Case No 149/95

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter of:

THE AFRICAN NATIONAL CONGRESS First Appellant

and

THE SOUTH AFRICAN COMMUNIST

PARTY..Second Appellant

and

SIPHIWE BETHUEL LOMBO...............................Respondent

CORAM: CORBETT CI, E M GROSSKOPF, NIENABER,
MARAIS et SCOTT JJA.

DATE OF APPEAL: 12 November 1996

DATE OF JUDGMENT: 18 February 1997

J U D G M E N T

/ CORBETT CJ/

CORBETT CJ:

In the Court below (the Durban and Coast Local Division) the respondent instituted an action for damages against the two appellants, the African National Congress ("ANC") - first appellant - and the South African Communist Party ("SACP") - the second appellant. It is common cause that each appellant is a political organization capable of suing and being sued in its own name.

The following allegations, inter alia,are made in respondent's particulars of claim:

(1) In about January 1986 respondent became a member of the ANC and, at the instance of the ANC and the SACP, left for Botswana in order there to undergo military training so as to be able to assist the appellants in their struggle against the then Government of the Republic of South Africa.

(2) During January 1986 the respondent was abducted by the appellants and handed over to the Botswana security forces who

interrogated him for three days. He was also then deprived of certain personal property.

(3) Thereafter appellants transported the respondent to Lusaka, Zambia, where he was imprisoned in a prison described as "RC" until about May 1986. This was followed by similar incarcerations in the "Nova Stallicao" prison in Angola until about November 1986; in the "Quatro" prison, also in Angola, until about December 1988; and in the "Bokoloda" prison in Uganda until his release by the appellants in August 1991.

(4) During his incarcerations the respondent was subjected to various forms of maltreatment, including detention in isolation and in darkness, prolonged interrogation, torture, asssaults and threats of death.

(5) During his imprisonment the respondent was deprived of adequate quarters, proper food, medical treatment, proper clothing, study and recreational opportunities, communication

with fellow detainees, and so on. (6) As a result of these assaults and torture the respondent suffered

pain, physical injury and mental anguish.

In his particulars of claim the respondent names various persons at whose instance this maltreatment at the hands of his guards occurred and avers that these persons were at all material times members of the appellants and acted in pursuance of the aims and objects of the appellants. He accordingly claims from the appellants damages in large sums of money for unlawful imprisonment, assault and torture, deprivation of the amenities of life, pain and suffering, shock, contumelia, loss of income and loss of his personal property. To these particulars of claim the appellants raised a number of special pleas and a main plea on the merits. When the matter came to trial before Broome DJP, he, at the request of the parties, heard argument on the fifth and sixth special pleas only and. reserved judgment. This was done presumably in terms of Uniform

Rule of Court 33 (4). The learned Judge later delivered judgment in terms of which both special pleas were dismissed with costs. With the leave of the trial Judge the appellants have appealed to this Court against his dismissal of the fifth special plea only.

This appeal was not prosecuted in accordance with the Rules of the Appellate Division. Notice of appeal was filed timeously, but the period of 20 days for the lodging of the power of attorney as prescribed by AD Rule 5 (3)(b) elapsed on 5 May 1995 without the required powers having been lodged. These powers of attorney, supported by resolutions by the appellants, were lodged only on 11 September 1995. The appellants were also seven days late in entering into security as required by AD Rule 6 (2) Appellants applied for condonation of their failure in these respects to comply with the Rules. It is not necessary to detail the reasons advanced for such failure. In short they indicate that the failure is to be attributed largely to the neglect of the appellants' then attorney. There was also

an undue delay in lodging the application for condonation.

Shortly after the lodging of the application for condonation respondent filed a notice of opposition thereto, but indicated that his opposition would be limited to the questions whether the grantor of the power of attorney was properly authorized to act on behalf of the appellants (petitioners) and whether the appellants had succeeded in discharging "the onus of establishing such as is necessary to succeed in the application". Subsequent to this a fresh application for condonation was filed to which were attached a new power of attorney and fresh resolutions.

