

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

(APPELLATE Provincial Division.)
(Provinsiale Afdeling.)

Appeal in Civil Case.
Appel in Siviele Saak.

THE PUBLICATIONS CONTROL BOARD

Appellant,

versus

CENTRAL NEWS AGENCY LTD.

Respondent

Appellant's Attorney
Prokureur vir Appellant Dep.S.A. (Bmftn.)

Respondent's Attorney
Prokureur vir Respondent

Appellant's Advocate
Advokaat vir Appellant

Respondent's Advocate
Advokaat vir Respondent

Set down for hearing on
Op die rol geplaas vir verhoor op

8-5-70

1.3.4.7.9

(C.P.D.)

per Rampff J.A.

Appeal allowed with costs including the costs of two counsel, and the order of the Court a quo is set aside and substituted by the following order:-

"The application is dismissed with costs, such costs to include the costs of two counsel".

REGISTRAR.
21/5/1970

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills Taxed.—Kosterekenings Getakseer.

Date. Datum.	Amount. Bedrag.	Initials. Paraaf.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE PUBLICATIONS CONTROL BOARD

Appellant

and

CENTRAL NEWS AGENCY LIMITED

Respondent

CORAM: STEYN, C.J., RUMPF, BOTHA, TROLLIP, J.J.A. et

RABIE, A.J.A.

HEARD: 8.5.1970.

DELIVERED: 21.5.1970.

J U D G M E N T

RUMPF, J.A. :

The respondent in this matter carries on business, inter alia, as newsagents and booksellers throughout the Republic of South Africa. In January, 1969, an English publishing firm commenced the publication of a part publication styled the "Book of Life". The respondent is the importer of this "Book of Life" series and is the sole distributor thereof. In May, 1969, the appellant, acting in terms of sec. 113 of the Customs and Excise Act, No. 91 of 1964, by certain Government notices declared parts 10, 11, 12, 14, 15, 17 and "all ensuing/.....

ensuing editions" to be objectionable. The respondent thereupon instituted review proceedings in the Cape Provincial Division of the Supreme Court, asking it to set aside the decisions reflected in the Government Notices, on the ground that the appellant had been obliged, as a matter of law, to afford applicant a fair hearing before it came to the above-mentioned decisions, either by a viva voce hearing or a hearing by allowing written representations, but had not afforded such hearing to respondent. The Cape Provincial Division, after referring, inter alia, to the provisions of the Customs Act, No. 91 of 1964, and the Publications and Entertainments Act, No. 26 of 1963, came to the conclusion that the provisions of the latter Act did not by necessary implication exclude the operation of the maxim audi alteram partem and ordered the decisions of the appellant to be set aside, with costs. The present is an appeal against that order.

Before dealing with the arguments advanced in this Court, it is necessary to refer generally to the purpose of the Publications and Entertainments Act, No. 26 of

1963, hereinafter referred to as "the Act", and to various sections thereof, and also to some sections of the Customs and Excise Act, No. 91 of 1964, hereinafter referred to as "the Customs Act".

In order to deal effectively with the printing, publishing or making of indecent or obscene or other undesirable publications and objects, or publications and objects prejudicial, inter alia, to the safety of the State, the Legislature has established a board known as the Publications Control Board, hereinafter referred to as "the Board", to perform the functions entrusted to it under the Act. The Board consists of not less than nine members, of whom not less than six shall be persons having special knowledge of art, language and literature or the administration of justice. The chairman and the vice-chairman, designated by the Minister of Interior, are to be of the group of six persons referred to above. The Board may appoint such committees as it may from time to time consider necessary, but the chairman of ^{any} ~~the~~ committee must be a member of the Board. In terms of sec. 3 of the Act, the Board has

the/.....

the following functions:

"The board shall-

- (a) examine any publication or object or cinematograph film submitted to it under this Act;
- (b) make such enquiries as it may consider necessary in regard to any public entertainment or intended public entertainment which is alleged to be or which the board has reason to believe is of a nature contemplated in section twelve;
- (c) advise the Minister in regard to any matter arising out of the application of any provision of this Act which the Minister may refer to the board; and
- (d) perform any other function assigned to it by this Act or any other law."

