

B. H. J. A. 1.

GRIFFIER, HOOGGEREGSHOF VAN SUID-AFRIKA	
(APPELLANT)	
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P G CASTEL N O

APPELLANT

and

METAL & ALLIED WORKERS' UNION

RESPONDENT

J J F HEFER, JA.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

CASTEL N.O.APPELLANT

and

METAL & ALLIED WORKERS' UNIONRESPONDENT

CORAM:JANSEN, VILJOEN, HEFER,SMALBERGER et VIVIER,JJA.

HEARD : 18 MAY 1987.

DELIVERED : 25 AUGUST 1987.

J U D G M E N T

HEFER, JA :

I shall refer to the parties to this appeal

by2

by their titles: in the Court a quo. What gave rise to the litigation between them, was a prohibition in terms of sec 46(3) of the Internal Security Act, No 74 of 1982 ("the Act") by the Minister of Law and Order ("the Minister") of all open air gatherings which were not of a bona fide sporting nature. Since 1 April 1984 such gatherings could only be held with the express permission of the Minister or of the magistrate of the district concerned.

The applicant is a registered trade union.

It has a branch in Natal. On 26 April 1984, Schreiner, the secretary of the Natal branch, applied to the chief magistrate of Durban for permission to hold

the.....3

the annual general meeting of the branch in the open air at Curries Fountain on 12 May 1984. On 4 May 1984 the respondent, who was the acting chief magistrate at the time, telephoned Schreiner and, after a brief discussion, refused permission for the meeting. This led to an urgent application to the Court a quo to set aside the respondent's refusal and to direct him to authorise the meeting. Despite opposition, WILSON J granted an order as prayed. The learned judge undertook to file his reasons for the order later. In the event more than seven months passed before he finally did so. Thereafter he dismissed an application by the respondent for leave to

appeal.....4

appeal and the present appeal, which is directed at the whole order, was noted with the leave of this Court.

Before I turn to the appeal itself I wish to deal briefly with the refusal of the application for leave to appeal by the Court a quo. The learned judge refused leave to appeal for no other reason than that the matter had become "totally academic, the meeting having been held". This approach is patently wrong. The fact that the meeting had already been held and that the effect of the order could accordingly no longer be undone, did not bring about that the matter had become academic.

Pronouncements....5

Pronouncements to the effect that a Court of appeal will not enquire into matters which are of intellectual or academic interest only (cf African Guarantee and Indemnity Co Ltd v Van Schalkwyk and others 1956(1) S A 326 (A) at p 329), are not to be misconstrued. As appears from the judgment of this Court in Lendalease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola and others 1976(4) S A 464 (A) at p 486, they

"all deal with the situation where the issue presented for decision to the Court of first instance was at that stage of abstract or intellectual interest only."

When.....6

When the urgent application was presented to the Court a quo in the instant case there was " a very real, live issue" (as CORBETT JA fittingly described it in the Len- dalease case) and what happened subsequently was of no importance. Leave to appeal ought not to have been refused merely because the meeting had already been held by the time that the application for leave was heard.

The reasons for WILSON J's order were reported in 1985(2) S A 280. Briefly stated, the Court's main findings were

- (a) that the applicant had not been given a hearing;

(b).....7

(b) that the respondent had erred in his consideration of the application for authority by adopting an incorrect approach and by taking irrelevant matters into account; and

(c) that the respondent had refused the application mala fide and in fraudem legis.

If the first finding is correct, it will dispose of the appeal. I shall accordingly deal with it first. The learned judge did not elaborate on the cryptic statement at p 287 A of the report that the applicant had not been afforded a hearing, and the reader has been left in the dark as to the facts and grounds upon which such an important finding came to be made.

It.....8

It emerged in this Court that the applicant's case was that potentially prejudicial information or private knowledge which the respondent had, had not been disclosed to the applicant and that it had not been given an opportunity to refute it before the decision to refuse authority was taken. We were referred in this regard to the factors listed at p 287I - 288F as the ones which the respondent said had weighed with him in coming to the conclusion that the proposed meeting might lead to a breach of the public peace and should accordingly not be authorised. None of them had been disclosed to Schreiner before permission for the meeting was refused. They came to light for the

first time when respondent's opposing affidavit was filed.

On the authority of Pretoria North Town Council v Al Electric Ice-Cream Factory (Pty) Ltd 1953(3) S A 1(A) at p

13G - H and other similar cases it was submitted that the applicant had not been given a proper hearing.

