12.3.70 Judgment 11/70 214/69

G.P.-S.33967—1968-69—1,000. J. 219.

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

(Provincial Division.)
(APPELLATE Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

THE SECRETARY FOR THE INTERIOR *Appellant,*

versus

1. ISMAIL MOOSA, 2. ESSA ISMAIL MOOSA *Respondent*

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

Respondent's Attorney / *Prokureur vir Respondent* Webber J...

Appellant's Advocate / *Advokaat vir Appellant* W.J. Voo S... Vd G Berger

Respondent's Advocate / *Advokaat vir Respondent* L.R Dw...

Set down for hearing on / *Op die rol geplaas vir verhoor op* 12 - 3 - 70

1 2 4 6

Coram: Steyn C.J, van Blerk, Botha Wessels et Trollip, J.J.A

(C.P.D.)

9.45 am — 11 00 am
11.15 am — 1 00 pm
2.15 pm — 4.00 pm
4.15 pm — 4.30 pm

Judgment 1.9.70 per Trollip J.A
all concurred with Steyn C.J.

REGISTRAR, APPEAL COURT,
GRIFFIT 3, APPELLHOF,
BLOEMFONTEIN.
- 1 9 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 SECRETARY FOR THE INTERIOR ..... APPELLANT.

VS.

ISMAIL MOOSA ..... 1st RESPONDENT.

AND

ESSA ISMAIL MOOSA ..... 2nd RESPONDENT.

CORAM: STEYN, C.J., VAN BLERK, BOTHA, WESSELS et TROLLIP, JJ.A.

HEARD: 12 May 1970. DELIVERED: 1 September 1970.

J U D G M E N T.

WESSELS, J.A. :-

This is an appeal against the order of the Cape Provincial Division (Banks and van Heerden, JJ.) setting aside the reference by the appellant of the classifications of first respondent, his wife and second respondent to the Race Classification Appeal Board, declaring that they are entitled to the return to them, without qualification, of their respective identity cards and ordering appellant to pay costs. The

proceedings in the Court a quo were initiated by first respondent on notice of motion dated 8 September 1969, citing appellant as respondent. First respondent (as applicant) applied for relief on his own behalf, on behalf of his wife (to whom he is married in community of property) and, being authorised to do so, also on behalf of second respondent (a major son of first respondent and his wife). For the sake of convenience I will hereinafter refer to the last-mentioned parties as applicants and to the appellant as the Secretary.

The circumstances leading up to the initiation of these proceedings are briefly as follows. The applicants were in the first instance classified as Indians in terms of the provisions of section 5(1) of Act No. 30 of 1950 (hereinafter referred to as "the Act"). In the first applicant's affidavit filed in support of the notice of motion, it is stated that although he "was not happy with that classification" he took no action at that stage. Subsequently "several leading members of the Coloured community" encouraged first applicant to seek to have the classifications of applicants altered from Indian to Coloured. First applicant thereafter collected "a

3/.....considerable

considerable volume of evidential support" for the claim that applicants should be classified as Coloureds. On 2 August 1963 the applicants addressed a request to the Secretary that their several classifications as Indian be altered to Coloured, and at the same time furnished him with the evidence which first applicant had collected. On 24 February 1964, an official communication was addressed to applicants' attorney. The first paragraph thereof reads:

> "With reference to previous correspondence regarding the abovementioned subject, I have to inform you that after careful consideration of all the facts and documents at my disposal it has been decided to reclassify Ismail Moosa, his wife Huri ..... and his son Essa ..... as Coloured persons."

In due course the applicants were furnished with new identity cards which reflected their classification as Coloured.

The matter rested there until November 1966, when it became known to applicants that the correctness of their classification as Coloureds was being questioned. They were required to return their identity cards to the Department of the Interior. Eventually, on 24 April 1968, the Secretary addressed a letter to each of the applicants, informing them

that "as a result of information received by this office" it would appear that their classification as Coloured "in terms of section 5(1)" of the Act was incorrect. Each letter contained the following paragraphs:

> "2. I intend, therefore, to alter your classification in terms of section 5(4) of the above-mentioned Act, from Coloured to Indian, but before doing so, hereby afford you an opportunity of being heard.
> 3. You are at liberty to make your representations in writing but if no such representations are received from you within 30 (thirty) days from the date of this notification, it will be assumed that you have no objection to your re-classification as an Indian and steps will be taken accordingly.
> 4. If desired, you may make verbal representations to the Regional Representative, Department of the Interior, Sanlam Centre, Heerengracht, Cape Town, within the time specified in paragraph 3 above."

The reference in paragraph 2 to section 5(4) of the Act is to the new section 5 substituted by section 2 of Act No. 64 of 1967, which was assented to on 16 May 1967. In terms of section 7 of the latter Act, the amendments effected to the Act shall be deemed to have come into operation on 7 July 1950.

On 21 May 1968 applicants caused a letter to be addressed to the Secretary in reply to his letters of 24 April 1968, addressed to them. It was contended on behalf

of the applicants that section 5(4) of the Act (as amended) did not empower the Secretary to alter their classifications from Coloured to Indian. This letter was replied to by the Secretary on 1 November 1968 in the following terms.

> "1. "With further reference to your letter AWB/SCT dated the 21st May, 1968, I have to inform you that, as a result of information which I have at my disposal and for the reasons stated in my letters of the 24th April, 1968, addressed to your clients, it would appear that the classification of your clients is incorrect.
> 2. I have accordingly decided, in terms of section 5(4)(b) of the Population Registration Act, 1950, to refer your clients' cases to a Board constituted in terms of section 11(4) of the Act, for a decision as to whether or not their classification should be altered.
> 3. You will in due course be advised of the date on which the matter will be heard by the Board."

It is unnecessary to detail the events which intervened between the writing of the abovementioned letter and the institution of the motion proceedings in the Court a quo. I might mention, though, that it appears that the Secretary referred the matter to a board in terms of section 11(4) of the Act (as amended by section 4 of Act No. 64 of 1967) on 30 May 1969, but that the applicants were not aware thereof when they instituted the motion proceedings.

It is a convenient stage to refer to the

judgment in Essop v. Sekretaris van Binnelandse Sake en Andere, 1969(4) S.A. 243(C). The substantial issue raised in that case is similar to that which arose for determination by the Court a quo. In Essop's case it was decided that, having once altered a classification in accordance with the provisions of section 5(3) of the Act, the Secretary was functus officio, and could not thereafter ~~once more~~ again alter the classification of the person concerned, either in terms of section 5(3) of the Act or of section 5(4) of the Act (as amended).

It was common cause that the judgment in Essop's case was decisive in regard to the issues raised before the Court a quo, unless that case was wrongly decided. It was contended on behalf of the Secretary that Essop's case was wrongly decided and should, therefore, not be applied. The Court a quo decided, however, that this contention could not be upheld. The same question regarding the correctness or otherwise of the judgment in Essop's case arises for consideration by this Court.

Since it will be necessary for me to refer to the various provisions of section 5 of the Act (as substituted

by section 2 of Act No. 64 of 1967), it is convenient to set out the terms thereof. It reads as follows:

"5. (1) Every person whose name is included in the register shall be classified by the Secretary as a white person, a coloured person or a Bantu, as the case may be, and every coloured person and every Bantu whose name is so included shall be classified by the Secretary according to the ethnic or other group to which he belongs.

(2) The State President may by proclamation in the Gazette prescribe and define the ethnic or other groups into which coloured persons and Bantus shall be classified in terms of subsection (1), and may in like manner amend or withdraw any such proclamation or any proclamation purporting to have been issued in terms of this subsection.

(3) (a) The State President may in any proclamation referred to in subsection (2) whereby a previous proclamation, including a proclamation purporting to have been issued in terms of that subsection, is amended or substituted, state that anything done or purporting to have been done under the provisions of that previous proclamation, which could be done under that proclamation as so amended or under the new proclamation whereby ~~xii~~ that proclamation is so substituted, shall be deemed to have been done under the amended or new proclamation, as the case may be.

(b) A proclamation under subsection (2) may be issued with retrospective effect as from a date not earlier than the seventh day of July, 1950.