When the appeal was called before us respondent's counsel indicated that in the light of the new documentation he withdrew the objection to the power of attorney and opposed the condonation solely on the ground that there were not reasonable prospects that the appeal would succeed. He also pointed out that there was no tender of wasted costs, but this was immediately made

by appellants' counsel. In the circumstances the Court proceeded to hear argument on the merits of the appeal, in order to determine both the application for condonation and, in the event of its success, the appeal itself. I proceed now to consider those merits. The fifth special plea reads as follows:

> 1. At all times material and more especially prior to 3rd February 1990, the first and second defendants were banned alternatively unlawful organisations in terms of the laws of the Republic of South Africa.
>
> 2. In the premises the first and second defendants did not exist in law and accordingly could not commit any of the delicts alleged.
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> 3. In the further premises no action in law lies against the first and or second defendants for any or all acts committed by the first and second defendants during the aforesaid period of May 1986 to 1st February 1990.
>
> WHEREFORE the first and second defendants pray

that the plaintiffs claim for any or all acts committed between the period May 1986 to February 1990 be dismissed and for judgment in their favour with costs, such costs to include the cost of two Counsel."

(I have quoted from the pleadings in the appeal record. The judgment of the Court a quo quotes the fifth special plea, but para 3 is in terms different from what I have quoted. It is not clear to me which of these versions is the correct one. In my view, however, nothing turns on this difference.)

It is conceded by counsel for the appellants (correctly in my view) that prior to the enactment of certain legislation which resulted in each of the appellants being declared an "unlawful organization" (or, as it is sometimes put, being "banned - see S v Arenstein 1967 (3) SA 366 (A), at 373 B), each of them constituted a universitas personarum, i e an artifical or juristic person constituting a legal entity apart from the natural persons (members) composing it, having the capacity to acquire rights and incur obligations and to own

property apart from its members and to sue and be sued, and having perpetual succession. (See Webb & Co Ltd v Northern Rifles; Hobson & Sons v Northern Rifles 1908 TS 462, at 464-5; Magnum Financial Holdings (Pty) Ltd (In Liquidation) v Summerly and Another NNO 1984 (1) SA 1(50 (W), at 163 E-G.) The general contention of the appellants is, however, that as a result of their being declared unlawful organizations each of them was stripped of its legal personality and was rendered a "phantom" organization, having no legal existence and, therefore, being incapable during the relevant period (1986 to February 1990) of committing any of the delicts alleged by the respondent. Accordingly, so it was argued, no action in law could lie in respect of these delicts and the fifth special plea ought to have been upheld with costs.

The earliest relevant piece of legislation was the Suppression of Communism Act 44 of 1950, which came into operation on 17 July 1950 (see Kahn v Louw NO and Another 1951

(2) SA 194 (C), at 199 E). This Act contained along and extensive definition of "communism" (sec 1) and it declared the Communist Party of South Africa, including all its component bodies, to be an "unlawful organization" (sec 2(1)). It further empowered the Governor-General to declare, by proclamation in the Gazette, any other organization to be an unlawful organization if he was satisfied that it professed to be an organization for propagating the principles of communism, or that this was one of its purposes, or that it engaged in activities calculated to further the objects of communism, or that it was controlled by such an organization (sec 2 (2)). The Act also defined (in sec 3) the consequences where an organization had been declared unlawful. I shall return to this aspect later.

The next legislation of relevance was the Unlawful Organizations Act 34 of 1960. Sec 1 (1) of this Act empowered the Governor-General, if he was satisfied that the safety of the public or the maintenance of public order was threatened in consequence of the

activities of "the body known as" the Pan Africanist Congress or "the body known as" the African National Congress, to declare the body, without notice to it, to be an unlawful organization; this to be done by proclamation in the Gazette. And sec 1 (2) gave a similar power to declare unlawful any body which in his (the Governor-General's) opinion had been established to carry on, directly or indirectly, any of the activities of a body declared unlawful under sec 1 (1). In terms of sec 2 of this Act various provisions of Act 50 of 1950 were applied to organizations declared unlawful under sec 1 (1) or sec 1 (2).

