

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA

(APPELAFDELING)

In die saak tussen:

DIE MINISTER VAN JUSTISIE

Appellant

en

NEVILLE EDWARD ALEXANDER

Respondent

CORAM: RUMPF, H.R., BOTHA, JANSEN, TROLLIP et CORBETT, A.RR.VERHOOR: 19.5.1975. GELEWER: 19 Augustus 1975

U I T S P R A A K

RUMPF, H.R. :

Respondent is in 1964 skuldig bevind aan n oortreding van artikel 21 (1) van Wet 76 van 1962, n wetsbepaling wat handeling wat as Sabotasie beskou kan word, strafbaar maak. Luidens daardie artikel is die minimum straf wat vir so n oortreding opgelê kan word n periode van vyf jaar gevangenisstraf. Die respondent is gevonniss tot tien jaar gevangenisstraf. By sy ontslag uit die gevangenis op 13 April 1974 is aan hom drie kennisgewings uitgereik kragtens die

bepalings/....

bepalings van artikels 9 (1), 10 (1) (a) en 10 quat (1) van die Wet op die Onderdrukking van Kommunisme, No. 44 van 1950, soos gewysig, waarvolgens hy, kortliks gestel, deur die Minister van Justisie (a) belet is om enige byeenkoms by te woon, (b) tot n bepaalde gebied en, in verband met sy woning, vir sekere tye ingepark word, en belet word om bepaalde publikasies die lig te laat sien, en om enige besoekers by sy huis te ontvang, behalwe n geneesheer, en (c) gelas is om hom elke Woensdag by n bepaalde polisiekantoor aan te meld. Hierdie kennisgewings is gedateer 8 April 1974. Op 30 April 1974 is namens respondent n brief aan die Minister gerig waarin die Minister gevra is, luidens die bepalinge van artikel 9 (2) en 10 (1) bis van die Wet, om die redes mee te deel waarom die kennisgewingsuitgereik is, en om die gegewens te verskaf wat die Minister beweeg het om die kennisgewings uit te reik.

Om artikel 9 (2) van die Wet te verstaan, is dit nodig om na artikel 9 (1) te kyk. Artikel 9 (1) en (2) lees soos volg:

- "9 (1) Wanneer die Minister oortuig is dat n persoon aan bedrywighede deelneem wat die verwesenliking van een of ander van die oogmerke van kommunisme bevorder of bereken is om dit te bevorder, kan hy by wyse van n deur hom ondertekende kennisgewing aan daardie persoon gerig en oorhandig of aangebied, hom verbied om, behalwe in die gevalle wat in die kennisgewing bepaal word of wat die Minister of n landdros wat ooreenkomstig sy algemene of spesiale voorskrifte optree, te eniger tyd uitdruklik magtig-
- (a) enige byeenkoms; of
 - (b) n bepaalde byeenkoms of enige byeenkoms van n bepaalde aard, klas of soort, by te woon op enige plek of in enige gebied gedurende enige tydperk of op enige dag of gedurende bepaalde tye of tydperke binne enige tydperk.
- (2) Indien iemand aan wie n kennisgewing kragtens sub-artikel (1) oorhandig of aangebied is, die Minister skriftelik versoek om aan hom die redes vir die kennisgewing en die gegewens wat die Minister beweeg het om die kennisgewing uit te reik, mee te deel, dan moet die Minister aan bedoelde persoon sy redes vir die kennisgewing en soveel van die gegewens wat die Minister beweeg het om die kennisgewing uit te reik as wat, volgens sy oordeel, sonder benadeling van die openbare beleid bekend gemaak kan word, skriftelik meedeel."

Artikel 10 handel ook oor die posisie wanneer

die "Minister oortuig is" oor sekere feite en artikel 10 (1) bis

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het dieselfde bewoording as artikel 9 (2). Beide artikels 9 (2) en artikel 10 (1) bis is in 1954 in die Wet ingevoeg.

Die ontvangs van die versoek om redes en gegewens is op 9 Mei 1974 erken. Op 17 Augustus 1974 het die Minister sy redes soos volg geformuleer (Bylae „E" tot respondent se aansoek):

„(1) REASONS

- (i) Notice in terms of section 9 (1) of Act 44 of 1950

The Minister is satisfied that your client engages in activities which are furthering or are calculated to further the achievement of the objects of communism.

- (ii) Notice in terms of section 10 (1) (a) of Act 44 of 1950

The Minister is satisfied that your client engages in activities which are furthering or may further the achievement of the objects of communism.

(2) Information

The information which induced the Minister to issue the abovementioned notices can, in his opinion, not be disclosed without detriment to public policy."

Op 3 Oktober 1974 het respondent n dringende aansoek tot die Afdeling Kaap die Goeie Hoop gerig waarin n bevel gevra is wat die kennisgewings ongeldig verklaar. In sy

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beëdigde verklaring het respondent sy loopbaan geskets, veral sy akademiese prestasies in die Duitse taal en letterkunde wat hy deur studie in Duitsland verwerf het, en wat bekroon is met n doktorsgraad magna cum laude aan die Universiteit van Tübingen. Na sy studie het hy teruggekeer na Kaapstad en tydens sy arrestasie was hy deeltydse lektor in Duits aan die Universiteit van Kaapstad en onderwyser aan die Livingstone High School. In sy beëdigde verklaring meld respondent dat hy skuldig bevind is aan n oortreding van artikel 21 (1) van Wet 76 van 1962 deurdat hy met ander saamgesweer het om onwet- tige handelingte te pleeg wat die veiligheid van die Republiek en die handhawing van wet en orde in gevaar sou stel. Hy verduidelik ook wat hom beweeg het om ernstig die moontlikheid te oorweeg om deur guerrilla-oorlogvoering n politieke veran- dering hier te weeg te bring. Hy beweer verder dat tydens sy verblyf in die gevangenis hy nie deelgeneem het aan enige bedrywighede wat beskou kan word van so n aard te wees dat dit die oogmerk van kommunisme kon bevorder nie en dat hy in elk

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geval nie die geleentheid daartoe gehad het nie, en hy beweer verder dat hy nie 'n kommunist is nie en dat hy nie aan bedrywighede deelneem wat die oogmerk van kommunisme bevorder nie, en dat hy ook nie van plan is om dit te doen nie. Hy doen aan die hand (a) dat die Hof geregtig is om die afleiding te doen dat die Minister, wat die kennisgewings betref, geen ander gegewens behalwe die skuldigbevinding voor hom gehad het nie, of (b) dat die veiligheidspolisie agter die uitreiking van kennisgewings sit en dat die Minister eenvoudig aanvaar het dat die veiligheidspolisie hul eie redes gehad het om die kennisgewings te laat uitreik of (c) dat die Minister dit as 'n beleid beskou om politieke gevangenes wat 'n lang termyn van straf uitgedien het, in te perk. Respondent verklaar ook in sy beëdigde verklaring dat die aansoek dringend is vanweë die drastiese effek daarvan op sy persoonlike lewe en op sy vryheid. Hy werk as 'n klerk in 'n "supermark" en sy akademiese kwalifikasies het feitlik waardeloos geword.

