212/54

212/54

G.P.-S.918—1950-1—2,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division).
Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

MAHOMED ISMAIL PATEL *Appellant,*

versus

MINISTER OF THE INTERIOR & REGR. OF DEEDS (TVL) *Respondent.*

Appellant's Attorney / *Prokureur vir Appellant* KWT A.

Respondent's Attorney / *Prokureur vir Respondent* Maude & VL.

Appellant's Advocate / *Advokaat vir Appellant* S.A. Maisels QC; C. Gagnet QC; C.F. Eloff.

Respondent's Advocate / *Advokaat vir Respondent* L. Theron.

Set down for hearing on / *Op die rol geplaas vir verhoor op* FRIDAY 4TH MARCH 1955

2 S & S: L

(9.45 — 12.30) — C.A.V.

Judgment: 30/3/55.

Appeal dismissed, with costs.

Henning, Steyrens, van Heerden, Hoexter & Jansen JJ.A.

Registrar.

30/3/55.

Original

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

MAHOMED ISMAIL PATEL Appellant

and

THE MINISTER OF THE INTERIOR and THE REGISTRAR OF DEEDS, TRANSVAAL. Respondents

Coram:Greenberg, Schreiner, van den Heever, Hoexter et Fagan, JJ.A.

Heard: 4th. March, 1955. Delivered: 30-3-1955

J U D G M E N T

GREENBERG J.A. :- The appellant instituted action in the Transvaal Provincial Division against the respondents for an order declaring that he is not debarred, under the laws relating to the tenure of land by Asiatics in force from time to time in the Transvaal subsequent to the promulgation of Act 12 of 1924 and prior to the promulgation of Act 41 of 1950, from lawfully holding fixed property in such province. In his declaration, after setting out in the first three paragraphs who are the parties to the action, he alleged :-

"4./.....

"4. The Plaintiff was born at Johannesburg in what is now the Transvaal Province of the Union of South Africa on the 25th day of September, 1896, to certain FATIMA ABDURRAHMAN, a female member of the race or class known as Cape Malays.

5. The father of the plaintiff was one ISMAIL AMOD PATEL an Asiatic Indian, but the union between the plaintiff's father and mother (which was solemnized according to Islamic (Mohammedan) rights at a time when a previous union between the said ISMAIL AMOD PATEL and an Indian woman according to such Islamic rights still existed and was thus a polygamous union) was at all material times not recognised as a valid marriage in the South African Republic or thereafter in the Transvaal Colony or thereafter in the Union of South Africa, and is still not so recognised.

6. The Plaintiff -

(a) Was brought up and educated as a Cape Malay.

(b) Has always -

(i) Regarded himself and held himself out as a member of the race or class known as Cape Malays.

(ii) Lived as a Cape Malay among members of the race or class known as Cape Malays.

(iii) Followed Cape Malay customs and the Cape Malay manner of living.

(iv) Adhered to and professed Cape Malay religion.

(c) Has brought up and educated his children as members of the race or class known as Cape Malays and in the Cape Malay religion.

(d) Has been generally regarded and accepted as a member of the race or class known as Cape Malays and is still so regarded and accepted.

(e) Was at all times and still is in fact and in law a member of the face or class known as Cape Malays.

(f)/.....

(f) Is for the purposes of Law 3 of 1885 of the Transvaal as amended deemed, under the provisions of Act 12 of 1924, not to be a member of one of the Native races of Asia."

7. In this paragraph the appellant gives a list of fixed properties in the Transvaal of which he is the registered owner, and of the Deeds of Transfer into his name of these properties; it is not necessary to give this list.

"8. In all the aforementioned Title Deeds, the Plaintiff is described as Mahomed Ismail Patel (Cape Malay) born on the 25th. September, 1896.

9. The First Defendant, however, now contends that the Plaintiff was as at the date of coming into force of the Group Areas Act No. 41 of 1950, i.e. as at the 30th March, 1951 was subject to the provisions of Law 3 of 1885 of the Transvaal and was at that date debarred from holding fixed property in the Transvaal and the First Defendant has called upon the Plaintiff to sell the fixed properties more fully set out in paragraph 7 hereof to a person who may lawfully hold such property and has threatened upon failure to comply with such demand to take proceedings in respect of such properties under the provisions of Section 20 of the Group Areas Act No. 41 of 1950 aforesaid.