(4) If at any time it appears to the Secretary that the classification of a person in terms of subsection (1) (other than a classification in accordance with a decision of a board) is incorrect he may, after giving notice to that person and, if he is a minor, also to his guardian, specifying in which respect the classification is incorrect -

(a) alter the classification of that person in the register after affording such person and such guardian (if any) an opportunity of being heard;

or

(b) refer the case to a board for decision as to whether the classification of that person in the register should be altered.

(5) In the application of this section -

(a) a person shall be classified as a white person if his natural parents have both been classified as white persons;

(b) a person shall be classified as a coloured person if his natural parents have both been classified as coloured persons or one of his natural parents has been classified as a white person and the other natural parent has been classified as a coloured person or a Bantu.

(c) a coloured person whose natural parents have both been classified as members of the same ethnic or other group, shall be classified as a member of that group;

(d) a person shall be classified as a Bantu if his natural parents have both been classified as Bantus."

Before considering the meaning to be given to section 5(4), it is useful to have regard to certain provisions of the Act which are more particularly concerned with the compilation and maintenance of the population register by the Secretary.

In terms of section 2 the Secretary is required to compile and thereafter to maintain a register in which there shall be included the names of the persons referred to in section 4. In terms of section 7 (disregarding the special

provisions in regard to natives), there must be included in the register, in respect of every person whose name is included therein, certain particulars, inter alios, "his classification in terms of section five" and "his identity number." There are several sections which indicate the sources from which the particulars to be included in the register are to be obtained. Section 3 refers to "forms and returns received ..... under the Census Act, 1910" and "such other records as may be available to the Secretary." In terms of section 9 (as amended by section 3 of Act No. 64 of 1967) further sources of information are indicated, which need not be detailed herein. It is of significance to note that in terms of section 12, the Secretary

> "may require any person in respect of whom any particulars required for recording in the register have been furnished in any form or return received under the Census Act, 1910 (Act No. 2 of 1910), or in any form prescribed under section nine, to furnish to him evidence as to the correctness of any such particulars."

It follows that the Secretary is not limited to the information which may be extracted from the sources mentioned in section 3 or to the particulars furnished in terms of section 9 of the Act. If he is of opinion that such information is incorrect, or is in doubt about its correctness, he may require the person

concerned to furnish evidence as to the correctness of the particulars in question.

In terms of section 7(1)(i) the identity number of every person whose name is included in the register must be included in such register. The number to be included is that assigned to the person concerned by the Secretary in terms of section 6 of the Act.

There remains for consideration the provisions of section 5, which must inevitably be complied with before effect can be given to the provisions of section 7(1)(b) of the Act, i.e., before an entry can be recorded in the register in respect of the classification in terms of section 5 of a person whose name is included in the register.

As soon as a person's name is included in the register, the Secretary is required by section 5(1) to classify him as a white person, a Coloured person or a Bantu, as the case may be. Where a person has been classified as a Coloured person or a Bantu, the Secretary must in addition classify him according to "the ethnic or other group" to which he belongs. When the Secretary has completed the task of

classification imposed upon him by section 5(1), section 7(1)(b) requires that such classification be included in the register. In so far as section 5(1) of the Act is concerned, the duties imposed upon the Secretary are of an administrative nature, and he may exercise his powers without any reference whatsoever to the person concerned. He may confine himself to such information as may be available to him in terms of the provisions of sections 3 and 9 of the Act. If he considers it necessary, however, he can invoke the provisions of section 12 of the Act, and require the person who is to be clasified to furnish him with evidence relevant to the question of classification. The Secretary is, however, not bound to give such person a hearing, even though he might presumably be entitled to do so. Although these provisions aim at reducing the risk of an incorrect classification being made in terms of section 5(1) of the Act on insufficient or incorrect information, the possibility of error nevertheless exists, as was pointed out in Phillips v. Direkteur vir Sensus, 1959(3) S.A. 370 (A.D.) at p. 375A. It is, of course, also possible that a classification in terms of section 5(1), which is based

12/.....upon

upon correct and sufficient information, might be incorrect because the Secretary misconstrued the facts or the provisions of the Act. The legislature no doubt contemplated these possibilities, hence the further provisions of section 5 which relate to the alteration of an incorrect classification made in terms of section 5(1). In my opinion the terms of section 5 make it clear that the Secretary is not empowered by section 5(1) to make any further classification, after he has once classified a person in terms thereof, on the ground that his first classification was incorrect, i.e., he is not authorised to reconsider the classification on an administrative basis. The procedure to be followed by the Secretary, if he contemplates reclassification, is laid down in section 5(3) of the Act, which governed the position when the applicants' classifications were altered in February of 1964. Section 5(3) in terms authorises the Secretary to reconsider "the classification of a person in terms of sub-section (1)", i.e., the classification made by him in the discharge of his duties under section 5(1). In so far as section 5(3) is concerned, the legislature contemplated that the classification of the person concerned would be reconsidered only after affording him an opportunity of being heard. It

seems self-evident that it can only "appear" to the Secretary that a classification made in terms of section 5(1) is incorrect, if he is satisfied, after considering all the information then at his disposal and hearing the person concerned, that a classification different from that made in terms of section 5(1) is the correct classification. In my opinion the alteration of an existing classification in terms of section 5(3) necessarily involves the making of a new classification. The question then is, whether a classification made by the Secretary in terms of sub-section (3), is for all purposes of the Act to be regarded as a classification in terms of sub-section (1)? Although the matter is not free from doubt, I am of the opinion that the legislature intended drawing a distinction between a classification in terms of section 5(1) and one in terms of section 5(3) of the Act (in its unamended form), and probably did so with due regard to the fact that a different type of procedure was prescribed for each separate act of classification, one being of a purely administrative nature, the other involving an enquiry of a quasi-judicial nature. If the legislature did not intend drawing a distinction between a classification em-

[illegible] country

[illegible] (2) [illegible] correct,

[illegible] then [illegible]

[illegible] processes, [illegible]

Location [illegible] (1)

the correct [illegible] cation. [illegible] of

[illegible] section (c) [illegible]

volves [illegible] them

[illegible]

[illegible] section (c), [illegible] purposes [illegible]

as a [illegible] in terms [illegible]

[illegible]

[illegible]

cation in terms of section (c) [illegible] terms of section

(c) [illegible]

[illegible]

[illegible] produce [illegible] this, [illegible]

[illegible] negative [illegible] volve

[illegible]

[illegible]

[illegible]

powered by section 5(1) and one empowered by section 5(3), it would seem that the words "in terms of sub-section(1)" in section 5(3) are superfluous. It would have been sufficient to have provided, "If at any time it appears to the Secretary that the classification of a person is incorrect, he may ....." or to have qualified "classification" by adding "in terms of section 5." Elsewhere in the Act, where it is obviously intended to refer to any classification, irrespective of the particular provision of the Act in terms of which it was made, the reference is to the "classification in terms of section five". (See, sections 7(1)(b), 8(2)(b), 11(1), 13(2)(b) and 15). I might mention that the references in section 5 to "classified" and "classification" refer, firstly, to the duty of the Secretary to consider the information at his disposal in order to determine how the person concerned is to be classified and, secondly, to the end result of his labours, i.e., the determination of the person's classification as White, Coloured or Bantu, etc. Section 5 is not concerned with the entry made in the register of the classification in terms thereof. (See sections 2 and 7(1)(b)).

I conclude, therefore, that applicants'

classification as Coloureds during February of 1964 were not classifications made by the Secretary in terms of section 5(1), but in terms of section 5(3) of the Act. The classifications of the applicants, first as Indians and subsequently as Coloureds, were made by the Secretary at different times, on different facts and by virtue of a different statutory power authorising him to act in the matter of the classification of a person whose name is included in the register.

When the applicants were informed during 1968 by the Secretary that he intended considering their classifications once more, a new section 5 had been substituted by Act No. 64 of 1967. Section 5(4)(a) is in substance a re-enactment of the original section 5(3), the only difference being the insertion of the phrase "(other than a classification in accordance with a decision of a board)". Section 5(1) was re-enacted in similar terms. Having regard to the provisions of section 11(6) of the Act (as substituted by section 4 of Act No. 64 of 1967) - which declares the decision of a board to be "final and binding upon all persons" - it is not clear why the aforementioned phrase was inserted in section 5(4). It is

possible that the legislature considered that if an aggrieved person appeals to the board against a classification by the Secretary in terms of section 5(1) of the Act, his classification remains one in terms of that sub-section, whatever classification the board decides to be the correct one. The legislature may have thought it wise, in order to avoid possible uncertainty, to exclude in express terms such a section 5(1) classification from those which may be reconsidered by the Secretary in terms of section 5(4).