The duties of the Board extend over a wide field. In regard to publications and objects, sec. 8 (1) of the Act provides as follows:

"The board shall have power-

- (a) at the request of any person and (except in the case of a person to whom any function has been assigned by this Act or the Customs Act, 1955 (Act No. 55 of 1955) upon payment of the prescribed fee, to examine any publication or object and to state whether that publication or object is in the opinion of the board undesirable or not;

(b)/.....

- (b) at the request of any person investigating any offence under this Act or the Customs Act, 1955 (Act No. 55 of 1955), to examine any publication or object and to state whether that publication or object is in the opinion of the board undesirable or not;
- (c) subject to the provisions of sub-section (2), to approve of the importation by any person during any specified period, of any publication or object referred to in paragraph (c) of sub-section (1) of section five which-
- (i) is published by a specified publisher; or
 - (ii) falls within a particular class of publication published by a specified publisher; or
 - (iii) deals with any specified subject,
- if in the opinion of the board that publication or object is not or is not likely to be undesirable; and at any time in its discretion to withdraw any approval granted under this paragraph;
- (d) by notice in the Gazette to prohibit the importation, except under the authority of a permit issued by the board, of publications or objects which-
- (i) ~~are published by a specified publisher; or~~
 - (ii) deal with any specified subject,
- if, in the opinion of the board, those publications or objects are undesirable or likely to be undesirable.

(e)/.....

(e) if-

- (i) any edition of a publication which is published periodically in the Republic-
- (aa) has in a prosecution in respect of an offence under section 5 (1) (a) been found to be undesirable; or
- (bb) is in terms of a statement by the board under this section (not being a statement under paragraph (b) of this subsection) undesirable in its opinion, and such statement has not been set aside under section 14; and
- (ii) in the opinion of the board, every subsequent edition of such publication is likely to be undesirable, by notice in the Gazette to declare every edition of such publication to be undesirable, and thereupon every edition of that publication shall, until such notice is withdrawn in like manner by the board, be deemed to be undesirable."

In terms of section 1 of the Act "publication or object" includes:

- "(a) any newspaper published by a publisher who is not a member of the Newspaper Press Union of South Africa;
- (b) any book, periodical, pamphlet, poster or other printed matter except a poster issued as an advertisement of a newspaper published by a publisher/.....

publisher who is a member of the Newspaper Press Union of South Africa;

- (c) any writing or typescript which has in any manner been duplicated or made available to the public or any section of the public;
- (d) any drawing, picture, illustration, painting, woodcut or similar representation;
- (e) any print, photograph, engraving or lithograph;
- (f) any figure, cast, carving, statue or model; and
- (g) any record or other contrivance or device in or on which sound has been recorded for reproduction."

Sub-sections (1) and (2) of sec. 5 provide as follows:

"(1) No person shall-

- (a) print, publish, manufacture, make or produce any undesirable publication or object; or
 - (b) distribute, display, exhibit or sell or offer or keep for sale any publication or object if that publication or object-
 - (i) has in a prosecution in respect of an offence under paragraph (a) been found to be undesirable; or
 - (ii) is in terms of a statement by the board under section eight (not being a statement under paragraph (b) of sub-section (1) of that section) ~~undesirable in its opinion~~ or is in terms of a decision by the board under sub-section (3) of section twenty-one of the Customs Act, 1955 (Act No. 55 of 1955), indecent, obscene or objectionable, and such statement or decision has not been set aside under section fourteen of this Act,
- and/....

and the board has caused such finding, statement or decision to be made known by notice in the Gazette;

(c) except under the authority of a permit issued in terms of section eight-

- (i) import any publication or object with a soft cover of which the net selling price to an importer in the Republic does not exceed fifty cents; or
- (ii) import any publication or object of which the importation has been prohibited by the board under paragraph (d) of sub-section (1) of that section.