10. The Plaintiff refers to the facts set out in paragraphs 4, 5 and 6 hereof and contends that he is not debarred under the laws relating to the Tenure of Land by Asiatics in force from time to time in the Transvaal subsequent to the promulgation of Act No.12 of 1924 and prior to the promulgation of Act No. 41 of 1950 from lawfully holding fixed property in such province.

11./.....

11. The Plaintiff is desirous that this Honourable Court shall at his instance inquire into and determine the Plaintiff's right to hold fixed property in the Transvaal."

The respondents excepted to this declaration on the ground that it is vague, embarrassing and bad in law and discloses no cause of action; the exception was upheld on the ground that in order to make out a case for the relief claimed the appellant would have to show that he belonged to the race known as Cape Malays and that the allegations in the declaration, even if admitted, do not show this.

At the commencement of his argument in this Court appellant's counsel asked that paragraph (a) of the prayer to the summons and declaration be amended by striking out the words "and prior to the promulgation of Act 41 of "1950 ". By consent this was done.

The issue in this appeal is whether, on the true construction of section 1 of Act 12 of 1924, exemption from the restrictive provisions in section 1 of Law 3 of 1885 (Transvaal) has been granted, as the respondents contend, only to persons who by descent are Cape Malays, or whether, in accordance with appellant's contention, while descent may be a factor in the decision the

circumstances/.....

circumstances set out in paragraph 6 of his declaration must also be taken into account in deciding whether a person is a Cape Malay in terms of section 1(2) of the 1924 Act. If the respondents' contention is correct, then it is clear from the decision in this Court in Rex v. Radebe and Others (1945 A.D. 590) and the facts as to the appellant's parentage appearing in paragraphs 4 and 5 of his declaration, that he is not entitled to the benefits granted by the 1924 Act.

Section 1 of Law 3 of 1885 reads:-

"Deze wet is van toepassing op de personen behoorende tot "een der inboorlingrassen van Azië, waaronder begrepen zal "zoogenaamde Koelies, Arabieren, Maleijers en Mohamedaansche "onderdanen van het Turksche rijk,"

and section 2 (b) provides :-

"Omtrent de personen bedoeld in Art.1 zullen de volgende "bepalingen van kracht zijn:.....(b) Zij kunnen geen "eigenaars zijn van vast goed in de Republiek."

Sections 1 and 2 of Act 12 of 1924 are in these terms :-

"1(1) From and after the commencement of this Act no Cape "Malay shall, for the purposes of Law No.3 of 1885, of the "Transvaal, and of section two of the Asiatics (Land and "Trading) Amendment Act (Transvaal) 1919, (Act No. 37 of "1919) or any other law relating to Asiatics, be deemed to "be a member of one of the native races of Asia.

(2)/.....

" (2) For the purposes of this Act a Cape Malay means a "member of the race known as the Cape Malays who was born and is ordinarily resident in a part of South Africa now "forming part of the Union.

"2. Whenever in any suit or other civil proceedings to "which he is a party or in any criminal proceedings in "which he is accused, any person claims or sets up the "defence that he is a Cape Malay, the burden of proving "the assertion shall be upon such person."

Section 1 of the 1885 Law was considered by this Court, in a question relevant to the point now in issue, in Transvaal Arcade Ltd. v. Rand Townships Registrar (1923 A.D. page 442). In that case the Court had before it information by way of affidavits in regard to facts throwing light on the meaning of the terms in section 1 "zoogenaamde Koelies,Arabieren,Maleijers," (so-called Coolies, Arabs and Malays); such information we have not got in this case, but INNES C.J., in giving the judgment of the Court, said (at page 446) that the affidavits embody what is common knowledge to those acquainted with the circumstances and conditions of the country, and on this basis the judgment is applicable to the case now before us. The learned Chief Justice drew attention to the word "zoogenaamde" in the section, which he said qualified Coolies, Arabs and Malays; it was not contended before us that we should not accept this ~~qualification~~ interpretation.

He/.....

He held that the term "Malays" was intended to denote a class of persons in South Africa, a distinct and distinctive section of the population here. He did not construe the term as meaning the same as "the Malay race ".

