2 [illegible] 71 126 [illegible] /71

G.P.-S.33967—1968-69—1,000. 15 - 1 - 72 J. 219.

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

(..[illegible]..Provincial Division.)
(..Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

[illegible] Appellant,

versus

[illegible] Respondent

Appellant's Attorney
Prokureur vir Appellant [illegible]
Respondent's Attorney
Prokureur vir Respondent D.P. S.A. / 13-12

Appellant's Advocate
Advokaat vir Appellant L.S. Melunsky
Respondent's Advocate
Advokaat vir Respondent S.G. Rein

Set down for hearing on
Op die rol geplaas vir verhoor op 18/19 - 5 - 1972
2. 3. 5. 6. 8.

Coram: Botha, Holmes, Potgieter, Jansen et Rabie JJ.A.

9.45 am	—	11.00 am
11.15 am	—	12.45 pm
2.15 pm	—	3.20 pm

C. A. V.

Jansen J.A.:- Appeal dismissed with costs.

[signature]

3 [illegible]

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 :

LAWRENCE JAMES PINKEY ..... Appellant.

and

THE RACE CLASSIFICATION BOARD ..... First Respondent.

and

THE SECRETARY OF THE INTERIOR ..... Second Respondent.

Coram : BOTHA, HOLMES, POTGIETER, JANSEN et RABIE JJ.A.

Heard : 18, [redacted] May, 1972. Delivered : 30 May, 1972.

J U D G M E N T.

JANSEN J.A. :-

The appellant appeals against an order of the Eastern Cape Division upholding the decision of the first respondent, a board constituted pursuant to the appellant's objection to his classification as a Chinese by the second respondent, the Secretary for the Interior (acting in terms

of /.....

of sec. 5(1) of the Population Registration Act, 1950 - as amended by Acts 71 of 1956, 73 of 1957 and 30 of 1960 -, hereinafter referred to as Act 30 of 1950). The first respondent had dismissed the appellant's contention that he was entitled to be classified as a white person.

Despite the Secretary having done the classification in terms of the original definition of "white person" in sec. 1 of Act 30 of 1950, the first respondent applied the new definition which had only been enacted (by sec. 1 of Act 61 of 1962) some weeks after the appellant had lodged his objection (in terms of sec. 11). The Board considered itself bound to do so by sec. 45 of Act 80 of 1964, which was promulgated before the hearing of the appellant's objection and purported to confer retrospective effect upon the new definition. The Court a quo also applied the new definition. (The course of the hearing was, however, interrupted by the enactment of Act 64 of 1967, which inter alia qualified the new definition of 1962, and gave rise to the question whether it regulated the proceedings, a question

ultimately answered in the negative by this Court. See 1966(2) SA 73(E), 1968(2) SA 99(E), 1968(4) SA 628(A)).

The appellant's first contention is that although sec. 45 of Act 80 of 1964 does confer retrospective effect upon the 1962 definition, it does not disclose an intention by the Legislature to affect existing rights or unconcluded proceedings and that, consequently, the appellant's objection to his classification should have been decided by the Board under the original definition under which he had been classified. The section reads as follows :-

> " (1) The amendments effected to sections one and twelve of the Population Registration Act, 1950, by the Population Registration Amendment Act, 1962 (Act No. 61 of 1962), shall be deemed to have come into operation on the seventh day of July, 1950.
>
> (2) Anything done under the Population Registration Act, 1950, at any time prior to the commencement of this Act, shall be deemed to have been done under that Act as amended by the amendment of the said section one referred to in sub-section (1)."

As /.....

As to sub-section (1), the appellant's contention is fully borne out by the aforementioned decision of this Court (reported at 1968(4) SA 628) and in the case of Bell v. Voorsitter van die Rasseklassifikasieraad en Andere (1968(2) SA 678(A)). As to sub-section (2), the matter is, as far as this Court is concerned, res integra: no similar provision appears in Act 64 of 1967, the subject matter of these two decisions. The plain words of sub-section (2), however, enacted as they are in addition to (1), clearly refute the appellant's contention. The appellant's classification, as also the lodging of his objection, falls under "anything done under the Population Registration Act, 1950, at any time prior to the commencement of this Act", and his classification is, therefore, deemed to have been done in terms of the definition of 1962, and, consequently, his objection must also relate to a classification in terms of that definition. It follows that in deciding the merits of the objection, the first respondent was bound to apply the new definition of 1962.

