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THE MINISTER OF HOME AFFAIRS — FIRST APPELLAANT

THE DIRECTOR-GENERAL OF HOME AFFAIRS — SECOND APPELLANT

AND

AMERICAN NINJA IV PARTNERSHIP — FIRST RESPONDENT

ODDBALL HALL PARTNERSHIP — SECOND RESPONDENT

JUDGMENT BY:

NESTADT, JA

CASE NO 709/91 /CCC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE MINISTER OF HOME AFFAIRS FIRST APPELLANT

THE DIRECTOR-GENERAL OF HOME AFFAIRS SECOND APPELLANT

and

AMERICAN NINJA IV PARTNERSHIP FIRST RESPONDENT

ODDBALL HALL PARTNERSHIP SECOND RESPONDENT

CORAM: CORBETT CJ, BOTHA, NESTADT, F H GROSSKOPF JJA

et HARMS AJA

DATE HEARD: 17 AUGUST 1992

DATE DELIVERED: 22 SEPTEMBER 1992

J U D G M E N T

NESTADT, JA:

Over the years the South African government has considered it desirable to encourage the local

production of films. It has sought to achieve this by the grant of state financial assistance to the South African film industry. Such assistance has comprised tax concessions and the payment of subsidies to producers. Schemes embodying particulars of these benefits have been announced from time to time. A series of circulars were successively issued by the government department responsible for the administration of the schemes. The circular relevant to this appeal is dated 1 August 1989. I refer to it as "the circular". It was issued on behalf of the Department of Home Affairs. In due course it will be necessary to deal with its terms in some detail. Suffice it at this stage to say that provision is made for the payment of three kinds of tax-free subsidy to the producers of South African films. They are calculable as a percentage (i) of "local production cost"; (ii) of "local revenue", and (iii) of "net foreign revenue" (these expressions

being defined). In each case it is stated that the percentage is not to exceed a specified maximum. And, in the case of subsidies on local and foreign revenue, a maximum subsidy is specified, namely 75% of the local production cost of the film (in the case of subsidies on local revenue) and 50% of the total production cost of the film (in the case of subsidies on foreign revenue).

Alleging that they had each produced a film which qualified for the subsidies referred to, two partnerships brought an application in the Transvaal Provincial Division for an order declaring that the Minister of Home Affairs was obliged to pay them the prescribed subsidies. Cited as respondents were inter alia the Minister and the Director-General of Home Affairs. The main basis (and the only one now relevant) on which they opposed the relief sought was that no liability had been incurred in terms of the circular or otherwise. The matter came before SPOELSTRA J. By this

time the partnerships' claims for subsidies in respect of local production cost and local revenue had been settled. The written compromise entered into between the parties provided for payment of certain amounts to the partnerships by the State without admission of any liability. What remained in issue were the partnerships' rights to subsidies in principle and in particular their claims to a subsidy based on foreign revenue. This issue the learned judge decided in their favour. Thus he granted the declarator sought (subject to the qualification that the partnerships' respective rights to payment were "subject to the terms and conditions" of the circular).

This is an appeal by the Minister and Director-General against such order. It is brought with the leave of the court a quo. There was also before us a cross-appeal by the partnerships against the refusal of their prayer for attorney and (own) client

costs. It is, however, no longer being pursued. This follows on the Court, during argument, querying whether, no leave to cross-appeal having been granted, it was competent. In what follows, I continue to refer to the parties by their original designations, ie the partnerships as the applicants and the Minister and Director-General as the respondents.

One of the grounds relied on in the founding affidavit for the relief claimed is what is termed a "legitimate expectation" that the subsidies would be paid. The applicants say that they acquired this expectation not only from the terms of the circular, but from the respondents' prior conduct in, inter alia, invariably paying the advertised subsidies to those producers who qualified for payment under previous schemes. SPOELSTRA J rejected this ground as a valid cause of action. He held that the principle relied on gave rise only to a procedural remedy; it did not found

a substantive right. Before us the correctness of this view was debated. Mr Mendelow for the respondents supported it. Mr Levin for the applicants, citing English authority in support of his argument, contended that SPOELSTRA J was wrong. It is unnecessary to decide or even consider the point. This is because of the conclusion I have come to concerning the applicants' other cause of action.

