22-9-71 Judgment 110/71

G.P.-S.33967—1968-69—1,000. J. 219.

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

(APPELLATE ~~Provincial~~ Division.)
(Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

ROBERT MANGALISO SOBUKWE *Appellant,*

versus

THE MINISTER OF JUSTICE *Respondent*

Appellant's Attorney Israel, Sackstein & S. *Respondent's Attorney*
Prokureur vir Appellant *Prokureur vir Respondent* D. & S.A. (13m 6/71)

Appellant's Advocate *Respondent's Advocate*
Advokaat vir Appellant *Advokaat vir Respondent*

Set down for hearing on
Op die rol geplaas vir verhoor op 9 — 11 — 1971

1 2 3 6 5

TPD

Cyril Thompson J. The appeals of both appellants are dismissed with costs, such costs to include the fees of two counsel.

REGISTRAR, APPELLATE DIVISION
GRIFFIER, APPÈLHOF.
BLOEMFONTEIN.
- 2 -12- 1971

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:

ROBERT MANGALISO SOBUKWE ..... First Appellant

and

THE MINISTER OF JUSTICE ..... Respondent.

SHANTAVOTHIE NAIDOO ..... Second Appellant

and

THE MINISTER OF JUSTICE ..... Respondent.

Coram: OGILVIE THOMPSON, C.J., RUMPFF, BOTHA, JANSEN et TROLLIP, JJ.A.

Heard: 9th November 1971. Delivered: 2nd December 1971.

J U D G M E N T.

OGILVIE THOMPSON, C.J.:

The two appellants, both South African citizens by birth, whose movements have been restricted by notices issued by respondent under the provisions of sec. 10 (1) (a) of the Suppression of Communism Act, 1950 (Act No. 44 of 1950 as amended), applied separately, in the circumstances hereinafter set out,

on...../

on notice of motion to the Transvaal Provincial Division for orders directing the respondent to permit them to travel to Jan Smuts Airport to enable them there to embark, pursuant to departure permits granted in terms of the Departure from the Union Regulation Act (No. 34 of 1955 as amended), on an aircraft leaving the Republic. The two applications were heard together by the full bench of the Transvaal Provincial Division which dismissed them both with costs. Against these decisions the appellants now appeal. As the issues arising for decision are the same in both cases, the two appeals were, at the request of counsel, heard together. The relevant facts are not in dispute and may be relatively briefly summarised. In this summary I shall, for greater clarity, refer to the appellants by their respective surnames.

A notice issued, in terms of sec. 10 (1) (a) of Act 44 of 1950 as amended, by respondent on 12th May 1969 and expressed to expire on 21st May 1974, inter alia prohibits Sobukwe from absenting himself from "the area comprising the Kimberley Municipality". In Naidoo's case, the relevant notice - likewise

issued...../

issued by respondent in terms of sec. 10 (1) (a) of Act 44 of 1950 as amended - is dated 19th December 1968, expires on 31st December 1973, and inter alia prohibits her from absenting herself from "the magisterial district of Johannesburg".

Sobukwe, who holds several academic degrees, wishes to leave the Republic permanently, with his family, to take up a teaching post which he has accepted at an American university and which will also enable him to study there for a Ph.D. degree. The American Consulate General is prepared to issue visas to Sobukwe and his family for permanent residence in the United States. His application for a passport having been refused by the Minister of the Interior, Sobukwe then applied to the Secretary for the Interior, by letter dated 23rd May 1970, for a permit to leave the Republic pursuant to the provisions of the Departure from the Union Regulation Act (Act No. 34 of 1955 as amended). On 3rd June 1970 the Secretary replied calling for certain documents in support of Sobukwe's application, including "documentary proof that you are no longer restricted to the

magisterial..../

magisterial district of Kimberley". Sobukwe's application for such documentary proof was, on 24th June 1970, refused by the Minister for Justice, the present respondent. The refusal was conveyed in the following terms:

> "..... your application for the relaxation of the notices in force against you under the Suppression of Communism Act, 1950, to enable you to leave the country, has been refused".

