

FAWKES & WARD, JJ. {  
December 18th, 1912.

FICHARDT vs. SMUTS, N.O.

*Law 4 of 1895, Article 14.*

*A farmer who keeps more than 10 heads of coloured families living on his farm without having acquired the special permission prescribed by the Native Passes and Squatting Law (No. 4 of 1895) cannot be sued in a civil action for payment of the tax imposed by Article 14 of that Law.*

Appeal from a decision of the Resident Magistrate of Bloemfontein.

Respondent (plaintiff in the Court below) had sued defendant (now appellant) for the sum of £25 alleged to be due under Article 14\* of Law 4 of 1895 (Native Passes and Squatting Law). Article 9 of that Law provides that no registered owner may keep more than five heads of coloured families on his farm except as provided for in other sections of the Law. Article 12 enacts that it is necessary to obtain special leave from the Landdrost to keep more than five heads of coloured families. Article 17 prescribes the penalties to which an owner, occupier or lessee of a farm is liable who keeps more heads of coloured families on his farm than the Law allows, inclusive of the number allowed him by Article 12.

The plaintiff alleged that defendant had obtain no special leave from the Magistrate, in terms of Article 12, to keep more than 5 heads of native families upon his farm, and he claimed, under Article 14, the sum of £25, being £5 for each head of a coloured family above 10 and up to 15. The evidence showed that defendant had more than 15 heads of families upon his farm. The Magistrate overruled defendant's objection to the summons that he could not be liable under Article 14 and gave judgment for plaintiff for the sum of £25 and costs.

*C. L. Botha*, for the appellant: Where a statute creates a new duty and provides a penalty for a breach thereof the only remedy is the enforcement of the penalty.

\* Article 14, so far as material, reads :—"Should any owner . . . keep more than five heads of coloured families with leave of the Landdrost, he shall be bound to produce his written permission so to do, to the Field-cornet, and shall yearly when the personal taxes are being collected be bound to pay £5 per annum to the Field-cornet for each head of family above ten and up to fifteen. . . ."

1912.  
Dec. 18.  
Fichardt vs.  
Smuts, N.O.

1912.  
Dec. — 18.  
Fichardt vs.  
Smuts, N.O.

Appellant never applied for leave to keep more heads of families than five upon his farm and does, therefore, not come under the provisions of Article 14. The only remedy was a criminal prosecution under Article 17.

*H. F. Blaine, K.C.*, for the respondent: The owner of a farm who keeps more than ten families thereon, whether with or without permission, is liable to a civil action for payment of the tax as well as to a criminal prosecution. If not the law would sometimes operate to the disadvantage of the man who got special leave, and to the advantage of the man who did not.

[FAWKES, J.: The Magistrate's special permission is limited to 15 heads. Can a tax be imposed upon an unlawful act?]

No man can rely upon his own unlawful act as a defence to a claim.

FAWKES, J.: This is an appeal from the decision of the Assistant Resident Magistrate of Bloemfontein in a civil action in which he awarded the tax mentioned under Article 14 of the Native Passes and Squatting Law (No. 4 of 1895) to the Minister of Finance in respect of five families in excess of ten found to be living on the appellant's farm. Article 12 provides that the Magistrate may grant leave in writing to an applicant to keep more than five heads of coloured families upon his farm, but he cannot give this leave for more than fifteen heads of coloured families. Article 14, following the provisions of Article 12, provides that when leave has been granted by a Landdrost to keep coloured families on a farm in excess of the five, a tax of £5 for each head is to be paid where there are more than ten such heads and up to fifteen. It appears that the appellant in this case got no permission at all from the Magistrate and in these circumstances I do not think the provisions of Article 14 can apply. The appeal will, therefore, be allowed and judgment entered for the defendant with costs in this Court and in the Court below.

WARD, J., concurred.

[Appellant's Attorneys, MCINTYRE & WATKEYS.  
Respondent's Attorneys, GORDON FRASER & MCHARDY.]

[Reported by C. A. BECK, Esq., Advocate.]