This argument brought to the fore the real question which calls for decision. It is whether the audi alteram partem rule had to be observed by the respondent in dealing with the application for authority. His counsel submitted that there was no need for its observance since, according to the majority judgment in Laubscher v Native Commissioner, Piet Retief 1958(1) S A 546 (A) and subsequent decisions of this Court, a public official

performing.....10

performing an administrative function need not observe the rule if the performance of the function does not affect the rights of or will not entail legal consequences to another. In the present case, respondent's counsel argued, the refusal of authority for the meeting did not affect any right of and did not involve legal consequences to the applicant; a gathering of the proposed kind had been prohibited and could not validly be held without authority, and the Court a quo erred in distinguishing Laubscher's case (at p 286G of the report) by finding that "the applicant, in applying for authority to hold a meeting, was not applying for permission to do something it was not otherwise entitled to do".

Applicant's counsel supported the Court a quo's ruling that Laubscher's case is distinguishable - although he did so on grounds which do not seem to have been considered by the Court. The dispute in this Court thus centred on the applicability of the principle in Laubscher's case.

Respondent's counsel received full support for his argument from the decision in Congress of South African Trade Unions v District Magistrate of Uitenhage and another 1987(2) S A 102 (S E C L D) which appeared in the Law Reports not long before the hearing of the appeal. In that case KROON J came to the conclusion on the authority of Laubscher's case that the audi

alteram partem rule need not be observed by a magistrate in an application for authority to hold a gathering prohibited in terms of sec 46(3), and expressly dissented from the Court a quo's reasoning in the present case. I may say at the outset that I am generally in agreement with what KROON J stated at p 107F-108C. Points were, however, raised in the appeal which KROON J did not consider. This judgment will therefore have to be somewhat more elaborate than his.

Appellant's counsel, correctly, did not contend that the applicant had a right to hold the gathering for which respondent's authority was sought. Sec 46(3) of the Act provides that -

" (t)he Minister may, if he deems it necessary or expedient in the interests of the State or for the maintenance of the public peace or in order to prevent the causing, encouraging or fomenting of feelings of hostility between different population groups or parts of population groups of the Republic, prohibit in a manner determined in subsection (2) (a) -

- (a) any gathering in any area; or
- (b) any particular gathering or any gathering of a particular nature, class or kind at a particular place or in a particular area or wheresoever in the Republic,

during any period or on any day or during specified times or periods within any period, except in those cases determined in the prohibition in question by the Minister or which the Minister or a magistrate acting in pursuance of the Minister's general or special instructions may at any time expressly authorize."

These words leave no doubt as to the underlying intention.

The section clearly confers upon the Minister the power to prohibit any gathering or any kind of gathering or all gatherings if he deems it necessary or expedient for any of the stated purposes. Provided that it is exercised for no other purpose there are no bounds to his power. I say this despite the form in which the provision has been couched. Its last three lines may suggest to the reader - and apparently suggested to the Court a quo as appears from pp 285I and 286F - G of the report - that the power to prohibit does not extend to the cases mentioned after the word "except", ie that the Minister may not prohibit gatherings "in those cases determined in the prohibition in question by the Minister

or which the Minister or a magistrate-----may expressly authorize". Any impression of such a limitation of power must, however, be dispelled. It is entirely illogical to say that the Minister may not prohibit a gathering which he himself may decide not to prohibit, or which he or a magistrate may authorise. Such a construction would, moreover, render the power to prohibit entirely nugatory: bearing in mind that the section contains no limitation of the gatherings which may be excluded by way of a determination in a prohibition or which the Minister or a magistrate may authorise, the Minister would, on that construction, have no power to prohibit any gathering. It is clear that the words in question were not

intended.....16

intended as a curtailment of the power granted earlier in the section. If, by reference to what happened in the present case, one were to ask, for instance, whether the Minister had the power to prohibit gatherings of a bona fide sporting nature, the answer is plainly in the affirmative; it remains the same if the question is whether he had the power to prohibit other open air gatherings.

In the exercise of this power the Minister published the notice. It reads as follows:

"Prohibition of gatherings in terms of s 46(3) of the Internal Security Act 1982.

Whereas I, Louis le Grange, Minister of Law and Order, deem it expedient for the maintenance of the public peace, I hereby prohibit, in terms of s 46(3) of the Internal Security Act, 1982 (Act 74 of 1982) any gathering

in the Republic of South Africa from 1 April 1984 up to and including 31 March 1985, except in the cases of gatherings -

- (1) of a bona fide sporting nature; or
- (2) taking place wholly or for as long as they last within the walls of a building; or
- (3) at any time expressly authorised by me or the magistrate of the district concerned.