The Secretary's power to act in terms of either paragraph (a) or (b) of section 5(4) may be exercised (subject to the person concerned being given a hearing), "If at any time it appears" to him "that the classification of a person in terms of sub-section (1) ..... is incorrect.....". I have already stated that in my opinion the applicants' classification as Coloureds is not a classification "in terms of sub-section (1)". In the case of the applicants, the jurisdictional fact giving rise to the exercise of the power granted to the Secretary by section 5(4) does, therefore, not exist. The power can accordingly not be exercised by the Secretary. On this approach it is unnecessary to consider the meaning of

the words, "If at any time" in the sub-section.

I am, however, of the opinion that the words, "If at any time it appears ....." do not mean, "If at any time and whensoever it appears .....", or "If at any time and as often as it appears .....". On this issue Essop's case (supra) was, in my opinion, correctly decided. The reasons for the conclusion that the Secretary is functus officio after once exercising the power granted him by section 5(4) are fully dealt with by Steyn, J., in his judgment, and it is unnecessary for me to repeat them in this judgment. It will be sufficient to make certain additional observations arising out of arguments addressed to this Court.

It was contended on behalf of the Secretary that the legislature intended that the register should be maintained in a state of correctness. This leads to the conclusion, so it was argued, that although the power to alter particulars other than classification, is not expressly given, the Secretary

may alter, and may alter more than once. From this would follow that where the power to alter is expressly given, the Secretary may also alter more than once.

This contention is devoid of substance. The register is in a state of correctness, if the particulars required to be included have been correctly entered therein. These particulars are detailed in section 7 of the Act. If, due to oversight or clerical error, particulars are incorrectly entered, the register is not in the required state of correctness. The register is then corrected by including therein the correct particulars. The particulars are not altered, the entry is corrected so as to comply with the provisions of sections 2 and 7 of the Act. An alteration might, of course, take place in regard to particulars which were correctly included, e.g., a change of name or of the ordinary place of residence, an alteration in classification in terms of section 5 or of marital status, will undoubtedly affect the correctness of the register. Any change in the particulars referred to in section 7 (including one arising from an alteration in the classification of the person) must be reflected in the register so as to comply with the pro-

visions of sections 2 and 7 of the Act. But a correction (or alteration) of particulars included in the register is not to be confused with any change in or alteration of the particulars which are required to be included in the register. Thus, section 5(4) is concerned with the alteration of the classification of a person whose name is included in the register, and not with the correction of the entry in the register regarding the classification of the person concerned.

It was, further, contended that "the rights and convenience of an individual must perforce yield to the policy sought to be achieved by the statute," the corollary being that the "policy" might be frustrated unless section 5(4) were to be construed in the manner contended for on behalf of the Secretary. The "policy", as outlined by counsel, did not contemplate finality in the classification and reclassification of the individual citizen, but ultimate correctness in an absolute sense. Having regard to the social inconvenience, and possible hardship, which may attend repeated reclassification, I would hesitate to ascribe such a policy to the legislature, unless I were to be driven thereto by a consideration of the matter of the statute and its scope and purpose. A considera-

tion of these matters leads me to conclude that, though the legislature undoubtedly contemplated that persons should be correctly classified in accordance with the provisions of the Act, it was not unmindful of the fact that the public interest and the interest of the individual citizen require that, at a certain stage, finality should be reached so that the individual citizen, having been assigned his niche in our social set-up, may order his life and that of his family on a basis of reasonable permanence. Thus, the right of a person, who has been classified in terms of section 5(1), or reclassified in terms of section 5(4), to have his classification reconsidered by a board in terms of section 11, endures for a limited time only (section 11(1)). He is "in no circumstances" entitled to object against his classification or reclassification after the prescribed time has elapsed. It is, however, conceivable that new facts may become known after the prescribed period has elapsed, which demonstrate that the classification or reclassification is incorrect. This circumstance does not revive the right of the person concerned to have the classification or reclassification reconsidered by a board. I do not overlook counsel's submission that it was

21/.....intended

intended by section 5(4) that the Secretary should have power to reclassify a person, so often as it appears to him, by reason of the emergence of new facts or otherwise, that his existing classification is incorrect. If a person, who considers himself aggrieved by his classification or reclassification does object within the prescribed time, the decision of a board (subject to a right of appeal in terms of section 11(6)) brings about finality. Yet, new facts, which emerge thereafter, may clearly demonstrate that this "final" classification is incorrect. Neither the Secretary nor the board has jurisdiction in these circumstances to reconsider the matter in order to maintain the "correctness" of the register in accordance with the "policy" contended for by counsel on the Secretary's behalf.

In the course of argument reference was also made to difficulties which might arise if a proclamation prescribing and defining ethnic or other groups into which Coloured persons and Bantus "shall be classified in terms of section (1)" is amended or substituted (with or without retrospective effect) in terms of section 5(2) and (3) of the Act. The amended or substituted proclamation might necessitate

"reclassification" of persons whose names are included in the register and who were classified in accordance with the earlier proclamation. The problem would, of course, depend to some extent on the nature and scope of the amendment brought about by the new proclamation. It might, e.g., merely prescribe that the "Cape Coloured Group" will henceforth be known as the "South African Coloured Group", or consolidate several groups into one group, e.g., by providing that persons falling within the "Cape Coloured Group", the "Malay Group" and "the other Coloured Group" will henceforth be regarded as falling within the same group to be called the "South African Coloured Group". On the other hand, the amendment may be so far-reaching by reason of completely new ethnic groups with new definitions being prescribed, that all persons, other than those falling in the white group, will have to be classified afresh. In so far as the less drastic changes are concerned, which do not involve individual reclassification of the persons concerned, but merely a change in group "names", it would seem that the register could be corrected in terms of the provisions of sections 2 and 7 of the Act. If, however, reclassification of individual

23/.....persons

.....

persons is required, it appears that the Secretary might be authorised to act in terms of section 5(1), on the basis that the original classifications have, as it were, become pro non scripto. This would enable him to classify the persons concerned in terms of section 5(1). Whatever the answer might be (and an amendment of the Act might have to solve the problem), the provisions of section 5(4) do not provide one. One obvious reason why section 5(4) does not appear to meet the case, flows from the fact that a classification in accordance with a decision of a board is not alterable by the Secretary in terms of that sub-section. Another reason, of a somewhat awesome nature, why section 5(4) is not appropriate in "mass" classification, flows from the fact that where the Secretary purports to act in terms thereof, he is not only required to give the prescribed notice of his intention to do so to every person concerned, but must also grant such person an opportunity of being heard. Indeed a mammoth task, where the classification of several million people may be involved.

It was also suggested, with reference to examples, that if the power of the Secretary were to be limited

in the matter contended for on applicants' behalf, he would be unable to act in cases of hardship. This consideration has no weight in regard to the construction of section 5(4) which requires the Secretary to classify in accordance with the provisions of the Act, notwithstanding the fact that such classification might result in hardship. It would appear that hardship may in practice follow in the train of correct classification at least as often as it might do so as a result of an incorrect classification. In this regard I might refer to the provisions of section 5(4)(c) of the Act (as amended by section 2 of Act No. 106 of 1969), which appears to be indended to empower the Secretary to deal, inter alios, with hardship cases.

It was also submitted that a person can always obtain finality by seeking the board's decision. In so far as this is concerned, the applicants were faced with the difficulty that the Secretary had after full and careful consideration reclassified them at their own instance in a manner which gave them no cause to feel aggrieved.

I would dismiss the appeal with costs.

A. Howard C.J.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between:

THE SECRETARY FOR THE INTERIOR ..... APPELLANT

AND

ISMAIL MOOSA ..... FIRST RESPONDENT

AND

ESSA ISMAIL MOOSA ..... SECOND RESPONDENT

Coram: Steyn C.J., Van Blerk, Botha, Wessels,

et Trollip, JJ.A.