Die kern van respondent se eisorsaak is ^{du}s dat

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dat die Minister nie opgetree het soos deur die artikels hierbo genoem vereis word nie of dat hy mala fide opgetree het. In sy antwoord het die Minister o.a. verwys na n beëdigde verklaring van n kolonel ~~William~~se waarin redes gemeld word waarom n gevangene, soos respondent was, wel voldoende geleentheid het om aan bedrywighede deel te neem wat die verwesenliking van een of ander van die oogmerke van kommunisme kan bevorder. Verder bevat die beëdigde verklaring van die Minister o.a. die volgende paragrawe:

- "7. (b) Ek ontken verder Applikant se bewerings dat hy in die tydperk van sy gevangenisstraf nie aan sodanige bedrywighede deelgeneem het nie en dat daar gevolglik niks behalwe die feit van sy skuldigbevinding kan gewees het om my te beïnvloed by die uitreiking van die betrokke kennisgewings nie.
8. (a) Ek erken dat ek nie enige gegewens waarop my redes vir die uitreiking van die betrokke kennisgewings gebaseer was aan die Applikant geopenbaar het nie, en daarop wil ek die volgende bevestig:
- (i) Voordat ek die betrokke kennisgewings onderteken het, is daar inderdaad gegewens aan my voorgelê ten opsigte van die Applikant se optrede na sy skuldigbevinding en vonnis, dit wil sê, sy optrede terwyl hy sy vonnis uitgedien het.

- (ii) Ek het die betrokke gegewens oorweeg en bona fide tot die gevolgtrekking gekom dat die Applikant inderdaad besig was om deel te neem aan bedrywigheide wat die verwesenliking van een of ander van die oogmerke van kommunisme bevorder of bereken is om dit te bevorder.
- (iii) Daarop het ek die betrokke kennisgewings onderteken en laat uitreik.
- (iv) Na ontvangs van die Applikant se versoek bylae 'C' tot die aansoek, het ek oorweeg of dit dōenlik sou wees om aan die Applikant enige of al die gegewens wat my beweeg het om die betrokke kennisgewings uit te reik mee te deel, maar ek het na oorweging tot die slotsom gekom dat geen van die gegewens bekend gemaak kon word sonder om die openbare beleid te benadeel nie.
- (v) Na ontvangs van die huidige aansoek het ek weereens oorweeg of ek enige van die gemelde gegewens kan bekend maak, maar ek het weereens tot die gevolgtrekking geraak dat enige sodanige bekendmaking die openbare beleid sou benadeel.
- (vi) In die omstandighede kan ek dus nie meer sê as dat ek voorsien is van sekere gegewens, dat ek daardie gegewens behoorlik oorweeg het en daarop tot die gevolgtrekking gekom het wat in (ii) hierbo uiteengesit is nie. In die omstandighede van hierdie geval vind ek dit onmoontlik om my redes vir die betrokke kennisgewings enigsins wyer of vollediger te omskryf as wat reeds gedoen is, sonder om daardeur ook
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aan te dui wat die gegewens is waarop ek gehandel het. Ek vind dit dus onmoontlik om iets by te voeg tot wat reeds gesê is in bylae 'E' tot die Aansoek."

In sy repliserende verklaring van 29 Oktober 1974 het respondent sy bewerings in sy aansoek herhaal en het hy beklemtoon dat as die Minister se houding gehandhaaf sou word, respondent se beroep op die Hof kragteloos sou wees. Hy versoek ook dat die Hof sy inherente bevoegdheid moet uitoefen en die Minister gelas om die gegewens voor die Hof te lê om hom in staat te stel om te oordeel of die gegewens bekend gemaak kan word sonder benadeling van die publieke beleid en of die bevinding van die Minister tersyde gestel moet word. Die respondent verklaar ook dat hy in limine aansoek gaan doen om n bevel wat die Minister gelas om die gegewens vir die doel voor die Hof te lê. By die repliserende verklaring was gevolglik n formele kennisgewing dat by die verhoor van die aansoek die Hof versoek sal word om so n bevel uit te reik. By die verhoor is dit duidelik gestel deur respondent se advokaat dat die versoek gerig is op n bevel dat

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relevante dokumente vertroulik aan die lede van die hof voorgelê word. Die Hof (regter Steyn, met instemming van regter Banks) het na aanhoor van die aansoek in limine die volgende bevel teen die Minister uitgereik:

- „1. Dat die aansoek dat Respondent beveel word om die „gegewens" wat hom beweeg het om die betrokke kennisgewings uit te reik voor die Hof te plaas, van die hand gewys word.
2. Dat Respondent binne 21 dae vanaf datum hiervan 'n eedsverklaring by hierdie Hof opberg waarin hy verklaar welke dokumente hy as politieke hoof van die Departemente wat onder hom ressorteer in sy besit of onder sy beheer het, of ooit gehad het, betreffende geskilpunte in die geding wat tans deur Applikant teen hom aanhangig gemaak is.
3. Dat Respondent sal in sodanige eedsverklaring verklaar dat hy self die inhoud van sodanige dokumente besigtig het en indien hy ten opsigte van enige sodanige dokumente beswaar opper teen die blootlegging daarvan, sal hy die aard van die dokument of die kategorie waarin die dokument ressorteer so volledig moontlik beskryf. Respondent sal ook verklaar op welke grond en op welke wyse hy voorsien dat die openbare beleid deur blootlegging, of deur in camera insae deur die lede van die Hof, benadeel mag word.
4. Dat Respondent sal die eedsverklaring, sover prakties moontlik, aan die voorskrifte van Hofreël 35, gelees met vorm 11 van die eerste bylae daartoe, laat beantwoord.

[illegible]

and the following conditions:

1. The first group of respondents (n = 10) was composed of students who had completed the course and were currently employed in a position related to their field of study. The second group (n = 10) was composed of students who had completed the course and were currently employed in a position not related to their field of study. The third group (n = 10) was composed of students who had completed the course and were currently unemployed. The fourth group (n = 10) was composed of students who had completed the course and were currently employed in a position related to their field of study. The fifth group (n = 10) was composed of students who had completed the course and were currently employed in a position not related to their field of study. The sixth group (n = 10) was composed of students who had completed the course and were currently unemployed. The seventh group (n = 10) was composed of students who had completed the course and were currently employed in a position related to their field of study. The eighth group (n = 10) was composed of students who had completed the course and were currently employed in a position not related to their field of study. The ninth group (n = 10) was composed of students who had completed the course and were currently unemployed. The tenth group (n = 10) was composed of students who had completed the course and were currently employed in a position related to their field of study.

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1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

2. Once the problem is identified, the next step is to define the objectives and goals of the project. This helps to clarify what needs to be achieved and provides a clear direction for the team.

3. The third step is to develop a plan or strategy to address the problem. This involves breaking down the problem into smaller, manageable tasks and determining the resources and timeline needed to complete them.

4. The fourth step is to implement the plan. This involves putting the strategy into action and monitoring progress regularly to ensure that the project is on track.

5. The final step is to evaluate the results of the project. This involves assessing the outcomes against the objectives and goals, identifying any lessons learned, and determining the next steps for future projects.