It is I think clear that Act 12 of 1924 was passed in order to remedy what the learned Chief Justice described as the harshness of subjecting members of this class to the provisions of the restriction imposed in regard to the ownership of land by the 1885 Act and this consideration renders it likely that the exemption from the restriction contained in Act 12 would be an exemption in regard to such class. Moreover in section 1(2) of this Act, the exemption is granted in favour of members "of the race "known as the Cape Malays." If this were an exemption based solely on ethnological grounds, on grounds in which the sole factor is one of descent, then the words "known as" would not have been used; the exemption would have been granted in favour of the members of that race. The primary meaning of "race", according to the Shorter Oxford English Dictionary, is "a group of persons.....connected "by common descent and origin" and this common descent and origin would constitute the race. But the word is often used in a sense less clearly connected with the idea of descent,as when reference is made to the "two white races "of South Africa." Moreover, the use of the words "known as" indicates that what constitutes the group in

question/.....

question is the general view as to what are the factors constituting the class, which is a far more indefinite concept than the narrow conception of race and cannot be decided without evidence as to what the general view is. In Mall v. Registrar of Companies (1946 A.D. page 727) the Court at page 741, on the authority of the Transvaal Arcade Company case (supra), said "..... the "application of any rigid test as to racial purity for the "purpose of ascertaining who is and who is not a Cape Malay "would clearly be out of place." This is in harmony with the view I have already expressed as to the meaning of Act 12 of 1924. But there are passages at page 740 of Mall's case which emphasize the difference between the words "a member of the race known as the Cape Malays" in section 1 (2) of this Act and the definition inserted into Act 37 of 1919 by section 7 of Act 35 of 1932, which reads, ".....a person belonging to the race or class known as "the Cape Malays." The contrast drawn between the two phrases may be in conflict with the view I have expressed as to the meaning of the phrase in the 1924 Act; if it is, then it should be borne in mind that in Mall's case the Court was not interpreting the 1924 but the 1932

Act/.....

Act and, in order to bring the position under that Act into relief, the Court contrasted its wording with that of the earlier Act. The Court read the words "a member of the "race known as Cape Malays" as meaning "a member of the race "of Cape Malays" but if it had read this phrase as I suggest it should have been read, it would a fortiori have come to the same conclusion on the question then in issue; to put it in another way, if in Mall's case the Court had assumed in favour of the then respondent that the words in the 1924 Act referred solely to race, it would have come to the same conclusion. It was therefore unnecessary to decide whether the view I have expressed is correct or not and it seems to me thus that the decision leaves the present Court at large on the question now in issue.

It appears to me therefore that the words in section 1(2) of Act 12 of 1924, viz. " a "member of the race known as Cape Malays," should be construed in the manner I have indicated. It may be, as was contended on behalf of the appellant, that the word "race" was used by the law-giver in view of the word "rassen" in the 1885 Law, the purpose of the Act being to provide, as it did in section 1(1), that a Cape Malay was not to "be deemed to be a member of one of the native races

"of/.....

"of Asia ".

The court a quo considered that the question before it was concluded against the appellant by the decision in Rand Townships Registrar v. Mandi (1945 T.P.D. page 149), but in my opinion that case does not cover the present question. The contention on behalf of the unsuccessful respondent in that case was that the persons, whose right to hold fixed property was under consideration and who were of mixed Indian and Cape Coloured blood, did not fall within the prohibition of the 1885 Law. The court (at page 157) asked itself what answer the legislature and the European population of the Transvaal in 1885 would have given to the question whether the issue of a marriage between a "zoogenaamde Koelie" and a native, Cape Coloured or European wife was also a "Koelie" and had no hesitation in answering the question in the affirmative. I express no opinion as to whether this attitude was justified and whether the answer warranted the conclusion to which the court came; the question in the present case is what is the proper construction of section 1 of Act 12 of 1924. For the reasons I have given, I am of opinion that what the appellant will have to prove in the trial is that he is a member of the "class" exempted by that section. No doubt where both parents are

e.g./.....

e.g. Europeans or Africans the facts pleaded in paragraph 6 of the declaration might not avail him as proof that he falls within the exempted class. But where one of his parents is a member of the "race or class of Cape Malays" - and paragraph 4 of the declaration says that this is so - the position is different. If descent is not the sole criterion then what is said in paragraph 6 of the declaration is capable of supporting his claim that he is a Cape Malay in terms of the Act; the declaration was therefore not excipiable.

For these reasons I think the appeal should be allowed with costs and the order in the court below altered into one dismissing the exception with costs.