(2) A publication or object shall be deemed to be undesirable if it or any part of it-

- (a) is indecent or obscene or is offensive or harmful to public morals;
- (b) is blasphemous or is offensive to the religious convictions or feelings of any section of the inhabitants of the Republic;
- (c) brings any section of the inhabitants of the Republic into ridicule or contempt;
- (d) is harmful to the relations between any sections of the inhabitants of the Republic;
- (e) is prejudicial to the safety of the State, the general welfare or the peace and good order;

~~(f) discloses, with reference to any judicial proceedings-~~

- (1) any matter which is indecent or obscene or is offensive or harmful to public morals or any indecent or obscene medical, surgical or physiological details the disclosure of which is likely to be offensive or harmful to public morals;

- (ii) for the dissolution or a declaration of nullity of a marriage or for judicial separation or for restitution of conjugal rights, any particulars other than-
 - (aa) the names, addresses and occupations of the parties and witnesses;
 - (bb) a concise statement of the allegations, defences and counter-allegations in support of which evidence has been given;
 - (cc) submissions on any point of law arising in the course of the proceedings, and the decision of the court thereon;
 - (dd) the judgment and the verdict of the court and any observations made by the judge in giving judgment."

Guidance to the Board as to when a matter is deemed to be indecent, obscene or offensive or harmful to public morals is to be found in section 6, which states:

"(1) If in any legal proceedings under this Act the question arises whether any matter is indecent or obscene or is offensive or harmful to public morals, that matter shall be deemed to be-

- (a) indecent or obscene if, in the opinion of the court, it has the tendency to deprave or to corrupt the

minds/.....

minds of persons who are likely to be exposed to the effect or influence thereof; or

(b) offensive to public morals if in the opinion of the court it is likely to be outrageous or disgusting to persons who are likely to read or see it; or

(c) harmful to public morals if in the opinion of the court it deals in an improper manner with murder, suicide, death, horror, cruelty, fighting, brawling, ill-treatment, lawlessness, gangsterism, robbery, crime, the technique of crimes and criminals, tippling, drunkenness, trafficking in or addiction to drugs, smuggling, sexual intercourse, prostitution, promiscuity, white-slavery, licentiousness, lust, passionate love scenes, homosexuality, sexual assault, rape, sodomy, masochism, sadism, sexual bestiality, abortion, change of sex, night life, physical poses, nudity, scant or inadequate dress, divorce, marital infidelity, adultery, illegitimacy, human or social deviation or degeneracy, or any other similar or related phenomenon; or

(d) indecent or obscene or offensive or harmful to public morals if in the opinion of the court it is in any *other* manner subversive of morality."

~~The Board also has to certify all~~

cinematographic films exhibited in the Republic in public places or in any place to which admission is obtained by virtue of considerations specified in the Act, and the legislature

has/.....

has specifically set out what may not appear in any film so exhibited. Section 10 of the Act provides:

"The board shall not approve any cinematograph film which in its opinion-

- (a) depicts any matter that prejudicially affects the safety of the State;
- (b) may have the effect of-
 - (i) disturbing the peace or good order;
 - (ii) prejudicing the general welfare;
 - (iii) being offensive to decency;
 - (iv) giving offence to the religious convictions or feelings of any section of the inhabitants of the Republic;
 - (v) bringing any section of the inhabitants of the Republic into ridicule or contempt;
 - (vi) harming relations between any sections of the inhabitants of the Republic; or
 - (vii) propagating or promoting communism, as defined in the Supression of Communism Act, 1950 (Act No. 44 of 1950); or
- (c) depicts in an offensive manner-
 - (i) the State President;
 - (ii) the Republic's armed forces or any member thereof;
 - (iii) death;
 - (iv) human figures;
 - (v) love scenes;
 - (vi) controversial or international politics;
 - (vii)/.....

- (vii) public characters;
- (viii) juvenile crime;
- (ix) criminality and the technique of crime;
- (x) brutal fighting;
- (xi) drunkenness and brawling;
- (xii) addiction to drugs;
- (xiii) scenes of violence involving white and non-white persons;
- (xiv) intermingling of white and non-white persons; or
- (xv) violence towards or ill-treatment of women ^{or} ~~the~~ children."

It is obvious that objectionable goods may be imported into the Republic by land, sea or air.

Section 113 (1) of the Customs Act prohibits the importation of "goods which are indecent or obscene or on any ground whatsoever objectionable, unless imported under permit issued by the Publications Control Board referred to in section two of the Publications and Entertainments Act, 1963 (Act No. 26 of 1963)".

Section 113 (3) of the Customs Act contains the following provisions:

"(a) In the event of any question arising as to whether any goods are indecent or obscene or objectionable, the decision of the Publications Control Board referred to in section two of the Publications/

Publications and Entertainments Act, 1963, shall be final, but subject to a right of appeal as provided in section fourteen of that Act as if such decision were a decision referred to in that section.