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5. Dat die verdere verhoor van hierdie saak sal oorstaan vir beslegting tot n datum wat, na beraadslaging, deur die Griffier bepaal sal word. Die Griffier word versoek om prioriteit aan die verdere verhoor van die saak te verleen.
6. Dat die koste van die aansoek in limine sal oorstaan vir beslegting tot die uitgestelde datum van verhoor. Op die uitgestelde datum en na aanhoor van die partye se regsverteenvoordigers sal die Hof uitsluitel gee of hy resterende magte het om behoorlik geopperde besware teen blootlegging (indien enige) te verwerp of ten einde daaroor te beslis, self na sodanige dokumente te kyk. Daarna sal die Hof die hoofgeding tussen die partye verhoor."

Die Minister appelleer met toestemming van die Hof a quo teen hierdie bevel en is dus die appellant in hierdie Hof.

Om te begryp op welke gronde die Hof a quo die bevel uitgereik het, is dit nodig om na die uitspraak te verwys waarin ook die betoë van die advokate van beide partye gestel word. Namens respondent is in die Hof a quo aangevoer dat die Wet waaronder opgetree is, nie die reg van n persoon, teenoor wie opgetree is, uitsluit om toegang tot die howe te hê nie, en dat na aanleiding van die beslissing in

Van/.....

Van der Linde v. Galitz, 1967 (2) S.A. 239, en die beslissing deur die House of Lords in Conway v. Rimmer, (1968) 1 All E.R. 874, die hof die bevoegdheid het om self die dokument te ondersoek om vas te stel of die Minister gronde gehad het om hom op die privilegie van publieke beleid te beroep. Namens appellant is aangevoer dat daar twee basisse is waarop die aansoek gefundeer kan word. Die eerste is n substantiewe aansoek om die Minister se bevinding op grond van mala fides tersyde te stel. Ten opsigte van so n aansoek het die Hof nie die bevoegdheid om die openbaarmaking van die gegewens te gelas of om self daarna te kyk ten einde te bepaal of die beroep op „die openbare beleid“ geregverdig is of nie. In hierdie verband is n beroep gedoen op die beslissings in Joyi v. Minister of Bantu Administration and Development, 1961 (1) S.A. 210 (K) en Kloppenburger v. Minister of Justice, 1964 (4) S.A. 31 (N). Volgens die uitspraak van die Hof a quo is die tweede basis soos volg gestel:

„Tweedens, so is aangevoer, kan die aansoek as n proseduurlike aangeleentheid benader word, met ander woorde as n aansoek om oorlegging van dokumente in terme van die Hofreëls. Mnr. Grosskopf (wat namens appellant verskyn het) het nie betoog dat

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die aansoek van die hand gewys moet word omdat dit, streng tegnies beskou, nie n aansoek om blootlegging is nie. Inderdaad wou hy nie sy beswaar op enige tegniese nie-nakoming van die Reëls grond nie. Hy het egter n tweërlei betoog in dié verband aan die Hof voorgedra. In die eerste plek was sy submissie dat daar nog nie n blootleggingsbevel gemaak is nie en dat die Hof derhalwe nog nie kan beoordeel wat die Minister se reaksie sou wees indien so n bevel gemaak sou word nie. Dit is eers nadat n bevel gemaak is dat die Hof sou kon besluit of dit enige magte het en of dit n gepaste geval vir die uitoefening van sodanige magte sou wees. In die tweede plek het hy aangevoer dat die huidige nie n geval is waar blootlegging gelas behoort te word nie, aangesien daar inderwaarheid geen geskil is oor die gemoeds-toestand van die Minister nie. Soos ek hom verstaan het, was sy betoog in dié verband dat, aangesien dit nie betwis kan word dat die Minister inderdaad die oordeel gevorm het dat die openbare beleid hom nie toelaat om die gegewens openbaar te maak nie of dat Applikant deelgeneem het aan bedrywighede wat die oogmerke van kommunisme bevorder nie, daar nie sodanige geskil bestaan wat n blootleggingsbevel sou regverdig nie."

Ek kwoteer hierdie deel van die uitspraak omdat die Hof a quo klaarblyklik die rigting ingeslaan het wat genoem is in die eerste deel van die alternatiewe betoog wat namens appellant in die Hof a quo gelewer is.

In/.....

In sy uitspraak gaan die Hof a quo voort en behandel dan die eerste vraag, naamlik, of n hof die bevoegdheid het om die Minister te gelas om die gegewens wat hy oorweeg het, bekend te maak. Daar word verwys na Sachs v. Minister of Justice, 1934 A.D. 11, Sobukwe and Another v. Minister of Justice, 1972 (1) S.A. 693 (A) op bl. 706 en Shidiack v. Union Government, 1912 A.D. 642 en die uitspraak lees o.a.:

„Die hoofaansoek wat tans voor die Hof dien is dan ook inderdaad n aansoek om hersiening van Respondent se beslissing. Die Hof sal uiteindelik, indien die geskil sy normale loop neem, tot n besluit moet raak of hierdie aanval gestand gedoen kan word al dan nie.

Dit kom my egter nie voor dat die feit dat n litigant beweer dat die uitvoerende gesag sy magte oorskry het of mala fide opgetree het, volgens ons geldende reg vir n Hof die mag gee om sy oordeel te plaas in die plek van die oordeel van die uitvoerende gesag en na gegewens te kyk of navraag in verband daarmee te doen ten einde te bepaal of sodanige gesag die diskresie wat die

Wetgewer/.....

Wetgewer aan hom en hom alleen verleen het, behoorlik uitgeoefen het nie. Die Hof se plig is om uitsluitel te gee op die geskilpunt voor hom, en dit is: moet die besluit van die persoon wat die gesag uitoefen - in hierdie geval die Minister - tersyde gestel word op een van die bekende hersieningsgronde al dan nie. Die eskalasie van die omvang van gedelegeerde magte wat in die hande van die uitvoerende gesag beland het, is n aangeleentheid wat besorgdheid aanwakker, maar kan nie die geregtelike gesag hom regte laat aanmatig wat hom nie toegeken is of toekom nie.

Die benadering wat ek so pas geskets het, is een wat herhaaldelik deur ons Howe bevestig is.

In Sachs v. Minister of Justice, voormeld te blse 36 - 37, stel Stratford, W H R dit soos volg:

„One further general observation I would make is this: that once we are satisfied on a construction of the Act, that it gives to the Minister an unfettered discretion, it is no function of a Court of law to curtail its scope in the least degree, indeed it would be quite improper to do so. The above observation is, perhaps, so trite that it needs no statement, yet in cases before the Courts when the exercise of a statutory discretion is challenged, arguments are sometimes advanced which do seem to me to ignore the 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 courts of law to enforce its will. In the present case we were referred to many decisions dealing with the exercise of discretionary powers. In this division, at all events, no decision affirms the right of a Court to interfere with the honest exercise of a duly conferred discretion.”

(My/....