Heard: 12th May, 1970. Delivered: 1st September, 70

J U D G M E N T.

TROLLIP, J.A. :-

I have read the judgment of Wessels, J.A. It sets out the relevant facts, so they need not be repeated here. After giving the matter anxious consideration, I have arrived at a different conclusion for reasons that follow.

In 1950, for the first time, form and

substance ..... /2.

substance were given to the concept of having a comprehensive register of the whole population of this country in the Population Registration Act, No.30 of that year. Since then the Act has often been amended, even as recently as 1969 by Act No.106 of that year. It was not disputed, however, that this appeal turns on the Act as amended by Acts up to and including Act No.64 of 1967. This judgment will therefore be based on the Act in its 1967 form, i.e., the sections referred to will be those amended up till then, but where necessary I shall refer to the Act in its 1950 and 1969 forms.

In my view the nub of the problem in this appeal is the true meaning of the phrase in section 5(4), "the classification of a person in terms of sub-section (1)", i.e., section 5(1). Does it mean any classification of a person on the register, including a reclassification by the Secretary under section 5(4), or is it confined to the person's initial classification by the Secretary ? If the former, the appeal must succeed; if the latter, then the decision of the Court a quo was correct and the appeal must

fail ..... /3.

fail. As the wording of the phrase itself does not provide a clear and firm answer, its context in section 5 and other relevant sections of the Act must be considered.

The objects of the Act were, first, the compilation and maintenance of a comprehensive register of the population, containing certain information about every person included in it, and, second, the issue of an identity card to each such person aged 16 years or more. Consequently, sections 2 and 3 enjoin that, as soon as practicable after the 1951 census, the Director of Census (now the Secretary of the Interior) has to compile such a register and thereafter "maintain" it. That means that he is thereafter obliged, subject to the provisions of the Act, to keep it up to date and ensure that all the information in it is correct and otherwise in order. Some of the particulars that have to appear about every person whose name is included therein are, his full name and sex, his place of ordinary residence, the date and place of his birth, his citizenship and nationality and whether he is an alien, and his marital status (section 7).

Some ..... /4.

Some of those particulars are, of course, liable to change, and such changes have to be effected in the register by the Secretary by reason of his duty under section 2 to maintain the register in a proper, up to date, and correct state. Every person aged 16 years and over whose name is in the register has to be issued with an identity card containing some of the information appearing in the register (section 13), and, if that information is or subsequently becomes incorrect, the identity card has to be replaced with one containing the correct particulars (section 15(1)).

It will be immediately apparent that those particulars are intended to reflect material information about the registered person's legal status, such as his sex, age, nationality, marital status. Of great importance to a person's status in South Africa is his ethnological class or group, for it bears upon his rights, privileges, and generally his legal position as an individual in or with regard to the rest of the community. Hence the Act makes elaborate provision for determining such class or group of every registered person, and it requires that,

when ..... /5.

when determined, it must be recorded in the register and reflected in his identity card (see sections 7(1)(b) and (2)(b) and 13(2)(b) and 5(b)).

I turn now to those provisions. It is manifestly fundamental to such a system of classification that the relevant classes or groups should be specified and defined. The Act does that in section 5(1). For easy reference I repeat it here:-

> "Every person whose name is included in the register shall be classified by the Secretary as a white person, a coloured person or a Bantu, as the case may be, and every coloured person and every Bantu whose name is so included shall be classified by the Secretary according to the ethnic or other group to which he belongs".

Those classes and groups are defined in section 1.

It should be immediately emphasized that section 5(1) is the only provision in the Act specifying

the ..... /6.

the relevant classes or groups. As Mr. Vos for the appellant rightly observed, it is the only source in the Act of the power to effect the contemplated classification. Consequently, at the outset it appears prima facie that every classification under the Act must be one in terms of section 5(1), for there is no other provision under which it can be effected. That initial view is, I think, confirmed by other parts of the Act, which will now be examined.

The first classification of a registered person is done by the Secretary himself under section 5(1) on information culled from the census and other records available to him (section 3) and from any particulars submitted by the person himself under sections 9 and 12. That is clearly a classification by the Secretary in terms of Section 5(1). But section 5(1) is not confined by either its terms or its operation to that initial classification. For the Act provides for the subsequent reclassification of a person in certain circumstances, which, I think, can also only be effected in terms of that sub-section. Thus, under section 11, any

person ..... /7

person aggrieved by his initial classification can object against it (sub-section (1)); the Secretary must refer the objection to a board (herein called "the Board"), consisting of not less than 3 persons, presided over by a judge or ex-judge or magistrate (sub-section (4)), which then conducts a [redacted] legal hearing with witnesses and counsel or attorneys (sub-section (5)(a)); its decision on the objection is final and binding on all persons, except that the classified person can appeal to the Supreme Court (sub-section (6)), which can confirm, vary, or set aside the decision of the Board or give such other decision as it thinks the Board should have given (sub-section (7)); an appeal from its decision lies to the Appellate Division (sub-section (8)); and any decision by the Supreme Court or Appellate Division is deemed to be a decision by the Board (sub-section (9)), i.e., it is final and binding on all persons. Now the Board or Court may confirm the Secretary's classification; it would then remain a classification by the Secretary in terms of section 5(1). But the Board or Court can and may set aside the Secretary's

classification ... /8.

classification. Assuming without deciding that it then has the power to remit the matter to the Secretary to classify afresh, I think it is clear that he can still only classify the person in one of the classes or groups specified in section 5(1). That reclassification will therefore also be one by the Secretary in terms of section 5(1), there being no other section or sub-section under which it can be done. Or the Board or Court, having set aside the Secretary's classification, can and may itself determine the person's proper class or group. That again can only be one of those classes or groups specified in section 5(1). But in that event neither the Board nor the Court is itself empowered by the Act to give effect to its decision on the register. For that purpose it can only direct the Secretary to reclassify the person accordingly. The Secretary, the decision being binding on him, must then reclassify the person in the particular class or group of section 5(1) determined by the Board or Court. Again, I think, the process can be described as a classification by the Secretary in terms of

section ..... /9.

section 5(1), especially as there is no other section or sub-section of the Act which covers it. Mr. Dison, counsel for respondents (the applicants in the Court a quo), did not dispute those conclusions; indeed, he accepted their correctness. Moreover, they are confirmed by sections 7(1)(b), 8(2)(b), and 13(2)(b), which respectively require the register, the list from the register kept at every magistrate's office, and every identity card, to state, inter alia, the person's "classification in terms of section five". That must obviously include a reclassification made in accordance with the decision of the Board or Court, which shows that the legislature intended it to be a classification in terms of sub-section (1) of section 5, that being the only relevant sub-section. And as will be presently seen, convincing support for the above conclusion is also derived from section 5(4), for it speaks of a "classification in terms of sub-section (1) (other than a classification in accordance with a decision of a board)".

Hence, it is clear that section 5(1) is not confined to the initial classification by the Secretary; it

also ..... /10.

also includes a subsequent reclassification by the Secretary in accordance with a decision of the Board or Court.

The way is now clear to consider section 5(4), the crucial provision in this appeal. It too provides for a subsequent reclassification but for one by or at the instance of the Secretary himself. For easy reference I repeat the sub-section here.

> "If at any time it appears to the Secretary that the classification of a person in terms of sub-section (1) (other than a classification in accordance with a decision of a board) is incorrect he may, after giving notice to that person and, if he is a minor, also to his guardian, specifying in which respect the classification is incorrect -
>
> (a) alter the classification of that person in the register after affording such person and such guardian (if any) an opportunity of being heard; or
>
> (b) refer the case to a board for decision as to whether the classification of that person should be altered".

The ..... /11.

The argument for the respondents was that "the classification of a person in terms of sub-section (1)" means the initial classification by the Secretary, that such classification can be altered by the Secretary under section 5(4) if it appears to him to be incorrect, that it will then be a classification in terms of sub-section (4) and not sub-section (1), and that such reclassification can therefore not again be subsequently altered by the Secretary or referred by him to the Board for its decision on the alteration. Mr. Dison sought to reinforce the argument by maintaining that, as a person's status is involved and to avoid the uncertainty, insecurity, and hardship to a person that may otherwise ensue, the legislature must have intended the Secretary's second classification to be final, especially as he can only effect it as a result of holding a quasi-judicial inquiry. These are forceful contentions warranting close attention, but I ultimately concluded that they cannot be sustained by the various relevant provisions of the Act.