Further representations to the Secretary for the Interior having proved fruitless, Sobukwe then, through his attorney, by letter dated 18th December 1970, appealed pursuant to the provisions of sec. 5 (2) of Act 34 of 1955 to the Minister of the Interior. On 28th December 1970 Sobukwe's attorney wrote to respondent and, averring the latter's refusal to allow Sobukwe to leave the municipal area of Kimberley for the purpose of departing permanently from the Republic to be illegal, gave notice of an intended resort to legal proceedings. Receipt of this letter was acknowledged without comment, save to say that its contents had been noted. In response to Sobukwe's attorney's aforementioned letter of 18th December 1970, the Minister of the

Interior, through his private secretary, wrote on 1st March 1971 to say that Sobukwe's application for a permit in terms of Act 34 of 1955 to leave the Republic had been approved and that "the permit will in due course be forwarded to you by the Secretary for the Interior". No such permit is included in the record before us; but in both courts the argument has proceeded upon the basis that the relevant permit was in fact issued to Sobukwe and that it was duly endorsed in terms of sec. 5-(6) of Act 34 of 1955. By notice of motion dated 22nd March 1971, Sobukwe instituted the present proceedings against respondent in the court a quo, praying for an order:

> "Directing the Respondent to permit the applicant to leave the Magisterial District of Kimberley and to travel to Jan Smuts Airport to enable the Applicant to embark on an aircraft leaving the Republic of South Africa pursuant to the departure permit granted in terms of the Departure from the Union Regulation Act No. 34 of 1955 as amended".

The relevant facts in relation to Naidoo's case follow a closely similar pattern. Naidoo wishes to leave the Republic permanently and to take up residence in England. The evidence before the court is that there is no objection to her entering

the United Kingdom as a visitor for three months, and that she may seek employment there after her arrival. On 14th August 1970 the Secretary for the Interior wrote to Naidoo's attorney saying that the issue of a permit for her to leave the Republic permanently would be considered "on receipt of documentary evidence that the restrictions imposed on her in terms of the Suppression of Communism Act have been lifted". Requests, respectively directed to the Magistrate of Johannesburg and to the respondent, for such documentary evidence were, however, refused by letter from the Chief Magistrate of Johannesburg dated 27th October 1970. The material portion of that letter read:

> "..... I have to inform you that the Hon. the Minister of Justice is, after careful consideration, not prepared to relax Miss Naidoo's restrictions in order to enable her to leave the magisterial district of Johannesburg permanently".

On 30th December 1970 Naidoo's attorney wrote to respondent averring that his refusal to allow Naidoo to leave the area of Johannesburg to enable her to depart permanently from the Republic

was unlawful, and that this had "the effect of depriving her of her right to leave this country". This letter, which concluded by giving notice of intended legal proceedings, was on 4th January 1971 acknowledged by respondent without comment other than that its contents had been noted.

In response to further representations, the Minister of the Interior wrote, under date 25th January 1971, to Naidoo's attorney saying that the issue to her of a permit to leave the Republic had been approved and that the permit would in due course be forwarded by the Secretary for the Interior. Such a permit, with expiry date 28th April 1971, was in due course received by Naidoo. Subsequently, a further departure permit, expiring on 28th July 1971, was issued to Naidoo. Both permits bore an endorsement, in terms of sec. 5 (6) of Act 34 of 1955, that the holder is leaving the Republic permanently. On 10th February 1971 Naidoo's attorney again wrote to respondent informing him of the issue of the departure permit and enquiring whether, in the light thereof, respondent was prepared to re-

consider...../

consider his refusal to allow Naidoo to leave the magisterial district of Johannesburg. Receipt of this letter was acknowledged on 15th February 1971 together with the promise of "a further communication as soon as possible". By letter dated 2nd March 1971, respondent's private secretary informed Naidoo's attorney that respondent had "decided not to change his previous decision". Naidoo thereupon launched the present proceedings in the court a quo, praying for relief expressed, save for the substitution of the magisterial district of Johannesburg for that of Kimberley, in terms identical with those of the above-cited prayer in Sobukwe's application.