The founding affidavit does not spell it out very clearly, but it sufficiently emerges that the applicants also rely on another source of what I call the State's alleged obligation to pay them the subsidies claimed. Their case under this head was that the circular contained an undertaking by the State to pay the subsidies in question and that it became contractually bound to the applicants to do so. It was on this basis that the court a quo granted the application. The central issue in this appeal is

whether this finding was correct.

In order to decide this, it is necessary to examine the facts and in particular the terms of the circular more closely. One can do so without difficulty because on the papers there is no dispute of fact of any consequence; and of course the terms of the circular speak for themselves. It is a fairly lengthy document. The following are its salient features:

(i) As already indicated, its provisions apply to "feature films" produced in South Africa (actually Southern Africa) for local and international release.

(ii) Clauses 3, 4 and 5 contain what the applicants contend is the undertaking to pay the three kinds of tax-free subsidy. In the case of subsidies in respect of local production cost and local revenue, the wording used is that such subsidies "will be paid" (to the producer

of a South African film). In the case of net foreign revenue the undertaking is slightly different, viz, that the subsidy "will be payable". It was not suggested that there was any material difference between these two expressions.

(iii) The circular then goes on to provide for what are termed "registration procedures". Their effect (read with the definition of "South African film") is to make it a prerequisite of a claim for any subsidy in terms of the scheme that the film be registered. Application to register is made to an official called the Head: Film Subsidy Administration, Pretoria (the Head). The application, accompanied by a prescribed deposit payable to the Head, must generally be made before commencement of "principal photography" of the film.

(iv) Diverse information is required to be given in the application for registration and its correctness verified on oath. This includes details as to the identity of the producer; the working title of the film; the production budget; the countries where the film is expected to be released; where it is to be produced; and when it is anticipated production will commence and be completed. In addition the application must not only provide proof that the producer is a South African resident, but is to be accompanied by copies of the script of the film, any relevant distribution agreements and written confirmation by a bank that it holds available on behalf of the producer sufficient funds to cover the total production budget.

(v) It is stated to be within the Head's

discretion whether or not to register any film. Indeed, there is specific provision that the Head may limit the number of films to be registered "in order to remain within the total amount available for the payment of such subsidies". When he does register a film, registration is evidenced by a certificate issued by him. Such certificate is to specify the rates "applicable to the subsidies available in terms of this circular". He has the right to determine the rates "at which any subsidies referred to in this circular will be paid and the maximum amount of any such subsidies payable". There follows an important proviso, namely that "such rates or maxima once registered may not subsequently be reduced by the Head...without the prior written consent of the producer".

(vi) As will be seen later certain obligations are imposed on the producer once registration has taken place.

(vii) If, subsequent to registration, there is a "material change in respect of any of the information included in the application for registration", the producer must inform the Head who may inter alia "in his absolute discretion...require that the original registration be withdrawn and a new application submitted or limit the terms of any registration of the film...to the originally supplied information".

(viii) On completion of a film which has been registered, the Head must be informed of the producer's bank and account number "into which any subsidies due in terms of the circular should be paid".

(ix) Claims for subsidies "payable in terms of this circular" must be submitted to the Head in the form of an affidavit verifying the correctness of the claim. Its manner of calculation and, depending on which subsidy is being claimed, a host of other details (in some cases confirmed or certified by an independent accountant) have to be given. These elaborate requirements are obviously designed to enable the claims to be thoroughly investigated and substantiated. The same applies to the provision giving the Auditor-General the right to inspect books, records and documentation "pertaining to the production and exploitation of any film...registered in terms of this circular". This official may also examine "all the relevant facts and information relating to the

payment of any subsidies in terms of this circular". The Head has the right to demand immediate repayment of any subsidies incorrectly or erroneously overpaid to any producer.

(x) A certificate signed by the Head stating the amounts of subsidy paid to a producer "will be regarded by any court as proof of the correctness (thereof)".

(xi) The Head has the right to amend the terms of the circular but he may not thereby "prejudice or reduce the rights or claims of a producer in respect of a film...registered".