(My understreping.) Die beginsel is beaam in Kloppenburg v. Minister of Justisie (2) (voormeld) te bls 35, waar Fannin, R., wat die uitspraak namens die volle bank van die Natalse Afdeling gelewer het, die volgende sê in verband met hierdie besondere artikels van die tersaaklike wetgewing:

„As I see it, the whole purpose of the enactment of the 1954 amendment was to limit and circumscribe the affected person's common law rights under the audi alteram partem rule. In the first place, it is a necessary inference from the provisions of the sub-sections that the affected person is not to be entitled to be given any information or any hearing before the issue of a notice under sec. 9 (1) or 10 (1) (a) (see the 1934 Sachs case at pp 18-9 and 38-9). In the second place he is also to be deprived of his right to be told any information upon which the Minister has acted even after the issue of the notice, if the disclosure of that information would in the Minister's opinion be detrimental to public policy. The amendments were introduced not, as at one stage Mr. Naidoo contended, to confer rights upon the affected person. They were intended to limit his rights in the manner indicated. If that is appreciated, there must follow I think the inevitable implication, from the words of the sub-sections, that the statement which the Minister has to furnish in reply to the request made by the affected person must be one which does not disclose the type of information referred to (cf per De Waal, J.P., at p 20 in the 1934 Sachs case, supra). The powers which as a result of this amendment are conferred upon the Executive, through the Minister, are indeed extensive, and in particular cases a refusal by the Minister to give reasons and/or information may/...

may render it almost impossible for an affected person to be able to make representations which have any bearing upon the matters which were decisive when the Minister was considering the question as to whether he would issue notices under the statute. The importance to the person affected of the disclosure to him of the case against him was pointed out by Tindall, J., in the 1934 Sachs case at p. 29. Parliament, however, must be taken to have appreciated this and to have decided that in extreme cases the public good must take precedence over the rights of the individual affected person. Parliament has conferred upon the Minister the sole discretion as to whether the disclosure of information will be detrimental to public policy.'

(My understreping.)

Om hierdie redes het die Hof, na my mening, nie die mag om die gegewens waarop Respondent vertrou het op te eis ten einde te beoordeel of hy die diskresie wat die Wetgewer aan hom opgedra het behoorlik uitgeoefen het al dan nie."

Nieteenstaande hierdie uitdruklike bevinding, wat die uitspraak van die Natalse Hof in die Kloppenburgsaak onderskryf, gaan die Hof a quo voort deur te verwys na die sogenaamde resterende bevoegdheid wat die Hof het en wat hy kan uitoefen "in sekere omskrewe omstandighede en ook nie ten opsigte van alle dokumente nie". Die Hof a quo konstateer dan die volgende:

"Al/....

„Al wat tans bekend is, is dat ,daar sekere gegewens aan (die Minister) voorgelê (is)“. (As mens op die taalgebruik let is dit ofskoon wâarskynlik, nie bo twyfel, dat die gegewens, of al die gegewens, in skrif was nie.) Die Hof het tans geen kennis aangaande die aard van hierdie gegewens of in welke kategorie hulle val nie (indien hulle dokumente is nie). Die Hof het derhalwe tans onvoldoende inligting voor hom om n oordeel te kan vel of hy sodanige resterende bevoegdheide as wat hy mag hê, hoort uit te oefen en indien wel, op welke wyse.”

Die „kategorie“ waarin dokumente sou kan ingedeel wees en die sgn. „resterende bevoegdheid“ van n hof word bespreek in n uitspraak van hierdie Hof in Van der Linde v. Calitz (supra), as deel van die bewysleer en n oorsig van die-reg aangaande hierdie vraagstuk word gegee in Hoffmann se South African Law of Evidence, tweede uitgawe, hoofstuk 8. In Van der Linde v. Calitz, op bl. 259, word bevind „dat ons Howe, by soortgeskrifte* altans, wel bekleed is met n resterende bevoegdheid om n behoorlik geopperde beswaar dat blootlegging of voorlegging daarvan skadelik of nadelig vir die openbare welsyn sal wees te verwerp“. Wat „soortgeskrifte“ is, blyk uit bl. 241 van die saak. Daar word verwys, na aanleiding van twee teenstrydige Engelse beslissings in Robinson v. State of

South Australia, 1931 A.C. 704, n beslissing van die Geheime Raad en in Duncan and Another v. Cammell Laird & Co. Ltd., 1942 A.C.⁹⁰, n beslissing van die House of Lords, na dokumente wat uit hoofde van hul inhoud klaarblyklik nie sonder gevaar vir die openbare veiligheid voorgelê kan word nie, en na dokumente wat binne n kategorie val wat, afgesien van hul bepaalde inhoud, in die openbare belang teen publikasie beskerm moet word. Hierdie laaste word „soortgeskrifte” genoem. Nadat die Hof a quo verwys na n passasie in S. v. Naicker and Another, 1965 (2) S.A. 919 (N), en sekere Engelse beslissings en, nadat die Hof a quo konstateer dat sekere opinies uitgespreek in die Duncansaak o.a. deur die uitsprake in Conway and Rimmer (supra) as onjuis beskou word, word in die uitspraak gesê:

„Ek het hierdie ontwikkelings uiteengesit want ek meen dat deur die Howe se benadering te skets, dit duidelik word dat Respondent se segsman dit reg het wanneer hy betoog dat ons nog nie die stadium bereik het waarop ons n besluit kan vel of die Hof na dokumente kan kyk ten einde te besluit of n geopperde beswaar aanvaar of verwerp

moet/.....

moet word nie. Dit is so dat Respondent vir die doeleindes van die geding wat teen hom ingestel is en vir die bestryding van daardie skuldoorsaak die diskresie wat die Wet hom verleen het uitgeoefen het en op die uitoefening daarvan staatgemaak het. Respondent het egter nog geen eedsverklaring gedoen in reaksie tot n bevel wat hom gelas om dokumente bloot te lê nie."

En verder:

"Wanneer Respondent daardie geleentheid gehad het en n eedsverklaring gedoen het in die vorm soos deur ons aangedui sal word, kan die Hof as meester van sy proses die besluit neem - indien privilegie opgewerp word - of hy resterende magte het al dan nie en op welke wyse hy sodanige magte sal uitoefen."

Ten slotte verwerp die Hof a quo die betoog dat n blootlegging

~~nie geregverdig is nie en verklaar:~~

"Ek het reeds aangedui dat geen beswaar vanweë n tegniese nie-nakoming van die reëls namens Respondent geopper is nie en geen versoek om n uitstel is, ten spyte van behoorlike navraag, gedoen nie. Ek beoog derhalwe om die aansoek wat in limine deur Applikant geopper is as n aansoek om blootlegging te behandel. Hierdie aansoek hoort, na my mening, in die besondere omstandighede van hierdie saak toegestaan te word."

Die posisie blyk dus soos volg te wees:

die Hof a quo het beslis dat hy nie die mag het nie om die gegewens waarop appellant hom verlaat het, op te eis ten einde te beoordeel of die diskresie wat die Wetgewer in verband met die uitreiking van die kennisgewing aan die appellant opgedra het, behoorlik uitgeoefen is, maar dat hy wel die mag het om n bevel uit te reik dat die Minister n beëdigde verslag moet opstel, soos in die bevel van die Hof a quo beskryf word. Na ontvangs van die eedsverklaring van die Minister sal die Hof dan beslis of „hy resterende magte het om behoorlik geopperde besware teen blootlegging (indien enige) te verwerp of ten einde daaroor te beslis, self na sodanige dokumente te kyk“.