Section 10 (1) (a) of the Suppression of Communism Act (No. 44 of 1950 as amended, and to which I hereinafter refer as the 1950 Act) reads:

> "10. (1) (a) If the name of any person appears on any list in the custody of the officer referred to in section eight or the Minister is satisfied that any person -
>
> (i) advocates, advises, defends or encourages the achievement of any of the objects of communism or any act or omission which is calculated to further the achievement of any such object; or

(ii) is likely to advocate, advise, defend or encourage the achievement of any such object or any such act or omission; or

(iii) engages in activities which are furthering or may further the achievement of any such object,

the Minister may by notice under his hand addressed and delivered or tendered to any such person and subject to such exceptions as may be specified in the notice or as the Minister or a magistrate acting in pursuance of his general or special instructions may at any time authorize in writing, prohibit him, during a period so specified, from being within or absenting himself from any place or area mentioned in such notice or, while the prohibition is in force, communicating with any person or receiving any visitor or performing any act so specified:
Provided that no such prohibition shall debar any person from communicating with or receiving as a visitor any advocate or attorney managing his affairs whose name does not appear on any list in the custody of the officer referred to in section eight and in respect of whom no prohibition under this Act by way of a notice addressed and delivered or tendered to him is in force."

The Minister mentioned in this section is the Minister for Justice. A notice issued under the above-cited provisions may be withdrawn or varied by the Minister (sec. 10 (1) (b)); he is also empowered to extend the period of prohibition specified in any current notice issued by him under sec. 10 (1) (a)

(vide

(vide sec. 10 (1) (c)). Breach of a prohibition contained in a notice issued under sec. 10 (1) (a) is a criminal offence which, upon conviction, renders the offender liable to imprisonment for a period not exceeding three years (secs. 10(3), 10(4) and 11 (i)).

The validity of the aforementioned notices issued by respondent against the respective appellants is not challenged. It is common cause that these notices were duly issued by respondent pursuant to the provisions of sec. 10 (1) (a) of the 1950 Act and that they are currently of full force and effect. It is respondent's refusal to relax the provisions of these notices in order to enable appellants to avail themselves of the granted departure permits which is claimed in these proceedings to be illegal.

At first sight it would certainly appear to be somewhat anomalous that a permit to depart permanently from the Republic granted, with full knowledge of the circumstances, by one Minister of State functioning under one Act of Parliament should be wholly ineffective and nugatory because of the attitude adopted by another Minister of State functioning under

another Act of Parliament. If, however, that situation is legally competent upon a correct construction of the two Statutes concerned, the conclusion reached in the court a quo is unassailable.

The long title of the Departure from the Union Regulation Act (No. 34 of 1955 as amended and to which I hereinafter refer as the 1955 Act) reads:

> "To regulate the departure of persons from the Union and to provide for matters incidental thereto".

Section 2 of this Act provides:

> "No person shall leave the Union for the purpose of proceeding to any place outside the Union -
>
> (a) unless he is, at the time when he leaves the Union, in possession of a valid passport or a permit;
>
> (b) except at a port, unless his passport or permit bears an endorsement, or he is in possession of a document issued to him by a person authorized thereto by the Minister of the Interior, to the effect that authority has been granted to him by the said Minister or a passport control officer referred to in section 30 of the Admission of Persons to the Union Regulation Act, 1913 (Act No. 22 of 1913), to leave the Union at a place other than a port, and for such purposes and during such period as may be set forth in that endorsement or document".

By virtue of the provisions of sec. 3(a) of Act 32 of 1961, the word "Republic" replaces the word "Union" in the 1955 Act

and,...../

and, in terms of the definition clause of the latter Act, also includes the territory of South West Africa. This last-mentioned clause defines a "permit" as a permit issued under section five which has neither lapsed nor been withdrawn; the clause also defines "port" as meaning a port as defined in sec. 30 of the Admission of Persons to the Union Regulation Act, 1913 (Act no. 22 of 1913). For present purposes it suffices to say that an airport falls within the definition.