(xii) Finally there is a clause in terms whereof any dispute between a producer and the Head regarding the interpretation of the terms of the circular or the exercise of any of the powers of the Head is to be referred to

arbitration.

On 1 August 1989 a company called American Ninja IV Management (Pty) Ltd made application for the registration of a film called "American Ninja IV". And on 16 August 1989 a company called Oddball Management (Pty) Ltd made application for the registration of a film called "Oddball Hall". At this stage the applicants did not yet exist. They were only subsequently formed. The papers do not disclose exactly when this took place but it can be accepted that it was prior to the production of the film with which each partnership was concerned. In the case of the first applicant, American Ninja IV Management (Pty) Ltd became what is called the "managing partner". Similarly Oddball Management (Pty) Ltd became the managing partner of the second applicant. But to return to the applications for registration. Each was granted. On 31 August 1989 the Head, by letter, informed each of the

applicants as follows:

> "With reference to your application...I wish to inform you that the abovementioned film (the title of the film is given) has been registered... for subsidy purposes, in accordance with circular...of 1 August 1989".

The applicable subsidy rates are then set out. In each case they are in identical terms. They are stated to be "up to 25% of the local production costs of the film"; "at 70% of the local revenue, subject to a maximum of 75% of the local production costs of the film or R2 million whichever is the lesser"; and "at 80% of the net foreign revenue, subject to a maximum of 50% of the total production costs of the film". (There was a dispute whether "up to" was not a mistake but this issue is no longer relevant.) The communication ends with this intimation:

> "Your attention is drawn to the fact that if subsequent to this registration it appears that there is a material change in respect of any of the information included in your application for registration, the Head : Film Subsidy Administration reserves the right to cancel this

> registration, limit the terms of registration or to impose such penalties as set out in the relevant subsidy scheme."

It is common cause that these letters were the registration certificates (referred to in para (v) above).

The applicants' respective films having thus been registered in terms of the circular, each of the applicants, so the founding affidavit alleges, proceeded to produce their films. In due course thereafter, the films were exhibited both within and outside the Republic. As a result of their exploitation on the international circuit, foreign revenue was earned. This led the second applicant on 20 June 1990 to submit to the second respondent a claim for a subsidy (in the sum of R983 472.00) in respect of net foreign revenue calculated in terms of the formula specified in the relevant registration certificate. And on 6 August 1990, the first applicant similarly submitted its claim

for a subsidy (in the sum of R3.175 million) in respect of net foreign revenue earned by it. As I have said, the respondents have failed to pay. Nor have they been prepared to give an undertaking that payment of what is allegedly due to the applicants in terms of the registration certificates will be made (within a reasonable time or otherwise). On the contrary, their attitude has been that the State is not liable to the applicants. It was in these circumstances that the application was launched.

A contract is of course an agreement which is binding at law. So the first enquiry is whether, on the facts referred to, an agreement of the kind relied on by the applicants, viz that the first respondent would pay the subsidies claimed, was entered into. In a thorough and detailed presentation of the respondents' case, Mr Mendelow submitted that the answer was in the negative. The pith of his argument was that the

circular was merely a departmental regulation informing potential producers of films under what conditions the first respondent would consider applications for a subsidy; but there was no undertaking to pay the subsidy to an applicant who complied with the terms of the circular; this was so even though the film was registered; such registration was nothing more than an acknowledgment of receipt of the application; whilst the relationship between the parties contained elements of consensus, its true juristic character was a unilateral or authoritative act on the part of the State in the nature of a concession or privilegium; in other words the consent of the applicants played no contractual role; it was only a step in the administrative process leading to the possible grant of a subsidy; the State at all times retained the discretion whether or not to pay the subsidy; unless and until it decided to pay, no liability to do so arose.