Dis gemene saak dat in hierdie Hof die enigste geskilpunt die vertolking van artikel 9 (2) van die Wet is.

In hierdie verband moet gekonstateer word, dat, hoewel die Hof a quo die uitspraak in die Kloppenburgsaak (supra) onderskryf het, die Hof a quo in sy uitspraak nie die vraag behandel nie

wat/.....

wat die uitwerking van artikel 9 (2) op die gemeenregtelike resterende bevoegdheid van die Hof is in verband met die weerhouding van getuienis deur 'n Minister op grond van publieke beleid.

Namens respondent is aangevoer dat artikel 9 (2) nie by implikasie die Minister verbied om die besonderhede bekend te maak nie. Daar is aangevoer dat die bepalinge van die artikel alleen die regte van respondent en die verpligtinge van appellant in die administratiewe arena reël en dat hulle nie betrekking het op die verhouding tussen die partye in die arena van die Hof nie. In so 'n geval, so is betoog, ontstaan—daar 'n skerp belangebotsing wanneer die Minister gevra word om die besonderhede te openbaar in 'n saak waarin die geldigheid van sy eie handeling betwis word en die Minister kan nie bevoeg geag word om in so 'n geval 'n oordeel uit te spreek nie indien sy eie handeling ongeldig mag wees. En, so is aangevoer, indien dit die bedoeling van die wetgewer was om die Minister as finale arbiter aan te stel, sou die wetgewer

dit/.....

dit uitdruklik gesê het. Daar is ook betoog dat daar n duidelike indikasje in die Wet is dat die Minister nie die enigste arbiter is nie. Die bepalings van artikel 9 (2) is alleen van toepassing op n persoon teen wie opgetree is en wat om gegewens vra. n Derde persoon, betrokke in die saak, sou dus die Minister kon dagvaar, duces tecum, indien die gegewens relevant sou wees, en die Minister sou hom alleen kan beroep op een van die erkende privilegies in die bewysleer, waarvan die geldigheid deur n hof beoordeel kan word.

Die betoog van respondent is, na my mening, nie aanvaarbaar nie.

Andersins toelaatbare getuienis mag, volgens die gemene reg, in die algemeen nie geopenbaar word nie, indien die openbaring daarvan in stryd sou wees met die publieke beleid. In hierdie verband omvat die begrip „publieke beleid” veral oorwegings van staatsveiligheid, diplomatieke onderhandelings, die opsporing van misdaad en, in sekere gevalle, die werking van die Staatsdiens, vgl. Hoffmann (op. cit.) op bl. 196, en,

wat/.....

wat die algemene reël betref, op bl. 198, waar die volgende uit die Duncansaak (supra) aangehaal word:

"The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either (a) by having regard to the contents of the particular documents, or (b) by the fact that the documents belongs to a class which, on grounds of public interest, must as a class be withheld from production."

Die verskille tussen privilegie in engere sin en openbare beleid word deur Hoffmann (op. cit.) op bl. 197 soos volg aangedui:

"Privilege, as we have seen, is a right to withhold evidence. This right is always vested in one particular person and may not be claimed by anyone else. On the other hand, an objection to disclosure on grounds of public policy may be taken by the parties, a witness, a third party (usually the Minister) or the judge himself. Furthermore, private privilege may be waived, but the only analogy to waiver of state privilege would be a statement by a responsible Minister assuring the court that it would not be contrary to state interest to admit evidence which prima facie appeared to require exclusion. Another difference is that any document protected by private privilege may be proved by secondary evidence.

But/.....

But the contents of a document excluded on grounds of public policy cannot be divulged in any other way."

In Van der Linde v. Calitz (supra) het hierdie Hof, op bl. 257, uitdruklik beslis dat howe „beklee is met n resterende bevoegdheid om n behoorlike geopperde beswaar dat blootlegging of voorlegging daarvan skadelik of nadelig vir die openbare welsyn sal wees, te verwerp". Onder die gemene reg kan dit dus gebeur dat n hof die opinie van n Minister verwerp hoewel die hof met „nougessette omsigtigheid" (vgl. Van der Linde v. Calitz op bl. 259) te werk moet gaan.

Die posisie in die huidige Engelse reg is te vinde in die uitsprake in Conway v. Rimmer (supra).

Op bl. 880 van die verslag sê Lord Reid o.a.

„It is universally recognised that there are two kinds of public interest which may clash. There is the public-interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents

which/.....

which must be produced if justice is to be done. There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it. With regard to such cases it would be proper to say, as LORD SIMON did, that to order production of the document in question would put the interest of the state in jeopardy; but there are many other cases where the possible injury to the public service is much less and there one would think that it would be proper to balance the public interests involved."

By een van die fasette van publieke beleid ,
naamlik staatsveiligheid, is daar geen twyfel oor die benade-
ring van die hof nie. So sê Lord Morris of Borth-y-gest
op bl. 890:

"If a responsible Minister stated that production of a document would jeopardise public safety, it is inconceivable that any court would make an order for its production. The desirability of refusing production would heavily outweigh the desirability of requiring it. Other examples will readily come to mind of claims to protection from production which would at once be fully conceded."

Wat staatsveiligheid betref, het die wetgewer
in ons reg uitdruklik die volgende bepaal in artikel 29 (1)
van Wet 101 van 1969, soos gewysig:

"Ondanks/.....

„Ondanks andersluidende bepalinge van n wet of die gemenereg, word niemand verplig en word niemand toegelaat of gelas nie om in verrigtinge in n geregshof of voor n kragtens of by wet ingestelde liggaam of instelling of voor n kommissie soos beoog deur die Kommissiewet, 1947, getuienis af te lê of inligting te verstrek aangaande n feit, aangeleentheid of saak of aangaande n mededeling aan of deur so iemand gedoen, en word geen boek of dokument in sodanige verrigtinge oorgelê nie, indien n beëdigde verklaring wat heet onderteken te wees deur die Minister wat ten opsigte van daardie feit, aangeleentheid, saak, mededeling, boek of dokument verantwoordelik is, of, in die geval van n provinsiale administrasie of die gebied van Suidwes-Afrika, die betrokke Administrateur, aan die betrokke geregshof, liggaam, instelling of kommissie voorgelê word ten effekte dat bedoelde Minister of Administrateur, na gelang van die geval, bedoelde feit, aangeleentheid, saak, mededeling, boek of dokument persoonlik oorweeg het; dat dit, na sy oordeel, die veiligheid van die Staat raak en dat die blootlegging daarvan, na sy oordeel, die veiligheid van die Staat nadelig sal raak."

By die beoordeling van artikel 9 (2) moet mens nie die samehang van die Wet ignoreer nie. Dit skyn duidelik te wees dat die wetgewer met Wet 44 van 1950 bedoel het om die bestaan en veiligheid van die heersende staatsorde te handhaaf. Hoewel daar geen konvensionele oorlog heers nie, is dit tog duidelik dat deur hierdie Wet die staat in n onkon-

vensionele/...

vensionele stryd betrek is met kommuniste en ander persone _____
wat deur die bepalings van die Wet geraak word.