The relevant portions of sec. 5 of the 1955 Act read:

> "(1) The Secretary for the Interior or any person authorized thereto by the said Secretary, may issue to any person over the age of sixteen years who applies therefor in the form prescribed by the said Secretary and who pays the fee prescribed therefor, a permit to leave the Union: Provided that the said Secretary or any person authorized by him as aforesaid shall issue such a permit to any person who satisfies him that he intends to leave the Union permanently.
>
> (2) Any person whose application for a permit under sub-section (1) is refused by the said Secretary or any person authorized by him as aforesaid, may, within one month after being notified of such refusal, appeal in writing against such refusal to the Minister of the Interior.
>
> (3) The said Minister may confirm the refusal of the said Secretary or other authorized person or may direct that a permit to leave the Union be issued to the applicant.

(4) A permit under this section may be issued for such period of not exceeding five years as the said Secretary may in each case determine, and any permit so issued shall lapse on the expiration of the period of which it has been issued.

(5) The said Minister may at any time by written notice to the holder thereof withdraw any permit issued to him under this section, and may in such notice call upon such holder to return to the said Minister the said permit within a period specified in the notice.

(6) A permit issued to any person by reason of the fact that he intends to leave the Union permanently, shall be endorsed accordingly.

(7) ..... "

In terms of sec. 6 of the 1955 Act, any person who leaves the Republic pursuant to a permit endorsed in terms of sec. 5 (6) is deemed, should he thereafter return to the Republic, to have left it without a valid passport or permit and, further, he becomes, with effect from the time he left the Republic, "for all purposes a prohibited person" within the meaning of the Act 22 of 1913. Sec. 8 of the 1955 Act renders it a criminal offence to contravene any of the provisions of that Act.

Prior to the 1955 Act, there existed no statutory provision restricting the citizens of this country from leaving it. The position at common law was ill-defined. It would,

however, appear to be clear that exceptions to a citizen's otherwise unfettered right to leave the country at will were recognised by the common law. An obvious exception - although not one specifically mentioned in the books - would appear to be that of a convicted prisoner who has yet to serve his sentence. As counsel for appellants frankly conceded, it is manifest that such a person could not under any system of law validly claim to exercise a right to leave the country and thereby evade the punishment entailed in his sentence of imprisonment. Other exceptions to the general rule of the common law that a citizen might leave the country at will would, however, appear to have been recognised. Thus Van Bynkershoek: Quaestionum Juris Publici, Book 1, Ch XXII (Transl. De Ruusscher, p. 267), dealing with the recruitment of soldiers from foreign countries, states that some Sovereigns prohibit their subjects from leaving their country, and then goes on to say:

"Indien...../

"Indien 'er, gelyk ik zo even gezegt heb, geen wet is, die het verhindert, is het geoorlooft zyn Staat van onderdaan afteleggen, en naar zyn welgevallen naar een ander land te trekken. De schryvers over 't publieke recht stemmen dit eenparig toe, en de Groot wykt ook niet van dit gevoelen af, maar hy voegt 'er by, dat dit by de Moskoviters niet geoorlooft is; de Chinezen en Engelschen hebben ook dikwils opentlyk te kennen gegeven, dat dit by hen alzo min toegelaten is."

In the course of discussion whether it is permitted for nationals to withdraw from their states without permission, Grotius (De Jure Belli Ac Pacis, Book 2, Ch. 5, Sec. XXIV, Transl. W. Kelsey, p. 254) states:

"Yet here also we must observe the rule of natural justice which the Romans followed in putting an end to private associations, that a thing should not be permitted if it is contrary to the interests of society. 'Always, in fact,' as Proculus rightly says, 'it is the custom to observe, not what is to the interest of an individual associate, but what is to the interest of the association'. Moreover, it will be to the interest of the civil society that the national do not withdraw if a heavy debt has been contracted, unless the national is prepared to pay his share at once; likewise if war has been undertaken because of confidence in numbers, and especially if a siege threatens, unless the national is prepared to furnish an equally capable substitute to defend the state.

With...../

> With the exception of these cases, it is to be believed that peoples consent to the free withdrawal of their nationals, because from granting such liberty they may experience not less advantage than other countries".