Dated at Cape Town this 5th day of March 1984."

The wording of the notice is traceable to that of sec 46(3)

and what I said earlier in regard to the use of the word

"except" and the words following thereafter, applies

mutatis mutandis to the notice too. Its effect is that,

as from 1 April 1984 and for a year thereafter, all open

air gatherings except those of a bona fide sporting

nature.....18

nature were prohibited and could only be validly held with the express authority of the Minister or the magistrate concerned.

That no-one, therefore, had a right to hold a meeting in the open without the required authority seems to be such an obvious conclusion that, when WILSON J stated that "the applicant, in applying for authority to hold a meeting, was not applying for permission to do something which it was not otherwise entitled to do", he could not have implied that the applicant was entitled to hold the proposed meeting without authority. What he did intend to convey thereby, or what the grounds were for making such a statement, is by no means clear.

Judging by some of his other remarks (cf pp 284F - G, 285I - J and 286F - G) he seems to have held the view that sec 46(3) renders the freedom of assembly subject to the Minister's regulatory powers and that this freedom is affected by the refusal of authority for a gathering. But I would not venture to say that this was indeed the basis for distinguishing Laubscher's case. In the course of what follows, I shall nevertheless consider the extent to which the applicant's freedom of assembly may have been affected by the

respondent's.....20

respondent's refusal.

This very freedom of assembly was the basis on which applicant's counsel addressed us. It is, as he pointed out, one of the primordial rights which every citizen in a democratic society has. (S v Turrell and others 1973(1) S A 248(C) at p 256G-H). Another such right is embodied in the freedom to trade. As a result of statutory interference neither of these has remained intact : generally speaking, the right to trade may no longer be exercised otherwise than by licence and, in the event of a prohibition in terms of sec 46(3), the right of assembly may not be exercised save upon the authority of the Minister or a magistrate. An appli-

cation.....21

cation for authority, so the argument went, is not materially different from an application for a trading licence and it is generally accepted that the audi alteram partem rule has to be observed in applications of the latter kind. (Hack v Venterspost Municipality and others 1950(1) S A 172 (W); Tayob v Ermelo Local Road Transportation Board and another 1951(4) S A 440 (A)).

On the analogy of an application for a trading licence applicant's counsel argued that the rule also has to be observed in an application for authority in terms of sec 46(3).

In my view , however, the analogy of an application for a trading

licence.....22

licence is not a true one. The correct approach to such an application appears from what CENTLIVRES CJ said in Tayob's case (at p 449A - C) viz :

"The Chairman went on to suggest that the granting of an exemption was not a right but merely a privilege. It almost amounts to saying that the granting of an exemption is in the gift of the Commission or a local board. This is a wrong approach to adopt by a statutory board which is empowered by Parliament to grant permission to carry on a trade. It is not an exceptional privilege or monopoly which depends on the issuing of the permission. Even the humblest citizen has the right to approach such a board and he is entitled to get the permission he requires, unless there are sound reasons to the contrary. Cf Foxcroft v Bloemfontein

Licence23

Licence Certificate Board 1921 O.P.D. 148
at p 150."

(In Foxcroft's case a trading licence was described as -

"-----not an exceptional privilege or a valuable monopoly which depends on the issuing of the licence. It is a matter of the right of selling scones and other merchandise, a right which by the general law of the land every subject, even the humblest, possesses").

(See further Pretoria North Town Council v A.I. Electric Ice-Cream Factory (Pty) Ltd (supra) at p 10, Welkom Village Management Board v Leteno 1958(1) S A 490 (A) at p 505).

Unlike an applicant for a trading licence, an applicant for authority to hold a prohibited gathering is not entitled to get the permission he requires unless

there.....24

there are sound reasons to the contrary. A pre-requisite to the exercise by the Minister of his powers in terms of sec 46(3) is a decision by him that a prohibition is necessary or expedient for any of the stated purposes. The Minister's view as to the necessity or expediency thereof is conclusive and cannot be challenged on the ground that, objectively assessed, a prohibition is not necessary or expedient for any of those purposes; as the learned judge in the Court a quo acknowledged, this case plainly falls within the category of cases described by CORBETT J (as he then was) in South African Defence and Aid Fund and another v Minister of Justice. 1967(1)

S A 31 (C) at p 35 as

"-----instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the prerequisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed in an objective sense but whether, subjectively speaking, the repository of the power had decided that it did. In cases falling into this category the objective existence of the fact, or state of affairs, is not justiciable in a Court of law."