It is further argued, however, that even if this

was the law at the time the Board gave its decision, the subsequent insertion of sec. 21A in Act 30 of 1950, by The Population Registration Amendment Act, 1969 (No. 106), had the result of destroying, on appeal against that decision, any retrospective effect (derived from sec. 45 of Act 80 of 1964) of the 1962 definition, and that, therefore, the Court a quo was, and this Court is, bound to apply the original definition. Sec. 21A(2) provides :-

> "(2) An appeal in terms of section 11 against a decision of a board given prior to the commencement of the Population Registration Amendment Act, 1969, shall ..... be decided in accordance with the provisions of this Act as they existed on the date on which the relevant decision of the board in question was given, but without having regard to any retrospective effect of any provision of this Act, and in accordance with the provisions of Proclamation No. 123 of 1967."

The words relied upon by the appellant have been underlined. The contention rests on the assumption that these words govern the verb "decided"; but the question is whether

they do not relate to the verb "existed". The signed text of the subsection clearly indicates the latter. It reads :-

> "(2) Oor 'n appèl ingevolge artikel 11 teen 'n beslissing van 'n raad wat gegee is voor die inwerkingtreding van die Wysigingswet op Bevolkingsregistrasie, 1969, word .... beslis ooreenkomstig die bepalings van hierdie Wet soos hulle, sonder inagneming van enige terugwerkende krag van 'n bepaling van hierdie Wet, bestaan het op die datum waarop die betrokke beslissing van die betrokke raad gegee is, en ooreenkomstig die bepalings van Proklamasie No. 123 van 1967."

What is clearly intended is that amendments of the Act 30 of 1950 subsequent to the decision of a board (with the exception of Proclamation 123 of 1967) should not, on appeal, be taken into consideration by virtue of any retrospective effect they may possess. This is consistent with common-sense and fair play. The Legislature obviously had in mind the difficulties and hardship which could arise if a court on appeal were bound to decide a matter on provisions

of law different from those that existed at the time the board gave its decision - difficulties amply demonstrated at one stage in this very case (see 1968(2) SA 99(E)), later overruled by this Court (1968(4) SA 628). It may be pointed out that the dicta in Hoosain v. Sekretaris van Binnelandse Sake (1970(1) SA 259(A), 263E) and Felton v. Secretary for the Interior and Another (1970(2) SA 296(T), 300D-301A) are completely consistent with this view.

It follows that this appeal is to be decided in accordance with the law as it stood at the time the first respondent gave its decision. That law required (despite the fact that the appellant had been classified by the Secretary and his objection lodged before the promulgation of Act 80 of 1964) the application of the 1962 definition. It reads as follows :-

> "white person means a person who -
> (a) in appearance obviously is a white person and who is not generally accepted as a coloured person; or
> (b) is generally accepted as a white person and is not in appearance obviously not

a/.....

a white person,

but does not include any person who for the purposes of his classification under this Act, freely and voluntarily admits that he is by descent a native or a coloured person unless it is proved that the admission is not based on fact."

As has been mentioned, this definition was applied by both the Board and the Court a quo. The former found the appellant to fall under (a), but that he had made an admission as contemplated by the proviso (viz. that he was by descent a coloured person); the latter came to the conclusion that the appellant fell under neither (a) nor (b), and, in addition, that he had made an admission as contemplated by the proviso. The Court felt that the appellant was in appearance neither obviously a white person nor obviously not a white person, and that the evidence did not establish that he is generally accepted as a white person. It is contended that on the evidence (which is restricted to that adduced before the first respondent, the parties

having/.....

having declined to lead further evidence before the Court a quo) and a correct interpretation of the proviso, the appellant had made no such admission, and that the appellant should have been classified as white. It is strongly urged that the first respondent was right in placing the appellant under (a), but, alternatively, if the Court a quo was correct in its assessment of the appellant's appearance, it should have found it established that he was generally accepted as a white person and that he, therefore, fell under (b).