On 8 April 1960 and acting in terms of sec 1 (1) of Act 34 of 1960, the Governor-General promulgated a proclamation in which he declared the Pan Africanist Congress and the ANC to be unlawful organizations. And on 4 February 1966 and acting this time under sec 2 (2) of Act 44 of 1950, the State President by proclamation declared an organization known as The South African Communist Party to be an unlawful organization. Initially, having regard to sec

2 (1) of Act 44 of 1950 (which it will be remembered declared unlawful the Communist Party of South Africa), I was puzzled by the proclamation of 4 February 1966, but it would appear that the SACP and The Communist Party of South Africa were different organizations: that the latter dissolved, or purported to dissolve, itself in 1950 (see Kahn v Louw. NO and another, supra, while the former came into existence in or about 1960 (S v Arenstein. supra at 373 F).

Between their respective dates of enactment and 1982, Act 44 of 1950 and Act 34 of 1960 were amended in various respects. In 1982 there was enacted the Internal Security Act 74 of 1982, which was promulgated on 9 June 1982. According to its long title this was an Act —

> "To provide for the security of the State and the maintenance of law and order; and to provide for matters connected therewith."

It repealed the whole of Act 34 of 1960, as amended, and virtually the

whole of Act 44 of 1950, as amended, together with certain other "security" legislation (see sec 73). Act 74 of 1982 contained provisions for the declaration of certain organizations as unlawful, in many respects similar, and some respects identical, to earlier legislation. It also in effect extended such declarations under previous legislation by means of the following definition of "unlawful organization":

" 'unlawful organization' means an organization —

(6) which, before the commencement of this Act, was by or under any law repealed by section 73 declared to be an unlawful organization for the purposes of the repealed law in question, and which immediately prior to the said commencement is such an unlawful organization; or

(7) which, under section 4, is at any time after the said commencement declared to be an unlawful organization, and includes any branch, section or committee of any such organization and any local, regional or subsidiary body forming part of any such organization; ".

Act 44 of 1950 and Act 34 of 1960 contained laws repealed by sec 73 of Act 74 of 1982; and the ANC and the SACP were organizations which had been declared unlawful for the purposes of such laws and were such at the commencement of Act 74 of 1982. Accordingly they constituted unlawful organizations in terms of Act 74 of 1982. (See also in this regard sec 73 (2) which deems notices and orders given under the previous legislation to have been given under Act 74 of 1982.)

In terms of sec 4 (3) of Act 74 of 1982 and by a notice in the Gazette dated 3 February 1990, the proclamations of 8 April 1960 (declaring the ANC to be an unlawful organization) and of 4 February 1966 (declaring the SACP to be an unlawful organization) were withdrawn. I think that we may take judicial notice of the fact that the intended "unbanning" of these organizations had been announced by the then State President, Mr F W de Klerk, in his statement to Parliament on 2 February 1990.

In debating the effect of the appellants having been declared unlawful organizations, counsel for all parties focused on the provisions of Act 74 of 1982. Many of the relevant provisions of this Act are to be found in the earlier legislation, but since the material period is January 1986 to February 1990 and since the ANC and the SACP were unlawful organizations in terms of Act 74 of 1982 during this period, counsels' approach would seem to be an acceptable one.

Counsel for appellants referred us to certain decisions pertaining to illegal associations in terms of legislation relating to companies and sought to draw an analogy from them. One of these is a decision of the Cape Provincial Division, South African Flour Millers' Mutual Association v Rutowitz Flour Mills Ltd 1938 CPD 199. This concerned sec 4 of the Companies Act 46 of 1926 which provided that —

" ... no company, association, syndicate or partnership

> in the Union for the purpose of carrying on any business that has for its object the acquisition of gain by the company, association, syndicate, or partnership or by the individual members thereof, unless it is registered as a company under this Act, or is formed in pursuance of some other law, or of Letters Patent, or Royal Charter."