Every prohibition, therefore, presupposes an incontestable decision by the Minister that it is either necessary or expedient. In the present case, for instance, the Minister stated in the notice that he deemed the prohibition expedient for the maintenance of public peace and

its.....26

its expediency to that end is not justiciable. An application for authority to hold a prohibited gathering must, accordingly, be considered in the light of the decision already taken by the Minister that it is expedient for the maintenance of the public peace not to allow it to be held; it is not, as was stated in the A.I. Ice-Cream case, the duty of the Minister or the magistrate concerned to decide "whether sound reasons exist why the applicant should not be permitted" to hold the gathering; such a decision is taken by the Minister when a prohibition is imposed, and what in effect has to be decided when authority for a gathering is sought, is whether sound reasons exist for the prohibition.....27

tion to be lifted in the particular case.

On the face of it this distinction seems to be a formal one. But it is not: there is a fundamental difference between an application for a trading licence and an application for authority to hold a gathering prohibited in terms of sec 46(3). As appears from the cases referred to, a trading licence can only for sound reasons be withheld from an applicant. In that sense the applicant can be said to be entitled to be granted a licence. An applicant for authority to hold a prohibited gathering, on the other hand, is not entitled to be granted permission. Where a particular kind of gathering has been prohibited on account of the Minister's view that

it is expedient to do so for the maintenance of the public peace, an applicant for authority to hold a gathering of the kind in question has no right to receive permission, even though he may be able to show positively that the proposed gathering will not lead to a breach of the public peace. The legislature has assigned the power to grant the required permission to the Minister or to a magistrate acting in pursuance of the Minister's general or special instructions. And, although it may be accepted that permission is to be granted or refused in the postulated case only in accordance with the dictates of the maintenance of the public peace, it is clear that the Minister's or the magistrate's view as

to whether the gathering may lead to a breach thereof,
is conclusive and not justiciable. To hold that a
decision by either of them not to grant permission in
any given case is justiciable on the ground that, viewed
objectively, the reason for the prohibition does not
exist in that case, would lead to wholly untenable re-
sults. No sooner would the Minister decide that it is
expedient for the maintenance of the public peace to pro-
hibit all gatherings of a particular kind, than he and
the magistrate would in effect be compelled to lift a
prohibition imposed for that purpose, in every case
where it can be shown that a gathering will in fact not
lead to a breach of the public peace. Such a construction

would.....30

would make a mockery of sec 46(3) and the inviolability of the Minister's prerogative to decide on the expediency of a prohibition.

This conclusion not only disposes of applicant's counsel's argument, but also leads logically to another one. If freedom of assembly is not affected by the refusal of authority for a gathering in the same way that freedom to trade is affected by the refusal of a licence, the question is : Is the former affected at all by the refusal of authority? The answer is in the negative. Once it is accepted, as it must be, that the extent of a curtailment of freedom of assembly has, in terms of sec 46(3), been left for the decision of the

Minister.....31

Minister, it is clear that, to the extent that he decides to curtail it, it cannot be said to be capable of being affected further. As we know, certain gatherings have been prohibited; no-one has the right to hold a prohibited gathering without permission and, as I have indicated, no-one has the right to receive permission. To that extent freedom of assembly has been curtailed and it cannot be said to be affected if permission is refused.

Applicant's counsel did not suggest any other right which respondent's refusal of authority could affect, nor did he suggest that the refusal involved legal consequences to the applicant. I conclude,

therefore,.....32

therefore, that Laubscher's case cannot be distinguished and, applying the principle enunciated therein, that there was no need for the respondent to observe the audi alteram partem rule unless there are other reasons calling for its observance.

By urging upon us the great inequity which the principle in Laubscher's case may, in his submission, bring about (and has brought about in later cases) and the pressing need for legal reform, applicant's counsel invited us to extend the principle in order that relief may be granted in cases where an administrative decision, which does not affect a person's rights nevertheless

involves.....33

involves serious consequences to him, is taken without observance of the audi alteram partem rule. Such a result may be achieved, it was suggested, by adopting the approach presently in vogue in the Courts in England and certain other countries which affords relief in cases where there is no pre-existing right but the person concerned has what is sometimes referred to as a "legitimate expectation". (Wade: Administrative Law (5th ed) p 464-5.