The issue relating to the proviso is obviously crucial to the appellant's case. In contradistinction to (a) and (b) of the definition, which relate to appearance and acceptance, the proviso introduces the element of genealogy. As a "coloured person" is by definition "a person who is not a white person or a native" (sec. 1(iii) of Act 30 of 1950), it follows that a coloured person by descent is a person who is neither a white person by descent nor a native by descent. A "white person by descent" is

not /.....

not defined in the Act (although it is undoubtedly the standard by which appearance is assessed for the purposes of (a) and (b) of the definition), but a "white" or a "European", as a genetic concept, has a well recognized meaning, long established in this Country. Over 60 years ago Lord de Villiers C.J. had occasion to refer to "the universal meaning attached to the term 'European' throughout South Africa", which regarded a person as being of other than European descent once it is established that one of his "nearer ancestors" was black, like a Bantu, or yellow like a Bushman, Hottentot or Chinese (Moller v. Keimoes School Committee, 1911 AD 635, 642-3), while J. de Villiers J.P. pointed out that "in common parlance in South Africa European is contrasted with native and coloured, in which case it refers to what are commonly called the white races as opposed to the aboriginal and what are called the coloured races in South Africa" (at 653). Against this background there can be little doubt that the proviso to the new definition (of 1962) of "white person", relates to

an /.....

an admission of descent other than pure white. As in Moller's case, the facts of the present case make it "unnecessary to decide how far back in a person's pedigree it would be allowable to go in order to decide whether his European extraction is unmixed" (p. 644), or to define with precision "nearer ancestors", or to decide whether an admission of the presence of a minimal admixture of non-white blood by descent could be considered negligible for the purposes of the proviso to the 1962 definition. Suffice it to say that the proviso generally becomes operative when an admission of other than full blooded white descent is made, even where it does not concede a preponderance of other blood. The decision in Pitcher and Others v. Secretary for the Interior (1968(4) SA 238(C), dealing with the phrase "unless it is proved that the admission is not based on fact" appearing in the proviso, is fully consistent with and supports this view. It follows that dicta to the contrary in Olieslager v. Sekretaris van Binnelandse Sake (1966(3) SA 560(C)) and Engel v. Race Classification Board and /.....

and Another (1967(2) SA 298(C)) must be considered to be overruled.

With this interpretation of the proviso to the 1962 definition in mind, the alleged admissions by the appellant must now be considered. The Board and the Court a quo based their decisions on entries in a 1951 census form and an application form for an identity card, dated 5th October 1955. Both forms were signed by the appellant, and in both his race was stated to be "Chinese". It is submitted on a number of grounds that the Board and the Court a quo erred in considering these entries to be admissions by the appellant that he is "by descent a coloured person" in terms of the proviso. Inter alia the point is taken that in their context the statements should be read as not referring to descent, but to acceptance. There are serious difficulties inherent in this argument, but in the circumstances it is unnecessary to decide whether these entries fall under the proviso. The appellant has made other admissions. In his affidavit, prescribed by sec.

11(2) of Act 30 of 1950, supporting his written objection to his classification by the Secretary, the appellant stated :

> "Dat ek die seun is van en gebore uit die huwelik van my ouers William Pinkey wat half Frans en half Sjinees was en Isabel Maria Jacobs wat n blanke was."

In his evidence-in-chief before the Board, given on his own behalf, he repeated this and confirmed that his father was "van afkoms dan half Chinees en half Frans". Although it is contended by the respondents that the evidence does not establish his mother to have been white, it will be assumed in favour of the appellant that it was indeed so. These statements clearly relate to descent and amount to admissions that the appellant's father was coloured, and they were obviously made freely and voluntarily by the appellant for the purposes of his classification under the Act. The appellant has thus admitted in terms of the proviso (as construed above) that he is "by descent a

coloured person". There is no evidence that such admission is not based on fact - on the contrary, such evidence as there is, confirms the admission.

Seeing that the appellant is taken out of the 1962 definition of "white person" as a result of the proviso being applicable to him, it is unnecessary to consider whether by appearance or acceptance he may fall under (a) or (b) of that definition.

The appeal is dismissed with costs.

E.L. JANSEN J.A.

BOTHA J.A.)
HOLMES J.A.) Concurred.
POTGIETER J.A.)
RABIE J.A.)