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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVIS

In the matter between:

THE CABINET FOR THE TERRITORY OF SOUTH WEST AFRICA — Appellant

and

FRANK CHIKANE — 1st Respondent

COUNCIL OF CHURCHES IN NAMIBIA — 2nd Respondent

CORAM: RABIE, ACJ, JANSEN, VAN HEERDEN, HEFER et GROSSKOPF. JJA

HEARD: 1 March 1988

DELIVERED: 16 September 1988

J U D G M E N T

GROSSKOPF, JA

By .....

By Proclamation R 101 of 1985 the State President established legislative and executive authorities for the territory of South West Africa. As an annexure to this proclamation there is set out a "Bill of Fundamental Rights and Objectives". The Bill of Rights, as I shall call it, protects the "fundamental rights" defined in the Bill, against certain infringements by governmental action.

Subsequently the legislative authorities passed and promulgated the Residence of Certain Persons in South West Africa Act, No 33 of 1985. Its purpose was, according to the long title, "to restrict the right of certain persons to remain or stay in the territory of South West Africa; to

provide .....

provide for orders prohibiting certain persons from being in, or requiring certain persons to depart from, the said territory; and to provide for matters connected therewith." I shall henceforth refer to Act 33 of 1985 simply as "the Act".

The present appeal raises questions concerning the legality, in the light of the Bill of Rights, of certain provisions of the Act and of action taken thereunder. To understand the issues, it is, however, necessary first to have regard to the manner in which this matter comes before us, and to this I now turn.

The two respondents applied as a matter of urgency in the Supreme Court of South West Africa for an order de-

claring that a notice prohibiting the first respondent from being in the territory (which notice had been issued by the appellant purportedly in terms of Section 9 of the Act) was invalid and of no legal force and effect; for an order interdicting, restraining and prohibiting the appellant from taking any steps to prevent the first respondent from attending, participating in and giving a keynote speech at the general meeting of the second respondent for the period from 21 September 1986 to 25 September 1986 inclusive; for an order interdicting, restraining and prohibiting the appellant from taking any steps which have the effect of denying to the second respondent and its constituent members "the exercise of their rights, guaranteed by Proclamation R 101 of 1985,

to freedom of expression, including the freedom to receive information and ideas, to freedom of association and to freedom to enjoy, practise, profess, maintain and promote their religion"; and for an order of costs. The application, which was opposed, was set down for hearing on 12 November 1986 before HENDLER AJ. On the morning of the hearing, before the case was called, HENDLER AJ gave judgment in the matter of Eins v. The National Assembly for the Territory of South West Africa and Others. In this judgment he held as follows:

> "(a) Section 9 of Act 33 of 1985 is declared unconstitutional, invalid and unenforceable for want of compliance with the Bill of Fundamental Rights incorporated in Proclamation R 101 of 1985."

In .....

In passing I should note that the Eins case has since come on appeal to this Court and that the appeal has succeeded on the ground that the applicant did not have locus standi to apply for the setting aside of the section. (See The Cabinet of the Transitional Government for the Territory of South West Africa v. Eins 1988 (3) SA 369 (A)).

To return to the history of the present matter: the decision of HENDLER AJ in the Eins case placed the parties in the present matter in a quandary: if, as had been held in the Eins case, section 9 of the Act was invalid, there did not seem to be much point in arguing about the validity of a notice purportedly issued under the section. On the other hand, the Eins case had not decided all the issues raised in

the present case, as will be seen later. The parties sought to overcome their difficulties by agreeing that an order be granted in the present case, and agreeing that an application for leave to appeal would not be opposed. Consequently HENDLER AJ gave the following judgment on the merits of the present case:

> "Section 9 of Act 22 of 1985 having been declared unconstitutional and invalid by a judgment given on the 12th November 1986 in the matter of Eins and the National Assembly for the Territory of South West Africa.
>
> It was agreed between the parties that I make the following order in this matter:
>
> 1. That the notice issued by the respondent on the 22nd May 1986 in terms of Section 9 of the Residence of Certain Persons in South West Africa Regulation Act No. 33 of 1985 is invalid and of no legal force and effect.
> 2. The respondent is to pay the costs of the application including the costs of two counsel, but such costs shall not include any costs

incurred .....

incurred by the second applicant or any costs occasioned by prayer 1 including the costs of the hearing on the 19th September 1986."

Regarding leave to appeal HENDLER AJ held as follows:

"After having given an order by consent in the matter of Frank Chikane I was immediately asked by Counsel for the respondent for leave to appeal to the Appellate Division and he set out his grounds being that the judgment I delivered earlier today in the matter of Eins v The National Assembly for the Territory of South West Africa and Others was wrong and that some other Court, that being the Appellate Division, would come to a different conclusion.

.....

I am of the opinion that there is a reasonable possibility that some other Court may reach a different decision and as the parties are in agreement thereto I hereby grant leave to appeal the appeal to be heard by the Appellate Division."

In due course the appellant filed a notice of appeal against "die hele beslissing, uitspraak en bevel" given

by .....

by HENDLER AJ.

I have set out the course of the proceedings before HENDLER AJ in some detail because, as will be seen, it was the source of a number of unsatisfactory features in the present appeal. As appears from the above account, the parties and the Court proceeded on the assumption that the decision in the Eins case was decisive of the present matter. The Eins case was, however, concerned only with the validity of section 9 of the Act. This section was not assailed, at any rate not expressly, in the present proceedings. As will have been seen, the prayers in the notice of motion were directed to the action taken, or action that was feared would be taken , in terms of the section, and not to the validity

of the section itself. The same feature emerges from an analysis of the affidavits. In this regard it is advisable to consider separately the cases made out by each of the two respondents.

The first respondent is a minister of religion and a South African citizen ordinarily resident in Johannesburg. In 1985 the first respondent was invited by the Secretary of the Council of Churches in Namibia (the second respondent) to visit the territory in his capacity as general secretary of the Institute of Contextual Theology. The purpose was to set up a structure in the territory similar to this institute. The first respondent accepted the invitation. On

19 May 1986 the Diocesan Secretary and Treasurer of the Anglican Diocese of Namibia, Mr. Matt Esau, wrote a letter to the first respondent in which he gave details of the programme arranged for him for the period 24 May to 29 May 1986. The first respondent made arrangements to travel to South West Africa by air to arrive in time for the programme. On 23 May 1986, while checking in at Jan Smuts Airport for his flight, he was, however, served with the notice prohibiting his presence in the territory, purportedly issued in terms of section 9(1) of the Act. The first respondent's contention in his affidavits was that the notice was invalid on various grounds. These grounds

were .....

were, broadly speaking - I return to them in greater detail later - that the notice itself was irregular, and, in any event, that the appellant's decision to issue the notice was assailable for a number of reasons, among which an alleged denial of natural justice figured prominently.

The second respondent, according to its founding affidavit, is an organization of Christian churches. It regularly holds ecumenical meetings, conferences and workshops. It invited the first respondent to participate in the planned programme to which reference has already been made. The first respondent was, inter alia, to have been a keynote speaker at a conference during the period of his visit. The action taken by the appellant in purporting to

issue .....

issue the said notice, so it is alleged, constituted "a flagrant violation of the fundamental rights set out in Annexure 1 to Proclamation R 101 of 1985" of the second respondent and its constituent members in that they "have been denied (their) fundamental rights to freedom of expression, including the freedom to receive information and ideas". Moreover, it is contended, the action of the appellant "constitutes a denial of the freedom of association" in that the second appellant and its members "have been deprived of the right to associate in person" with the first respondent.

Thirdly it is contended that, in issuing the said notice, the appellant infringed article 9 of the Bill of Rights in that the second respondent and its members "have

been .....

been denied the right to enjoy, practise, profess, maintain and promote their religion".

As appears from the above summary of its founding affidavit, the second respondent's atttack was, like that of the first respondent, confined to the validity of the notice, no attack being launched against the validity of the section under which the appellant purported to act in issuing the notice.

In short, both respondents' cases, as set out in their notice of motion and founding affidavits, were that the notice was invalid. The validity of section 9 of the Act was not explicitly impugned. However, as will have been seen, leave to appeal to this Court was granted pertinently to enable the parties to argue the correctness of the judgment

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in the Eins case - a judgment which dealt solely with the validity of the said section 9.

At the commencement of his argument Mr. Mahomed , who appeared for the respondents, was questioned by the Court on whether he was entitled, on these papers, to advance the contention that section 9 of the Act was invalid. He replied that he had, during the proceedings in the Court a quo, as also in his heads of argument in that Court as well as before us, clearly indicated that the validity of section 9 would be attacked. The appellant was consequently not taken by surprise, he said; and this, indeed, is common cause.