The applicant was an association of flour millers which had allowed its membership to increase to twenty-one. It applied for a declarator, inter alai,that it was a legal association. At the time the application was heard the number of members had fallen below twenty-one. The main issue was whether the applicant was formed to carry on a business that had for its object the acquisition of gain by the association or its members. The Court held that the applicant was formed to carry on such a business for the acquisition of gain by its members and that it was, therefore, an illegal association. An alternative argument was presented on behalf of the applicant and the Court (Davis J, Centlivres J concurring) dealt with it thus (at 208-

209) —

"Mr Fagon argued further that even if at one stage the Association became an illegal one, and thus disappeared from the ken of the law, yet that when the; membership was again reduced below twenty-one it automatically revived. In my opinion this is not so. When once the Association became, as it has been put, a phantom - see Palmer (13th ed., p. 101) - it could not revive. 'Once dead, always dead, seems to me a terse way of putting the situation. I cannot believe that an Association can automatically one day be legally dead and the next day be alive and fully functioning, according as to whether it happens to have more than twenty members or not at any particular time. The very evil of uncertainty aimed at by the section would be increased a thousand-fold if this were so. Nor does it seem to me possible that a man who becomes aware that he is a member of an illegal Association and who subsequently does not worry himself any further about it, could, by the death of a number of members without his knowledge, perhaps years later find himself again to be a member. (Incidentally, he could not even resign, for there is no body to accept that resignation; a phantom surely cannot do so.) In the case of Ex porte Thomas; (14 Q.B.D. 379), the hitherto illegal

> association became registered under the Companies Act; from that moment it, of course, was no longer illegal, and the debtor who had paid instalments of his debt since registration with knowledge thereof was held tacitly to have agreed that his debt should be taken over by the new and legal concern. Upon a like principle, if I could upon these papers find any proof that respondent, with full knowledge of the circumstances, had, after the membership of the Association had ceased to be over twenty, done something unequivocal from which its assent to a new Association being formed could be inferred, I should hold that the previous illegality was immaterial. Thus, supposing at a date when the members had again been reduced below twenty-one the members (including respondent) had met together and amended the constitution, I think that that act would be tantamount to an agreement to restart on the old terms the Association which had died when it became too large to exist."

Further it would seem that an association offending against sec 4 of the Companies Act of 1926 lacked locus standi in judicio (see R v Twala 1952 (2) SA 599 (A), at 608 A - C; also Eaton Robins & Co v Nel (1909) 26 SC 365, at 369-70; Wakefield

<u>v ASA Seeds (Pvt)Ltd</u> 1976 (4) SA 806 (R), at 809 H - 810 A). The same would no doubt apply in the case of sec 30 (1) of the Companies Act 61 of 1973, which is identically worded. It seems to me that this approach constitutes a particular application of the general principles relating to the validity or invalidity of a transaction entered into or act done in contravention of a statutory provision or in disregard of a statutory requirement: as to which see <u>Swart v Smuts</u> 1971 (1) SA 819 (A), at 829 C - 830 C. The question is whether this approach applies in the case of an organization declared unlawful in terms of Act 74 of 1982.

Before discussing this I would make two preliminary observations. The first of these arises from the fact that, as already indicated, it is - and was before the Court a quo - common cause that at common law each of the appellants is a universitas capable of suing and being sued. As there is no evidence, or indeed averment, that either the ANC or the SACP reconstituted itself after 3 February 1990

and, accepting the principle stated in the South African Flour Millers case that "once dead, always dead," the acknowledgement of the present legal capacity of the appellants is hardly consistent with the notion that immediately prior to February 1990 they were non-persons or phantoms having no existence in law.

The second observation is that appellants' argument is founded on the supposition that their legal existence and capacity to incur delictual liability during the period May 1986 to February 1990 must be adjudged by reference to South African domestic law. The alleged delicts were all committed on foreign soil and this raises the question whether the rules of South African private international law regarding the choice of law in such a case would apply the lex fori or the appropriate lex loci delicti commissi.This problem in general is discussed by Prof C F Forsyth in his work Private Internationl Law; 3rd ed, 303-16. The point was not fully argued before us and I do not find it necessary to decide it. I shall assume, in appellants'

favour, that South African domestic law, including the security legislation to which I have referred, applies.

