed to the taxation
thereof. The appellants at no stage disputed the respondent's right to
present a bill of costs for taxation. The first part of the order made by H
the learned Judge in the Court *a quo* was obviously intended to convey
that the respondent was entitled to set down for taxation a bill of costs
which included the items to which the appellants had objected. In his
judgment the learned Judge decided that the respondent was entitled to
charge for the cost[illegible] opposition to the taxation, but expressly refrained from decidi[illegible] that all the items claimed by the respondent in
this connection were properly included on a party and party basis and

left it to the Taxing Master to decide whether every item was admis-
sible and, if so, the amount thereof. The second part of the order indi-
cates what the respondent is entitled to include and recover as part of
the party and party costs and it was consequently left to the Taxing
A Master to decide whether the items claimed were allowable on this
basis.

In former times it was the function of the Court, or one of the Judges,
to tax the costs of a case. The purpose of the taxation was really two-
fold; firstly, to fix the costs at a certain amount so that execution could
be levied on the judgment and, secondly, to ensure that the party who
B is condemned to pay the costs does not pay excessive, and the success-
ful party does not receive insufficient, costs in respect of the litigation
which resulted in the order for costs. In the Courts of Holland the
taxation of the costs was expressly reserved in the order for costs when
judgment was pronounced in the principal case. The form of the order
C was

"condemneren den impetrant of gedaagde in den kosten van dezen processe tot
taxatie en moderatie van den Hove".

For the purpose of taxation a declaration of costs was served on the
attorney of the party who was condemned to pay the costs. It was a
document prepared by the attorney and comprised a summary of the
case, a specified account of the costs which were to be taxed and the
D "na-kosten" which relate to the costs involved in the taxation. The
attorney of the party condemned to pay the costs may challenge the
various items of costs claimed in the declaration in the "diminutie"
which was a similar sort of document as the declaration and contained
the arguments on which the items were challenged. The attorney of
E the successful party then dealt with these arguments in a "contra-
diminutie". The taxation was then done by the Court, or commissioners
ordained by the Court to do the taxation, on these documents. The
party who was aggrieved with the taxation had a right of "revisie";
see *Regtsgeleerd, Practicaal en Koopmans Handboek* of van der Lin-
F den, 3.1.9.17; *Verhandeling over de Judiciele Practijcq of Form van
Procedeeren* of van der Linden, 2.8.2-6; *Manier van Procedeeren* of
Merula 4.102.1.3 and 4.104.1.1-4. The costs which the Court allowed
on taxation were the necessary and judicial costs which were incurred
in connection with the litigation itself. In this regard *Merula, op. cit.*,
4.104.1.5. points out:

G "Ende men zal doen de voorschreven taxatie, de oogen daarop hebbende,
als 't behooren zal:
V. Dat is, dat geen hinder, praejudicie, agterdeel of schade geschiede in dit
stuk, nog den triumphant, nog den succumbant: dezen in onnodige kosten toe
te laten: dien in noodige te verwerpen. Noodige en judicieele kosten moeten
alleen getaxeerd worden: op onnoodige, en die uit het proces niet spruiten,
behoord men geen regard te nemen."

H He refers to *Gail*, 1.151.4. *quae sint necessariae et judiciales, quaeve
item non necessariae et delicatae*. In para. 1 of Bk. 1, Obs. 151, *Gail*
first of all discusses costs which are *delicatae et voluntariae* which
should not be allowed on taxation and then proceeds to deal with costs
that should be allowed. According to him, there must be taken into
account judicial and necessary expenses, which were incurred on account
of the case itself, concerning the institution and prosecut[illegible] of the pro-
ceedings. He divides costs of this kind into four cat[illegible]ies and dis-
cusses how such costs should be taxed. All these cos[illegible] relate to the

institution and conduct of the judicial proceedings. In para. 11 *Gail*
states:

"Thus it must be observed in conclusion that the Judge must tax necessary and
judicial expenses and not luxurious and voluntary expenses so that he does not
burden the unsuccessful party unfairly. He must likewise have regard to such
costs which do not exceed the limits of reasonableness. He must also observe A
reasonable limits and not give effect to the immoderate luxury of just anyone."