Moreover, he submitted, his attack on the validity of section 9 was not based on any factual contentions but

purely .....

purely on a legal ground. In support of his right to raise this issue he relied on Allen v. van der Merwe 1942 WLD 39 at p. 47, Heckroodt N O v. Gamiet 1959(4) SA 244 (T) at p. 246 A-C and Van Rensburg v. Van Rensburg en Andere 1963(1) SA 505 (A) at pp. 509 E to 510 B. These cases lay down that a party in motion proceedings may advance legal arguments in support of the relief or defence claimed by it even where such arguments are not specifically mentioned in the papers, provided they arise from the facts alleged. This principle is clear but its application to the present case is not without difficulty. In the present case facts which may be relevant were not canvassed on the papers, as will be seen when one analyses the basis of the respondents' attack on

the validity of section 9 of the Act. To appreciate the arguments advanced in this part of the case it is necessary to have regard in some detail to the background to the Bill of Rights as well as some of its provisions, and to the contents of section 9 of the Act. I propose dealing first with these matters. Thereafter I shall return to the question whether evidence could have been adduced.

The manner in which the Bill of Rights was incorporated into the laws of South West Africa is discussed in the judgment of this Court in The Cabinet of the Transitional Government for the Territory of South West Africa v. Eins (supra). I can do no better than gratefully to adopt the relevant passage (pp. 383 H to 384 I). It reads as follows:

"On .....

"On 17 June 1985 the State President of the Republic of South Africa, acting in terms of sec. 38 of the South West Africa Constitution Act, 1968 (Act 39 of 1968), issued Proclamation R 101 of 1985 in which he made provision for the establishment of a legislative body, to be known as the National Assembly, and of an executive authority, to be known as the Cabinet, for the territory of South West Africa. The statutory provisions relating to the National Assembly and the Cabinet are set out in a Schedule to the Proclamation. There are several annexures to the Schedule. The first of these, Annexure 1, is headed 'Fundamental Rights contained in Bill of Fundamental Rights and Objectives'. It consists of (a) a Preamble, which concludes with the statement that '... we, the people of SWA/Namibia, claim

and .....

and reserve for ourselves and guarantee to our descendants the following Fundamental Rights which shall be protected and upheld by our successive governments and protected by entrenchment in the Constitution', and (b) eleven 'Articles' in which the 'Fundamental Rights' are set out.

Sec. 3(1) of the Schedule confers on the National Assembly the power -

'(a) to make laws for the territory which shall be entitled Acts; and

(b) in any such law to amend or repeal any legal provision, including any Act of the Parliament of the Republic of South Africa in so far as it relates to or applies in the territory ...'

Sec. 3(2)(b) imposes certain restrictions on the powers of the National Assembly. It reads as follows:

'3.(2) The assembly shall not have power -

(a) .....

(b) to make any law abolishing, diminishing or derogating from any fundamental right.'

The aforesaid restriction on the powers of the National Assembly is, however, not an absolute one, for sec. 3(3) provides:

'3(3) The provisions of paragraph (b) of subsection (2) shall not be construed as prohibiting

the Assembly from amending the provisions of any law -

(a) which were in force in the territory immediately before the first meeting of the Assembly;

(b) which abolish, diminish or derogate from any fundamental right; and

(c) which have as their aim the security of the territory,

in such a manner that the last-mentioned provisions abolish, diminish or derogate from any such fundamental right to a lesser extent, or to repeal any such law and to re-enact the provisions thereof in any other law which amends some of the provisions so repealed in such a manner that it abolishes, diminishes or derogates from any fundamental right to a lesser extent.'

'Fundamental Right' is defined in sec. 1(1) as meaning 'any of the fundamental rights contemplated in articles 1 to 11 of the Bill of Fundamental Rights and Objectives'. Sec. 19 of the Schedule contains provisions relating to the power of the Supreme Court of South West Africa to pronounce upon the validity of Acts passed by the National Assembly.

Subsections .....

Subsections (1) and (4) of the section read as follows:

'19(1) The Supreme Court of South West Africa shall be competent to inquire into and pronounce upon the validity of an Act of the Assembly in pursuance of the question -

(a) whether the provisions of this Proclamation were complied with in connection with any law which is expressed to be enacted by the Assembly; and

(b) whether the provisions of any such law abolish, diminish or derogate from any fundamental right.

.....

(4) Save as provided in subsection (1), no Court of law shall be competent to inquire into or pronounce upon the validity of an Act of the Assembly.'"

The respondents' argument concerning the validity of section 9 of the Act was based mainly on articles 3 and 10 of the Bill of Rights. These articles read as follows:

ARTICLE .....

"ARTICLE 3

The right to Equality Before the Law

Everyone shall be equal before the law and no branch or organ of government nor any public institution may prejudice nor afford any advantage to any person on the grounds of his ethnic or social origin, sex, race, language, colour, religion or political conviction."

ARTICLE 10

The Right to Freedom of Movement and Residence

Everyone lawfully present within the borders of the country shall have the right to freedom of movement and choice of residence subject to the obligation not to infringe upon the rights of others and to such provisions as are properly prescribed by law in the interests of public health and public order. No citizen shall be arbitrarily deprived of the right to enter the country. Everyone shall have the right to leave the country in accordance with the procedures properly prescribed by law."

I turn now to section 9(1) of the Act, pursuant to which the notice was purportedly issued. It reads as follows:

"Notwithstanding .....

"Nothwithstanding the provisions of this Act or any provisions to the contrary contained in any other law, the Cabinet may, if it has reason to believe that -

(a) any person, excluding any person referred to in section 3(2)(d) or (e) or any person born in the territory, endangers or is likely to endanger the security of the territory or its inhabitants or the maintenance of public order;

(b) any such person engenders or is likely to engender a feeling of hostility between members of the different population groups of the territory,

by notice in the Official Gazette or by notice in writing to the person concerned, issue an order prohibiting any such person to be in the territory or, in the case of any such person within the territory, ordering any such person to depart after a period specified in any such notice from the territory or any particular place in the territory or any portion of the territory defined in such notice and not to return to the territory or such place or portion of the territory."

Paragraph (a) of this subsection excludes from its operation "any person referred to in section 3(2)(d) or (e)" of the Act. These persons are persons rendering service in the territory in terms of the Defence Act, 1957 (section 3 (2)(d)), and persons employed in the territory in the service of the Government of South Africa or the government of Rehoboth or in the government service of the territory (section 3(2)(e)).

The respondents contend that section 9 of the Act offends against articles 3 and 10 of the Bill of Rights, because section 9(1)(a) discriminates between two categories of persons:

1) The first category consists of persons born in the territory, persons rendering service in the territory in terms of the Defence Act and persons employed in

the .....

the territory in the service of certain governments;

2) The second category consists of all other persons not included in the first category.

The effect of section 9(1) is that the persons referred to in the first category can never be subject to a notice in terms of section 9, whereas all other persons can be. This, the respondents submit, is constitutionally impermissible in that it conflicts with the guarantee against "arbitrary" deprivation of the rights of persons to enter the territory in article 10 of the Bill of Rights and with the constitutional guarantee of the right of equality enshrined in article 3 of the Bill of Rights.

It was common cause in argument that the opening words of article 3 ("Everyone shall be equal before the law")

established a general rule against discrimination, and that substantially the same concept was included in the prohibition on "arbitrary" conduct in terms of article 10. It was, however, also common cause that this general rule did not forbid reasonable classification for the purposes of legislation. In this regard the parties referred us inter alia to authorities on the Fourteenth Amendment to the Constitution of the United States of America which forbids each of the States "to deny to any person within its jurisdiction the equal protection of the laws". With reference to this provision, the following has been said:

> "The guarantee of the equal protection of the laws means the protection of equal laws. It forbids class legislation, but does not forbid classification .....

tion which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed. The inhibition of the amendment ... was designed to prevent any person or class from being singled out as a special subject for discriminating and hostile legislation. It does not take from the states the power to classify either in the adoption of police laws, or tax laws, or eminent domain laws, but permits to them the exercise of a wide scope of discretion, and nullifies what they do only when it is without any reasonable basis. Mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed.. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis."

(Willis, Constitutional Law (1st ed.) 579,quoted by Paul

Sieghart .....

Sieghart, The International Law of Human Rights, p. 265.