~~Schreiner, J.A.~~
~~van den Heever, J.A.~~
~~Hoexter, J.A.~~
Fagan, J.A.) Concur

Leo Greenberg

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

MAHOMED ISMAIL PATEL Appellant

and

THE MINISTER OF THE INTERIOR and THE REGISTRAR OF DEEDS, TRANSVAAL. Respondents

Coram:Greenberg, Schreiner, van den Heever, Hoexter et Fagan, JJ.A.

Heard: 4th. March, 1955. Delivered: 30-3-1955

J U D G M E N T

SCHREINER, J.A. :- I agree with the ~~reasons~~ conclusion of my brother GREENBERG and in the main with his reasons for arriving at that conclusion. I find, however, a further, and in my view more compelling, reason for allowing the appeal in the definition of "Asiatic" in the new section 11 inserted in Act 37 of 1919 by paragraph section 7 of Act 35 of 1932. That definition reads " any Turk and any member "of a race or tribe whose national home is in Asia, but "shall not include any member of the Jewish or the Syrian "race or a person belonging to the race or class known as "the Cape Malays." This is the definition that was

dealt/.....

dealt with in Mall v. Registrar of Companies (1946 A.D.727 at pages 739 to 741), where it is distinguished from the definition in Act 12 of 1924. The Court in Mall's case was not concerned with the question whether the 1924 definition had been interpreted by that of 1932; it was concerned only with the position under the latter and, in order to bring it into relief, contrasted the language used in 1924. But I find nothing in the judgment in Mall's case which is inconsistent with the view, which seems to me to be plainly correct, that in speaking of "a person "belonging to the race or class known as the Cape Malays" Parliament was referring to one group only, namely, the group which had been called a "class" by INNES C.J. in the Transvaal Arcade case (1923 A.D. 442) and to which the word "race" had been applied in Act 12 of 1924. Parliament, while assuming, rightly or wrongly, that the Jewish and Syrian groups constituted ethnic entities, accepted the position that the Cape Malay group was sometimes called a race and sometimes a class, with what appropriateness it found it unnecessary to determine. What seems to be beyond question is that Parliament was not in 1932 exempting two overlapping groups, the Cape Malay "race" and the Cape Malay "class", but

was using language by which it was hoped to clarify the position by stating, practically in so many words, that it was the Malay group, whether ordinarily or properly called a race or a class, that was to be exempted, It is true that the

1932/.....

1932 Act was dealing with only a portion of the field covered by the 1924 Act but it was so important a portion that it is hardly conceivable that Parliament in 1932 intended to exempt under the title of Cape Malay a range of persons that was in any way different from or wider than the range exempted under the 1924 Act. Apart from the fact that the form of the language used points overwhelmingly to this being the correct view, endless confusion must have resulted from any difference in the fields of exemption under the two Acts.

If this view is correct it seems to follow that in 1932 Parliament impliedly gave a meaning to the 1924 Act, or clarified the meaning, which might otherwise perhaps have been uncertain. There is authority for the view that Acts of Parliament, without having been passed for the express purpose of explaining previous Acts, may nevertheless be used as "legislative declarations" or "Parliamentary expositions" of the meaning of such Acts(cf. Craies on Statute Law, 5th. Edition pages 137 et seq.). It is not surprising that courts are cautious in the use of this aid to interpretation, since it is usual for later legislation to amend rather than to declare the meaning of earlier statutes on the same topic. It is, of course, the function

of/.....

"Malays" used in Act 12 of 1924 means "the race or class "known as the Cape Malays", and that the appellant is therefore entitled to attempt to prove that he is a Cape Malay within the meaning of the 1924 Act by giving evidence of the matters alleged in his declaration.

D. Schreiner
29.3.55

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between:-

MOHAMED ISMAEL PATEL
Appellant

and

THE MINISTER OF THE INTERIOR AND
THE REGISTRAR OF DEEDS, TRANSVAAL.
Respondent

Coram:- Greenberg, Schreiner, van den Heever, Hoexter et, Fagan, JJ.A.

Heard:- 4th March, 1955. Delivered:- 30/3/1955

VAN DEN HEEVER, J.A. JUDGMENT.

I agree with the judgment of my brother Greenberg, but wish to state an additional consideration which led me to that conclusion. The word "race" is of uncertain origin and uncertain connotation. Colloquially people use the expression "the British race". In that context the word cannot mean a group of people connected by common descent. "Common descent" itself is a nebulous phrase save when used genealogically and relating to a common ancestor. Used in anthropology

2/ the .....

the meaning of the word is even more uncertain than in everyday parlance. Even the criteria to be applied for purposes of classification are hotly disputed. When the term is applied to a group of people admittedly of mixed origins, language becomes as elastic as the connotation of the word "democracy" in modern usage.