(b) If any printed, engraved, lithographic or photographic matter is according to the decision of the said board indecent, obscene or objectionable, and is contained in any publication which in the opinion of that board is one of a series, the said board may publish the name of such publication by notice in two consecutive issues of the Gazette, and thereupon every issue of that publication shall, until such notice is withdrawn by the said board by notice in the Gazette, for the purpose of this section be deemed to be indecent, obscene or objectionable, as the case may be.

(c) For the purpose of any decision as to whether goods are indecent or obscene or objectionable within the meaning of this sub-section, the provisions of sub-section (2) of section five and section ten of the Publications and Entertainments Act, 1963, shall mutatis mutandis apply."

The manner in which the Act and those provisions of the Customs Act that deal with objectionable matter have mutually been integrated, indicates, in my view, that the Board, functioning under the Act, and the Board's procedure in arriving at a decision on any question put before it or on the issue of any permit, have been adopted by Parliament for the purpose of dealing/.....

dealing with objectionable goods in terms of the Customs Act.

As far as appeals from the Board are concerned, it is necessary to quote both sections 11 and 14 of the Act.

Section 11 reads as follows:

- "(1) Any person who is aggrieved by a decision of the board in respect of any cinematograph film which he has submitted to the board for its approval, may within thirty days after the decision of the board was given, on payment of the prescribed fee, appeal to the Minister against that decision in the prescribed manner.
- (2) The Minister shall thereupon enquire into and consider the matter or consider the matter upon the receipt of the report of a person deputed by him to inquire into the matter on his behalf and to report thereon to him, and may confirm, vary or set aside the decision of the board or give any other decision which he may consider just.
- (3) The decision of the Minister shall not be subject to appeal to or review by any court of law, and shall for the purposes of this Act be deemed to be a decision of the board."

Section 14 provides:

- "(1) Any person who-
- (a) is in charge of any public entertainment or intended public entertainment; or
- (b)/.....

(b) is the importer of goods referred to in section 113 (3) of the Customs Act, 1964 (Act No. 91 of 1964); or

(c) has in terms of section 8 (3) submitted a specified edition of a publication or object to the board,

and who is aggrieved by a decision of the board in respect of such entertainment, goods or edition, or any person who is aggrieved by a decision of the board in terms of section 8 (1) (a) or (e) may within thirty days after the decision of the board was given, appeal against that decision by way of application on notice of motion to any provincial or local division of the Supreme Court of South Africa.

(2) The division of the Supreme Court to which the appeal is made shall enquire into and consider the matter and may confirm, vary or set aside the decision of the board or give such other decision as in its opinion the board ought to have given, and make such order as to costs as it may deem fit.

(3) Any judgment given or order made by a provincial or local division of the said Supreme Court in terms of sub-section (2), shall be subject to appeal to the Appellate Division of the Supreme Court of South Africa in the same manner and on the same conditions as if it were a judgment given or order made in a civil proceeding in that provincial or local division.

(4) Any decision by the court in terms of sub-section (2)

or/.....

or (3) relating to any publication or object or any public entertainment or intended public entertainment or goods, shall for the purposes of this Act be deemed to be a decision of the board."

It was submitted on behalf of appellant in this case that not only did the Act, properly construed, exclude the application of the audi alteram partem rule but also any review under the common law, whether based on irregularity or illegality. It was suggested that because of the kind of appeal introduced by sec. 14 of the Act. (as to which see Publications Control Board v. William Heineman Ltd., 1965 (4) 137 (A) at p. 147) the legislature intended to substitute this procedure for any other remedy which an aggrieved person may have. I cannot agree with this view. In De Wet v. Deetlefs, 1928 A.D. 298 at p. 290, this Court expressed the following view: "It is a well-recognized rule in the interpretation of statutes that in order to oust the jurisdiction of a Court of law, it must be clear that such was the intention of the legislature." The mere introduction of the procedure as set out in sec. 14 of the Act does not indicate any intention of the legislature to remove the very important right of review under the

Common law. As it is, the legislature in sec. 11 (3) of the Act expressly states that a decision by the Minister, acting as an appellate tribunal in matters concerning films, shall not be subject to review by a court of law. This, in my view, is an indication that if Parliament had intended to limit the jurisdiction of the Court to an appeal under section 14 of the Act, and to exclude the right of review, it would have said so in express terms.