The critical phrase, "the classification

of a person in terms of sub-section (1)", is not by its own terms confined to the initial classification, and I have already pointed out that sub-section (1) is itself not so confined. Hence the phrase, standing by itself, must relate to any classification in terms of that sub-section. That is cogently confirmed by the very next provision in parenthesis in sub-section (4) - "other than a classification in accordance with a decision of a board". The reason for the insertion of this reservation is, of course, clear: according to section 11 a decision by the Board (which includes a decision by the Court) is final and binding on all. But it is the fact of the reservation's insertion in that context that is so significant, for it shows that neither the critical phrase nor section 5(1) was meant to be confined to the Secretary's initial classification; otherwise its insertion would have been totally unnecessary. (I should interpolate here that it was not the 1967 Act that first introduced that reservation; it appeared, albeit in different form, in the original section 5 of the 1950 Act. There the Secretary's power to alter "the

classification .... /13.

classification of a person in terms of sub-section (1)" was made "subject to the provisions of sub-section (7) of section eleven", section 11(7) being the then provision that rendered the Board's and therefore the Court's decision final and binding. The effect and significance of that reservation was therefore the same as that expressed above.) Consequently section 5(4) means that any classification in terms of section 5(1) is alterable by the Secretary, or by the Board at his instance, except one already confirmed or altered in accordance with a decision of the Board or Court.

Now when the Secretary exercises his power in section 5(4) to "alter the classification of that person in the register", he in reality does two things: (a) he sets aside or deletes the existing, incorrect classification, and (b) he classifies the person afresh on the register. While the whole process of (a) and (b) can be described as an "alteration in terms of section 5(4)" - see for example section 15(1) - I do not think that (b) alone, i.e. the reclassification, can really be aptly described as being

"in ..... /14

"in terms" of sub-section (4), since that sub-section does not specify any class or group to which the person must now be assigned. Those classes or groups are only specified in sub-section (1). Consequently, and virtually for the same reasons already given in relation to a reclassification effected in accordance with a decision of the Board or Court, I think that a reclassification by the Secretary under section 5(4) is also correctly describable as "the classification of a person in terms of sub-section (1)" within the meaning of that phrase in section 5(4). Or to put the same conclusion another way: that phrase in truth means "the classification of a person as a white person, coloured person, Bantu, etc., as specified in section 5(1)".

It is true that that conclusion does tend te render the words "in terms of sub-section (1)" otiose; the legislature could perhaps have simply said, "the classification of a person (other than a classification in accordance with a decision of a board)"; but, as against that, it will

be ..... /15.

be observed that elsewhere in the Act, in referring to a person's classification, the legislature also calls it "his classification in terms of section five" when "his classification" or "his classification under this Act" would have sufficed (see sections 7(1)(b), 8(2)(b), 13(2)(b), and 11(1)). The reason for such seemingly unnecessary precision in all these sections is probably the absence from section 1 of a definition of "classification". Hence, I do not think that any such linguistic otioseness advances the case for the respondents.

Mr. Dison also relied on a comparison of the relevant wording of section 5(4), "classification in terms of sub-section (1)" of section 5, with that in the sections just mentioned - "classification in terms of section five" (my italics); this difference in language, he urged, was deliberate, since it was intended that the latter phrase should cover a classification under both sub-sections (1) and (4) of section 5, whereas the former should be confined to one (the initial one) under sub-section (1) thereof. But that difference in wording is

otherwise ..... /16.

otherwise explicable; as sub-sections (1) and (4) both occur in the same section, i.e. section 5, it was natural for sub-section (4) to refer specifically to a "classification in terms of sub-section (1)" instead of a "classification in terms of this section", whereas in the other sections, being seperate and distinct from section 5, it sufficed to be less specific and to use the latter phrase. Consequently, no sustenance for the argument can be drawn from that difference in wording.

The language of sections 5(4)(c) and 21 A(1)(a), being amendments added by Act No. 106 of 1969, was also called in to aid the same argument for respondents. The former speaks of "the classification of such person in the register", the latter of "the classification of any person". This general language was again contrasted with the more specific wording of section 5(4): "the classification of a person in terms of sub-section (1)" of section 5. And the same inference as set out above was sought to be drawn from the difference in wording. It suffices to say

that ..... /17.

that, even assuming that this recent Act can be relied on to interpret the prior Acts, I do not think that the language in those provisions is so clear as to compel me to depart from the above construction of section 5 in the 1967 Act that all classifications under the Act must necessarily be in terms of section 5(1). Possibly the reason for the use of that general language in the 1969 Act was the legislature's realization that to refer, as it had previously done, to a person's classification as being one "in terms of section five" or "in terms of sub-section (1) of section five" was being unnecessarily precise.

The meaning of the expression "if at any time" in section 5(4) was also much debated at the Bar, but it does not advance the argument of either party, for by itself it is equivocal. It can connote either "every time", i.e. "whenever", or "at a particular time no matter when". In conformity with the context here, as determined above, I think it means the former and not the latter. Consequently, section 10(1) of the Interpretation Act, No. 33 of 1957, which enacts that, unless the contrary

intention appears, a statutory power may be exercised "from time to time as occasion requires", need not be invoked here to achieve the same result. On this aspect, therefore, the correctness of the decision in Holden v. Minister of the Interior 1952 (1) S.A. 98(T) does not arise for consideration, but, in any event, it seems to be distinguishable since the relevant statutory provisions there were quite different from those here.

It was also stressed that under section 5(4) the Secretary could only alter a classification after holding an inquiry. In Essop v. Sekretaris van Binnelandse Sake en Andere 1969 (4) S.A. 243(C) at p.246 that inquiry was labelled a quasi-judicial one. Hence it was inferred by the Court there and was again contended here that, the alteration having been made after that inquiry, the Secretary became functus officio and the reclassification final. But this Court has warned against relying too greatly on such an approach. Referring to the categorization in judgments and juristic literature of discretions and functions

as ..... /19.

as being "administrative", "quasi-judicial", and "judicial", Schreiner, J.A. said in Pretoria North Town Council v. A.1. Ice-Cream Factory 1953 (3) S.A. 1(A) at p. 11:

> "What primarily has to be considered in all these cases is the statutory provision in question, read in its proper context".

Here, on a proper construction of section 5(1) and (4) in the context of other provisions of the Act, the Secretary does not in my view become functus officio on reclassifying a person under section 5(4), because such reclassification, being a "classification in terms of sub-section (1)", is itself subsequently alterable by the Secretary under section 5(4), if it appears to him to be incorrect. And I cannot help thinking that, if the legislature had intended that the first alteration by the Secretary should be final as far as he is concerned, it would have said so expressly. After all, the problem of having finality in such matters and the need to enact it expressly

were ..... /20.

were clearly appreciated by the legislature. For in section 11(6) and (9) it expressly rendered a decision by the Board and Court final and binding, and in the very provision in question here, section 5(4), it gave effect thereto by expressly precluding a classification in accordance with such a decision from being subsequently altered by or at the instance of the Secretary even if it appears to him to be incorrect. The conspicuous absence from section 5(4) or elsewhere in the Act of a similar express provision rendering an alteration by the Secretary final and binding, induces me to conclude that finality in the Secretary's reclassification was not intended. The reason for the differentiation is not far to seek. A decision by the Board or Court is only arrived at after a full hearing (see section 11); the legislature consequently treated it as being res judicata, i.e. that it must be irrebuttably presumed to represent the person's correct classification (cf. African Farms & Townships Ltd. v. Cape Town Municipality 1963 (2) S.A. 555 (A) at p.564). On the other hand, the decision by the Secretary under section 5(4) is arrived at after an inquiry of a far lesser order than

such a full hearing, and the legislature therefore did not consider that his decision warranted its correctness being irrebuttably presumed. I do not mean to convey thereby that his inquiry is not normally a full or careful one; on the contrary, the nature and extent of the investigations conducted on the Secretary's behalf before he acted in the present case show the fullness and care with which such an inquiry is conducted. But it obviously cannot be as full, exhaustive, or thorough, as a hearing by the Board or Court. The legislature indeed appreciated the limitations of such an inquiry, as compared with one conducted by the Board or Court, for under section 5(4)(b) it empowered the Secretary to refer the question of altering the classification to the Board for its decision.