In my view the argument cannot be sustained. It is true that a number of authorities cited by counsel may be said to support the principles contended for. Thus in Fellner vs Minister of the Interior 1954(4) SA 523(A) it was held that even though the requirements of a regulation governing the issue and renewal of passports were complied with, the Crown was not contractually bound to grant the application; it had undertaken no more than to consider it. In Estate Breet vs Peri-Urban Areas Health Board 1955(3) SA 523(A) SCHREINER JA rejected the notion that the relationship between an applicant for the establishment of a township and the Administrator was governed by a contract, within the meaning of the Prescription Act, 18 of 1943, between them. And in Dilokong Chrome Mines (Edms) Beperk vs Director-General of the Department of Trade and Industry (an unreported judgment of this Court given on 21 May 1992), BOTHA JA, dealing with an argument that an

export incentive scheme in terms whereof compensation was advertised as payable to those who qualified for it had given rise to a contract between the claimant and the government department concerned, said (at pp 23-26 of the typed judgment):

> "Wat hier gebeur het, is dat die Minister, verteenwoordigend van die uitvoerende gesag van die Staat, bekend gemaak het dat sekere geldelike voordele beskikbaar gemaak is vir sekere uitvoerders wat aan bepaalde vereistes voldoen en wat eise indien volgens die 'riglyne' wat daarvoor voorgeskryf is. Hierdie oorwegings dui op wat na my oordeel van fundamentele belang is in die huidige ondersoek: die aard van die onderliggende verhouding tussen die partye. Daardie verhouding is dié van owerheid teenoor onderdaan. Dit lê op die gebied van die administratiefreg. Dit kan natuurlik gebeur dat 'n kontraktuele verhouding geskep word tussen die uitvoerende gesag en 'n onderdaan, soos wanneer 'n kommersiële ooreenkoms beklink word, maar in die huidige geval is die beskikbaarstelling aan onderdane van geldelike bystand uit die Staatskas deur middel van 'n suiwer begunstigende beskikking, iets wat so eie is aan 'n administratiefregtelike verhouding dat ek geen ruimte daarin kan sien vir 'n bevinding van kontraktuele aanspreeklikheid van Staatskant nie.
> ...Op die oog af verklaar die kennisgewing dat die uitvoerende gesag die Staat verbind tot die vergoeding van onderdane wat aan sekere vereistes voldoen. Mense wat die voordele kan en wil benut,

> moet 'n bepaalde eisprosedure nakom, maar die kennisgewing gee nie te kenne dat dit 'n voorvereiste is vir die totstandkoming van die owerheid se verbintenis as sodanig nie; die bestaan daarvan word reeds aanvaar. Anders as in die geval van twee individue wat op privaatregtelike terrein beweeg, is daar niks vreemds in die gedagte dat die Staat eensydig aanspreeklikheid teenoor sy onderdane opdoen nie. Inteendeel sou dit vreemd wees om te dink dat die owerheid se onderneming ingevolge die kennisgewing slegs deur middel van aanname en omskepping tot 'n kontrak afdwingbaar gemaak kan word."

It seems to me, however, that these cases are distinguishable on the facts from the one before us and that they are therefore of no assistance to the respondents. Obviously the State and its organs can contract. In the absence of any particular enabling statutory provision, the source of this power is the common law prerogative (Baxter: Administrative Law p 389). Where such a contract is concluded the State exercises its powers with the concurrence of the persons affected and is liable under the State Liability Act, 20 of 1957. Sec 1 of this Act provides that any claim

against the State which would, if that claim had arisen against a person, be the ground of an action, shall be cognizable by any competent court whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by an authorised servant of the State acting as such. On the other hand, the State may exercise its powers without the concurrence of the persons affected. Here one has what Prof Baxter, op cit at p 351, terms an authoritative or unilateral administrative act. I am satisfied that in casu the relationship between the parties was essentially contractual. Unlike Fellner and Estate Breet we have a transaction which is a commercial one. It involves the payment of money to the producers of certain kinds of films whom the State wishes to benefit. In Dilokong, as appears from the latter part of the judgment which I have quoted (and from the facts set out earlier by BOTHA JA), liability on the part of

the State did not arise from agreement; the State had unilaterally undertaken liability; whoever qualified could claim. That is not so here. Here (as in cases such as Mustapha and Another vs Receiver of Revenue, Lichtenburg and Others 1958(3) SA 343(A), S & T Import and Export (Pvt) Ltd vs Controller of Customs and Excise 1981(4) SA 196 (ZAD) and Ondombo Beleggings (Edms) Bpk vs Minister of Mineral and Energy Affairs 1991(4) SA 718(A)), the relationship between the applicants and the respondents arose and could only arise from agreement. I cannot agree with Mr Mendelow that the consent of an applicant for financial aid is not a prerequisite to the grant thereof. The grant of financial aid had to be sought by a producer. To obtain it, he had to apply to register his film. Nor, as was argued, is it correct that the use of "subsidy" in the circular is indicative of there not having to be consensus. The word may denote a unilateral grant, but in the context used it