At the present time the function of taxing bills of costs in lawsuits in
the Supreme Court has been assigned to the Taxing Master and he is to
be guided in performing this function by these principles which have
been enshrined in Rules of Court. As far as the Transvaal is concerned,
sec. 1 of Law 12 of 1899 provides that all bills of costs in lawsuits in B
the High Court must be taxed by the Taxing Master of the High Court
unless the High Court may otherwise determine. Sec. 43 (2) (*a*) of the
Supreme Court Act, 59 of 1959, empowers the CHIEF JUSTICE and the
JUDGES-PRESIDENT of the several Divisions of the Supreme Court to
make Rules, subject to the approval of the State President, for regulat- C
ing the conduct of the proceedings of the various Provincial and Local
Divisions and, in terms of sub-sec. (3) (*n*), any such Rules may prescribe
the taxation of bills of costs and the recovery of costs. Rule 70 of the
Rules of Court, which were made under and by virtue of the afore-
mentioned section, prescribes the taxation and the tariff of fees of
attorneys. In terms of sub-rule (1) it is competent for any Taxing D
Master to tax all bills of costs for services actually rendered by an
attorney in his capacity as such, whether in connection with litigation
or not, subject to a proviso which is not material to this case. With a
view to affording the party who has been awarded an order for costs
a full indemnity for all costs reasonably incurred by him in relation to E
his claim or defence and to ensure that all such costs shall be borne
by the party against whom such order has been awarded, the Taxing
Master shall, in terms of sub-rule (3), on every taxation allow all such
costs, expenses and charges as appear to him to have been necessary or
proper for the attainment of justice or for defending the rights of any
party, but, save as against the party who incurred the same, no costs F
shall be allowed which appear to the Taxing Master to have been in-
curred or increased through over-caution, negligence or mistake, or by
payment of a special fee to an advocate, or special charges and ex-
penses to witnesses or to other persons, or by other unusual expenses.
It is the expressed intention of this sub-rule to afford a party against G
whom an order for costs has been made in a lawsuit a full indemnity
for all costs reasonably incurred by him in relation to his claim or
defence. It consequently contains an injunction on the Taxing Master
to allow all such costs, charges and expenses as appear to him to have
been necessary or proper for the attainment of justice or for defending
the rights of any party. This sub-rule, as is apparent from its contents, H
purports to deal with judicial expenses, and the Taxing Master is en-
joined only to allow such judicial costs, charges and expenses as appear
to him to have been necessary or proper in the sense of having been
reasonably incurred. As against the party condemned to pay the costs,
such costs do not i[illegible]de costs which appear to the Taxing Master to
have been incurr[illegible]r increased through over-caution, negligence or
mistake, or by the payment of a special fee to an advo[illegible]

charges and expenses to witnesses or to other persons, or by other un-
usual expenses. Whether judicial costs have been necessary or proper
is thus always a question of fact to be decided by the Taxing Master.
Rule 48 provides for a review of taxation by a Judge of the Supreme
A Court. Any party dissatisfied with the ruling of the Taxing Master as to
any item or part of an item which was objected to or disallowed *mero*
motu by the Taxing Master may, in terms of sub-rule (1), subject to a
proviso where the amount involved is less than R10, require the Taxing
Master to state a case for the decision of a Judge. On such a review
B the Judge will have to consider whether sufficient grounds exist for
interfering with the exercise of the discretion of the Taxing Master.

On this broad basis, generally speaking, only amounts which the
successful party has paid, or becomes liable to pay, in connection with
the due presentment of his case are recoverable as costs, and such a
party is, for instance, only entitled to claim his own witness expenses
C provided he is duly declared to have been a necessary witness; cf.
Texas Co. (S.A.) Ltd. v. *Cape Town Municipality*, 1926 A.D. 467 at
pp. 488 and 489. The Taxing Master is also limited in exercising his
functions in respect of judicial costs, i.e. to, say, costs which are *prima*
facie directly and necessarily incurred in connection with the due pre-
D sentment of the case. There are also costs which are incurred in con-
nection with something incidental or collateral to the litigation and not
as a direct or necessary step in the conduct of the action. Such costs are
not covered in an ordinary judgment for costs in the action or pro-
ceedings, and it is the function of the trial Court to decide whether or
not such costs should be included in the judicial costs and be incor-
E porated in the party and party costs. The Taxing Master has no right
to usurp the functions of the Court in this regard. The qualifying ex-
penses of an expert or professional witness may, for instance, have
been properly and necessarily incurred for the due presentation of a
case, but are not judicial costs arising directly out of the action but are
F in the nature of collateral and incidental costs and will not be allowed
by a taxing master unless such costs have been incorporated by the
Court into party and party costs; cf. *Union Government* v. *Modder-*
fontein "B" Goldmines Ltd., 1925 T.P.D. 61; *Grimbeek* v. *Oosthuizen*,
1927 T.P.D. 899; *Estate Aswegen* v. *Steytler*, 1931 C.P.D. 470;
Thumler v. *Weis*, 1934 E.D.L. 224. A further instance of such costs
G would be the costs of a running transcript of evidence and the tran-
script of evidence; see *South African Railways and Harbours* v. *Wil-*
cock, N.O., 1935 C.P.D. 489 at p. 502; *Randles Bros. & Hudson Ltd.*
v. *Commissioner of Customs and Excise*, 1942 N.P.D. 244.