In die onderhawige saak het die Hof a quo
die oorspronklike aansoek wat deur respondent gedoen is om
gegewens van die Minister te verkry, afgewys op grond van
artikel 9 (2) van die Wet, maar het toe daarna die aansoek
beskou as n aansoek om blootlegging op die veronderstelling
dat die Minister onder die gemene reg getuienis sal weerhou,
met n beroep op publieke beleid, en nie behoorlike besonder-
hede sal verskaf nie aan die hand waarvan die Hof sou kon

beslis of hy geregtig sou wees om in die omstandighede n beroep
op publieke beleid te doen. Wat die Hof a quo, myns insiens,
oënskynlik oor die hoof gesien het, is dat dít nie n geval is
nie waar die Minister hom op die gemene reg beroep, maar op
die uitdruklike bepalings van die Wet. En in die onderhawige
geval is die Minister deur die wetgewer, klaarblyklik met die
oog op die doel en die uitvoering van die Wet, genoop om self
die diskresie uit te oefen, en ook om geen gegewens te verstrek

nie/.....

nie waarvan die bekendmaking volgens sy oordeel die openbare beleid sal benadeel. Die Wetgewer moes voorsien het dat gegewens, wat die openbare beleid mag benadeel, en wat aan die betrokke persoon gelewer word, verder versprei sal word. Vandaar dat die artikel nie lees nie: „as wat, volgens sy oordeel, sonder benadeling van die openbare beleid aan bedoelde persoon gelewer kan word, skriftelik meedeel” (vgl. die gebruik van die woord „lewer” in die eerste deel van sub-artikel 9 (2)) maar wel: „as wat, volgens sy oordeel sonder benadeling van die openbare beleid bekend gemaak kan word, skriftelik meedeel”. „Bekendmaking” of „openbaring” (disclosure) van gegewens wat die openbare belang mag benadeel, is woorde wat gebruiklik is wanneer staatsprivilegie by blootleggingsaansoeke ter sprake kom.

Artikel 9 (2) is deur Wet 15 van 1954 in die Wet ingevoeg. Op daardie stadium is die gemene reg nog vertolk as sou getuienis, wat andersins in n hof toelaatbaar is, nie geopenbaar mag word nie, indien die getuienis die

openbare/....

openbare belang mag benadeel. Hierdie verbod is as totaal geag (vgl. Barnicott v. Minister of Justice, 1913 T.P.D. 691 en Sachs v. Minister of Justice (supra)), en na my mening was dit die bedoeling van die Wetgewer om in artikel 9 (2) beslag te gee aan daardie vertolking van die gemene reg. Dit is opmerklik dat artikel 9 (2) woordelik dieselfde is as artikel 1 (13) van Wet 27 van 1914 wat in die saak Sachs v. Minister of Justice (supra) ter sprake gekom het. In die uitspraak van regter-president de Waal, in die Transvaalse Provinsiale Afdeling in daardie saak (op bl. 21), word verwys na die Barnicottsaak en gesê:

"Similarly, in this case, the Minister having been vested by Parliament with the very wide, almost autocratic powers under sub-sec. (12), and the Minister having informed the Court that he acted bona fide throughout, and that throughout he had no other object in view but to exercise his discretion in the proper manner, it is impossible for us to say that he acted wrongly, or that he erred in not making fuller disclosures such as are demanded by the petitioner."

So ook sê regter Tindall op bl. 25 en 26:

"Passing now to the question whether the Minister has failed to comply with sub-section (13)

by/.....

by failing to give the required information which induced him to issue the notice, the Minister's opinion that the disclosure of information will be detrimental to public policy is final unless it can be shown that he did not arrive at his opinion in good faith or that he did not seriously apply his mind to the question: cf. Barnicott v. Minister of Justice, 1913, T.P.D. 691."

Dit skyn duidelik te wees dat dit aanvaar is dat die gemene reg in die statuut vasgelê is. Hierdie hof het die uitsprake van die provinsiale regters bekragtig. Dat n ander vertolking van die gemene reg in 1967 in Van der Linde v. Calitz (supra) plaasgevind het, doen nie af aan die Wetgewer se bedoeling in 1954 nie. Vir doeleindes van Wet 44 van 1950 het die Wetgewer m.i. uitdruklik die diskresie verleen aan die Minister om te beslis watter gegewens hy, met die oog op benadeling van die publieke beleid, sal verskaf of nie en hierdie diskresie kan alleen op die gebruikelike gronde tersyde gestel word. Dit gaan hier ook nie alleen oor dokumente nie maar oor "gegewens" wat uit die aard van die saak uit skriftelike en mondelinge informasie kan bestaan. Na my mening is daar nie twee arena's nie,

soos namens respondent betoog is. Die doel van die Wetgewer was om voorsiening te maak dat n persoon, wat deur n ministeriële kennisgewing geraak is, die Minister kan vra waarom die kennisgewing uitgereik is en ook om aan hom die gegewens te gee wat die Minister beweeg het om die kennisgewing uit te reik. Sy reg op die reg audi alteram partem het n beperkte reg geword, soos in die Kloppenburgsaak beslis is. Die Wet skep nie n administratiewe arena nie. As daar n arena is, is dit n arena van die Hof en in hierdie arena het die Wetgewer die Minister n statutêre diskresie verleen. Dit is betoog dat die respondent in die onderhawige geval in n moeilike posisie verkeer. Dit is egter m.i. nie moontlik nie vir n hof om homself indirek, deurmiddel van n blootleggingsbevel, n bevoegdheid te verleen wat in stryd is met artikel 9 (2) van die Wet.

Indien die Minister volgens die Wet sekere gegewens moet weier aan n persoon wat direk deur n kennisgewing geraak word, is dit myns insiens ook n noodwendige afleiding dat n derde persoon, wat die Minister sou dagvaar

duces tecum a fortiori nie op sodanige gegewens geregtig
sou wees nie.

Na my mening moet die appèl slaag met koste,
insluitende die van twee advokate en moet die bevel van die
Hof a quo tersyde gestel word en vervang word deur n bevel
wat lui: „Die aansoek van Applikant in limine word afgewys
met koste, insluitende die van twee advokate.”



HOOFTREGTER.

BOTHA, A.R.
JANSEN, A.R.
TROLLIP, A.R. } Stem saam.

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the appeal of:

THE MINISTER OF JUSTICE Appellant

versus

NEVILLE EDWARD ALEXANDER Respondent

Coram: RUMPF, C.J., BOTHA, JANSEN, TROLLIP et CORBETT, JJ.A.

Date of Hearing: 19 May 1975.

Date of Judgement: 19 August 1975.

J U D G M E N T.

CORBETT, J.A.:

The facts and issues with which this appeal is concerned are set forth in the judgment of the Chief Justice. I have come to a different conclusion in regard to the central issue in the case and as to the order which should be made. My reasons are shortly as follows.

Counsel/.....

Counsel for appellant and counsel for respondent were agreed that the appeal hinged on the question as to whether, by reason of section 9(2) of Act No. 44 of 1950, as amended, the appellant was protected, and precluded, from making discovery of any document in his possession, containing information which induced him to issue the notice under section 9(1), if in his opinion it could not be disclosed without detriment to public policy. (The same issue arises in regard to section 10(1)bis, with reference to a notice under section 10(1), but, inasmuch as sections 9(2) and 10(1)bis are identically worded, I shall, in discussing the issue, refer merely to section 9(2).) Appellant's counsel conceded that if section 9(2) did not have this effect he could not really attack the grant of the discovery order and had to content himself with an appeal against the terms of the order; while respondent's counsel conceded that if section 9(2) did have this effect a discovery order would be a brutum fulmen and ought not to have been granted.