Moreover, there is the following positive indication in the Act that the Secretary's reclassification under section 5(4) was not intended to be final unless confirmed by the Board or Court. Apart from the possibility that, despite the inquiry conducted by the Secretary, his

reclassification ..... /22.

reclassification might be incorrect, the legislature must have envisaged that persons' circumstances or the law defining the classes or groups may thereafter change, thereby rendering such reclassifications incorrect. Thus, for example, the ethnic or other groups of coloured persons or Bantus, into which persons have been reclassified by the Secretary under section 5(4), may subsequently be altered or abolished by the State President under section 5(2) and (3) with retrospective effect to 7 July 1950, the date the original Act came into operation, thereby rendering those reclassifications incorrect; and section 5(5) indicates that a person's reclassification may subsequently become incorrect through a reclassification of his parents. As previously stated herein, one of the objects of the Act is to ensure that the particulars in the register are up to date and correct. The legislature could therefore hardly have intended that the Secretary, the keeper of the register, should supinely shut his eyes to any such supervening incorrectness in one of its important particulars; the contrary seems more probable, that it intended he should

alter ..... /23.

alter the incorrect classification , even if it was a re-classification. And, I think, that is precisely what section 5(4) contemplates. It authorises the Secretary to alter a classification whenever it appears to him that it "is incorrect" (my italics to emphasize the use of the present as opposed to the past tense, "was incorrect"). That therefore includes a classification which, although originally correct, has since become incorrect. As that can also happen to a reclassification by the Secretary, I think that the intention was that whenever its incorrectness becomes apparent to him, he can alter it too.

In coming to the above conclusion I have not been unmindful of the possible uncertainty, insecurity, or hardship, that may result in some cases from the Secretary's having power to alter his classification of a person more than once. On the other hand, it must be borne in mind that, ~~if the Secretary was unable~~ is unable to alter his reclassification, that too might cause hardship, as, for example, where it is subsequently found to be incorrect, or it has subsequently become incorrect through a change in the person's circum-

stances ..... /24

stances, after the time for objecting under section 11 has elapsed. But those factors must all have been present to the mind of the legislature when it enacted this legislation; nevertheless, it decided as a matter of policy that, in so far as the Secretary's functions are concerned, the need to maintain the correctness of the register must prevail.

In my view, therefore, section 5(4) of the Act, as amended up to and including 1967, means that whenever it appears to the Secretary that the classification or the reclassification of a person (other than a classification confirmed or a reclassification made in accordance with a decision of the Board or the Court) is incorrect, he may alter it , after following the procedure therein laid down, or he may refer the case to the Board to decide whether it should be altered.

In ..... /24(A).

In Essop's case, supra, the Court invoked the presumption against the legislature's intending any unjust or unreasonable result in its enactment in order finally to construe section 5(4). In the Court a quo in the present matter Banks, J., in that regard, observed (correctly in my view):

> "If this statement was intended to indicate that a first alteration in classification would always be beneficial and a second classification always detrimental to the individual, then I cannot agree with it. There certainly could be cases where an individual would benefit from a second alteration in reclassification".

In any event, as the section in the context of the whole Act is not ambiguous in my view, there is no room or need for invoking the presumption.

It follows that Essop's case, supra, was in my view wrongly decided and must be overruled, and that the decision in the present case by the Court a quo, which followed it, was also wrong. The appeal should therefore

succeed ..... /25.

succeed.

In regard to costs it appears that after the application was served on the appellant, it acceded to the respondents' prayer to return the respondents' identity cards and agreed to pay their costs to the 14th October 1969 on a party and party basis. As to costs of counsel, I think that only those relating to one counsel should be allowed in the application and this appeal.

The following order is therefore proposed:-

The appeal is upheld with costs; the order of the Court a quo is set aside and the following order is substituted: "The application is dismissed with costs, except those incurred by the applicants up to and including the 14th October 1969 which the respondent is ordered to pay."

W.G.TROLLIP, J.A.

Steyn, C.J.)
Botha, J.A.) concur.

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA.

(APPÈL-AFDELING)

In die saak tussen:

DIE SEKRETARIS VAN BINNELANDSE SAKE.....Appellant

versus

ISMAIL MOOSA.....Eerste Respondent

ESSA ISMAIL MOOSA.....Tweede Respondent

Coram:STEYN H.R., VAN BLERK, BOTHA, WESSELS et TROLLIP A.RR.

Verhoor: 12/5/70 Gelewer: 1 September 1970

U I T S P R A A K.

VAN BLERK A.R.:

Die appèl gaan oor die klassifikasie van die respondente ingevolge die Bevolkingsregistrasiewet, 1950, soos gewysig deur Wet No. 64 van 1967.

Die feite blyk uit die uitspraak van my kollega Wessels waarin ook die tersaaklike bepalings oor klassifikasie aangehaal word.

Die bedoeling van die wetgewer deur die

klassifikasie...../2.

klassifikasie van die bevolking in verskillende klasse is vermoedelik om uitvoering te gee aan die beleid om verskillende klasse afsonderlike gebiede te laat okkupeer. Dit sou meebring dat iedereen wat in die klas waarin hy val 'n besondere status in die samelewing sal beklee. Dat dit sy elementêre reg is om sekerheid te hê, en te behou, oor sy plek in die maatskappy val sekerlik nie te betwyfel nie. Indien egter die appellant se betoog aangeneem word, sal die respondente se statusposisie skommelend en in die weegskaal bly. Geen herklassifikasie sal ooit finaal wees nie. Nie alleen sal so'n onbevredigende toestand vir hul 'n blywende beswaring meebring nie, maar dit sal ook nadelig vir die algemene welsyn wees. Dit sou die belang van die samelewing raak. Indien die wetgewer beoog het dat iemand wat eenmaal geklassifiseer is daarna, so dikwels, as wat volgens die bevinding van die gemagtigde amptenaar daar rede voor bestaan, herklassifiseer kan word, dan sou dit seker nie moeilik gewees het om in artikel 5(4) sodanige bedoeling in duidelike taal te stel nie. Maar nou, soos my kollega Trollip tereg sê in sy uitspraak, wat ek die

geleentheid...../3

gelentheid gehad het om te lees, gee die kardinale sinsnede in artikel 5(4) - in die juiste betekenis waarvan die kern van die vraagstuk in hierdie appèl lê - nie op sigself 'n duidelike antwoord op die eintlike vraag wat hier ontstaan nie. Die sinsnede is "... iemand se klassifikasie ingevolge subartikel (1)...." (dit is artikel 5(1)). En die vraag wat hier beantwoord moet word, is of die klassifikasie in die sinsnede vermeld beperk is tot die aanvanklike klassifikasie of nie.

As die wetgewer 'n resultaat beoog het, wat 'n ontwrigting en onbestendigheid inhou - nie alleen vir die enkeling maar ook vir die samelewing as 'n geheel - dan sal, by ontstentenis van duidelike taal waardeur so'n bedoeling uitgedruk is, nie geredelik by die afwesigheid van dwingende aanduidings tot die teendeel so'n bedoeling uit die bepalings van die wet as 'n geheel afgelei word nie. Na my mening is hier nie sodanige aanduidings in die wet aanwesig nie.

Maar...../4

Maar al sou die wet as n geheel gelees vatbaar wees vir n uitleg wat die appellant voorstaan dan sluit dit myns insiens nie die minstens ewe oortuigende uitleg - soos gemotiveer deur my kollega Wessels - tot die teendeel uit nie. Dit synde so, moet by twyfel die begunstigende en die mins beswarende uitleg aangeneem word. Dit is n regsvermoede dat die wetgewer nie geneë is, of beoog om inbreuk op die indiwidu se regte te maak nie, hetsy dit sy vermoënsregte of sy primordiale regte geld. In Dadoo, Ltd.and Others v. Krugersdorp Municipal Council, 1920 A.D. 530 op bl. 552 sê Hoofregter Innes van genoemde regsreël: "It is a wholesome rule of our law which requires a strict construction to be placed upon statutory provisions which interfere with elementary rights. And it should be applied not only in interpreting a doubtful phrase, but in ascertaining the intent of the law as a whole."