The subject is also discussed at some length by Puffendorf: De Jure Naturae et Gentium, 8. xi. 2-3. After recording the general right of a citizen to leave his country, he continues, in sec. 3 and with quotation of portion of the above-cited passage from Grotius, to say (Transl. C.H. & W.A. Oldfather, p. 1350):

> "But the express consent of the state will have to be secured by such as have assumed a special office, especially if it be for a stipulated term, as in the case of such as are on a commission or an expedition, or engaged in any other task which they undertook by a special agreement.
>
> A man's departure should also be timely, and when it is not to the special interest of the state that it should not take place".

In the light of the foregoing, it is, I think, indisputable that under the common law the general right of a citizen to leave the country was subject to certain limitations. However unprecisely...../

unprecisely defined those limitations may have been, it is clear that a citizen's right to leave the country was not an absolute right exercisable under all circumstances.

In laying down, as a pre-requisite for legal departure from the Republic, the possession either of a valid passport or of a permit, sec. 2 of the 1955 Act introduced a new requirement. The citizen's common law right to leave the Republic was thus not in any way increased but, on the contrary, was pro tanto further restricted by this Act. The law relating to the granting and renewal of passports was considered by this Court in Sachs v. Dönges, N.O., 1950 (2) S.A. 265 and in Fellner v. Minister of the Interior, 1954 (4) S.A. 523. See also May: The South African Constitution, 2rd Ed. p. 243, for the alterations in the conditions of grant of a passport introduced after the decision in Sach's case. Without attempting to define the precise ambit of the rights conferred by a passport, it suffices to say that, while in certain respects a valid passport confers greater rights than a departure permit - which latter is merely an authority to leave the Republic - even the possession of a valid passport does not - as may again be illustrated by the

example of the convicted convict - necessarily and under all conceivable circumstances confer upon the holder an absolute right to depart from the Republic. It is, however, contended that, departure permits having been granted them with full knowledge of the existence of the notices previously issued by respondent under sec. 10 (1) (a) of the 1950 Act, appellants have an absolute right to leave the Republic, and that, by declining to allow them to proceed to Jan Smuts Airport, respondent is illegally frustrating that right. The validity or otherwise of that contention is the vital matter for decision in this appeal.

In contrast with the first portion of that section, the proviso to sec. 5 (1) of the 1955 Act is couched in apparently imperative terms. For the proviso states that, once the Secretary for the Interior is satisfied that an applicant intends to leave the Republic permanently, he "shall" issue a permit. This notwithstanding, and despite the presence in the proviso of the words "any person", the aforementioned example of the imprisoned convict illustrates the seeming absurdity of according the proviso a literal meaning. Considerations such as these suggest

- I express no final view on the point - that the correct construction of the proviso may be that the applicant for a departure permit should establish both his intention to leave the Republic permanently and his ability to implement that intention. However that may be, the present appeal falls to be decided in the light of the fact that, despite knowledge of the terms of the pre-existing notices under section 10 (1) (a) of the 1950 Act, departure permits have actually been issued to the appellants.

Emphasising the general right to leave the country accorded to a citizen by the common law, and pointing to the long title of the 1955 Act, counsel for appellants submitted that the Statute merely regulates the exercise of that general right. The essence of the argument on behalf of the appellants is that, in the case of citizens intending to leave the Republic permanently, the possession of a validly issued departure permit confers upon the holder an absolute right to leave this country permanently, which said right has implicit in it the further right to proceed to a port or airport in order to exercise that absolute right.

Ex hypothesi a person leaving the Republic on a departure permit granted under the proviso to sec. 5(1) of the 1955 Act does so permanently; indeed, as I have mentioned earlier, he commits a criminal offence if, having once left, he thereafter attempts to return. It is true that, in contrast, the 1950 Act is, as was urged upon us by counsel for appellants, primarily - though not entirely: vide eg. secs. 10 quin (1) and 11 (g) bis - concerned with the suppression of communism within the Republic (see for example the expressions "advocated in the Republic" and "change within the Republic" which appear in the definition of "communism" in the 1950 Act). Nevertheless, postulating the existence of a valid notice issued under sec. 10 (1) (a) of the 1950 Act restricting the movements of an individual because of his actual or apprehended contravention of that Act within the Republic, it would seem obvious that to allow that individual to depart permanently from the Republic would afford no guarantee against the continuance of similar actual or apprehended contraventions by him from outside the Republic. Nor am I able to agree with counsel for appellants' submission that since the 1950 Act is primarily concerned with the situation within the Republic, it necessarily follows