The/.....

The central issue thus being the applicability of section 9(2), it is appropriate to focus attention upon its terms. It reads -

"If any person to whom a notice has been delivered or tendered under sub-section (1) requests the Minister in writing to furnish him with the reasons for such notice and with a statement of the information which induced the Minister to issue such notice, the Minister shall furnish such person with a statement in writing setting forth his reasons for such notice and so much of the information which induced the Minister to issue the notice as can, in his opinion, be disclosed without detriment to public policy."

The first point to be noted, in regard to the terms of section 9(2), is that it purports merely to regulate the communication of certain reasons and information by the Minister to the person to whom a notice has been delivered or tendered under section 9(1), to whom I shall refer as "the prohibited person". As far as the information which induced the Minister to issue the notice is concerned, he is obliged to set forth in his statement in writing only so much as can, in his opinion, be disclosed

without/.....

without detriment to public policy. I agree that, as held in Kloppenburg v. Minister of Justice (1964 (4) S.A. 31 (N)), the section confers upon the Minister the sole discretion to decide whether the disclosure of information will, or will not, be detrimental to public policy; and that, with reference to information the disclosure of which will be detrimental in this way (which, for the sake of brevity, I shall call "privileged information"), the Minister is not only excused but also, by implication, prohibited by the section from making disclosure. That, however, does not, in my opinion, conclude the enquiry. It remains to be seen what the scope of this immunity from, and prohibition against, disclosure was intended to be.

The crux of the appellant's argument is that the prohibition against the disclosure of privileged information contained in section 9(2) does not apply simply to communications between the Minister and the prohibited person; it applies generally and, in particular, constitutes a statutory barrier to the disclosure of such

information/....

information in the course of legal proceedings. For the reasons which follow I am of the opinion that this argument is unsound.

In the first place, as is manifest from the wording of the sub-section, it does not state unequivocally that the Minister is protected from disclosing such information in legal proceedings. It does not purport to cater for that type of situation at all. As I have already remarked, it merely purports to regulate the communication of information by the Minister to a prohibited person. It is a question of what may or may not be disclosed in the statement in writing which the Minister is required to furnish to the prohibited person. The sub-section does not deal expressly with disclosures generally. Moreover, a consideration of the history of section 9(2) reinforces the conclusion that, when enacting it, the Legislature had in view only the relationship between the Minister and/.....

and a prohibited person. Act No. 44 of 1950, in its original form, did not contain any provision similar to section 9(2), or section 10(1)bis for that matter. These sub-sections were introduced by way of amendment in 1954 (see sections 6(c) and 7 of Act No. 15 of 1954). It is fairly obvious that the amendments were prompted by the decision of this Court in the case of R. v. Ngwevela (1954 (1) S.A. 123 (A.D.)), in which it was held, with reference to section 9 in its original form, that the principle of audi alteram partem applied and that before the Minister exercised his powers under the section, the person affected was entitled to be given an opportunity of being heard. The purpose and effect of the amendments were to limit and circumscribe the affected person's common law rights under the audi alteram partem rule (see Kloppenburger v. Minister of Justice, supra, at p. 35). But this, in my opinion, represents the full scope of the intended sphere of operation of section 9(2), viz., the extra-curial rights of a prohibited person to be informed by the Minister of the reasons for the notice under section 9(1)

and of the information which induced the Minister to issue the notice.

For the argument of appellant's counsel to succeed, it is necessary to read into section 9(2) a much wider field of operation than seems warranted by the language of the sub-section. It must immediately be conceded that in certain instances a legislative intent wider than that disclosed by the actual language of the enactment may be found to exist (see Steyn, Uitleg van Wette, 4th Ed., pp. 50-7). One of these instances is when such a wider intent may be inferred (to quote Steyn, op.cit., p. 53) -

"Ex consequentibus, d.w.s. waar 'n wet 'n bepaalde gevolg verbied, word verstaan dat hy ook alles verbied waardeur die gevolg veroorsaak word."

Applying this general approach to the present case, it might be contended that, bearing in mind the general scope and purpose of Act 44 of 1950, it was implicit in section 9(2) that privileged information should not be disclosed by the Minister under any circumstances;

in/.....

in other words, that he was entitled, and enjoined, to withhold such information not only from the prohibited person, when requested for his reasons and for information under section 9(2), but also, for instance, from the Court when required to give evidence or make discovery of relevant documents in the course of legal proceedings. What was the point, it might be asked, of creating a protective cocoon of secrecy vis-à-vis the prohibited person, when the latter asks for reasons under section 9(2), only to have the cocoon breached and the secret information revealed when Court proceedings, initiated by the prohibited person, or possibly some third party, required this to be done?

In my view, there is a twofold answer to this line of argument. Firstly, if the Legislature intended such an all-embracing prohibition, why was this not stated in so many words? The possibility of these matters, and more particularly the reasons for action having been taken against a prohibited person, being canvassed in a court

of/.....

been
of law must have/hovering in the background when these
amendments were enacted in 1954. -- Indeed Ngwevela's case (supra)
itself raised this and related issues. I find it difficult
to infer that the Legislature overlooked this aspect of the
matter. And yet no express provision is made therefor in
section 9(2), or elsewhere in the Act. This situation may
be contrasted with the position created by other statutory
provisions, such as those discussed in Hoffmann, Law of
Evidence, 2nd Ed., at pp. 210-11, and section 29 of the General
Law Amendment Act, No. 101 of 1969, both in its original and
amended forms, the latter being quoted in full in the judg-
ment of the Chief Justice.

Secondly - and this, I think, provides a plausible
reason why the Legislature did not deal expressly with court
proceedings - the condition of the common law, relating to
the exclusion of evidence on the grounds of state interest
or state privilege, was at that time (i.e., in 1954) such
that the Legislature would have been justified in thinking
that it was not necessary to do so. At that time the

accepted/.....

accepted view, both in this country and in England (whose law was, and still is, authoritative in this sphere - see Van der Linde v. Calitz, 1967 (2) S.A. 239 (A.D.), at pp. 246-7) was that evidence, particularly documentary evidence, which was otherwise relevant and liable to production in a court of law, should not be produced if the public interest required that it should be withheld. In the case of an official document in the possession of a state department, objection to its production on this ground, taken in proper form by the political head of the department concerned, was regarded by the Court as conclusive, unless, possibly, the Court was able to hold that the objection to production was frivolous or vexatious (see, e.g. Barnicott v. Minister of Justice, 1913 T.P.D. 691; Duncan v. Cammell, Laird and Co., Ltd., 1942 A.C. 624). Duncan's case, which represents, perhaps, the high-water mark of judicial abdication in the face of the claims of public policy or state interest, was referred to by this Court, apparently/.....

apparently with approval, at any rate in regard to documents the disclosure of which might endanger national security, in the case of Crane v. Johannesburg Stock Exchange (1949 (4) S.A. 835 (A.D.), at p. 842). This then was the state of the common law when section 9(2) was introduced into Act 44 of 1950; and this continued to be the position for some years, for it was not until the sixties that there set in the reaction which culminated in England in the overruling of Duncan's case by the House of Lords in Conway v. Rimmer (1968 A.C. 910) and in South Africa in the refusal by the Appellate Division to follow Duncan's case in Van der Linde v. Calitz (supra).