was a quid pro quo for the obligations undertaken by a producer. In brief, they are to produce and market the registered film and (in order to qualify for the subsidy) comply with the criteria specified in the circular. SPOELSTRA J found that the circular was an invitation by the first respondent to producers to avail themselves of the financial assistance referred to in it, in other words an invitation to do business; that the application for registration constituted an offer to contract (on the terms stated in the circular); and that the registration of the film was an acceptance of such offer. It may be that this analysis does not sufficiently take into account that it may be only on registration that the specific subsidy rates are determined (by the Head). This being so, there may not be complete agreement until the producer accepts such rates, usually by conduct in proceeding with production of a film and thereafter claiming the subsidy. But

subject to this qualification I agree with the approach of the judge a quo. Certainly, the whole tenor of relationship between the parties is consensual, the terms of their agreement being what is provided for in the circular. Of course, these terms were stipulated and therefore in a manner of speaking imposed on the applicants by the State. But one contracting party often does this. If the party then decides to contract on that basis, it cannot be suggested that there was, for that reason, no agreement. To the contrary, he has agreed to such terms. And the fact that they may be considered harsh in certain respects matters not.

The second question that arises for determination is whether the agreement which was concluded in respect of each film was entered into with the intention that it should create legal relations. Unless it was, ie unless, judged objectively, the parties had the necessary animus contrahendi, no

contractual liability on the part of the first respondent to pay the subsidies would have arisen. In considering this issue, we must examine the terms of the agreement, ie the circular, itself. They are, after all, the primary source of determining the likely intention of the parties. And they are, I think, sufficiently unambiguous to make it unnecessary to look, as was suggested, at the provisions of prior schemes as an aid in interpretation. What do the terms of the circular show? There is the basic undertaking itself, viz that a tax-free subsidy "will be paid (payable)" ((ii) above). This is surely an existing promise by the State, albeit in relation to a performance in the future. Contrast it with an expression such as payment of a subsidy "will be considered" which, on the respondents' approach, is what one would have expected to find. From the producer's point of view, too, firm obligations, which arise on registration, are

stipulated for. SPOELSTRA J details them as follows:

> "There is, for instance, the obligation to employ South African residents; he must keep the department informed of the progress of the production of the film or material changes in the information supplied in his application for registration; he must commence with the principal photography within six months after registration and complete it within a prescribed period; he must provide confirmation by a bank or other financial institution that there are sufficient funds available to cover the budgeted production cost; he must pay to the department a substantial deposit which may be forfeited in whole or in part if the film is not completed; and he must market the film."

So we have a case of mutual obligations by both parties to the agreement; a bilateral contract. That there was an intention that the agreement have contractual force is further demonstrated by the proviso ((v) above) that once the film is registered, the subsidy rates may not be reduced unless the producer agrees. And, in the same vein, one has the right of the Head to amend the terms of the circular but subject to the rights of a producer whose film has already been

registered ((xi) above). That court proceedings may result is clearly contemplated by the provision as to a certificate signed by the Head having evidential force ((x) above). As such it is another pointer to the necessary animus contrahendi. So, too, is the right that is afforded the Head to repayment of any overpaid subsidies. Take also the clause relating to the payment of a deposit ((iii) above). On registration of the film, it has to be applied in a certain manner depending on whether the film is completed or not. Lastly, there is the arbitration clause ((xii) above). There can hardly be a dispute referable to arbitration in the absence of a liability on the part of one or both parties to the agreement.