that, in passing the 1955 Act with knowledge that the 1950 Act was already on the Statute Book, the Legislature must have intended that a permit granted under the proviso to sec. 5 (1) of the 1955 Act authorising permanent departure from the Republic should override any notice issued against the holder of such permit under sec. 10 (1) (a) of the 1950 Act. As I have pointed out earlier, under the common law a citizen's right to leave the country was not absolute, and that right was in no way enlarged by the 1955 Act. Accordingly the submission - cardinal to much of the argument addressed to us by counsel for appellants - that all citizens have a fundamental common law right to leave the Republic which is merely regulated by the 1955 Act cannot, in my judgment, be unreservedly accepted. (Cf. Halsbury, 3rd Ed., Vol 7, par. 618, where the general right of persons to leave the realm in peace time is qualified as being "subject to the provisions of Statutes, and rules and orders made thereunder").

In my opinion, a permit issued under the proviso to sec. 5 (1) of the 1955 Act confers no such absolute right as is contended

for...../

for on behalf of the appellants. The possession of such a permit, in my view, merely frees the grantee thereof from the prohibition contained in sec. 2 of the 1955 Act - viz: that no person may leave the Republic unless he is at the time of leaving in possession of a valid passport or permit. Nor am I able to regard the permit as impliedly carrying with it an absolute right to its exercise irrespective of all other considerations. The permit, in my judgment, avoids the proscription against the departure from the Republic as contained in the 1955 Act without, however, at the same time automatically overriding any other lawful impediments - whether statutory in origin or otherwise - which may exist restricting free movement on the part of the individual concerned.

While fully conceding that the issue of a departure permit to a convicted person who has yet to serve his sentence does not entitle such person to leave the Republic, counsel for appellants also sought to draw a distinction between, on the one hand, restriction of movement as a result of judicial process and, on the other hand, restriction of movement consequent

upon...../-

upon administrative action pursuant to delegated statutory powers. In the present context, I am unable to regard this as a valid distinction. The right to personal freedom, it has been stated (vide Jennings: The Law and the Constitution, 3rd Ed. p. 243) "is a liberty to so much personal freedom as is not taken away by law". As was said by Stratford, A.C.J., in Sachs v. Minister of Justice, 1934 A.D. 11 at 37, it is a "plain principle that Parliament may make any encroachment it chooses upon the life, liberty or property of any individual subject to its sway, and that it is the function of the courts of law to enforce its will". Under the provisions of the 1950 Act, wide powers are entrusted to the present respondent, inter alia to restrict the movements of persons by notices issued under sec. 10 (1) (a) of that Act. Postulating a currently valid notice issued under that section, such notice has the force of law with concomitant criminal sanction against contravention. In the present case it is, as stated earlier in this judgment, common cause that the notices restricting the movements of the two appellants were duly issued by respondent pursuant to the provisions of sec. 10 (1) (a) of

the...../

the 1950 Act and that the restrictions upon the respective appellant's movements contained in those notices are currently valid. Breach of those restrictions is a criminal offence. The restrictions thus constitute a legal bar, directly deriving from the 1950 Statute, against either appellant proceeding to Jan Smuts Airport and which effectively precludes them from exercising the departure permits which have been issued to them. In this respect the position of the appellants is in principle indistinguishable from that of the incarcerated convict who has been issued with a departure permit but has yet to serve his sentence. Nowhere in the papers before us is it suggested that respondent acted mala fide in declining to relax the restriction upon appellants' movements as contained in the notices issued by him under the 1950 Act. The case made is that such refusal is inherently unlawful because it frustrates appellants' alleged fundamental and unqualified right to leave the Republic. As no such fundamental absolute right is vested in appellants, their contention cannot, in my judgment, be upheld.