No doubt Parliament had these difficulties in mind when Act 12 of 1924 was passed. Consequently it defined a Cape Malay ~~is~~ as "a member of the race known as the Cape Malays," provided he was born in the Union.

Before we can classify the individual as being or not being a Cape Malay, we must ascertain what the Legislature meant by the expression "the Cape Malays". To convey its meaning Parliament introduced an external criterion unrelated to descent, and contemplated a group of people "known as" Cape Malays. The application of such an external touchstone, defined in terms of general knowledge and the usage of language, to my mind excludes the application of inherent characteristics as direct tests. Saint Paul prided himself on being "known as" a Roman.

As to the limits of the group of people "known as" Cape Malays I must confess to a lack of knowledge more profound than the traditional judicial ignorance. To my mind it is impossible to determine the extent of the group of people known as Cape Malays without evidence on the point. Evidence may show that recent intrusions of certain types into that body are generally regarded as accretions to it. Evidence may show that the criteria alleged by appellant as appertaining to him are the stigmata generally accepted as being characteristic of the class of persons known as the Cape Malays.

In my judgment, therefore, the declaration was not excipiable.

J.G.H. Lee J.

Original

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION).

In the matter between:—

MAHOMED ISMAIL PATEL,

APPELLANT,
(Plaintiff and
Respondent a quo),

AND

T. E. DONGES, N.O. and A. H. K. COUSINS, N.O.,

RESPONDENTS,
(Defendants and
Excipients a quo).

APPEAL

FROM A JUDGMENT OF THE TRANSVAAL PROVINCIAL DIVISION OF THE SUPREME COURT OF SOUTH AFRICA BY THE HON. MR. JUSTICE DOWLING AND THE HON. MR. JUSTICE BRESLER ON THE 22nd DAY OF OCTOBER, 1954.

Attorneys for Appellant:—

MacROBERT, DE VILLIERS & HITGE,
Van der Stel Buildings,
Pretorius Street,
PRETORIA.

KANNEMEYER, WARDHAUGH & ASHMAN,
P.O. Box 681,
BLOEMFONTEIN.

Attorneys for Respondents:—

STATE ATTORNEY,
Somerset House,
Vermeulen Street,
PRETORIA.

NAUDÉ & NAUDÉ,
P.O. Box 153,
BLOEMFONTEIN.

van der Reyden

IN THE SUPREME COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

22nd October, 1954.

MAHOMED ISMAIL PATEL
Plaintiff

v.

T. E. DONGES N.O.
1st Respondent

and

A.H.K. COUSINS N.O.
2nd Respondent.

JUDGMENT

DOWLING, J.: This is an exception to a declaration which alleges that the plaintiff is the son, born in Johannesburg, of an Asiatic Indian male and a woman said to be a Cape Malay, whose union was solemnized according to Mohammedan rites. It is further alleged that the plaintiff, by reason of his habits, social environment, religion and so forth, has been accepted and regarded as a member of the race or class known as Cape Malays. Particulars in this regard are set out in par. 6 of the declaration.

The declaration further sets out that the plaintiff is the registered owner of certain erven and portions of land in Bloemhof and Schweizer Reneke.

Plaintiff alleges in par. 9 of the declaration: "The first defendant, however, now contends that the plaintiff was as at the date of coming into force of the Group Areas Act, No. 41 of 1950, i.e. as at the 30th March, 1951, subject to the provisions of Law 3 of

1885 of the Transvaal, and was at that date debarred from holding fixed property in the Transvaal and the first defendant has called upon the plaintiff to sell the fixed properties more fully set out in paragraph 7 hereof to a person who may lawfully hold such property and has threatened upon failure to comply with such demand to take proceedings in respect of such properties under the provisions of section 20 of the Group Areas Act, No. 41 of 1950, aforesaid".

The plaintiff seeks an order "declaring that the plaintiff was not debarred under the laws relating to the tenure of land by Asiatics in force from time to time in the Transvaal subsequent to the promulgation of Act 12 of 1924 and prior to the promulgation of Act 41 of 1950 from lawfully holding fixed property in such Province".