An illustrative discussion of the topic appeared in 1987 SALJ 165 in an article "Legitimate Expectation and natural justice : English, Australian and South African Law" by John Hlophe.)

Counsel's invitation must be declined. The

majority.....34

majority judgment in Laubscher's case has been consistently followed and applied in a long line of decisions including several in this Court. I am not unmindful of the serious and, in certain respects, justified criticism which has been levelled at some of the decisions and at the principle involved. (See eg Baxter : Administrative Law p 577 et seq; John Hlophe's article (supra); Taitz : "The application of the audi alteram partem rule in South African Administrative Law" 1982 T H R H R 254).

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It may well be that there is indeed a need for legal reform. But it would be idle to explore the possibility of reform in the present case. Even if the "legitimate expectation" approach were to be adopted, there is no room for its application here. Applicant's counsel submitted that the applicant had a legitimate expectation that it would receive a fair hearing, and that its application would not be refused on grounds which it had not been afforded an opportunity to refute. There is, however, no factual basis for such a submission. Unlike the English and Australian cases on which counsel relied, nothing had happened before the application

for authority was submitted and nothing happened thereafter which could have caused the applicant to entertain such an expectation; there is not even an allegation in its affidavits that it in fact did entertain it. I am by no means sure that this case would in England be classified as a "legitimate expectation" case. There is nothing in this case which calls for an extension of the accepted principle.

It follows that the first ground on which respondent's refusal was set aside, cannot be sustained.

The remaining grounds may conveniently be considered together. At p 288J - 289B of the report the following findings and remarks were recorded:

"I am satisfied, on the papers before me, that the magistrate had not directed himself properly in the law; had not excluded from his consideration matters which are irrelevant and that the decision he arrived at was not one a reasonable man could reach on the basis of the factors which he took into account. He was, accordingly, in law mala fide and, if he, in fact, refused the application for the reasons given, was in fraudem legis. I do not, for a moment, suggest that the magistrate was motivated by any improper motives. He acted as he thought he was entitled to do in terms of the Act, but, in so doing, overlooked, in my view, the applicant's right to be heard and the fact that applications for permission to hold gatherings must be considered in the light of the provisions of the Act."

When I first read this passage, I had some difficulty in understanding the Court's finding in the sentence reading : " He was, accordingly, in law mala fide and, if he, in fact, refused the application for the reasons given, was in fraudem legis." Fraus legis is imputed to someone who, whilst pretending to use a power for the purpose for which it was assigned to him, in fact uses it for an unauthorised one. Such an abuse of power is said to constitute mala fides. This is what the learned judge also understood the position to be, judging by his reference to Van Eck N O and Van Rensburg N O v Etna Stores 1947(2) S A 984 (A) at p 996 - 998 earlier in his reasons where he indicated that the re-

spondent would have acted in fraudem legis and mala fide, had he refused permission for the meeting for a purpose unconnected to the maintenance of the public peace. Yet, the formulation of the finding in the sentence just referred to, seems to suggest that it was not positively found that he had in actual fact acted in fraudem legis.

However, the general tenor of the Court's reasons is that he had done so. There is a finding, for instance, that he had not envisaged any danger to the public peace and that he had taken irrelevant matters into account, and it was said in the concluding remark that he had overlooked that applications for permission had to be considered in the light of the provisions of the Act. It seems to me,

therefore.....40

therefore, that the finding of mala fides must, despite its obscurity, be interpreted as implying that the respondent had acted in fraudem legis.

Unfortunately this does not solve another problem. The grounds for the finding of mala fides were stated to be, not only the fact that the respondent had not directed himself properly in law and had failed to exclude irrelevant matters from his consideration, but also the unreasonableness of his decision. Exactly how its unreasonableness figured in the enquiry was not explained. In a proper case and depending on its degree, gross unreasonableness may justify an inference of mala fides, but in this case the finding that the respondent

had.....41

had not envisaged any danger to the public peace, provided that it was correct, of course, alone cleared the way for a finding of mala fides on the basis of the Etna Stores case, and on that basis it was unnecessary to refer to the unreasonableness of the decision. Whether it was intended as an additional ground, I do not know. However, whatever the purpose might have been, the unreasonableness of the decision was raised by the Court a quo and by applicant's counsel in this Court and I shall deal with it.