See also Corpus Juris Secundum,(1985 ed)Vol 16 B, para 708 pp 499 to 507)

Both parties referred us also to the attitude of the Courts in India, whose constitution contains a similar provision in article 14. There it was decided that, to pass the test of permissible classification, two conditions had to be fulfilled:

> "1. The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group;
>
> 2. That differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely geographical, or according to objects, occupations or the like. What is necessary is that there must be a nexus between the basis

of classification and the object of the Act under consideration."

(Paul Sieghart, op cit, p. 266).

In the Federal Republic of Germany article 3 paragraph 1 of the Grundgesetz is, as far as translation permits, identical to the introductory words of article 3 of the Bill of Rights in South West Africa. It reads:"Alle Menschen sind vor dem Gesetz gleich". In the application of this provision, the Bundesverfassungsgericht (the constitutional court) has adopted the same general approach as that applied in the United States of America and India, set out above. See K Doehring, Staatsrecht der Bundesrepublik Deutschland (1976) pp. 277-9; H H Rapp, Art. 3 G G als Masstab Verfassungsgerichtlicher Gesetzkontrolle,in vol. 2, at p. 371

of a collection of contributions called Bundesverfassungs-gericht und Grundgesetz published in 1976 to honour the 25th anniversary of the Bundesverfassungsgericht; and I von Münch, Grundgesetzkommentar (1981) Vol. 1 pp. 159, 163-4.

The above principles laid down with respect to the constitutions of the United States of America, the Republic of India and the Federal Republic of Germany are in my view equally applicable to article 3 of the South West African

Bill .....

Bill of Rights, and to article 10 in so far as it refers to the arbitrary deprivation of the right to enter the territory.

The question then is whether the distinctions in section 9 of the Act rest on a "reasonable basis": i.e., whether they are "founded on an intelligible differentia"; and whether that differentia has a "rational relation to the object sought to be achieved by the statute in question". A Court, in ascertaining the object sought to be achieved by the statute, engages in a process of interpretation. In doing so, it may make use of whatever permissible aids are available for the interpretation of the statute in issue. The question of interpretation is one of law.

The .....

The position is, however, different when a Court considers matters such as the reasonableness or intelligibility of the distinctions in the Act, and the rationality of their relation to the object sought to be achieved by the Act. These are largely matters of fact depending upon the circumstances to which the Act applies. This aspect was not adverted to in argument before us, but would appear to be self-evident: whether a distinction is a reasonable one must, in the final analysis, depend on the facts to which it relates, and, where the facts are not such that a Court can take judicial notice of them it is difficult to see how a Court can come to a conclusion without evidence.

Before .....

Before I consider whether evidence is or should be admissible in our law, it is instructive to see how the matter is approached in the United States of America, a country in which the rules of evidence correspond closely to ours, and where the Courts have great experience in applying the provisions of a Bill of Rights. There the permissibility of leading evidence has been recognized

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in a number of authoritative decisions of the United States Supreme Court. I refer to two which are illustrative.

Weaver v. Palmer Brothers Company (1926) 270 U S 402 concerned a Pennsylvanian statute which regulated the manufacture, sterilization and sale of bedding. Section 2 of the Act prohibited the use of material known as "shoddy" in the making, remaking or renovating of various types of bedding and upholstery (known collectively as "comfortables"). The question for decision was "whether the provision purporting absolutely to forbid the use of shoddy in comfortables violates the due process clause of the equal protection clause" (i.e., the Fourteenth Amendment) (ibid. at p. 410). The Court approached the case as follows (ibid.):

"The .....

> "The answer depends on the facts of the case. Legislative determinations express or implied are entitled to great weight; but it is always open to interested parties to show that the legislature has transgressed the limits of its power. Penna. Coal Co. v. Mahon, 260 U.S. 393, 413. Invalidity may be shown by things which will be judicially noticed (Quong Wing v. Kirkendall, 223 U.S. 59, 64), or by facts established by evidence. The burden is on the attacking party to establish the invalidating facts. See Minnesota Rate Cases, 230 U.S. 352, 452."

On the facts the Court found, by a majority, that "the absolute prohibition of the use of shoddy in the manufacture of comfortables is purely arbitrary and violates the due process clause of the Fourteenth Amendment" (ibid., p. 415). The minority came to a different conclusion on the facts (ibid. pp. 415-6).

Borden's .....

Borden's Farm Products Co. Inc. v. Baldwin, Commissioner of Agricultural and Markets of New York et al (1934) 293 U.S. 194 was a case concerning a New York Milk Control Law of 1933, as amended in 1934, which, inter alia, authorized certain milk dealers to sell milk at a lower minimum price than that applying to others. Here also the question was whether the provision contravened the due process and equal protection clauses of the Fourteenth Amendment to the Constitution. The reasonableness of the distinction in the Act obviously depended on the circumstances of the milk trade in New York, which, the Court held, "largely lie outside the range of judicial notice" (ibid.,.at p. 208). However, the case was not before the Court on evidence, or upon determi-

nations.....

nations of fact based upon evidence. In these circumstances the respondents invoked the presumption that legislative action is prima facie to be regarded as constitutional. The Court dealt with this contention as follows (ibid., pp. 209-10):

> "Respondents invoke the presumption which attaches to the legislative action. But that is a presumption of fact, of the existence of factual conditions supporting the legislation. As such, it is a rebuttable presumption. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-80; Hammond v. Schappi Bus Line, 275 U.S. 164, 170-172; O'Gorman & Young v. Hartford Insurance Co., 282 U.S. 251, 256-258. It is not a conclusive presumption, or a rule of law which makes legislative action invulnerable to constitutional assault. Nor is such an immunity achieved by treating any fanciful conjecture as enough to repel attack. When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there

is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary. Lindsley v. Natural Carbonic Gas Co., supra; Clarke v. Deckebach, 274 U.S. 392, 397; Lawrence v. State Tax Comm'n, 286 U.S. 276, 283. The principle that the State has a broad discretion in classification, in the exercise of its power of regulation, is constantly recognized by this Court. Still, the statute may show on its face that the classification is arbitrary (Smith v. Cahoon, 283 U.S. 553, 567) or that may appear by facts admitted or proved. Southern Ry. Co. v. Greene, 216 U.S. 400, 417; Air-Way Electric Corp. v. Day, 266 U.S. 71, 85; Concordia Insurance Co. v. Illinois, 292 U.S. 535, 549. Or, after a full showing of facts, or opportunity to show them, it may be found that the burden of establishing that the classification is without rational basis has not been sustained. Lindsley v. Natural Carbonic Gas Co., supra; Rast v. Van Deman & Lewis Co., 240 U.S. 342; Radice v. New York, 264 U.S. 292; Clarke v. Deckebach, supra;

> Ohio Oil Co. v. Conway, 281 U.S. 146; Tax Commissioners v. Jackson, 283 U.S. 527. But where the legislative action is suitably challenged, and a rational basis for it is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and of findings. With the notable expansion of the scope of governmental regulation, and the consequent assertion of violation of constitutional rights, it is increasingly important that when it becomes necessary for the court to deal with the facts relating to particular commercial or industrial conditions, they should be presented concretely with appropriate determinations upon evidence, so that conclusions shall not be reached without adequate factual support."

In the result the case was remanded to the Court below to proceed "upon pleadings and proofs" with the instruction that "the facts should be found and conclusions of law be stated" (ibid. at p. 213). See, also, Pacific States

Box and Basket Co. v. White et al (1935) 296 U.S. 176.

The above two cases were, perhaps, obvious ones: a Court can hardly take judicial notice of facts relevant to the merits or demerits of using "shoddy" in the manufacture of "comfortables" or of facts bearing on the need for different minimum prices for milk in New York. In principle, however, the present case does not seem to me to be essentially different. We are asked to pronounce on the reasonableness of two distinctions found in section 9 of the Act, viz., that between persons born in the territory, and others; and that between persons employed in the territory in various types of government service, and those not so employed. The question is whether these distinctions are justifiable in

respect .....

respect of a power to prohibit certain persons (being, broadly speaking, persons believed to be a threat to security, public order or the harmony between different population groups) from being in the territory or any part of the territory. No doubt some of the issues involved in these distinctions may be sufficiently notorious for us to take judicial notice of them. Others are less obvious. This is so particularly with regard to the various types of government employees referred to in the section. To illustrate the principle involved I propose analysing the provisions of the Act in this regard in greater detail.

It will be recalled that the power to issue a notice in terms of section 9 of the Act may be exercised if the

Cabinet .....