I turn now to the merits of appellants' argument. In this regard it is important to note that, unlike the sections in the Companies legislation, Act 74 of 1982 does not prohibit the formation of a particular kind of association or organization: it empowers the Minister of Law and Order on certain grounds to declare an organization to be an unlawful organization. The intended effect of such a declaration, and more particularly whether such a declaration causes the organization in question to become a non-person or phantom, must be sought in the provisions of Act 74 of 1982 as a whole.

There is no provision in Act 74 of 1982 which expressly decrees that an organization, once declared unlawful, ceases to be vested with legal personality. On the contrary, there are a number of provisions of the Act which seem to presuppose the continued

existence de jure of an organization after its banning. The Minister's powers to declare an organization to be an unlawful organization are prescribed by sec 4 (1) and sec 4 (2) of the Act. (I shall later consider sec 4 (2) in some detail.) The consequences of such a declaration of unlawfulness are set forth, partly, in sec 13 (1) which reads as follows:

> "13. (1) As from the date upon which an organization becomes an unlawful organization by virtue of a notice under section 4 (1) or (2) or, for the purposes of paragraph (a) of the definition of 'unlawful organization', as from the date of commencement of this Act —
>
> (a) no person shall —
>
> (i) become, continue to be or perform any act as an office-bearer, officer or member of the unlawful organization;
>
> (ii) carry, be in possession of or display anything whatsoever indicating that he is or was at any time before or after the commencement of this Act an office-bearer, officer or member of or in any way associated with the

unlawful organization;

(iii) contribute or solicit anything as a subscription or otherwise, to be used directly or indirectly for the benefit of the unlawful organization;

(iv) in any way take part in any activity of the unlawful organization, or carry on in the direct or indirect interest of the unlawful organization, any activity in which it was or could have engaged at the said date; or

(v) advocate, advise, defend or encourage the achievement of any of the objects of the unlawful organization or objects similar to the objects of such organization, or perform any other act of whatever nature which is calculated to further the achievement of any such object;

(8) all property (including all rights and documents) held by the unlawful organization or held by any person for the benefit of the unlawful organization, shall vest in a person designated by the Minister of Justice as the liquidator of the assets of the unlawful organization; and

(9) the unlawful organization shall, if it is registered in any office, cease to be registered, and the officer in charge of the register shall remove its name from the register."

Sec 13(1) clearly contemplates that <u>after</u> an organization has become unlawful, a person might become or continue to be an office-bearer, officer or member thereof; or might possess or display evidence of such membership; or might contribute or solicit subscriptions for the benefit of the organization; or might take part in this activities of the organization; or might advocate the achievement of the objects of the organization. This is all prohibited and contravention of this prohibition is made a criminal offence by sec 56 (l)(a) of the Act. It is difficult to visualize these offences being committed in relation to a phantom. Just as a phantom cannot accept the resignation of a member (see quotation from the judgment of Davis J in the <u>South African Flour Millers</u> case, supra) so it could hardly enrol a new member; and likewise be the object of the other prescribed acts listed in sec 13 (l)(a). Sec 22 (1), which deals with Gazetted prohibitions by the Minister against certain persons being or becoming office-bearers, officers or members of an unlawful organization, also appears

to recognise the possibility of this happening after the organization has become unlawful. And sec 13 (4) is equally significant. It provides:

> "(4) Notwithstanding anything to the contrary contained in any instrument, rule or agreement governing the relations between the unlawful organization and its office-bearers, officers or members, any such office-bearer, officer or member may by resignation terminate his relationship with the unlawful organization as from the date of the resignation."

Thus in this instance the Legislature considered it necessary to facilitate resignation from an unlawful organization, something redundant if the organization were rendered a phantom by the declaration of unlawfulness. Moreover, this provision appears to recognize that the "instrument, rule or agreement" referred to has legal effect and could otherwise prevent such a resignation.