Section 20 of the Group Areas Act, in subsection (1)(b), provides: "If any immovable property - (b) has at the commencement of this Act been acquired or is at the said commencement held in contravention of any provision of any law repealed by this Act or in pursuance of any agreement which is null and void in terms of any such provision, or is registered in favour of any person who is in terms of any such provision debarred from holding it, or is dealt with or used contrary to any condition of a permit or any term of a certificate issued under any such provision, under the authority of which it was acquired or held - the Minister may, after not less than three months' notice in writing to the person concerned and to the holder of any registered mortgage bond over the property, cause the property to be sold either out of hand upon the terms and conditions agreed to by the person

concerned and approved by the Minister after consultation with the mortgagee or if the property has not been so sold, within such period, not being less than one month, as the Minister may allow, then by public auction upon such terms and conditions as the Minister may determine".

Section 1 of Law 3 of 1885, which is a law repealed by Act 41 of 1950, provides: "Deze Wet is van toepassing op de personen behoorende tot een der inboorlingrassen van Azia, waaronder begrepen zoogenaamde Koelies, Arabieren, Maleijers en Mohamedaansche onderdanen van het Turksche rijk", and section 2(b) provides: "Omtrent de personen bedoeld in Art. 1 zullen de volgende bepalingen van kracht zijn: .....(b) Zij kunnen geen eigenaars zijn van vast goed in de Republiek".

The crisp question for decision is whether the plaintiff is a "zoogenaamde Koelie" in terms of section 1 above quoted.

The defendants contend that on his admitted parentage the plaintiff is a "zoogenaamde Koelie", while the plaintiff contends that the facts alleged in the declaration show him to be a Cape Malay to whom, by reason of the provisions of Act 12 of 1924, the disablement prescribed by Law 3 of 1885 does not apply.

Section 1 of Act 12 of 1924 provides: "(1) From and after the commencement of this Act no Cape Malay shall, for the purposes of Law 3 of 1885, of the Transvaal, of section <u>two</u> of the Asiatics (Land and Trading) Amendment Act (Transvaal) 1919, (Act No. 37 of 1919) or any other law relating to Asiatics, be deemed to be a member of one of the native races of Asia. (2) For the purposes of this Act a Cape Malay means a member of the <u>race</u> known as the Cape Malays who was born and is ordinarily

resident in a part of South Africa now forming part of the Union."

The question appears to me to be concluded by authority against the plaintiff. In Rand Townships Registrar v. Mandi (1945, T.P.D. 149) it was held that a child of an Asiatic by a marriage with a South African coloured woman, and the children of such child by another Asiatic, are "Coolies" within the meaning of sections 1 and 2 of Law 3 of 1885. I think it follows from the reasoning in that case that the present plaintiff is also a "Coolie" for the purposes of that law. In that case MURRAY, J., after passing in review the circumstances prevailing in the Transvaal at the time of the enactment of Law 3 of 1885, poses the question (at p. 157): "If, then, instead of marrying or cohabiting with another 'zoogenaamde Koelie', the member of the class had taken unto himself a native, Cape Coloured or European wife or reputed wife, what answer would have been given in 1885 by the members of the Volksraad and by the European population of the Transvaal generally to the question, are the children of such a union also 'Koelies'? To my mind the answer would undoubtedly have been in the affirmative. These children would, equally with their father, have been popularly considered to be one of the class of Coolies compelled to live in streets, wards and locations specially assigned to them by the Government, and to be subjected to the disability regarding the holding of fixed property".

It was urged by Mr. Galgut, on behalf of the plaintiff (respondent in this exception), that Mandi's case did not apply for three reasons: (1) Because Act 12 of 1924 was not considered; (2) because the mother of

Mandi was a coloured woman, not a Cape Malay; and (3) because the case went off on an assumed basis that the father was a "zoogenaamde Koelie".

As regards the first reason, it was, of course, not necessary for the Court in Mandi's case to consider Act 12 of 1924 because there was no question of the respondent, Mandi, in that case being a Cape Malay. But this does not invalidate the reasoning followed in determining that Mandi was a "Coolie". If, in the present case, the plaintiff is a "Coolie" the provisions of Act 12 of 1924 do not assist him.

As regards the second reason, the test which was applied in Mandi's case was whether the proportion of Asiatic blood was a substantial one, and it could make no difference if the father being an Asiatic, the mother is a coloured woman or a Cape Malay.