Cabinet has reason to believe that a person "endangers or is likely to endanger the security of the territory or its inhabitants or the maintenance of public order" (sec. 9(1)(a)) or "engenders or is likely to engender a feeling of hostility between members of the different population groups of the territory" (sec. 9(1)(b)). As a short-hand symbol I shall refer to the conduct,actual or potential, described in section 9(1)(a) and (b) as "harmful conduct".

For present purposes we are concerned with the following persons excluded from the ambit of section 9, viz. persons rendering service in the territory in terms of the Defence Act, and persons employed in the territory in the service of the government of the Republic of South Africa or

the Government of Rehoboth or in the government service of the territory. I shall refer to these persons collectively as government servants.

The immunity of government servants to action under section 9 may be explicable on a number of bases. In theory it may be contended that government servants will never be guilty of harmful conduct, and that there consequently is no need to include them within the purview of the Act. This possibility may, I consider, be ignored as far-fetched and unrealistic.

Other possible reasons for the distinction between government servants and others cannot, however, be so summarily dismissed. There may be means of dealing with

government servants who are believed to be guilty of harmful conduct which are as effective or more so than those laid down in the Act, thus rendering the Act unnecessary in relation to them. Moreover, if in some cases these means were to be less than effective, there may be satisfactory ways of terminating the employment of a government servant suspected of being guilty of harmful conduct, and thereby making him subject to the provisions of the Act like everybody else. In short: the exclusion of government servants may conceivably be justified on the basis that the purpose of the Act may, with reference to them, be achieved in other satisfactory ways.

The validity of this postulated justification would .....

would depend on the extent of control which the appellant has in respect of government servants of the various classes referred to in the section. Relevant to this question would be the service conditions, disciplinary provisions, etc. in respect of each of these classes. These matters were not canvassed before us at all, and although much of it may presumably be found in statutes, regulations or other official publications,it is hardly the task of a Court to make an independent investigation into these matters. Moreover, in assessing the effect of matters such as the relevant conditions of service, one would be concerned not only with the theoretical position expressed in official documents but also with the position as it pertains in practice. This we cannot

ascertain without evidence. In the present case there is a further complication in that some classes of government servants would appear not to be under the direct control of the appellant but of some other government or authority. Among these are included persons rendering service in terms of the Defence Act, persons employed in the service of the government of the Republic of South Africa, and those employed in the service of the government of Rehoboth. (In regard to Rehoboth, see the Rehoboth Self-Government Act, no. 56 of 1976, and particularly section 16, read with item 11 of the Schedule, and sections 34, 35 and 36). In respect of these classes of government servants the attitudes of the authorities which employ them may also be a relevant factor. What,

for instance, would the position be if these authorities were unalterably opposed to the application of the Act to their employees? Would the legislature then be placed before the choice either to forgo the protection of section 9, which it considers necessary in the interests of the territory, or to insist on the application of the Act to all government servants even if it leads to a conflict with the authorities employing them, with consequences which I can hardly imagine, far less assess? In such a situation it could, depending on the circumstances, surely be open to the legislature to pass an act with the exclusion of such government servants. Such legislation would, again depending on the circumstances, it seems to me, not necessarily offend against

article .....

article 3 or article 10. A particular classification may sometimes be justified by the exigencies of the State's external relations or constitutional limitations. In regard to possible issues such as these also, it seems to me, a Court will need full information in order to come to any firm conclusion.

It appears from the above that there are many issues involving mixed questions of fact and law which are at least of potential relevance to the differentiation between government servants and others which have not been canvassed in the present case. And, as will be seen, the same applies to other issues raised by the respondents.

The question then is: is evidence admissible to resolve these issues? In the light of what I have said it seems clear that a Court would often be unable to give a satisfactory decision on the reasonableness or unreasonable-

ness .....

ness of a distinction introduced by legislation unless it can hear evidence concerning the facts to which the distinction relates. This is obviously a strong reason for allowing such evidence. There are also, however, certain possible disadvantages. In particular the admission of evidence would make a decision on the validity of legislation, which is a matter of general importance, depend on the evidence which the parties place before the Court. In a case like the present there is no reason to suppose that the parties, if they had so wished, could not have placed all the relevant facts before the Court, but this might not always be so. Questions as to the validity of legislation may presumably arise in different types of proceedings, and the parties to

such .....

such proceedings may not always be able to present complete evidence on all relevant aspects of the case before the Court, or it may not suit their interests to do so. I assume, for instance, that an accused in criminal proceedings would be entitled to contend that the statute under which he is charged is void because it conflicts with the Bill of Rights. Such an accused would not necessarily be able to produce all the evidence which may be relevant to his attack on the legislation. In other types of proceedings parties may be able to produce evidence, but for one reason or another may not wish to do so. In the result the Court may still be compelled to decide the matter on incomplete information even though evidence was admissible

and .....

and was in fact admitted. This is, of course, by itself undesirable in a matter as important as the validity of a statute. In addition it raises the question whether another Court would, in the light of further evidence adduced in another matter, be entitled to come to a different conclusion. If different Courts in different cases could come to different conclusions about the validity of a statute, chaos could result. The same problems could, of course, arise in attacks on sub-ordinate legislation, where evidence is admissible in certain cases (see, e.g., Sinovich v. Hercules Municipal Council 1946 AD 783 at p. 811 per SCHREINER JA), but the results are more serious when one deals with legislation of an organ like the National Assembly.

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In view of the problems which could result from allowing evidence in these matters, it might be thought better to decide constitutional matters without evidence and purely on the basis that a Court will not rule a measure invalid if it can reasonably conceive of a state of facts which would justify the distinction which the measure introduces. An approach along these lines is, however, also not satisfactory. It would require a Court to indulge in a process of conjecture and imagination, and the Court's decision would turn on hypothetical facts, which may be wide of the mark, rather than on the true facts which may be easily ascertainable. Moreover, a particular application of the Bill of Rights may relate to facts which are so

specialized .....

specialized that a Court would scarcely be able, without evidence, to imagine what the practical implications are of the measure which is attacked, or what the circumstances may be which could justify it. As examples I may refer again to the two American cases discussed above.

Now, as I have stated, the question whether evidence is admissible in a case like the present was not argued before us. It is an important question, and its answer is not self-evident. Accordingly I prefer not to give any decision on it. I consider that I am entitled to follow this course because no evidence was in fact tendered by either of the parties in the Court a quo or before us. The issue of the legality of the legislation was, it will be recalled, presented to us by the respondents as a pure question of law argued in support

of .....

of their contention that the notice was invalid. If one assumes that evidence was, despite the parties' attitude, admissible in principle, the Court will accordingly have to decide the matter as if on exception. This will entail that all issues of fact that might be relevant must be assumed to have been determined adversely to the present respondents. This method of dealing with the matter is essentially the same as that which one would apply if, in principle, no evidence is admissible, and I proceed to deal with the appeal on that basis.

In the light of my comments above I turn now to the respondents' criticisms of section 9 of the Act. Their main argument, as I have stated, was that the distinctions between persons subject to the section, and those not sub-

ject .....

ject to it, were impermissible. I have already by way of illustration dealt with the distinction between what I called government servants and others. As I have indicated, one can imagine the possible explanations for the distinction which I have discussed above and there may well be circumstances in which one or more of them may constitute a reasonable basis for the distinction. It follows that, by reason of the limited basis upon which I am dealing with this matter, the respondents' attack founded on this distinction cannot succeed.

The second distinction which was criticized was the distinction between persons born in the territory, who are immune to action under the Act, and persons not so born,

who .....

who are subject to the Act. The reason for this distinction is, I think, reasonably clear. The right to freedom of movement within a state, and, more particularly, the right to enter a state, is often, in charters of human rights, restricted to nationals of the state. See Sieghart, op cit. p. 179. This same attitude is reflected in article 10 of the Bill of Rights which protects a "citizen" against arbitrary deprivation of his right to enter the territory (I deal fully with this provision later). The limitation of such rights to nationals or citizens reflects the generally held view that the distinction between national and alien is a relevant one in respect of rights to entry into, residence in, and movement within a state. Nationals have a greater

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stake in the state; they are less likely than aliens to commit acts which may prejudice the state or cause racial animosity; and they have a stronger moral claim than aliens to freedom of movement and residence within the state. Now as we know, there is no South West African citizenship, and the legislature consequently could not exclude citizens from the provisions of the Act. Birth within the country is, however, an accepted manner by which citizenship is acquired in South Africa (see sections 2,3 and 4 of the South African Citizenship Act, no. 44 of 1949; section 1(a) of the British Nationality in the Union and Naturalization and Status of Aliens Act, no. 18 of 1926; and section 1(a) of the Union Nationality and Flags Act, no. 40

of .....

of 1927). It does not seem to me that the legislature would have been unreasonable in considering that, although citizens could not be excluded from the operation of section 9 because no citizenship existed, there was another way in which much the same result could be achieved. This was by excluding one class of persons who were regarded as entitled to citizenship, viz., persons born in the territory. And information on the composition of the South West African population may conceivably have shown that they represent by far the largest part of those who would be entitled to South West African citizenship under any citizenship statute that was likely to be introduced.