In the instant case the taxation of the attorney and client bill of costs
H was raised in the appellants' plea, not for the purpose of introducing
an issue to be decided by the Court, but merely for the purpose of in-
dicating to the Court that the appellants had a claim of some kind
which, when reduced to a fixed sum on taxation, would entitle the
appellants to an automatic set-off by operation of law. The taxation
of that bill of costs was merely a matter incidental and collateral to
the action to which the pleadings related and was in no part of the
... than any other matter would have

result of the outcome of which the appellants would have been entitled
to a judgment or award in a fixed sum of money which would have
brought set-off into operation and was raised in the pleadings as a
ground of postponement to allow for such set-off. On the plea as it
stands the reference to the taxation of the bill of costs was evidently A
solely for the purpose of claiming a postponement pending the taxa-
tion. The costs of opposition incurred in connection with the taxation
of the bill of costs cannot be said to have been incurred directly or
necessarily in connection with the due presentment of the respondent's
case and do not form part of the party and party costs in the action that B
was settled. Furthermore, the purpose of a taxation is to fix the amount
due under a bill of costs. No provision is made in the tariff for the costs
incurred in opposing such a taxation. The party who draws the bill of
costs and has it taxed is also only entitled to a charge allowed in the
tariff, despite the expense he has been put to by opposition in having
the bill taxed. When the attorney and client bill of costs was settled, it C
could only have been settled on this basis. In the circumstances, it can
never be correctly argued that it was within the contemplation of the
parties or an implied term of the settlement of the action that the costs
incurred in connection with the opposition of the taxation were to form
part of the party and party costs of the action. D

The Court *a quo* was approached to construe the settlement which
entitled the respondent to the party and party costs of the settled action.
There is nothing ambiguous or unusual about an agreement to pay
party and party costs, and such costs fall to be taxed by the Taxing
Master according to the provisions of Rule 70 (3). The learned Judge
in the Court *a quo* purported to act under the provisions of sec. 19 (1) E
(*c*) of the Supreme Court Act, 59 of 1959, in entertaining the applica-
tion and making the declaratory order. This section provides that a
Provincial or Local Division shall have power in its discretion, and at
the instance of any interested person, to enquire into and determine
any existing, future or contingent right or obligation, notwithstanding F
that such person cannot claim any relief consequential upon the de-
termination. The respondent was certainly a person who was interested
in the existing rights which he derived from the settlement as regards
the party and party costs, but such rights could not be enquired into
and determined by the Court in respect of individual items of costs,
charges and expenses without impinging upon the functions of the Tax- G
ing Master. The purpose of the declaratory order was not to bind the
appellants but the Taxing Master whose function it is to tax the bill
of costs in accordance with the provisions of Rule 70 (3), but he was
not made a party to the proceedings so as to be bound by the order.
In my view sec. 19 (1) (*c*) cannot be used for the purpose it was used H
in this case. While purporting to deal with the matter under the provi-
sions of sec. 19 (1) (*c*) the learned Judge, instead of construing the
settlement, in effect considered all the circumstances surrounding the
case and really made an order incorporating the costs incurred in con-
nection with the opposition to the taxation in the party and party costs
in the action, something which only a trial Court could have done on
the application of the respondent.

a quo was not entitled to consider and should not have considered the declaratory order under the provisions of sec. 19 (1) (*c*) and was also not entitled to come to the conclusion that the costs of opposition to the attorney and client bill of costs were included in the party and A party costs of the action that was settled.

In my view the appeal should be allowed with costs and the judgment given in the Court *a quo* be amended to read—"Application dismissed with costs". The Court was asked to allow the costs of two counsel. Although the matter was dealt with on points raised on appeal, this appeal was not decided entirely on the contentions advanced by the B parties. In my view this is not a case in which the fees of two counsel should be allowed.

THERON, J. and BEKKER, J., concurred.

C Appellants' Attorneys: *Gordon, Michalson and Nathan Silver*, Johannesburg; *Dyason, Douglas, Muller and Meyer*, Pretoria. Respondent's Attorneys: *Cliffe, Dekker and Todd*, Johannesburg; *Adams and Adams*, Pretoria.