The answer proffered by the respondents to these cogent indications of a contractual intention was, in effect, that on a proper interpretation of the circular, the State's obligation to pay subsidies only

arose if and when a producer's duly documented claim was accepted. If, in its discretion, the State decided not to accept the claim and pay the subsidy, no liability on its part arose. Reliance was placed on certain surrounding circumstances and in particular evidence that the scheme for State financial aid was being abused by certain producers. The respondents' answering affidavits allege that prior to the issue of the circular in August 1989, there had been "an avalanche" of claims under previous schemes; many of such claims were regarded as coming from "adventurers" who were not genuine film producers; if they were all to be paid, the amount budgeted as financial aid to the film industry would be exceeded "by hundreds of millions of rands". In these circumstances, so it was said, the State was anxious to curtail its liability under the scheme. It had to know what its liability in respect of each film would be. But, so the argument proceeded,

at the stage of registration of a film, the State would not know for what amount, if any, it was binding itself; there was only an estimate of production costs; the film might never be made; and in the present matter when application for registration was made, even the identity of the producer was uncertain; this was because the applicants were (as has been said) not then in existence. These matters would only be resolved or ascertained when a producer's claim to a subsidy was lodged. On the strength of these considerations the case sought to be made out was that what was called "the initial" registration of the film was never intended to bring about a contract; it was only intended to "give the State an idea of the extent of probable applications"; thereafter an applicant's claim had to be quantified and verified; if it was accepted, a second registration would take place; only then would a contract on the terms specified in the circular

eventuate; before this happened, the terms of the circular were nothing more than "guidelines" for those who wished to avail themselves of the benefits of the scheme. In other words, there was what was styled a "two-tiered system of registration". The acceptance of the application for registration related to the first stage of registration. No second registration ever having occurred (because the State had not decided to pay the subsidies claimed), the State was not liable.

The argument must be rejected. Firstly, it fails to take account of the commercial realities of the transaction. It was within the State's discretion whether or not to accept an application for registration. It could therefore control the claims for subsidies that might be made against it. Furthermore, it would know what the approximate amount of the subsidy in respect of local production costs was in each case likely to be. This is because, as has been stated, a

detailed production budget has to be submitted with every application for registration. And, seeing that subsidies in respect of local and foreign revenue are subject to a maximum calculable as a percentage of production costs, these subsidies too could be be estimated. Bear in mind also the provision ((vii) above) entitling the Head to withdraw registration or limit its terms where the information contained in the application for registration has materially changed. This, I would have thought, would include the case of the production budget turning out to have been materially underestimated. So the State's alleged financial dilemma is more apparent than real. In any event, this is no reason for inferring a lack of animus contrahendi. Even if it could be said that the State entered into a bad or awkward bargain or that the scheme was an unwise one, this is no ground for relieving it of its obligations. There is no question

of its undertaking being void for vagueness. The subsidies are determinable by objective criteria. Moreover, the matter must also be considered from the producer's point of view. It is clear from the evidence that the assurance of a subsidy was a significant inducement to interested persons to embark on the production of a film, including the expenditure of what appears to be substantial amounts of money. More especially is this so if regard is had to a feature of the subsidy scheme that I have not yet mentioned. In terms of sec 24 of the Income Tax Act, 101 of 1990, any taxpayer who qualifies for a subsidy payable in terms of the circular forgoes certain tax advantages that would otherwise be available to him under sec 24 F of the Income Tax Act, 58 of 1962. By providing that a producer may only apply to register a film if the film will not receive any benefits in terms of sec 24 F, the circular itself anticipates this. In the light of what

has been said, I cannot believe that any sensible business man would have entered into the agreement evidenced by the circular unless the State were bound by its undertaking to pay the subsidies in question.

Secondly, the double system of registration contended for is quite incompatible with the terms of the circular. The circular refers only to a single registration. If the intention had been that there be a second, subsequent registration (when a claim for a subsidy was accepted), this would have been plainly stated in the circular. But it is silent in this regard. Nor did the respondents adduce any evidence of a second registration ever having taken place in practice. The respondents' argument confuses the entering into of a contract with its performance. In effect, the respondents say that the binding force of the terms of the circular is suspended until a producer's claim to a subsidy is accepted. I am unable

to agree. There may be and often is an intent to contract even though you do not know what your exact liability will be under the agreement entered into. That is the case here. It will be apparent from a number of the provisions of the circular to which reference has already been made that reciprocal rights and obligations are created on registration. It is such registration that entitles a producer to a subsidy provided, of course, that he produces the film and proves his claim in accordance with the terms of the circular. So while certain provisions (governing how an application for registration is to be made and even the framing and submission of a claim) may be regarded as guidelines to a producer, there are others which clearly show that binding contractual relations come into existence prior to the final stage of the State's acceptance of a claim. The terms of the last paragraph of the Head's letter accepting the applications for

registration recognise this. I have in mind the reference to the Head's right inter alia to cancel the registration if there has been a material change in the information submitted in the application.