The .....

The fact that some anomalies may result from the classification in certain exceptional circumstances would not necessarily result in the classification being objectionable. As is said in the Corpus Juris Secundum (1985 ed vol. 16 B para 716 pp 533-4:"... a classification having some reasonable basis does not offend the equal protection clause because it is not made with mathematical nicety or scientific exactness or because in practice it actually results in some inequality."

To .....

To sum up on this part of the case: I find myself unable to hold as a matter of law that the distinctions between persons subject to section 9 of the Act and those not so subject cause the section to contravene the prohibition on discrimination contained in articles 3 and 10 of the Bill of Rights.

I turn now to further alleged grounds of invalidity of section 9. Before doing so I should, however, once again place the respondents' attack on this section in its proper perspective. The respondents' claims in the present matter are based solely on the notice issued against the first respondent: it is the validity of that notice which is impugned, and the legality of section 9 is attacked only as an

argument .....

argument in support of the conclusion that the notice is invalid. It follows that it would not avail the respondents to point to defects in the section which do not bear on the validity of the action taken against the first respondent. In particular it would not help them to show that parts of the section are invalid unless the invalidity of these parts taint also the provision under which the appellant purported to act in the present case.

These considerations apply with particular force to the appellant's second attack on the section. This attack is directed against the ouster clause, section 9(3), which reads as follows:

> "No Court of law shall have jurisdiction to pronounce upon the validity of an order issued under subsection 1."

This .....

This clause, it is contended, "is arbitrary because it insulates arbitrary action from judicial scrutiny". (The quotation is from the Respondents' Heads of Argument). Moreover, the respondents contend, the provision is "potentially capable of infringing article 4 of the Bill of Rights" (ibid.) which, generally, declares everyone to be "entitled to a fair and public hearing" in "the determination of his rights and obligations in a civil action and of any criminal charge against him". It seems to me that it is not necessary to go into these matters, nor other ancillary ones that were debated. Even if section 9(3) were to be invalid on any of the grounds suggested, this would not, in my view, affect the validity of sub-section (1) under which the impugned

notice .....

notice was issued. Section 9(3) is an ancillary, adjectival, provision, which is, in my view, clearly severable from the substantive provisions of sub-section(1).

The next ground of alleged invalidity derives from the audi alteram partem rule. The respondents' contention is that if, on a proper interpretation of section 9 of the Act, the audi alteram partem rule is excluded both before a decision to act in terms of the section is taken and after, then the section is unconstitutional, again because it is arbitrary.

I shall be dealing with the application of the audi alteram partem rule specifically in its relation to the respondents later. As will be seen my conclusion is that,

whether .....

whether or not the rule may be capable of invocation in other circumstances or by other persons, the respondents cannot rely on it in the present case. In this regard I rely, inter alia, on the urgent circumstances under which action was taken against the first respondent. The fact that action could be taken in the circumstances of the present case without affording the person affected a hearing would clearly not, in my view, render the empowering legislation unconstitutional.

Against this background the present argument has a certain air of unreality about it. We are asked to assess the legality of the section on the grounds of its possible application in the future in different circumstances or against other persons. One may question whether it is desirable to decide constitutional issues on such a theoretical basis. Be

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that as it may, the present argument may, in my view, be disposed of quite simply. Section 9 does not contain an express indication whether or not the audi alteram partem principle is to be applied, nor, if it is applicable, in what form it

is .....

is to be applied. If this matter were to be pertinently raised the Court will accordingly give effect to the legislature's presumed intention. At the same time the Court will also have to bear other principles of construction in mind. In particular the Court will have regard to the principle expressed in the maxim ut res magis valeat quam pereat, i.e., the principle that the legislature must be presumed to have intended to make a valid and effective provision. Applying the latter principle to the circumstances of the present case, a Court will be disinclined to interpret a statute in such a way that it would offend against the Bill of Rights. If an alternative construction were reasonably possible, a Court would tend to prefer that construction. Consequently,

if the Act were to offend against the Bill of Rights unless a certain minimum by way of resort to the audi alteram partem rule were included in the Act, a Court would, if possible, interpret the Act so as to include at least that minimum. And in the present case there would be no difficulty in interpreting the Act in such a way. The audi alteram partem rule is applied, inter alia, in cases where governmental organs are authorized by statute to give decisions prejudicially affecting the rights of an individual (see the authorities quoted later in this judgment). The present is such a case, and although there are indicia to suggest that the rule was not intended to apply, as was held in Winter and Others v. Administrator-in-Executive Committee and Another

1973 .....

1973(1) SA 873 (A) at p. 888 G to 891 F,a case decided under the predecessor to the Act, viz., Proclamation 50 of 1920, these *indicia* would not necessarily be accorded the same weight in interpreting the present Act. In particular it seems to me that in the present context the principle *ut res magis valeat quam pereat* would be decisive. If a Court were to consider that the exclusion of the *audi alteram partem* rule would render the Act invalid, it would in my view inevitably decide that the rule was not intended to be excluded.

It follows, therefore, that one can safely accept that the Act is not invalid by reason of the exclusion of the *audi alteram partem* rule. This may be so either because

the .....

the exclusion of the rule would not in law render the Act invalid, or because the rule has not been excluded from the Act, at least not to such an extent as to render the Act invalid. I need not decide which of these reasons is valid because, as I have said, the respondents themselves can in any event not invoke the rule, if it applies.

Then it is contended that section 9(1)(b) of the Act is open to the objection that it has no reasonably ascertainable meaning as to the "different population groups" between whom feelings of hostility must not be engendered. It is not clear to me that this complaint is really covered by the Bill of Rights, but, be that as it may, it is in my view without substance if regard is had to relevant legislation in South West Africa. In this regard the most important measure is Proclamation A G 8 of 1980 which makes

provision .....

provision for representative authorities to be established for the population groups of the territory. Section 3 of the Proclamation lays down that the population groups for which representative authorities may be established are the Basters; the Bushmen; the Caprivians; the Coloureds; the Damaras; the Hereros; the Kavangos; the Namas; the Ovambos; the Tswanas and the Whites. The manner in which these groups are constituted is summed up as follows in Ex parte Cabinet for the Interim Government of South West Africa: In re Advisory Opinion in terms of section 19(2) of Proclamation R 101 of 1985 (RSA) 1988 (2) SA 832 (SWA) at pp. 840 E to J.

"In terms of s 4 of Proc AG 8,

every .....

every person in the territory, for the purpose of the Proclamation, is deemed to be a member of the population group indicated in the identity document issued to him under the provisions of the Identification of Persons Act 1979 (Act 2 of 1979). Further provision is made for other persons, who for one reason or another are not a member of a population group indicated in the identity document issued to him in terms of, or recognised, by the Act referred to (such as for instance married women or persons under 16 years, or persons holding other types of identity documents), to be assigned to a particular population group. Finally any person who is still not under any of these provisions falling under any population group is deemed to be a member of the population group of which he is generally accepted to be a member.

The Identification of Persons Act 1979 makes it compulsory (s 2 (1)) for any person 'in the territory' who is over the age of sixteen years to be in possession of an identity document. Failure to produce such identity document to a member of the security forces on demand may result in arrest without warrant, and generally failure

to .....

to comply with any provision of that Act is made an offence.

In terms of Regulations promulgated under the Identification of Persons Act 1980 (AG 13 of 1980), the application for an Identification Document, which must be completed in order to obtain such a document, requires the applicant to denote the population group to which he belongs, which is then inserted in the identity document issued to him.

The effect of the combined provisions of the identification of Persons Act 1979, and of Proc AG 8, is therefore that for practical purposes every person born or resident in the Territory is deemed to belong to one of the 11 population groups established in s 3 of Proc AG 8."

Against this legislative background the reference to "the different population groups of the territory" in

section .....

section 9 of the Act seems to me to be perfectly clear. It obviously refers to the groups dealt with in Proclamation 8 of 1980 and Act 2 of 1979, including the regulations thereunder.