As regards the third reason, the father in Mandi's case is described in the judgment as an "Indian waiter". At p. 157 MURRAY, J., who delivered the judgment of the Full Court, said: "It is not suggested in the present argument that the applicant's father, Mandi Nawaz, was not a member of the class described by the Volksraad as 'zoogenaamde Koelies'. In my opinion he was. This would be so, whether he was or was not born in South Africa". In the present case the father of the plaintiff is described in the declaration as an "Asiatic Indian". It seems to me quite immaterial whether in the present case the plaintiff is a "zoogenaamde Koelie" or a person "behoorende tot een der inboorlingrassen van Azia". It is plain that the plaintiff's father was one or the other.

My conclusion in this case seems to be fortified by certain decisions of the Appellate Division sub-

sequent to Mandi's case. The persons benefiting by Act 12 of 1924 are "members of the race known as Cape Malays". In Rex v. Radebe and Others (1945, A.D., 590) it was held that "in deciding whether an accused person is a native within the meaning of Natal Act 49 of 1898, which provides that 'native means and includes all members of the aboriginal races or tribes of Africa South of the Equator, the sole test is descent, other elements such as appearance and habits being only probative of descent". The inquiry in that case was whether a given person was a member of a "race or tribe". In the instant case the inquiry is fundamentally similar, whether the plaintiff is a member "of the race known as Cape Malays". At p. 608 of the judgment in Radebe's case SCHREINER, J.A., is reported to have said: "In the first place, it seems to me that the natural meaning of membership of a race or tribe is membership by blood or descent". He continues at p. 609: "Once preponderance is accorded to descent it seems to me that there is no stopping short of the view that descent is the factum probandum, the ultimate matter to be proved. Where the word 'native' stands undefined it may be that various factors may be taken into account in deciding whether in common parlance a particular person would be described as a native. But once the definition imports descent, factors such as appearance and habits can only be used as evidence of descent. A man may look like a native and live like a native but the question remains whether he is a native in terms of the definition. This view is well expressed by MILLIN, J., in Nkabinde's case (supra) in the following language: 'If you have no reliable evidence as to his racial origin, if it cannot be determined who his parents and grandparents were, then if it is alleged that he is a native you have to look at the man and consider his habits of life. But it seems to me that if

there is evidence as to what his racial origins are it is futile to consider his appearance or his habits of life'. In Masholo v. Masholo (1944, 1 P.H.R., 33) the same view of the definition in Act 38 of 1927, as amended, was adopted by the Native Divorce Court (Cape and O.F.S.). Again, in Rex v. Moronha (1927, S.R., 25), where the question was whether a Goanese fell within the expression 'all aboriginal natives of India or their descendants', BISSET, C.J., applying certain Cape decisions arising out of the Liquor Law, said: 'Where the evidence of descent clearly brings a person within or excludes him from, the limits of the definition, there is no room or need for the application of any further test'. This view, that descent is what has ultimately to be proved and that appearance and habits are only evidence of descent is supported by Rex v. Parrott (supra), Rex v. Levenson (supra), Rex v. Smuts (1912, C.P.D., 538) and Rex v. Millin (1925, E.D.L.,354), and descent also appears to have been accepted as the basic test in Rex v. Kogan (1918, A.D., 521). In my opinion, there is nothing in Act 49 of 1898 outside the definition which points, whether by way of indicating the scope and purpose of the Act or otherwise, to this view being inapplicable. I conclude that in deciding whether a person is a native within the definition the sole test is descent, other elements being only probative of descent".

If I am right in my view that this reasoning applies in the present case, then the plaintiff cannot be regarded as a member of the race known as Cape Malays as defined in Act 12 of 1924.

In this connection, however, it is right to refer to the remarks of FEETHAM, J.A., in Mall v. Registrar of Companies (1946, A. D., 727). The learned Judge,at

p. 741, said: "In regard to the question of descent, I may add that, in view of the recognition by INNES, C.J., in the Transvaal Arcade Co. case (supra) that the word 'Malays', as used in South Africa, denotes a class of coloured person whose fore-fathers came from the East Indies, and who, 'in spite of a certain admixture of other blood have, as a class, retained Mohammedan religion and also many of the characteristics of their ancestors', the application of any rigid test as to racial purity for the purpose of ascertaining who is and who is not a Cape Malay would clearly be out of place. If there has been an admixture of other blood in the past, it cannot be readily assumed that, where it becomes necessary to decide whether or not a person is 'a member of' or 'a person belonging to' the race of Cape Malays, the same rule applies as that laid down in the case of Rex v. Radebe and Others (supra) where, in deciding as to the effect of the definition of 'native' there in question, this Court held that the sole test of membership of a race being descent, a person does not pass that test so as to be regarded as a member of a native race where only one of his parents is a native and the other belongs to an entirely different race".