One final point on the argument under consideration. It relates to the fact that the applicants were only formed after registration. As I have said, the respondents contend that this detracts from there having been an intention to contract (at the stage of registration). This point was never raised by the respondents as a defence either in this way or on the more basic issue of whether an agreement was concluded in the first place. It should not be allowed to be advanced now. Besides, the evidence shows that American Ninja IV Management (Pty) Ltd and Oddball Management (Pty) Ltd, in applying for registration of their respective films, were contracting for the benefit of a partnership to be formed, ie intending a

stipulatio alteri; that the applications were accepted in the form presented; and that the applicants had each accepted the benefits of the contracts entered into on their behalf. On this basis, the fact that the applicants were not in existence when the films were registered would not detract either from the conclusion of an agreement or from it having been entered into with the necessary intent. There is nothing to indicate that the respondents would not have been prepared to contract in this way or that it was necessary that the identity of all the partners be known at the stage of registration.

What amounts to an alternative ground for resisting the applicants' claims was, however, relied on by the respondents. It was that even if a contract was concluded, it was not binding because the Head had no authority to enter into it. The argument rested on secs 31 and 32 of the Exchequer Act, 66 of 1975. In

terms of sec 31(1)(p), the Treasury has the power to approve payments as "an act of grace" from State money. In terms of sec 31(1)(q) the Treasury has the power to approve "gifts" of State moneys. However, in terms of a proviso to sec 31(1) amounts and gifts in excess of R25 000 may not be approved unless moneys for that purpose have been appropriated by Parliament. Sec 32 provides for the delegation of the Treasury's powers. It was said that the undertaking to pay the subsidies claimed by the applicants had not been approved by the Treasury; nor had the power to approve such payments been delegated; and in any event moneys for the purpose had not been appropriated by Parliament. The argument is not well-founded and can be briefly disposed of. The short answer to it is that the sections of Act 66 of 1975 relied on simply do not apply. Where, as here, the State has entered into an ordinary commercial contract, the State's liability is, as I have said, governed by

Act 20 of 1957. In any event, payments under the circular would not be an act of grace or a gift. These expressions are not defined in the Act. They must therefore be given their ordinary meaning. Both import the concept of a gratuitous indulgence or favour in return for which the promisee does not give anything of value. That is not the case here. A producer under the scheme has obligations, the main one being the production of a film. Furthermore, the State's motive was not pure liberality. One of its purposes was to earn foreign exchange for the country. So it required something in return for the payment of a subsidy. For good reason, neither "act of grace" nor "gift" is used in the circular. The evidence shows that the Head was authorised to register the applicants' films. That is an end to this point.

To sum up, I am of the opinion that in the case of each of the applicants, an agreement was entered

into with the State on the terms set out in the circular; that it has contractual force; and that it is therefore binding on the State. There is no dispute that the first respondent is, in the event of the applicants properly quantifying their claims in terms of the provisions of the circular, the person liable to make payment. I am further satisfied that the applicants have sufficiently established that they are each the "beneficial owner of the copyright" in their respective films and that they are therefore "the producer" (as defined in the circular) thereof; and that such films are South African films (also as defined). In the result, they were entitled to the declarator sought and SPOELSTRA J correctly granted it.

The following order is made:

(1) The appeal is dismissed with costs, including the costs of two counsel.

(2) No order is made on the cross-appeal, save that the

applicants (ie the respondents on appeal) are to pay the costs thereof, including the costs of two counsel.

H H NESTADT JA

CORBETT, CJ)
BOTHA, JA) CONCUR
F H GROSSKOPF, JA)
HARMS, AJA)