Then the respondents objected to section 9(2) of the Act, which reads as follows:

> "Any order issued under sub-section(1) shall be of force during the period specified in the order or, if no period is so specified, until it is withdrawn."

This provision, the respondents submit, renders the whole section arbitrary, since no "decisional criteria or jurisdictional grounds" (quoted from the Heads of Argument) are stated to enable the appellant to decide why and under what circumstances it can withdraw an order. I do not agree. An order under

sub-section .....

sub-section (1) may be issued if the appellant has reason to believe that a person may indulge in what I have called harmful conduct. The power to withdraw an order granted in terms of sub-section (1) can and should plainly be exercised if and when the appellant no longer has reason so to believe. Compare State President and Others v. Tsenoli; Kerchhoff and Another v. Minister of Law and Order and Others 1986(4) SA 1150 (A) at p. 1183 C to 1184 F.

Finally it is contended that section 9 of the Act infringes article 10 of the Bill of Rights for a further reason. Article 10 guarantees the right of freedom of movement and residence subject, inter alia, to "such provisions as are properly prescribed by law in the interests of

public .....

public health and public order". Section 9, it is contended, goes beyond the ambit of these exceptions. In particular the respondents argue that "public order" is a narrower concept than, for instance, national security, and that the exception was introduced to prevent people such as convicted prisoners from claiming the right to travel freely within the territory.

The expression "public order" is not defined in the article nor have we been referred to any authority which suggests that it has an accepted technical meaning. It must accordingly be accorded its ordinary meaning in the context. In the present case the context is of particular importance. It can hardly be contended that everyone lawfully present in

South .....

South West Africa is entitled to travel freely through military camps and other military or security installations, or to visit strategic spots or areas. Provisions in the interest of "public order" would clearly, in the context, include appropriate limitations on the freedom of movement and residence to protect the security of the territory and its inhabitants. The context would

seem .....

seem to demand such limitations, and the ordinary meaning of "public order" is, in my view, wide enough to encompass them.

It is true that certain other provisions of the Bill of Rights refer to both "public order" and "national security" in defining permissible exceptions - see, for instance, article 5 dealing with freedom of expression and article 7, dealing with freedom of association. These articles would appear to suggest that the two expressions bear different meanings. I need not, however, pursue this matter, because even if "public order" and "national security" are to be distinguished for purposes of articles 5 and 7, this would not entail that any meaning attributed to "public order" in those articles would necessarily also be the correct meaning

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in article 10. It is no law of the Medes and Persians that the same expression must always bear the same meaning throughout an enactment, and in the present case common sense demands that the exception in respect of "public order" must be given a reasonably wide meaning in article 10.

The evil which section 9 of the Act is designed to counteract would appear to be the endangering of "the security of the territory or its inhabitants or the maintenance of public order" and the engendering of "a feeling of hostility between members of the different population groups of the territory". Action to combat these evils would, I consider, fall within the description "provisions prescribed in the interests of

public .....

public order". We were not asked to hold that section 9 was not "properly" so prescribed within the meaning of article 10.

This then concludes my discussion of the respondents' attack on the legality of section 9 of the Act. The result is that the respondents have not shown, in my view, that the notice issued in terms of the section should be set aside on the grounds that the section itself violates the Bill of Rights. In view of this conclusion it is not necessary to consider whether the Act, if it had been in conflict with the Bill of Rights, would have been saved by section 3(3) of Proclamation R 101 of 1985 which, it will be recalled, permits certain limited conflicts with the Bill of Rights in respect of

amendments .....

amendments to, or re-enactments of, laws which existed immediately before the first meeting of the National Assembly.

I turn now to the respondents' attack on the validity of the notice. Before dealing with it in detail I wish to make a few general observations about the form of the notice. Section 9(1) of the Act authorizes the appellant, if the necessary jurisdictional facts are present, to "issue an order prohibiting any ... person to be in the territory". This is to be done, according to the Act, "by

notice .....

notice in the Official Gazette or by notice in writing to the person concerned". The latter type of notice was given in the present case. No particular form is required by the Act, and the appellant need not disclose its reasons for issuing the notice. See in this regard Winter and Others v. Administrator-in-Executive Committee and Another 1973(1) SA 873 (A) at p. 888 A. Although Winter's case was, as noted above, decided under the predecessor to the Act, it is in my view still applicable in the respect now under consideration. The position under the Act therefore differs from that pertaining, for instance, to a notice under the Rents Act, in respect of which it has been held:

> "When the tenant is given notice of ejectment,

the reason why the lessor requires occupation must clearly be stated so that the tenant may know whether the ground is a just one and requires him to vacate".

(R. v. Moldenhauer 1954(4) SA 112 (E) at p. 114 E. See also Akoon v. Thoolasamiah 1963(4) SA 498 (N)). It follows therefore that the above decisions under the Rents Act, to which we were referred, are not of assistance for present purposes. Nor, I should add, are cases like R. v. Anthony 1938 TPD 602 which deal with the effect of allegations in a charge sheet.

This brings me to the terms of the notice. They were as follows:

"NOTICE TO:

PASTOR FRANK CHIKANE

Whereas the Cabinet has reason to believe that your presence is likely to endanger the security of South West Africa/Namibia or its inhabitants

or .....

> or the maintenance of public order and or will engender or is likely to engender a feeling of hostility between members of the different population groups, you are hereby prohibited in terms of section 9 of the Residence of Certain Persons in South West Africa Regulation Act, 1985 (Act 33 of 1985) to be in South West Africa/ Namibia."

The respondents' first contention is that the notice is in law invalid and "in effect, excipiable" because it does not allege a jurisdictional ground contemplated by the legislation. The basis of this contention seems to me to be misconceived. As I have noted above, the Act does not require the appellant to furnish its reasons at all, and a fortiori does not require it to set them out fully and accurately in the notice. The failure to state a proper jurisdictional ground in the notice therefore cannot per se lead

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to the invalidity of the notice. Any statement in the notice may of course be evidence as to what in fact the reasons of the appellant were, to be considered in conjunction with other evidence if an enquiry into the appellant's reasons were to be necessary for any purpose. That, however, is another matter.

In any event, the respondents' argument on this point seems to me to be insubstantial and even hair-splitting. It amounts to this: in the notice the appellant specified the "presence" of the first respondent in South West Africa as the feature which was considered likely to endanger the security of the territory, etc. However, the respondents argue, the mere presence of the first respondent, as distinct from any acts which he might perform while being present, cannot have

the .....

the feared result. Moreover, it is contended, the very affidavits filed by the appellant show that the appellant was not in fact concerned about the mere passive presence of the first respondent in South West Africa, but that the appellant sought to prevent the action which it expected the first respondent to take. In these circumstances, the respondents conclude, the notice did not disclose any jurisdictional ground, and, even if it did, it did not disclose the jurisdictional ground on which the appellant's decision was based. In my view this argument cannot succeed. No reasonable man would read the notice in the sense suggested by the respondents, i.e., as indicating that it was the mere inactive, passive presence per se of the first respondent which was

considered ....

considered undesirable.

Allied to the argument is a further one which I consider equally insubstantial. The expression "and or" in the notice, it is said, introduces confusion and vagueness as to the reason for the notice. Various authorities deprecating the use of the "bastard conjunction" "and/or" were quoted to us in support of this argument. As I have said, the appellant need not give its reasons for issuing the notice at all, and consequently it follows, in my view, that if the reasons are given in a vague or obscure way, that would not per se invalidate the notice.

In any event I do not think that the notice is vague or obscure. Whatever stylistic objection there may

be .....

be to the expression "and/or", the expression is in common and regular use and often has a clear meaning in its context. In the present case the notice mentions two broad classes of danger which, in the appellant's view, could be created by the first respondent's presence in the territory. The first class is danger to the security of the territory or its inhabitants or the maintenance of public order. The second class is the danger that a feeling of hostility might be engendered between members of the different population groups. The expression "and/or" indicates that one or the other or both of these classes influenced the appellant in giving the notice. This information may not be particularly informative, but it is clear enough.

Then ..

Then it is contended that any possible mischief which could have been expected from the presence of the first respondent in the territory could "with greater flexibility, effectiveness and sensitivity and with less prejudice to the First Respondent" (quoted from the Heads of Argument) have been prevented by making use of the machinery of the Internal Security Act, no. 44 of 1950, which is still in force in South West Africa. So, the respondents suggest, the appellant might have taken action to prevent the first respondent from addressing a particular gathering, or being in a relevant area at a particular time, rather than to impose an all-embracing prohibition under the Act. This submission is presented in two alternative forms. In the first form the

respondents ..

respondents assume for the sake of argument that the appellant did fear on reasonable grounds that the first respondent would by his utterances endanger the maintenance of public order and possibly engender feelings of hostility between different population groups in the territory. They expressly disavow any contention that the appellant, in applying the Act in these circumstances, used its power under the Act for a wrong purpose, or acted mala fide. "The submission is simply that the appellant acted ultra vires: it used the Act in circumstances where it was never the intention of the lawgiver that the Act should be used."(ibid.).