Counsel for respondent submitted that it must be inferred from the nature of the Board's duties that it is most unlikely that Parliament intended to exclude the audi alteram partem rule. What follows is a brief summary of the arguments advanced in support of this contention. The Board, so it was said, is not vested with an administrative discretion to decide whether a publication should be distributed or not.

It does not act mero motu, but only when a matter is referred to it, and ^{it} must decide the "question" before it in the light of the provisions of the Act. The Board, like the Court on appeal, is, broadly speaking, concerned with two main issues: the likely range of readers of the publication and the probable effect/....

effect of the publication. In a case like the present the identity of ^{the} persons who are likely to read the publication is an objective fact about which usually only the importer can give evidence. Parliament must have been aware that an appeal to the Supreme Court would in many cases not be economic and if the Board is not compelled to consider relevant evidence it might lead to unjust results. Finally, it was submitted that there is authority for holding that the Board should afford the importer a hearing. In Commissioner of Customs and Excise v. Watch-Tower Bible and Tract Society, 1941 C.P.D. 438, in which the Court was concerned with sec. 23 (c) of Act 9 of 1913 (as substituted by sec. 6 of Act 40 of 1934), it was held ~~that~~ that the Minister acting under that section was bound to afford the importer a hearing before arriving at a final decision as to whether certain goods were indecent, obscene or objectionable.

After giving due weight to the considerations advanced by counsel for respondent, and ^{to} their cumulative effect and after studying the provisions of the Act and the Customs Act, I am of the opinion that the Act discloses a clear

intention/.....

intention by Parliament that the Board, in exercising its functions under sec. 3 (a) of the Act, is not required to afford a hearing to a person affected by its decision.

It is, of course, firmly established in our law that when a statute gives judicial or quasi-judicial powers to affect prejudicially the rights of person or property, there is a presumption, in the absence of an express provision or of a clear intention to the contrary, that the power so given is to be exercised in accordance with the fundamental principles of justice. One of these principles is that the person affected should be given an opportunity to defend himself or of being heard. If, however, on a proper construction of the statute, it appears that the legislature did not intend the person affected to have the right of being heard, the implied right will be held to be excluded. Thus, in relation to the maxim audi alteram partem, it was said by this Court in Sachs v. Minister of Justice, 1934 A.D. 11 at p. 38: "Sacred though the maxim is held to be, Parliament is free to violate it. In all cases where by judicial interpretation it has been invoked, this has been justified on the ground that the enactment impliedly incorporated it. When on the true interpretation

of the Act, the implication is excluded, there is an end of the matter." In a number of cases, also in this Court (see, inter alia, R. v. Ngwevela, 1954 (1) 123 (A)), it has been stated that where statutes of the kind referred to above are concerned, the maxim audi alteram partem should be enforced unless it is clear that Parliament has expressly or by necessary implication enacted that it should not apply. The words "by necessary implication" convey a degree of inferential compulsion, that goes further, linguistically at any rate, than an inference of clear intent. That, with respect, seems unwarranted. One begins with a presumption that the kind of statute referred to impliedly enacts that the audi alteram partem rule is to be observed, and, because there is a presumption of an implied enactment, the implication will stand unless the clear intention of Parliament negatives and excludes the implication. (See also Minister van Naturellesake v. Monnakgotla, 1959 (3) 11 (A) 517 at p. 521).

In the present matter it is necessary to ascertain what the intention of Parliament was as to the functions and duties of the Board and what procedure Parliament intended

the/.....

the Board to follow when it performs its duties.

It is clear, in my view, that the Act endows the Board with preventative powers in relation to publications and objects which Parliament considers to be not only harmful to public morals but also prejudicial to the safety of the State and the maintenance of peace and good order. Its duty is to prevent the publication or distribution of such material and the nature of its duty involves ex necessitate rei a conflict between the public interest and the interests of the State on the one hand and the interests of the individual on the other. The task of the Board is to deal not only with undesirable publications and objects which are brought to its notice either by members of the public or under the Customs Act, but also with public entertainments, and, in addition, the task of the Board is to certify all cinematographic films exhibited in a public place in the Republic. The Board, established under the Act, is a board, the majority of whose members have special knowledge of art, language and literature or the administration of justice, and it is enjoined in express terms to "examine" any publication or object or film submitted to it under the Act (sec. 3 (a)).