The learned Judge in his remarks does not suggest in what manner the "rigid test" should be relaxed. If he had in mind the appearance, associations and the general manner of living of the persons under consideration, such an inquiry is precluded by Mandi's case (at p. 152 of the report). If he had in mind the test contemplated in Mandi's case (at p. 157), such test would not assist the present plaintiff. The test in question is indicated in the following extract from the judgment, at p. 157: "So long as the proportion of Asiatic or Indian blood was a sub-

stantial one, not necessarily a preponderating one, membership of the class would continue, although obviously with successive generations a point might eventually arise at which the admixture would be so slight that the descendant of a Coolie would cease to be described as such".

The requisite degree of dilution of Asiatic blood cannot be present in the case of the plaintiff.

So far, therefore, as the remarks of FEETHAM, J.A., throw doubt on my use of the test described in Radebe's case to fortify the conclusion based in the first instance on Mandi's case, I would point out that the remarks in question were obiter, that Mandi's case is binding upon this Court, and, in my opinion, governs the present inquiry. (After writing the above remarks I found that in the case of Dollie v. Rand Townships Registrar, reported in 1949, 2 P.H., K. 152, BLACKWELL, J., came to the same conclusion as I have).

If the inquiry were whether the plaintiff belonged to the "class" known as Cape Malays the answer might have been different. In Mall's case (sup. cit.) the Court had occasion to compare the reference to "Cape Malays" set out in sec. 11 of Act 37 of 1919 as inserted therein by Act 38 of 1932 with the definition propounded in sec. 1(2) of Act 12 of 1924. The former reference is to "a person belonging to the race or class known as Cape Malays". FEETHAM, J.A., makes the following comments at p. 740: "From a comparison of the terms of the definition of "Cape Malay" in sec. 1(2) of this Act with reference to Cape Malays in the definition of 'Asiatic' contained in sec. 11 of Act No. 37 of 1919, as inserted therein by the Act of 1932, it will be seen that there are the following substantial divergencies between the two: (1) instead of

speaking of 'a member of the race known as the Cape Malays' as the 1924 Act does, the 1932 definition speaks of 'a person belonging to the race or class known as the Cape Malays'; (2) the qualifying words which follow 'Cape Malays' in sec. 1(2) of the 1924 Act - 'who was born and is ordinarily resident in a part of South Africa now forming part of the Union' - are entirely omitted from the reference to Cape Malays in the 1932 definition. The result is that the group of persons excluded from the 1932 definition of 'Asiatic' by the words at the end of that definition referring to Cape Malays are a substantially wider group than the group excluded from the scope of Law 3 of 1885 as the result of the passing of Act No. 12 of 1924. The addition of the words 'or class' after 'race' in the 1932 definition of Asiatic is, I think, a clear indication that, for the purpose of deciding whether or not a person is excluded from falling within that definition by reason of his being a Cape Malay, considerations other than those of descent, namely, considerations as to the habits and social environment of the person concerned, can properly be taken into account, and from the uncontradicted statements in paras. 16 and 17 of the applicant's petition, it seems to me that - whether or not on grounds of descent alone she would be entitled to rank as a Cape Malay, as being 'a member of the race known as the Cape Malays' - she has clearly succeeded in making out her claim to be 'a person belonging to the class known as Cape Malays', and is therefore excluded from the definition of Asiatic contained in the 1932 Act".

It follows that the plaintiff's allegation in the declaration that he belongs to "the class known as Cape Malays" is not helpful to his case, which must be

confined to an allegation that he belongs to the race known as Cape Malays, an allegation which, even if the facts alleged in the declaration are admitted, he cannot substantiate.

In the result the exception is upheld with costs.

It was intimated by counsel for the respective parties that the party against whom the judgment went desired leave to appeal. It is not clear to me that leave is necessary in this case, but so far as it may be necessary such leave is granted to the respondent.

(Sgd) WALFORD DOWLING

I agree.

(Sgd) C. P. BRESLER