Die bedoeling van die wetgewer sal bewaar bly, en nie geweld aangedoen word, as die herklassifikasie tot die oorspronklike beperk word nie.

Ek sou die appèl van die hand wys met koste.

P.J. van Heerden.

AR43/69

GESERTIFISEER 'N WARE AFSKRIF
CERTIFIED A TRUE COPY
ASST.-GRIFFIER VAN DIE HOOGGEREGSHOF, K.P.A.
ASST. REGISTRAR OF THE SUPREME COURT, C.P.D.

GRIFFIER VAN DIE HOOGGEREGSHOF VAN S.A. (KAAPSE PROVINSIALE AFDELING) KAAPSTAD 15 CAPE TOWN

IN THE SUPREME COURT OF SOUTH AFRICA:

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

19-5-1970 ...FONTEIN ...CIAL COURT

GRIFFIER VAN DIE HOOGGEREGSHOF VAN S.A. (KAAPSE PROVINSIALE AFDELING) KAAPSTAD 15 -5- 1970 CAPE TOWN

In the matter between :

ABDURAHMAN MOHAMED HOOSAIN Appellant

and :

SECRETARY FOR THE INTERIOR Respondent

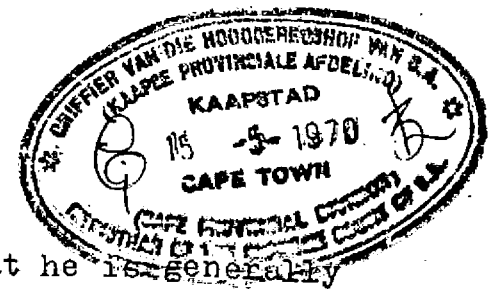
JUDGMENT delivered this 11th day of JUNE 1969.

BANKS. J.: This is an appeal from a decision of the Race Classification Appeal Board dismissing appellant's objection to his classification by the respondent as an Indian.

In so far as the facts are concerned, the Board found on the evidence before it that appellant is a "fullblooded Indian" of 26 years of age, who was brought to South Africa as a child of 8 years of age and was thereafter "to all intents and purposes adopted by and lived with a Malay woman and brought up as a Malay". It further found that appellant had on a balance of probabilities proved that he is generally accepted as a Cape Malay.

In dismissing appellant's objection the Board stated that

"even/...



"even though objector has proved that he is generally accepted as a Cape Malay this does not in any way detract from the finding that he is in fact an Indian in accordance with the provisions of paragraph 5 of Proclamation No. 123 of 1967, because according to the interpretation placed by the Board on the wording of Paragraph 5, it is of the opinion that the Legislature intended that descent is to prevail over acceptance."

Mr. Boshoff who appeared for the respondent accepted the Board's factual findings. Mr. Dison, for appellant, on the other hand, challenged the Board's finding that appellant is a "full-blooded Indian". He referred to the evidence of appellant's father and one Ismail Fakier that some two hundred years ago a number of Arabs settled in the district of Radnagiri, India, whence appellant came. It was argued that in consequence it had not been proved that appellant was "in fact an Indian". The Board found this evidence to be vague and unconvincing and I agree with the Board that the case must be decided on the basis that appellant is of Indian parentage. The evidence further reveals that appellant's father has been classified as an Indian. Appellant's mother, who has remained in India, has not been classified.

It appears that appellant lodged his objection on the 19th November 1966. Nevertheless the Board held that Proclamation No. 123 of 1967 was applicable. This Proclamation was issued under the amended provision of Section 5 of the Population Registration Act (introduced by Section 2 of Act No. 64 of 1967).

The amending Act came into operation on the 16th May, 1967, and the Proclamation was brought into operation as from the 26th May, 1967. The question arises whether since appellant had been classified under the relevant Statute and the Proclamation as it stood in 1966 and had lodged his objection before Section 2 of Act No. 64 of 1967 came into operation, the Board acted correctly in so doing.

Mr. Boshoff contended that the Board was correct whereas Mr. Dison was content to submit alternative arguments based on either Proclamation. In my view it is unnecessary to decide into which group appellant falls to be classified under the earlier Proclamation as in my view the amended provisions of Section 5 of the Act and Proclamation No. 123 of 1967 issued thereunder were correctly applied by the Board.

In the case of Bell vs. Voorsitter van die Rasseklassifikasieraad en Andere, 1968(2) S.A. 678 (A.D.) it was stated that

> "Die aanvaarding as deel van ons reg van die reël dat waar 'n wetsbepaling terugwerkend of andersins gewysig word onderwyl 'n geding hangende is, die regte van die gedingvoerende partye, by ontstentenis van 'n ander bedoeling, volgens die wetsbepaling wat ten tyde van die instelling van die geding gegeld het, beoordeel moet word, blyk dus duidelik te wees. Dat dit die reël is wat ook deur die Engelse Howe by die uitleg van Wette toegepas word, blyk duidelik uit die gewysdes waarna in Bartman v. Dempers, supra, verwys word.

and it was held that a provision that "the amendments affected in the principal Act by this Act shall be deemed to have come

into/...

into peration on the seventh day of July, 1950" was not such a contrary intention (ander bedoeling).

Coming now to the present case the amended Section 5 of Act No. 30 of 1950 provides as follows :-

"3(a) The State President may in any proclamation referred to in subsection (2) whereby a previous proclamation, including a proclamation purporting to have been issued in terms of that subsection, is amended or substituted, state that anything done or purporting to have been done under the provisions of that previous proclamation, which could be done under that proclamation as so amended or under the new proclamation whereby that proclamation is so substituted, shall be deemed to have been done under the amended or new proclamation, as the case may be.

(b) A proclamation under subsection (2) may be issued with retrospective effect as from a date not earlier than the seventh day of July, 1950."

The relevant portions of Proclamation No. 123 of 1967 read as follows :-

"..... I do hereby withdraw Proclamations No. 46 of 1959 and No. 27 of 1961, and declare -

(a) that with effect from the seventh day of July, 1950, the following groups shall be the groups into which coloured persons shall be classified :

"(b) that anything done or purporting to have been done under the provisions of the said proclamations and which could be done under the provisions of this proclamation shall be deemed to have been done under the provisions of this proclamation;"

In my view the Legislature could not have used clearer language in the enabling statute to indicate that the State President was to have the power to legislate retrospectively and

the fact /...

the fact that he was exercising that power appears in my view clearly from the provisions of the Proclamation quoted above. Indeed that view is confirmed by the history of this matter. In Arnold v. The Race Classification Appeal Board and Another, 1967(2) S.A. 267(C), it was held that the earlier proclamation was void for vagueness. The judgment was based on the conclusion that

> "the whole scheme and object of the Population Registration Act and the Proclamation is directed towards the definitive division of people into a particular group or sub-group";

that the terms of the Proclamation were such that a person could be classified in more than one group; and that the Proclamation was void for vagueness because it failed to indicate with reasonable certainty to the Secretary for the Interior in which group such persons are to be classified. It seems clear that that decision was accepted. The Act was amended, the Proclamations were withdrawn and Proclamation No. 123 of 1967 promulgated to meet the defect in the earlier Proclamation set out above. Further in order to obviate the necessity of reclassifying all the persons who had been classified under the defective (and now withdrawn) Proclamations such classifications are now "deemed to have been done under the provisions of the present Proclamation". Although the point does not appear to have been argued, it should be noted that on similar facts in the case of Die Sekretaris van Binnelandse Sake teen Jawoodien, 30/5/69 A.D. (not yet reported), Proclamation No. 123/1967 was applied and not the earlier Proclamations. The Board therefore correctly applied Proclamation No. 123/1967.

I come/...

I come now to the question whether appellant was correctly classified as an Indian under Proclamation No. 123 of 1967. In so far as it is material the Proclamation reads :-

"I do hereby withdraw proclamations No. 46 of 1959 and No. 27 of 1961, and declare

(a) that with effect from the seventh day of July, 1950, the following groups shall be groups into which coloured persons shall be classified;

(b) .....