The use of the word "examine" in relation to publications or objects/.....

objects in sec. 3 of the Act is, I think, significant. It connotes a unilateral procedure and, having regard to the nature of the evils to be curbed by the Board, it is indicative, in my view, of Parliament's intending the Board to act in the conflicts that arise, provisionally at least, and without delay, on the strength of its own expertness, experience and such enquiry as it deems necessary to make. Having decided that a publication is undesirable, the Board must "without delay" cause the decision to be published in the Gazette, which would give all affected persons notice of the Board's decision. The appeal afforded by sec. 14 is not an appeal in the legal sense but a hearing, if necessary by way of permissible viva voce evidence and cross-examination. The fact that this type of appeal has been provided for, indicates that Parliament intended to give a person affected by a decision of the Board an opportunity to place his case before a tribunal, a Court of law, which takes the place of the Board and which, subject to an appeal to the Appellate Division, finally decides the issue. The provision of such a full hearing at that stage is, in my view, inconsistent with an intention that there also should be a hearing before the

Board. (cf. the judgment of Tindall, J., at pp. 22 and 23 of

Sachs's/.....

Sachs's case, supra).

It is correct to say that a hearing before the Court would probably be more expensive than a hearing before the Board, but the object obviously was to give an aggrieved person the benefit of having the matter fully investigated and decided by a court of law, notwithstanding the qualifications of the members of the Board. There is also nothing in the Act from which it can be inferred that economy of proceedings should be taken into account in considering whether a person who might through a publication or object undermine the public morals or the safety of the State is entitled to a hearing.

There are other weighty considerations which indicate that Parliament intended the Board to operate without the application of the maxim audi alteram partem. In terms of sec. 14 of the Act certain specified persons, including an importer and also "any person who is aggrieved by a decision of the board in terms of sec. 8 (1) or (e)", may within thirty days after the decision was given, appeal against that decision. If the Board is compelled to hear representations, it would

follow/.....

follow, I think, that any person who may be "aggrieved" by the decision of the Board would be entitled to be heard. A hearing, in order to be effective, would require the Board to notify such affected persons of its intention to hold an enquiry, and in many cases a duty would be imposed on the Board to inform those who are entitled to a hearing of the grounds that might persuade the Board to come to a decision that a publication is undesirable under the Act. Without such information being given, a right to make representations might be quite ineffective. In addition, there may be cases where it is difficult, or even impossible, to ascertain who the potentially "aggrieved" persons are. The position in regard to cinematographic films appears to be different only in that an appeal is afforded to a "person who is aggrieved by a decision of the board in respect of any cinematograph film which he submitted to the board for its approval", and the appeal is to the Minister "who shall enquire into and consider the matter", and whose decision shall not be subject to appeal or review by any Court of law (section 11 of the Act).

If/.....

If it is not sufficient for the Board merely to "examine" the film in terms of sec. 3 (a) of the Act, it would be obliged to allow a hearing on any proposed decision to refuse a certificate, or to give a certificate only if parts are excised, or to give a conditional certificate.

Having regard to the multifarious duties of the Board under the Act, it would seem that the introduction of the audi alteram partem rule would lead to innumerable hearings and delays, to problems with regard to the determination of those who are entitled to a hearing, and also to an extension of effort far beyond the Board's capacity. It would probably render the task of the Board unfeasible.

Counsel for the respondent strongly relied on the decision in the case of Commissioner of Customs and Excise

v./.....

v. Watch-Tower Bible and Tract Society, supra, which was decided under the then existing Customs Act, No. 9 of 1913, and in regard to which the Court a quo in its judgment, inter alia, stated:

"To my mind however the introduction of a right of appeal in the present Customs Act cannot by itself be held to imply that the legislature by using virtually the same language which had been authoritatively interpreted in the Watch-Tower case (the correctness of which decision has not been questioned for 28 years) thereby intended to exclude the principles of natural justice and to deprive an importer of the opportunity of putting his side of the question."