I come now to the provisions of sec 4 (2), strongly relied upon by the appellants. It reads:

(2) (a) The Minister may by notice in the Gaztte declare

that any body, organization, group or association or

persons, institution, society or movement described

in or known by a name specified in the notice and

which in his opinion exists, or existed at any time

after 7 April 1960 —

(i) is in fact a body or organization specified in the notice which by virtue of a notice under subsection (1) or by virtue of the provisions of paragraph (a) of the definition of 'unlawful organization' is an unlawful organization;

(ii) was in fact at all times subsequent to a date specified in the notice, not being earlier than 8 April 1960, a body or organization so specified which by virtue of a notice under subsection (1) or by virtue of the provisions of paragraph (a) of the definition of 'unlawful organization' is an unlawful organization.

and thereupon the said body, organization, group or association of persons, institution, society or movement shall in any criminal proceedings be deemed to exist or to have existed at all such times, as the case may be, and to be or to have been at all such times, as the case may be, the said unlawful organization.

(b) In any criminal proceedings any act or omission

proved with reference to any body, organization, group or association of persons, institution, society or movement corresponding to the description or known by a name corresponding to the name of a body, organization group or association of persons, institution, society or movement in respect of which a notice has been issued under this subsection, shall be deemed to have been proved with reference to the unlawful organization specified in the notice.

(c) Whenever in any notice under this subsection a date is specified in terms of paragraph (a) (ii), any person who at any time during the period between the date so specified and the date of publication of such notice was an office-bearer, officer or member of any body, organization, group or association of persons, institution, society or movement corresponding to the description or known by a name corresponding to the name of any body, organization, group or association of persons, institution, society or movement in respect of which the notice has been issued, shall, for the purposes of any criminal proceedings, be deemed to have become an office-bearer, officer or member of the unlawful organization specified in the notice,

on the day immediately following upon the date so specified."

A provision in similar terms was introduced in Act 34 of 1960 by an amendment effected by sec 14 of Act 37 of 1963. The 7th of April 1960 was the date on which Act 34 of 1960 was assented to.

It was argued on appellants' behalf (with reference to sec 4 (2)(a)) that, in deeming the existence of an unlawful organization for criminal proceedings only, the Legislature clearly did not intend an unlawful organization to exist for the purpose of civil proceedings; that accordingly this was an appropriate case for invoking the aid of the maxim expressio unius est exculusio alterius; and that the object of the provision was to prevent persons prosecuted for offences relating to banned organizations escaping conviction because of the non-existence of such organizations in the eyes of the law.

In my view, this argument is not well-founded. As I have shown, sec 4 (2)(c) is not a general deeming clause relating to all

cases of unlawful organizations: it has a specific and limited application. This subsection relates, as I understand it, to a case where a body (e g the ANC) is an unlawful organization, either by declaration under sec 4(1) or by virtue of the provisions of para (a) of the definition of "unlawful organization", but it comes to be described or known (in the view of the Minister) by a different name (say the "XYZ"). In such a case, and provided that he is of the opinion that it (the body) exists or existed at any time after 7 April 1960, the Minister may, by notice in the Gazette, declare that the body known as the XYZ —

(i) is in fact (Afrikaans: "in werklikheid") the ANC; and

(ii) was in fact at all times subsequent to the specified date - not being later than 8 April 1960 - the ANC.

Upon such a declaration the body (i e the XYZ) is deemed, for the purposes of criminal proceedings, to exist or to have existed, as the case may be (i e depending on the expressed opinion of the Minister

in this regard) and to have been at all times the ANC. In the circumstances, there is no basis for the application of the expressio unius rule or for the inference that in civil proceedings all unlawful organizations are to be regarded as not having any existence. Indeed sec 69 (1), which is clearly intended to be applied in respect of unlawful organizations, provides:

> "If in any prosecution in terms of this Act, or in any civil proceedings arising from the application ofaayprovinon of this Acf, in which it is alleged that any person is or was a member or an active supporter of any organization, it is proved that he attended any meeting of that organization, or has advocated, advised, defended or encouraged the promotion of any of its purposes, or has distributed or assisted in the distribution of or caused to be distributed any periodical or other publication or document issued by, on behalf of or at the instance of that organization, he shall be presumed, until the contrary is proved, to be or to have been a member or an active supporter, as the case may be, of that organization." (My emphasis.)

