**1971** *Present :* **H. N. G. Fernando, C.J., and Thamotheram, J.**

A. K. DAVID, Appellant, *and* M. A. M. M. ABDUL CADER, Respondent

*S. C. 148/66 (F)—D. C. Puttalam, 6327*

*Delict—Liability of a person for breach of a duty imposed on him by statute—Chairman of an Urban Council—Refusal by him to grant a licence for a cinema—Breach of duty imposed on him by the Public Performances Ordinance—Liability to be sued personally as an individual person—Electricity Act.*

Plaintiff applied to the defendant, who was at that time the Chairman of an Urban Council, for a licence under the Public Performances Ordinance for a cinema. Although the provisions of the Public Performances Ordinance and the Rules made thereunder and the Electricity Act entitled the defendant to the grant of an unrestricted licence, the defendant offered to issue a licence containing the following direction :—" Council's lights should be employed provisionally between the hours of 9.30 p.m. to 12 midnight daily and 6 p.m. to 9.30 p.m. on every other day ". The plaintiff refused to accept this conditional licence and instituted the present action for damages on the ground that the defendant wrongfully and maliciously neglected to issue to the plaintiff the licence required by him for using electrical energy for the purpose of daily public performance at his cinema.

At an earlier stage of this action, the Privy Council had held (65 N. L. R. 253) that if indeed there was a right of action arising out of the breach of the duties of the licensing authority, the only way in which the licensing authority could be sued was as an individual person, for the granting or withholding of these licences by the chairman was his personal responsibility.

*Held,* that, inasmuch as the defendant was not legally competent to offer a qualified licence, his refusal to issue an unrestricted licence constituted a breach of a statutory duty imposed on him by the Public Performances Ordinance. Such a breach of duty was actionable in delict and it was not necessary to prove actual ill will or spite. It was immaterial that the object which the defendant had in imposing the restrictions on the licence was a laudable one.

APPEAL from a judgment of the District Court, Puttalam.

*C. Ranganathan, Q.C.,* with *Nimal Senanayake,* for the plaintiff-appellant.

*N. E. Weerasooria, Q.C.,* with *M. S. M. Nazeem* and *M. A. M. Baki,* for the defendant-respondent.

*Cur. adv. vult.*

May 30, 1971. H. N. G. FERNANDO, C.J.—

The plaintiff in this action applied in July 1958 to the defendant, who was then the Chairman of the Urban Council, Puttalam, for a licence under the Public Performances Ordinance for a cinema which was newly constructed in place of an old cinema which had previously been licensed. After some correspondence the plaintiff made a fresh application dated 14th November 1958. After further correspondence the defendant informed the plaintiff on March 11, 1959 that electricity could be supplied to the plaintiff's cinema daily " only for the late show starting from 9.30 p.m. and on every other day for the early show commencing from 6.00 p.m. as the period from 6.00 p.m. to 9.30 p.m. is being the peak hour ". Thereafter the defendant offered to issue to the plaintiff a licence drawn up in the terms set out in the document P62 which was produced at the trial. Cage 12

of P62, which is intended for " any special directions which the licensing authority may give under Rule A5 ", contained the following direction :—" Council's lights should be employed provisionally between the hours of 9.30 p.m. to 12 midnight daily and 6 p.m. to 9.30 p.m. on every other day." The plaintiff refused to accept this licence. He subsequently instituted this action for damages on the ground that the defendant wrongfully and maliciously neglected to issue to the plaintiff the licence required by him.

After the first trial of this action, the action was dismissed in the District Court on the ground that the plaintiff was not liable in his individual capacity for the act of refusing the licence. In appeal it was held in the Supreme Court that the plaintiff could not maintain any right of action for damages in respect of the refusal or failure to grant a licence of the kind involved, even if the licensing authority had acted maliciously in withholding the licence.

On a further appeal from that judgment, Their Lordships of the Privy Council held (65 N. L. R. 253) that the granting or withholding of these licences by the Chairman of the Urban Council is his personal responsibility, and that if indeed there is a right of action arising out of the breach of the duties of the licensing authority, the only way in which he can be sued is as an individual person.