In that case the Commissioner had issued summons and a declaration under the Customs Management Act, No. 9 of 1913, in terms of which he claimed condemnation of certain printed matter seized at Cape Town. It was alleged that the Minister of Interior, after consultation with the Board of Censors, appointed under sec. 2 (1) of Act 28 of 1931, had decided that the printed matter referred to in the declaration was objectionable. The defendant, inter alia, alleged that/.....

that no opportunity had been afforded to it to submit its contentions or evidence upon the question as to whether the printed matter was objectionable. On an exception being taken, inter alia, to this plea, the Court came to the conclusion that the plea was good and that the exception should be dismissed, with costs.

In terms of sec. 23 (c) of Act No. 9 of 1913, as amended by sec. 6 of Act No. 4 of 1934, the following from being goods were prohibited ~~being~~ imported:

"Goods which are indecent or obscene or on any ground whatsoever objectionable; in the event of any question arising as to whether any goods are indecent or obscene or objectionable the decision of the Minister of the Interior shall be final: Provided that in respect of printed, engraved, lithographic and photographic matter the decision shall be given after consultation with the Board of Censors appointed in terms of sub-section (1) of section two of the Entertainments (Censorship) Act, 1931 (Act No. 28 of 1931)."

In its judgment the Court made the following observations in regard to the phrase "in the event

of any question arising":

"In the Nederlands version the expression is 'in geval van twijfel'. Counsel for the excipient submitted that this phrase should be taken to mean that where Customs Officials are doubtful on the question of objectionability, the Minister is empowered to give a final decision.

Counsel for the respondent submitted that the word 'question' was synonymous with a dispute upon this point between an importer and the Customs authorities. For the purpose of the exception presently under consideration, however, it is unnecessary to express a final opinion upon the interpretation to be given to this particular phrase."

In the course of its judgment, the Court referred to a number of decided cases dealing with the maxim audi alteram partem, and the last authority referred to was the judgment of Tindall, J., adopted by Stratford, A.C.J., in Sachs v. Minister of Justice, supra. Having referred to this judgment, the Cape Court came to the following conclusion:

"In view of this decision it remains to consider whether Act 9 of 1913 either expressly or by necessary implication indicates that the maxim is not to apply. On this point we have been unable to find any such indication, except in so

far/.....

far as may be suggested that sec. 23 (c) by implication excludes the operation of the maxim. And so far from excluding it, the contrary would appear to be the case; for the Minister is required to give a final decision only in those cases where questions or doubts, as to the objectionability of printed matter, have arisen. The present would therefore appear to be eminently a case to which the maxim is of application."

From what appears above, the Watch-Tower case is, in my view, clearly distinguishable from the present case. The Minister in that case acted under the provisions of sec. 23 (c) of the Customs Management Act, No. 9 of 1913, in a matter affecting the interests of the importer, and his decision was final. The Court in that case held that there was no indication that sec. 23 (c) of that Act by implication excluded the operation of the audi alteram partem rule. For purposes of the present Customs Act, the Board has taken the place of the Minister, but, as indicated above, its functions and procedure have to be determined by reference to the provisions of the Act, the purpose and scope of which cannot be compared to the limited scope of sec. 23 (c) of Act No. 9 of 1913.

Section 113 (3) (a) of the Customs Act has retained the phrase "in the event of any question arising" as to whether any goods are indecent, obscene or objectionable, which is to be found in sec. 23 (c) of Act No. 9 of 1913, as amended. Having regard to the relevant sections of the Act and the Customs Act, quoted above, I think the phrase merely indicates that if an importer is not prepared to accept the view of the Customs Department, or if the Department itself has a doubt about any publication or object, the Department or the importer may refer such publication or object to the Board for its decision. I do not think that the words "in the event of any question arising", in the combined context of the Act and the Customs Act, necessarily connote a dispute, the nature of which is such that it gives rise to an inference that the Board is compelled to hear both parties.

For the reasons set out above I am of the opinion that the Act discloses a clear intention that the Board is not required to give the respondent a hearing and that the order issued by the Court a quo was wrong. The

appeal/.....

appeal succeeds with costs including the costs of two counsel, and the order of the Court a quo is set aside and substituted by the following order: "The application is dismissed with costs, such costs to include the costs of two counsel."



RUMPFF, J.A.

STEYN, C.J.	}	Concurred.
BOTHA, J.A.		
TROLLIP, J.A.		
RABIE, A.J.A.		