It is one of the canons of statutory interpretation that the Legislature is presumed to know the existing state of the law: and from this presumption arises the rule that a statute must be interpreted in the light of the existing law (see Steyn, op. cit., pp. 105, 139, xliv; Craies on Statute Law, 7th Ed., pp. 96-8). In this case Parliament must be taken to have been aware, in

1954, of the existing state of the common law in regard to the exclusion of evidence on the ground of state interest or public policy and the conclusiveness of a ministerial objection to the production of state documents. Viewing section 9(2) against that background, I do not think that there is any warrant for reading into the sub-section an intention to regulate the powers and obligations of the Minister in regard to the disclosure of privileged information in court proceedings. In this sphere the common law, as it was understood to be at the time, placed the Minister in virtually the same position in regard to court proceedings as he occupied vis-à-vis a prohibited person under section 9(2). There was, accordingly, no need for any such regulation. Bearing in mind that the legal position contended for by appellant's counsel involves an extensive interpretation of section 9(2) - virtually an implication of something not expressly covered by the language itself - I am of the opinion that the contention is unsound and that section 9(2) must be read as

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dealing merely with the Minister's obligation to furnish reasons and information to a prohibited person.

It may be argued that under the present state of the common law, i.e., taking account of Van der Linde v. Calitz (supra) and Conway v. Rimmer (supra), this interpretation gives rise to a possible anomaly in that whereas under section 9(2) the decision as to whether information is protected from disclosure is that of the Minister and that decision is final and unassailable, except on review grounds, in court proceedings the court itself, in the exercise of its residual power, would be the final arbiter of whether such protection was available. This argument assumes that the Court would be the final arbiter in regard to all documentary information, including that contained in "contents" documents. Making that assumption in favour of the argument, the answer, to my mind, is that at the time when section 9(2) was enacted no such anomaly existed - for the reasons which I have already stated. The anomaly, if there be one, arises from the

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changed approach of the common law which first manifested itself about a decade after the enactment of section 9(2).
A similar anomaly argument can be based upon the consideration that, as conceded by respondent's counsel, a prohibited person was not entitled to claim a mandamus compelling the Minister to disclose to him documentary information which had been withheld on the ground that its disclosure would be detrimental to public policy. If that be the position how could the Court, it might be asked, grant a discovery order in respect of such documents? The answer to this is similar to that given in regard to the previously considered anomaly. Any claim for such a mandamus would necessarily have to be based upon section 9(2), which itself circumscribes the right and limits it where privileged documents are concerned. A litigant's right to discovery is something else, falling outside the purview of section 9(2). Under the common law, as it was in 1954, the conclusiveness of a ministerial objection to discovery, on the ground of state interest or public policy, which

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in this sphere reduced the litigant's right to a mere vestigial one, eliminated any real anomaly. Such anomaly as may be said to arise from the new approach to the common law, would be largely mitigated by the Court's reluctance to interfere and order production of a document, particularly where, for instance, matters of state security were involved; and would disappear entirely if the Minister concerned decided to invoke the provisions of section 29 of Act 101 of 1969, as amended.

The presumptions against alterations to the common law and against the ousting of the court's jurisdiction (see Steyn, op. cit., pp. 83-4, 102 et seq.) are in this case much weakened by the nature of the common law and the limited character of the court's jurisdiction as understood at the time. In so far as these aids to interpretation have any application, however, they do support the conclusion which I have reached.

For/....

For these reasons, I have come to the conclusion that section 9(2) did not preclude the grant of a discovery-order by the Court a quo.

I turn now to consider the alternative appeal against the terms of the order. The order was made in terms of Rule of Court 35 (13). Appellant's counsel submitted that the Court a quo had erred in granting an order which was far wider than the discovery order contemplated in terms of Rule 35 (13) and in this connection referred specifically to paragraphs 2 and 3 of the order.

These read:

"2. Respondent sal binne 21 (een-en-twintig) dae vanaf datum van lewering van hierdie uitspraak 'n eedsverklaring by hierdie Hof opberg waarin hy verklaar welke dokumente hy as politieke hoof van die Departemente wat onder hom resorteer in sy besit of onder sy beheer het, of ooit gehad het, betreffende geskilpunte in die geding wat tans deur Applikant teen hom aanhangig gemaak is.

3. Respondent sal in sodanige eedsverklaring verklaar dat hy self die inhoud van sodanige dokumente besigtig het en indien hy ten opsigte van enige sodanige dokumente beswaar opper teen die blootlegging daarvan, sal hy die

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aard van die dokument of die kategorie waarin die dokument resorteer so volledig moontlik beskryf. Respondent sal ook verklaar op welke grond en op welke wyse hy voorsien dat die openbare beleid deur blootlegging of deur in camera insae deur die lede van die Hof, benadeel mag word."

("Respondent" here, of course, refers to the appellant)

I have difficulty in understanding the objection to paragraph 2 of the order: it simply appears to reproduce the requirements of rule 35(1) and (2), read with form 11 of the first schedule. Paragraph (3), however, is somewhat different. It does appear to lay down requirements which go beyond those contemplated by the Rule. No doubt, the Court felt that, if it was properly to exercise its residual powers of deciding whether the objection to production was well-founded or not, the Minister's affidavit should contain all these particulars. Normally, a court of appeal is reluctant to interfere with the exercise by a court of first instance of its inherent power to regulate its own procedures, but in this instance there seem to me to be two factors which

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compel an alteration of the Court's order. Paragraph 3
contemplates the possibility of the Court viewing the
documents in respect of which non-disclosure on grounds
of public policy was claimed; yet it appears that no
decision in that regard had been taken by the Court.
Though this is, perhaps, not a fatal objection, it does
seem premature to make orders of the type contained in
paragraph 3 before it has been decided not to accept, at
its face value, a possible Ministerial objection to dis-
closure; particularly when the particulars required by
paragraph 3 might to some extent force the Minister to
reveal information which he would otherwise wish to with-
hold on grounds of public policy. Secondly, and of more
importance, is the fact that the appellant might wish to
rely upon the provisions of section 29 of Act No. 101 of
1969. In that case there could well be a conflict be-
tween the requirements of section 29, as to what the appel-
lant's affidavit should contain, and the provisions of
paragraph 3 of the Court's order. In my view, the

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Court a quo should at this stage have simply made the conventional discovery order and awaited the appellant's response before determining what further action, if any, should be taken. I, consequently, think that the order of the Court a quo should be amended by the deletion of paragraph 3 thereof.

In my view, the appeal should be allowed only to the extent that paragraph 3 of the order of the Court a quo is deleted. Inasmuch as this is a minority judgment I do not propose to consider the question of liability for the costs of appeal.

M.M. Corbett
M.M. CORBETT.