An alternative submission was - with reliance upon the prayer in the Notice of Motion for alternative relief - advanced

by counsel for appellants to the effect that respondent had not applied his mind to the changed situation resulting from the issue of the permits but, in refusing appellants' requests, had, to adopt counsel's own expression, merely rested upon the continuing validity of the original notices. The submission may be said to derive some small support from the phraseology employed in certain paragraphs of respondent's opposing affidavits. It is, however, important to bear in mind that respondent's opposing affidavits were directed towards replying to the allegations made in appellants' affidavits filed in support of their respective notices of motion. These last-mentioned affidavits nowhere advance the contention that respondent failed to apply his mind to the issue now raised in counsel for appellants' abovementioned alternative submission. On the contrary, the only case made in appellants' founding affidavits is that, having regard to the issued permits, appellants have a right to use them, and that respondent's refusal to allow the appellants to proceed to Jan Smuts Airport is unlawful because he - and I now quote from appellants' founding affidavits which are in this respect identical...../

tical in both cases - "is not entitled to use a discretion vested in him under the Suppression of Communism Act to frustrate" the aforementioned alleged right to leave the Republic. It was in reply to that charge that respondent's affidavits were framed.

Independently of the aforegoing however, the papers before the Court reveal, in my opinion, that there is no real substance in the abovementioned alternative submission advanced by counsel for appellants. To deal first with Sobukwe's case. His initial letter, dated 8th June 1970, addressed to the Secretary for Justice, made specific mention of his application for an "exit permit" and that the Secretary for the Interior had called for a document to the effect that Sobukwe was "no longer restricted to the magisterial district of Kimberley". The letter concluded with a request for such a document "to enable me to fly to the United States of America". It was after these relevant facts had thus been put before him that respondent on 24th June 1970 refused the request in the terms cited earlier in this judgment. It is true that a departure

permit..../

permit had then not yet been issued - as mentioned earlier, it was not until 1st March 1971 that Sobukwe's attorney was informed that the Minister of the Interior had approved the issue of a departure permit - but on 28th December 1970 Sobukwe's attorney wrote to the respondent threatening legal proceedings on the ground that the latter's refusal to permit Sobukwe to leave the area of Kimberley to enable him to depart from the Republic permanently was "unlawful in that it has the effect of depriving him of his right to leave this country".

Having regard to the general tenor of this correspondence and the close similarity between Sobukwe's case and that of Naidoo - which latter was more or less contemporaneously before respondent - it would be wholly unrealistic to assume that respondent at any material time failed to appreciate that Sobukwe was proposing to leave the Republic permanently. All the indications are that respondent's refusal to accede to the requests addressed to him was with full knowledge of the fact that Sobukwe was proposing to leave the Republic permanently on a departure permit. It is moreover quite clear that when he executed his

opposing affidavit, respondent was fully aware that the departure permit had, consequent upon an appeal to the Minister of the Interior, in fact been issued to Sobukwe. In the total absence of any allegations in Sobukwe's founding affidavit that respondent had failed to apply his mind to the proper inquiry, counsel's alternative submission cannot, in my opinion, be sustained.

In Naidoo's case the position is, I think, even clearer. For after the Chief Magistrate had, on 27th October 1970, conveyed, in the terms cited earlier in this judgment, respondent's refusal to allow Naidoo to leave the magisterial district of Johannesburg, and subsequent to the threats of legal proceedings conveyed by letter dated 30th December 1970, Naidoo's attorney again wrote to respondent on 10th February 1971. This last-mentioned letter recorded that a departure permit had been issued and specifically requested a reconsideration of the earlier refusal to permit Naidoo to leave the magisterial district of Johannesburg. By letter dated 2nd March 1971 Naidoo's

attorney..../

attorney was informed that the respondent had decided not to change his previous decision.

Having regard to the aforegoing, the submission that respondent failed to apply his mind to the situation created by the issue of the departure permits, is, in my opinion, without validity.

For the foregoing reasons, the appeals of both appellants are dismissed with costs, such costs to include the fees of two counsel.

N. Gitlin Thompson

RUMPFF, J.A.)
BOTHA, J.A.)
JANSEN, J.A.) CONCUR.
TROLLIP, J.A.)