I find it difficult to follow this reasoning. If the Act was applied on reasonable grounds in good faith and

for .....

for the purpose for which it was intended I cannot see how one can say that the appellant acted ultra vires. The mere fact that another measure was available which could as appropriately (or, let us assume, more appropriately) have been applied in the circumstances could

hardly .....

hardly deprive the appellant of authority to take action under the Act. At most it could suggest that the appellant did not exercise its discretion properly by applying the less appropriate rather than the more appropriate statute. This, however, is in effect the respondents' alternative argument with which I deal later.

The respondents relied heavily on the case of Minister of Justice and Law and Order and Attorney-General v. Musarurwa and Others and Nkomo and Others 1964(4) SA 209 (RAD) in support of its contention. In that Rhodesian case three Acts were in issue. The Law and Order (Maintenance) Act authorized the Minister to confine persons within a particular area. Acting in terms of this Act the Minister caused

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the respondents to be confined within the area of Wha Wha.

The Law and Order (Maintenance) Act did not grant powers to exclude other persons from the area in which persons are confined. However, the Protected Places and Areas Act authorized the Minister to declare "protected places" from which unauthorized members of the public were excluded. Pari passu with the order confining the respondents to Wha Wha, the Minister declared "protected places" so as to prevent unauthorized members of the public approaching anywhere near to the boundary of Wha Wha and thus making contact with the respondents. In this way the Minister caused the respondents to be confined to Wha Wha without free access by members of the public. This result, which the Court described as the detention of the respondents, could not be achieved under either

of the Acts used separately. A third Act, the Preventive Detention (Temporary Provisions) Act did however make provision for the detention of persons under certain circumstances and subject to certain safeguards. Under this Act the results could be achieved which the Minister sought to achieve by using the other two Acts in combination. The Court of Appeal held that this was impermissible. The ratio was that the Law and Order (Maintenance) Act and the Protected Places and Areas Act together, or, alternatively, the Acts individually, were used for an unauthorized purpose, viz., to secure the detention of the respondents, a result which could in law be achieved only by applying the Preventive Detention Act. See at p. 221 G-224 A (BEADLE CJ); 224 E-F (QUENET JP)

and .....

and 226 H (HATHORN JA).

In the present case the respondents expressly disavow any suggestion that the appellant used its powers for an unauthorized purpose. Masarurwa's case (supra) is accordingly not in point.

I turn now to the alternative argument based on the Internal Security Act, viz., that the appellant did not exercise a proper discretion in that it failed to apply its mind to the possibility of acting under the Internal Security Act rather than in terms of section 9 of the Act. In its affidavits the appellant set out in considerable detail what the information (or, at least, some of it) was which gave it "reason to

believe" .....

believe" that the first respondent fell within the provisions of section 9 of the Act. The correctness of much of this information is disputed by the respondents, but it has not been suggested that the Court a quo could or should have investigated the disputes. On the affidavits as they stand the Court must therefore accept that section 9 could, in principle, be applied, and I did not understand the respondents to dispute this for purposes of the present argument.

The question then is whether it has been shown that the appellant failed to consider the possibility of

rather .....

rather making use of the Internal Security Act, and whether this failure rendered its decision to act under section 9 impeachable. In the founding papers no reference was made to the Internal Security Act. The first respondent's complaint on the facts was formulated as follows:

> "No reasonable person, properly applying his mind and having access to all the information concerning me (all of which is a matter of public record) could honestly have come to the conclusion that I was a person who would, or be likely to, endanger the public order or engender feelings of hostility between members of the different population groups in South West Africa/ Namibia ..."

No suggestion was made that, even if such a conclusion was possible, the appellant should have acted under the Internal Security Act rather than under the Act.

In .....

In opposing the above-quoted submission the appellant filed voluminous affidavits, as I have said, in which it set out some of the information on which it acted. The purpose was to answer the criticism made in the founding affidavit, and there was no call on it to deal with complaints which were not made. In reply, the first respondent's affidavit, although extensive, was limited to the same issue. Even then he did not raise the possibility that action under the Internal Security Act may have been more appropriate in the circumstances. In the result, by reason of the manner in which the respondents presented their case, we do not know whether the appellant did consider invoking the Internal Security Act in preference to the Act, and, if

it .....

it did, what induced it nevertheless to issue an order under the latter Act. It follows that there is no basis upon which we can hold that the appellant's action is impeachable on this ground.

Before considering the details of the further criticisms of the notice I propose digressing briefly to consider the ambit of the rights enshrined by the Bill of Rights, a matter which is relevant to various topics with which I still must deal.

It appears from the definition of "fundamental right" in section 1 of Proclamation R 101 of 1985 that the Bill of Fundamental Rights and Objectives was adopted on 18 April 1984 by what was then known as the Multi-Party

Conference .....

Conference. The Multi-Party conference did not have legislative competence, and the Bill of Rights did not, by its mere adoption, acquire any legal effect. The purpose of the Multi-Party conference was, as expressed in the Preamble to the Bill of Rights, that the Fundamental Rights enshrined in the Bill "shall be respected and upheld by our successive governments and protected by entrenchment in the Constitution". This presupposed that action would be taken to incorporate the Bill of Rights in a future constitution of the territory. In fact it was so incorporated in Proclamation R 101 of 1985, and the effect which it has must be ascertained by an interpretation of the Proclamation..

An examination of the Proclamation immediately

shows .....

shows that the intentions of the authors of the Bill of Rights have not yet been satisfied in full - although the Bill of Rights has been given legislative force, it has certainly not been "entrenched". There is nothing to prevent the amendment or repeal of the Proclamation by the appropriate legislative processes. And the effect which has been accorded the Bill of Rights is not as full as its authors might have desired: certainly it is not as full as contended by the respondents. The relevant provisions of the Proclamation are discussed in the above-quoted passage from the judgment in Eins's case and I do not wish to repeat them. Summarized they provide that (subject to the exception stated in section 3(3)) the National Assembly does not have the power to make

any .....

any law abolishing, eliminating or derogating from any fundamental right (section 3(2)(b)); and that the Supreme Court of South West Africa is competent to enquire into and pronounce upon the validity of Acts of the Assembly in order to determine whether section 3(2)(b) was contravened (section 19(1)(b)). Moreover, and this is an aspect not mentioned before, provision is made for the examination of existing legislation with the view to its possible amendment or repeal if it contravenes the Bill of Rights (section 19(2) and (3)). The Proclamation thus deals with the effect of the Bill of Rights on two types of legislation: legislation passed by the legislative authorities established by the Proclamation and pre- existing legislation. Cf. Ex Parte Cabinet for the Interim Government of South West Africa (supra) at p. 836 F-J, p. 837 I. The Proclamation

does not, however, accord any effect to the Bill of Rights outside the field of legislation. In particular there is nothing in the Proclamation to suggest that the Bill of Rights would, as such, have any bearing on the validity of administrative actions. Of course, the rights enshrined in the Bill are, generally speaking, recognized by our common law, and should be suitably borne in mind by authorities exercising delegated powers (cf. Omar and Others v. Minister of Law and Order and Others; Fani and Others v. Minister of Law and Order and Others; State President and Others v. Bill 1987(3) SA 859 (A) at p. 893 E-F),but this is something else from saying that any administrative action would necessarily be invalid if it conflicted with the provisions of the Bill

of .....

of Rights. In many cases the fact that administrative action under a statute is in conflict with the provisions of the Bill of Rights would serve to show that the statute, which authorizes such conduct, is itself objectionable, but this would not necessarily be so. In any event the statute may be an existing one, which is not invalid under the Proclamation even if it is in conflict with the Bill of Rights. In short, the rights enshrined in the Bill of Rights are, under the Proclamation, available only to challenge the validity of Acts of the National Assembly, and do not serve to limit governmental powers in other respects.