Secondly Their Lordships held that the Supreme Court had relied upon a decision of the English Court of Appeal which in the modern context was insufficient to found the proposition that an applicant for a licence can in no circumstances have a right of action for damages if there had been a malicious misuse of the statutory power to grant the licence. Their Lordships made the following further observations :—

> " Much must turn in such cases on what may prove to be the facts of the alleged misuse and in what the malice is found to consist. The presence of spite or ill-will may be insufficient in itself to render actionable a decision which has been based on unexceptionable grounds of consideration and has not been vitiated by the badness of the motive. But a " malicious " misuse of authority, such as is pleaded by the appellant in his plaint, may cover a set of circumstances which go beyond the mere presence of ill-will, and in their Lordships' view it is only after the facts of malice relied upon by a plaintiff have been properly ascertained that it is possible to say in a case of this sort whether or not there has been any actionable breach of duty. "

The judgment of the Supreme Court dismissing the plaintiff's action was therefore reversed, and a fresh trial has thereafter been held. At the fresh trial the learned District Judge was satisfied that, in refusing the licence required by the plaintiff and in offering to him only a licence in the form of P62 (which including the condition that there could be a performance at 6.30 p.m. only on alternate days), the defendant did not act out of ill-will or out of bad faith, and reached a finding that the defendant did not wrongfully or maliciously refuse to issue the licence. This finding was based on the acceptance of facts to which I will now refer.

The Urban Council of Puttalam, of which the defendant was Chairman, was authorized by a licence issued under the Electricity Act (Chapter 205) to supply electrical energy in the administrative area of the Council. For a somewhat long period prior to 1958 the installation maintained by the Council for the supply of the energy in its area had been in an unsatisfactory condition. The Chairman was informed by officers of the Council that it would not be possible, having regard to the condition of the Council's plants and installation, to allow a full supply of electricity daily for the existing cinema and also for the plaintiff's new cinema. On this advice, the defendant decided that when the plaintiff's cinema commenced to operate, each of the two cinemas should have a 6.30 p.m. performance only on alternate days. The proprietor of the existing cinema had agreed to this proposal, and the defendant's offer to the plaintiff of the licence in the form of P62 was made in pursuance of that proposal. Stated briefly, the finding of the District Judge was that the defendant was faced with the situation that the Council, of which he was Chairman, could not allow the plaintiff to operate his cinema daily for a performance at 6.30, without running the risk of a break-down of the Council's electricity supply.

It is now necessary to refer to matters concerning the supply of electricity by the Council. The plaintiff, when he commenced to replace the old cinema by the construction of a new one in 1957, applied to the Council for a disconnection of his former electricity supply. Thereafter in June 1958 he applied for a re-connection and this application was allowed by the Chairman. In the result, the plaintiff's contract with the Council for a supply of electricity for this cinema became effective when this re-connection was allowed. The plaintiff has produced receipts for charges levied by the Council in respect of the re-connection and for the security deposited against the cost of current to be supplied. In the language of the Electricity Act, the plaintiff was a " consumer " of electricity at his cinema at the time when he made his application to the defendant for a licence under

the Public Performances Ordinance. That being so, the Council was bound to supply electricity for the theatre in accordance with the terms of its contract with the plaintiff, and the Council had apparently no power under the Electricity Act or under the contract to prevent the plaintiff from using electrical energy for the purpose of daily public performances at his cinema.

It was not argued at the trial that the Council could have issued a lawful direction under the Electricity Act restricting the plaintiff's use of current between 6.30 and 9.30 p.m. on alternate days. Indeed, if there had been such a power, the Chairman's officers would not have hesitated to exercise it in order to avoid the risk of serious damage to the Council's electrical installation.

It thus becomes clear that in seeking to enforce the restriction contained in the licence P62, the defendant was not doing something authorized by the Electricity Act. Indeed the defendant in a letter written to the plaintiff in December 1958 (P44) expressly stated "I have not contemplated that an issue of a public performance licence to your cinema is subject to your consenting to my arrangements with regard to the supply of current". But it was precisely this consent which was required from the plaintiff when he was offered the licence P62.

The learned District Judge has not held that the restriction contained in P62 was one which could have been enforced under the Electricity Act. But he has held that the Rules under the Public Performances Ordinance allowed to the defendant a discretion to attach to a licence under that Ordinance "special directions because of the special circumstances that prevented him from releasing a full quantity of electricity".