(c) that in the application of paragraphs (1), (2), (3), (4), (5) and (6), of this proclamation, a person shall be deemed also to be in fact a member of a race or class or tribe if his natural father has been classified as a member of that race or class or tribe :-

(1) The Cape Coloured Group, which shall consist of persons who in fact are, or who, except in the case of persons who in fact are members of a race or class or tribe referred to in paragraph (2), (3), (4), (5) or (6), are generally accepted as members of the race or class known as the Cape Coloureds.

(2) The Malay Group, which shall consist of persons who in fact are, or who, except in the case of persons who in fact are members of a race or class or tribe referred to in paragraph (1), (3), (4), (5) or (6), are generally accepted as members of the race or class known as the Cape Malays.

(5) The Indian Group, which shall consist of persons who in fact are, or who, except in the case or persons who in fact are members of a race or class or tribe referred to in paragraph (1), (2), (3), (4) or (6), are generally accepted as members of a race or tribe whose national home is in India or Pakistan."

It will be observed that it is provided in paragraph (c) of Proclamation No. 123/1967 that in the application of paragraphs (1), (2), (3), (4), (5) and (6) of that Proclamation, a person shall be deemed to be in fact a member of a race or

class/...

class or tribe if his natural father has been classified as a member of that race of class or tribe. In Jawoodien's case (supra) it was held that the test in paragraph (c) only becomes applicable in cases where the first test set out in paragraphs (1), (2), (3), (4) (5) and (6), viz. whether a person "in fact" is a member of a particular group is not decisive. If this latter test is decisive then the other test set out in paragraphs (1), (2), (3), (4), (5) and (6), viz. general acceptance, and the test set out in paragraph (c), viz. the classification of the natural father, fall away. The Court in Jawoodien's case refrained from deciding in which order these further tests fall to be considered. The fact, therefore, that in the present case appellant's natural father has been classified as an Indian only becomes relevant if appellant is not in fact a member of one or other of the groups described.

Of which group, if any, has appellant been proved to be "in fact" a member?

Mr. Boshoff argued that on the authority of such cases as R. vs. Radebe and Others, 1945 A.D. 590 at p. 608; Lambert vs. Director of Census and another, 1956(3) S.A. 452(T) at p. 456; Mabitle vs. Secretary for the Interior, 1968(1) S.A. 29 (C), and Kolia vs. Secretary for the Interior, 1969(1) S.A. 287(C), that at least in the case of the ethnic groups described in the Proclamation, such as the Indian Group, the test whether a person is "in fact" a member of that group is whether such person is by descent a full-blooded member of that group, and more particularly in the case of the Indian Group whether he is

by descent/...

by descent a full-blooded member of a race or tribe whose national home is in India or Pakistan. The above quoted cases were referred to in Jawoodien's case without apparent disapproval and support Mr. Boshoff's contention, and I can see no reason why I should not apply them.

As I have already indicated appellant is a full-blooded Indian and he therefore falls within the Indian Group as defined. Mr. Dison did not appear to contest this finding but he argued that appellant also falls within the Malay Group as defined and that he should be classified as a member of that group. He quoted the case of Mall vs. Registrar of Companies, 1946 A.D. 727, in which it was stated that

> "the application of any rigid test as to racial purity for the purpose of ascertaining who is or who is not a Cape Malay would clearly be out of place".

See also Patel vs. Minister of the Interior and Another, 1955(2) S.A. 485.

Reliance was further placedon the evidence of Mr. Whisson, a senior lecturer in Social Anthropology who stated that he had made a special study of the Coloured Group including the Cape Malays. In his evidence he stated :-

> "I say again that Cape Malays and Cape Coloureds are a class of persons - the only distinguishing feature between the two is their religion - the first being Moslems. The distinction is a religious one, and not an ethnic one. Neither constitutes a race, but a class of persons. Cape Malays is a cultural group

dominated/...

dominated by their religion and religious customs. A Cape Coloured can become a Cape Malay if he adopts the Moslem faith and the converse would also be true."

Then there is the further evidence of the appellant and other witnesses, which apparently the Board accepted, that appellant had adopted the Moslem faith and had been accepted as a Cape Malay.

When this matter was argued Jawoodien's case was not available. It now confirms Mr. Dison's point that full-bloodedness is not the test for membership of the Cape Coloured and Malay Groups, as the following passage in that judgment indicates :-

"Die Staatspresident word naamlik gemagtig nie slegs om etniese groepe, d.w.s. rassegroepe - volgens genoemde gewysdes, volbloed-groepe - voor te skryf, waarin gekleurdes geklassifiseer moet word nie, maar ook ander groepe d.w.s. groepe waarvan lidmaatskap, wat herkoms betref, nie slegs deur volbloed herkoms bepaal hoef te word nie. Wat die welbekende en voor-die-hand-liggende Kaapse Kleurling-groep betref, sou die wetgewer nouliks in gedagte kon gehad het dat vir lidmaatskap uit hoofde van herkoms, volbloed herkoms die aangewese toets sou wees om in die omskrywing van die groep op te neem; en na my mening is dit ook nie wat die Staatspresident in paragraaf (1) gedoen het nie. Onder die persone wat inderdaad lede van daardie groep is, sal daar, uit die aard van die bekende samestelling van die groep, haas vanselfsprekend ook persone wees wat 'n blanke, 'n Bantoe, 'n Sjinees of 'n Indiër as ouer het, en om hulle van hierdie kategorie uit te sluit, sou 'n miskenning van die werklikhede wees. Daarom juis, sou ek reken, word in hierdie paragraaf nie slegs na 'n ras verwys nie, maar ook na 'n klas. Dit wil my daarom voorkom dat die

gevolgtrekking/...

gevolgtrekking in genoemde gewysdes nie sonder voorbehoud vir die eerste toets by hierdie groep geldig is nie, en om dieselfde redes ook nie vir die Maleiergroep nie. Die voorbehoud sou daarin bestaan dat naas volbloed herkoms, ook gemengde herkoms, met inagneming van ander bepalende faktore, voldoende is om die betrokke persoon inderdaad lid van hierdie rasse of klasse te maak."

But the point is whether a person can "in fact" be a member of the Cape Coloured or the Malay Groups if he is, for instance as in this case, a full-blooded Indian. I can find nothing in Jawoodien's case to support that view. The learned Chief Justice did state that

"Dit wil my daarom voorkom dat die gevolgtrekking in genoemde gewysdes nie sonder voorbehoud vir die eerste toets by hierdie groep geldig is nie"

but that statement does not indicate that a full-blooded member of one of the ethnic groups could be classified as a member of the Cape Coloured Group or the Malay Group. On the contrary, the judgment, taken as a whole, appears to me to indicate that the Cape Coloured and Malay Groups as described consist of persons who are not of pure descent. Reliance was, however, placed on Whisson's further evidence in this case which is to the following effect :-

"If a person comes from India and leaves his mother there and finds his father here unacceptable and has been brought up by Cape Malays he would certainly be absorbed by Cape Malays and the fact that he remembers a few words of his Indian tongue and is not afraid of his Indian connection, would not cause him to lose his Malay identity which he has acquired by acceptance."

But the/...

But the question is not whether he would be "absorbed by the Cape Malays" but whether he falls within the Malay Group as described by the Proclamation. It seems to me that the only possible construction of which the Proclamation is capable is that a person can only be a member of the class of Cape Malays or Cape Coloured if he is not a full-blooded member of one or other of the ethnic groups such as Indian and Chinese described in the Proclamation. Were it otherwise a person could fall within two groups and the Secretary for the Interior would not know how such a person should be classified. The earlier Proclamations were obviously withdrawn by Proclamation No. 123 of 1967 because of this difficulty. This latter Proclamation, moreover, bears unmistakeable signs of having been redrafted with the specific object of ensuring that the descriptions of the various groups are mutually exclusive, and I find that this is the specific intention of the Proclamation as evidenced by the terms of the Proclamation, which incidentally was validated by Section 62 of the General Law Amendment Act of 1968.

For these reasons I reject the argument that a full-blooded Indian can by the adoption of the Moslem faith and by his acceptance as a Cape Malay be "in fact" a member of the race or class known as Cape Malays, in terms of the Proclamation.

In my view the Board came to the correct conclusion that appellant is "in fact" and Indian.

The appeal is dismissed with costs.

VAN ZIJL, J. : I agree.