This sub-section clearly contemplates the issue arising in civil proceedings as to whether a person is a member of an unlawful organization; and thus predicates the existence in law of such an organization in civil proceedings.

Sec 4(3) of Act 74 of 1982 empowers the Minister to withdraw any notice issued under sec 4(1) or (2) "by like notice". The object of such a withdrawal would seem to be the release of the organization and its members from the consequences of banning and to reinstate it as a lawful body. If the consequences of banning were to eliminate the organization as a legal persona more than the mere withdrawal of the original banning order would seem to be necessary in order for it to be so reinstated. This suggests that this was not the consequence in law of a banning order. Indeed, when on 3 February 1990 the ANC and the SACP were "unbanned" by a notice in the Gazette withdrawing the original banning orders, it appears to have been generally accepted that these bodies ipso jure again became

lawful associations.

In support of their contentions appellants' counsel cited the case of United Methodist Church of Southern Africa and Others v Methodist Church of South Africa and Others 1991 (2) SA 138 (Tk AD). The facts in that case were that in 1978 die first respondent, the Methodist Church of Southern Africa, was banned in terms of the Undesirable Organizations Act 98 of 1975 (Tk). Thereafter legislation was passed in Transkei, the Methodist Church of Transkei (Private) Act 41 of 1978 (Tk), in terms of which the Methodist Church of Transkei (first appellant) was established and all the property of first respondent became the property of the first appellant. In November 1988 Decree 8 was issued which sought to remove the stigma of being an undesirable organization as far as first respondent was concerned and to restore it, as far as possible, to its position before the passing of Act 41 of 1978. The Decree (read with a Schedule) provided, inter alia, that all property the ownership of

which was vested in the first appellant should now vest in the first respondent. One of the issues in the case related to the interpretation of the Decree: whether its effect was to vest in the first respondent all the property held by the first appellant up to the date when the Decree came into operation or whether it merely applied to the property which was granted to the first appellant in terms of Act 41 of 1978. The Court held the latter to be the correct interpretation. In coming to this conclusion James JA (with whom Goldin JA and Hancke AJA concurred) made the following observation:

> "Decree 8 did not seek to destroy the first appellant as the first respondent had been destroyed by the provisions of the Undesirable Organizations Act, and I consider that any interpretation of the Schedule must take this matter into account".

I do not think that this case assists the appellants at all. The legal effect of the Undesirable Organizations Act 98 of 1975 (Tk) was not in issue. Nor has it been shown that this Act is in pari

materia. The Court was only concerned with the interpretation of the Decree and its effect upon the property of the first respondent. It was in this context that the above-quoted remark was made.

It is true, as emphasized in argument by appellants' counsel, that under the South African legislation the banning of an organization resulted in the liquidation of its assets. It does not follow from this, however, that it was deprived of legal personality. For the reasons given I do not think that it was.

I accordingly am of the opinion that the Court a quo came to a correct conclusion on this aspect of the case. I do not consider it necessary to consider the other point raised in the judgment a quo, viz whether, assuming that the declaration as an unlawful organization deprived the appellants of the right to sue, it followed that they could not have been sued. The fifth special plea was correctly dismissed.

Having taken into account the circumstances of the appellants' non-compliance with the Rules and the merits of the appeal,

I am of the view that as there are no real prospects of success the granting of condonation would not be warranted.

The application for condonation is accordingly refused with costs, the latter to include the respondent's costs in relation to the appeal.

MM CORBETT

E M GROSSKOPFJA)
NIENABER JA) CONCUR
MARAIS JA)
SCOTT JA)