Counsel appearing for the defendant in appeal could make no serious attempt to support the correctness of this finding of the District Judge. He however contended that the Rules under the Public Performances Ordinance did confer on the local authority (in this case the defendant) a discretion to refuse a licence under the Ordinance, and accordingly that if there was a discretion to refuse a licence there was also a discretion to specify the restriction which P62 contains. Counsel relied for this purpose on the words in Rule A5 (Subsidiary Legislation Vol. 3, page 357) that the Local Authority "may if he sees no objection, grant a licence", and also on the provision in Rule A6 that a licence may at any time be withdrawn by the Local Authority at his discretion. I will assume for present purposes that there may be grounds, such as detriment to the public interest or the avoidance of congestion or the existence of some epidemic, which might constitute a proper objection to the grant of a licence. But even that assumption does not in my opinion avail the

defendant. In this case, he has not refused a licence, but has instead sought to impose a condition restricting the authority given by a licence. It is clear from Rule A5 that the only conditions which may be so imposed are conditions "necessary in the interest of the safety and the comfort of the public". The condition sought to be imposed is clearly outside this category.

If indeed the Electricity Act had authorized the Council to impose the condition in question, it may be possible to hold that the defendant, by reason of his power to take objections into account, had also the power to impose that condition. But, as has already been stated, the Electricity Act did not permit the Council or the defendant to impose such a condition.

The presentation of public performances is not an activity which is unlawful or dangerous, and the object of requiring the licensing of a place such as the cinema is not to prohibit the exhibition of films, but only to secure that they are exhibited in a building constructed and maintained with due regard to the safety and comfort of audiences. Hence a person who applies for a licence for presenting public performances in a building which complies with all the requirements imposed by law is entitled to the issue of a licence ; and the defendant, in refusing the licence for which the plaintiff applied and in offering a licence which contained an invalid restriction, acted in a manner not authorised by law, and denied to the plaintiff his right under the law. This denial constituted a breach of the duty, which the defendant owed, to issue licences under the Ordinance to persons entitled to such licences. The judgment of the Privy Council at an earlier stage of this action contemplated that under the Roman Dutch Law such a breach of duty might well be actionable.

Wille (Principles of South African Law, 5th Edition, 502) states that "legislation, by imposing a duty, positive or negative, on one person, may impliedly confer a right on another person ..... and if the person subject to the duty commits a breach of the duty, his act or omission is equivalent to *culpa* and is an infringement of the right".

It seems to me that in this case there were present the requisites of the *actio injuriarum* as stated in Maasdorp's Institutes of South African Law, Vol. 4 page 6 :—

1. An intention in the part of the offender to produce the effect of his act. The defendant's conduct was with full knowledge that the plaintiff would be prevented from running his cinema for lack of the requisite licence.

2. An overt act which the person doing it is not legally competent to do. The defendant was not legally competent to offer a qualified licence.

3. An aggression upon the right of another by which the other is aggrieved. There was here an aggression upon the plaintiff's right under the Ordinance, and the plaintiff was clearly aggrieved by being thereby prevented from exercising his right to run a cinema.

Maasdorp in the same context points out that it is not necessary to prove actual ill will or spite, and that it is immaterial that the object which the defendant had in view was a laudable one. Thus the excuse which the learned District Judge was able to find for the conduct of the defendant in this case does not relieve him from liability.

It appears that, if the defendant had in the normal course issued a licence to the plaintiff, the licence would probably have been effective from 1st January 1959. But he was denied a licence for the whole of the year 1959. He has estimated the damages which he suffered by reference to the income actually received at the cinema after it was licensed in March 1960. The return which he made to the Council for the purpose of the levy of Entertainment tax for 1960 shows that on an average the monthly gross earnings at the cinema were Rs. 10,000. Deducting from these earnings 60 per cent for expenses, the plaintiff has in his evidence restricted his claim for damages to Rs. 4,000 per month. The claim seems to me fair and reasonable.

The judgment and decree under appeal are set aside, and judgment will be entered for the plaintiff in a sum of Rs. 48,000 and for costs in both Courts.

THAMOTHERAM, J.—I agree.

*Appeal allowed.*