D

S. v. BHANA.

(TRANSVAAL PROVINCIAL DIVISION.)

1968. *August* 19; *September* 20. BEKKER and TRENGOVE, JJ.

E

Magistrate's court.—Criminal proceedings.—Trial.—Conversion of a summary trial under sec. 93 (1) *of Act* 32 *of* 1944.*—Grounds for.—Problems facing an accused whose defence is that enactment* ultra vires.*—No ground for conversion.—Sec.* 110 *of Act.—Inapplicability of.*

F

A magistrate's court, in considering whether a matter is more proper for the cognisance of a Superior Court for the purposes of section 93 (1) of Act 32 of 1944, is required to apply its mind only to the nature of the offence and its magnitude and to nothing else. The problems facing an accused whose defence is that the enactment under which he is charged is *ultra vires* do not constitute a sufficient ground for the conversion of a G summary trial under section 93 (1), nor do the provisions of section 110 of the Act assist the accused.

Appeal from a conviction in a magistrate's court. The facts appear from the reasons for judgment.

I. Mahomed, for the appellant.

H *K. D. M. Moodie, S.C.* (with him *J. G. de Beer*), for the State.

Cur. adv. vult.

Postea (September 20th).

TRENGOVE, J.: The appellant was charged in the magistrate's court for the district of Johannesburg, on two counts of unlawfully occupy-

ing certain property in Pageview, Johannesburg, in contravention of the provisions of the Group Areas Act. Count 1, which relates to the period 6th February, 1966 to 25th October, 1966, was brought under the provisions of sec. 23 of Act 77 of 1957, and count 2, which covers the period 26th October, 1966 to date of summons, was brought under A the provisions of sec. 26 (1) of Act 36 of 1966. There are two counts only because in October, 1966, Act 77 of 1957 was repealed by Act 36 of 1966, and, in effect, the two counts really constitute one charge covering the period from 6th February, 1966 to the date of summons. The charge is that during the aforesaid period the appellant, being a member of the Indian group, wrongfully and unlawfully occupied cer- B tain land and premises in the township of Pageview, within an area declared by Proc. 110 of 1963 to be an area for occupation by members of the White group.

At the commencement of the trial in the magistrate's court, the appellant's attorney informed the magistrate that one of the defences C which the appellant wished to raise was that Proc. 110 of 1963 was *ultra vires* and he stated that it would be necessary to adduce evidence in support of this attack upon the validity of the Proclamation. The appellant's attorney then applied for the conversion of the summary trial into a preparatory examination on the ground that a magistrate's court has no jurisdiction to pronounce upon the validity of this Pro- D clamation or to hear evidence at a summary trial in support of any alleged ground of invalidity. The magistrate refused the application, the hearing then continued and at the conclusion of the trial the appellant was found guilty as charged.

The appellant has appealed against this conviction and the only E ground of appeal on which he relies is that the magistrate erred in declining to convert the summary trial into a preparatory examination under sec. 93 (1) of the Magistrates' Courts Act, 32 of 1944. This, therefore, is the only issue we have to decide. In his reasons for judgment on this aspect of the case, the magistrate stated:

"In terms of the provisions of sec. 93 (1) of the Magistrates' Courts Act, 32 F of 1944, the court can convert a summary trial into a preparatory examination, *inter alia*, if it appears that the offence under trial is from its nature or magnitude more proper for the cognisance of a Superior Court . . . It is the nature or magnitude of the offence that the court must look at in deciding whether it would be proper or not to convert the proceedings. In this matter the offence under trial was neither by nature nor by magnitude such that it was not fit and proper to be dealt with in the magistrate's court. The nature of possible G defences to the offence does not fall within the ambit of sec. 93 (1) . . . it was not the Legislature's intention in sec. 93 (1) to provide machinery for an accused to bring a specific type of defence before a court with jurisdiction to test that defence . . . The intricacies, nature or magnitude of matters purely coincidental to the fact that an accused has been charged with a particular offence do not fall within the ambit of the section."

I should perhaps point out, at this stage, that it is common cause that H the public prosecutor, in the instant case, opposed the application for a conversion and Mr. *Mahomed*, who appeared for the appellant, furthermore conceded that, in view of the provisions of sec. 89 of Act 32 of 1944 and sec. 46 (6) of Act 36 of 1966, the offence in the present case could not be regarded as one which from its nature or magnitude was cognisable on by a Superior Court. Mr. *Mahomed* submitted, however, that the magistrate placed a far too restricted interpretation on sec. 93 (1). He contended that the language of the section was wide