If I apply this conclusion to the question whether the appellant properly exercised its mind when deciding to

issue .....

issue a notice in terms of section 9, the result is that the appellant was clearly obliged to have regard, inter alia, to the effect which the notice would have on the first respondent's rights and position, but that this obligation was a general one deriving from the common law, and not a peremptory prohibition on contravening the Bill of Rights as was contended by the respondents. On the facts and issues presented to the Court no case has been made out that the appellant's decision is assailable by reason of a failure to comply with its common law obligations in this regard.

I turn now to the complaint that the audi alteram partem rule has not been obeyed. This maxim has its application inter alia in cases where governmental organs are

authorized .....

authorized by statute to give decisions prejudicially affecting the rights of an individual. In such cases the affected individual should, in the absence of sufficiently strong considerations to the contrary, be given an opportunity to make appropriate representations before a decision is taken (see the cases collected in Strydom v. Staatspresident Republiek van Suid Afrika, en 'n Ander 1987(3) SA 74 (A) at p. 94 E) or, sometimes, afterwards (see, eg. Omar and Others v. Minister of Law and Order and Others; Fani and Others v. Minister of Law and Order and Others; State President and Others v. Bill 1987(3) SA 859 (A) at p. 906 A to 907 F).

In the present case the appellant concedes that action under section 9 of the Act may sometimes affect the

rights .....

rights of the individual. However, the appellant contends, the notice issued against the first respondent did not impinge on any right enjoyed by either of the respondents, and consequently neither of them was entitled to the benefit of a hearing.

In reply to this argument, counsel for the respondents relied primarily upon the Bill of Rights. The first respondent, he said, was entitled under article 10 as a "citizen" not to be arbitrarily deprived of the right to enter the country. "Citizen", it was contended, must be interpreted as a South African citizen since there is no provision for a separate South West African citizenship. This contention is, in my view, untenable. Article 10

protects .....

protects a "citizen" against arbitrary deprival of his right to enter the "country". By "country" is clearly meant the country of which he is a citizen, i.e., South West Africa. This accords with the general purpose of the Bill of Rights which is to protect the fundamental rights of the people of the territory. Why should these rights be extended to all citizens of South Africa? More particularly, why should the people of South West Africa proclaim that all South African citizens have a fundamental right to enter the territory? If that had indeed been the intention one would have expected an express reference to South African citizenship.

The only other provision in the Bill of Rights

which .....

which uses the expression "citizen" is article 8, which guarantees to every "citizen" the right to participate in peaceful political activity intended to influence the composition and policies of the government; to form and join political parties and to participate in the conduct of public affairs. Quite clearly it was not intended that all South African citizens would be entitled to exercise these rights in South West Africa. "Citizen" in article 8 obviously means a citizen of South West Africa, and no reason exists why it should bear a different meaning in article 10. Indeed, for the reasons I have mentioned, all the indications are that the meaning of "citizen" in article 10 is the same in article 8. The submission that it

means .....

means a South African citizen must be rejected.

In the alternative the respondents' counsel argued that "citizen" had a wider meaning, including, if I understood him correctly, also foreign citizens who under present legislation are entitled to travel between South Africa snd South West Africa. Such an interpretation is even less acceptable. The considerations which show that "citizen" does not mean a South African citizen militate even more strongly against the notion that it includes everybody who is at present entitled to visit the territory.

It is true that there is no citizenship of South West Africa yet, but when the Multi-Party Conference adopted the Bill of Rights on 18 April 1984 (see the definition of

"fundamental .....

"fundamental right" in section 1 of Proclamation R 101 of 1985), it intended that the Bill of Rights should take effect in the future, and clearly contemplated that a South West African citizenship would come into being. Prior to the establishment of such citizenship the relevant sentence of article 10 creates difficulties of interpretation and application, but once again I need not dwell on this aspect, because no possible interpretation of "citizen" of South West Africa would be wide enough to include the first respondent.

Moreover, even if the first respondent had been a "citizen" for the purposes of article 10 this would, in my view, not have availed him. As I have tried to show above,

the .....

the Bill of Rights does not add anything to the common law except in regard to legislation. It does not create rights in administrative law which entitle individuals to insist on a hearing pursuant to the audi alteram partem rule.

A further contention in the respondents' heads of argument was that the first respondent was entitled, as a South African citizen, to enter into and remain in South West Africa for a period of thirty days in terms of section 3(1) of the Act, and that this was the right which had been encroached upon by the appellant. I assume, without deciding, that the liberty to enter the territory for this limited period constitutes a sufficient "antecedent right" to call for the

invocation of the audi alteram partem principle. On this assumption I agree with my brother VAN HEERDEN, whose judgment I have had the benefit of reading, that the first respondent was not entitled in the circumstances of urgency which prevailed in the present matter, to a hearing prior to the issue of the notice in question. I need not decide whether he was entitled to a hearing after the issue of the notice since it is not disputed that the appellant was then quite prepared to receive and consider any representations which the first respondent wished to make, but that the first respondent did not avail himself of this opportunity.

In seeking to invoke the audi alteram partem rule, the second respondent relies on articles 5,6,7 and 9 of the

Bill of Rights, dealing with, generally, the right to freedom of expression, the right to peaceful assembly, the right to freedom of association and the right to enjoy, practise, profess, maintain and promote culture, language, tradition and religion. The argument is that by preventing the first respondent from visiting the territory, the appellant has interfered with these rights vesting in the second

respondent .....

respondent, and should accordingly have afforded the second respondent an opportunity to make representations. My conclusion that the Bill of Rights does not create rights in administrative law which entitle persons to invoke the audi alteram partem rule would by itself be an answer to this contention, but there is, I consider, a further one with which I deal in the next paragraph.

If the second respondent's contention is correct it would mean that, whenever action is taken under section 9, representations should be invited not only from the person whose rights are directly involved, i.e., the person in respect of whom the notice is issued, but also from everybody having an indirect right or interest in the matter, such as

his family, employers, employees, business associates etc., and even friends who would like to associate with him pursuant to article 7 of the Bill of Rights. All of these people could claim some interest or right, including appeals to the Bill of Rights, which may be harmed by a deportation, or a refusal of entry of some other person. No authority has been quoted to us in which the audi alteram partem rule has been applied in respect of persons with indirect rights or interests of that kind. To include them within the category of persons entitled to make representations seems entirely impractical. Not only would the class of persons so included be impossibly wide, but the relevant authority would not normally know who they are or what their interest

is. Moreover, there does not seem to be any strong moral or equitable grounds for according such persons the right to make representations either in addition to, or in the place of, the person directly affected. In these circumstances the law does not in my view grant persons in the posision of the second respondent any right to make representations in respect of a notice or proposed notice under section 9 of the Act against a third party such as the first respondent.

My conclusion accordingly is that neither the first nor the second respondent has suffered any injury to its rights which would entitle them to invoke the maxim audi alteram partem. It is accordingly unnecessary to

decide .....

decide whether the maxim may be invoked if the Act were applied in other circumstances. If the question were to arise pertinently the Court would have to decide whether the reasoning in Winter and Others v. Administrator- in-Executive Committee and Another 1973 (1) SA 873 (A), in which it was held that the maxim was excluded under Proclamation 50 of 1920, applies also to the present Act. In this regard it should be remembered that, as discussed above, the present Act falls to be interpreted in the light of the Bill of Rights. Whether this or other factors call for a different interpretation is a question which I leave entirely open.

This .....

This concludes my discussion of the respondents' attack on the validity of the notice. For the reasons I have given, I do not consider that any of the respondents' grounds of attack can be sustained. In the result it is not necessary to decide whether, or to what extent, the Court is in any event precluded from pronouncing upon these matters by section 9(3) of the Act (assuming, of course, that this sub-section is valid - a question which I left open when dealing with the effect of the Bill of Rights on the validity of the Act).

My over-all conclusion is accordingly that neither of the respondents has shown that the appellant has acted unlawfully in issuing the notice in issue. It follows that

none .....

none of the relief sought in the notice of motion should have been granted.

Finally I should note that the appellant questioned the locus standi of the second respondent. Mr. Mahomed, while seeking to support the locus standi, also contended that the objection was largely irrelevant since the Court would have to consider the merits of the first respondent's contentions anyway. As I have now in fact considered and rejected both respondents' contentions on the merits, there is no further need to dwell on the second respondent's locus standi, and I decline to do so.

In the result I make the following order:

1. The appeal is allowed with costs, including the costs of .....

of the application to the Court a quo for leave to appeal. Costs are in both cases to include costs of two counsel.

2. The order of the Court a quo is set aside and replaced by the following:

The application is refused with costs, including the costs of two counsel.

E M GROSSKOPF, JA

RABIE, ACJ
JANSEN, JA } Concur
HEFER, JA