The question of mala fides, in general, and of fraus legis, in particular, falls to be considered in the light of two vital allegations in respondent's

opposing.....42

opposing affidavit which are not mentioned in the Court's reasons. The first is that the respondent had arrived at the decision to refuse permission honestly and without any ulterior motive. This was specifically admitted by Schreiner in the replying affidavit. The second one is that permission was refused after the respondent had "formed the opinion that the meeting could lead to a disturbance of the public peace and that it is expedient for the maintenance of the public peace not to authorise it". This assertion was not disputed in the replying affidavit and must also be taken as admitted. That being the case, the undisputed evidence before the Court was that the respondent had indeed envisaged a possible

breach of the public peace and had honestly considered it expedient for the maintenance of the public peace not to authorise the meeting.

As mentioned earlier, the Court nevertheless found that the respondent had not envisaged any danger to the public peace. Although it was not explicitly stated, this finding must have been the result of the Court's disdainful dismissal of the factors taken into account by the respondent as "verging on the frivolous" and as "picking at straws". Again it was not explicitly stated that these factors were irrelevant to the maintenance of the public peace, but this is all that the finding that irrelevant matters had been taken into consideration.....44

ration can imply. It seems, therefore, that the Court inferred from what it considered to be the respondent's inadequate and irrelevant reasons, that he had not foreseen any danger to the public peace and must, accordingly have refused permission for some other purpose. Theoretically this process of reasoning seems to be in order and might have been correct, had it not been for the admissions in the replying affidavit. But once those admissions were made - and the Court apparently overlooked that they were - it was entirely unfounded. At a later stage I shall indicate that the factors relied upon by the respondent were not irrelevant to the maintenance of the public peace; but, assuming for the moment that they

were,.....45

were, their irrelevance afforded no ground for a finding that permission had been refused for an unauthorised purpose. The decision might have been open to attack on the simple ground that irrelevant matter had been taken into account (cf Northwest Townships (Pty) Ltd v The Administrator, Transvaal and another 1975(4) S A 1 (T) at p 8G), but a finding of fraus legis was not justified where it was common cause between the parties that permission had been refused for the very purpose of the Act.

The Court's reference to the unreasonableness of the decision reveals another error. The formulation of the grounds for the finding of mala

fides obviously derived from the adoption by the learned

judge at p 287B - D of the following passage from the

judgment of Lord Denning MR in Secretary of State for

Education and Science v Metropolitan Borough of Tameside

(1976) 3 AER 665 at p 671 (HL) :

"-----the Minister must direct himself properly in law. He must call his own attention to the matters he is bound to consider. He must exclude from his consideration matters which are irrelevant to that which he is to consider. And the decision to which he comes must be one which is reasonable in this sense, that it is, or can be, supported with good reasons or at any rate be a decision which a reasonable person might reasonably reach."

In adopting this exposition of the English law on the

subject and by applying it unreservedly, the learned judge

did.....47

did not heed OGILVIE THOMPSON JA's warning in The Admini-

strator, Transvaal and the Firs Investments (Pty) Ltd

v Johannesburg City Council 1971(1) S A 56 (A) at p 80

where the learned judge of appeal said :

"The legal principle governing the present enquiry was formulated by STRATFORD, J.A., in Union Government v Union Steel Corporation (South Africa) Ltd., 1928 A.D. 220 at p. 237, in the following terms:

'There is no authority that I know of, and none has been cited, for the proposition that a court of law will interfere with the exercise of a discretion on the mere ground of its unreasonableness. It is true the word is often used in the cases on the subject, but nowhere has it been held that unreasonableness is sufficient ground for interference; emphasis is always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is 'inexplicable except on the assumption of mala fides

or ulterior motive', see African Realty Trust v. Johannesburg Municipality, 1906 T.H. 179, or that it amounts to proof that the person on whom the discretion is conferred, has not applied his mind to the matter. See Crown Mines Limited v. Commissioner for Inland Revenue, 1922 A.D. 91.'

As this passage makes abundantly clear, the onus resting upon a litigant seeking to set aside the exercise of a discretion on the ground of 'unreasonableness' is considerable indeed. It is, for instance, a heavier onus than that which rested upon a litigant seeking to set aside the decision of a Liquor Licensing Board as being 'grossly unreasonable' within the meaning of sec. 29 of Act 30 of 1928. (Loxton v Kenhardt L.L.Board, 1942 A.D. 275 at pp.286-287 and pp.311-312). In a case such as the present, the 'unreasonableness' relied upon must be so great as, on a preponderance of probabilities at the end of the case, to warrant the inference of the existence of mala fides or one or other of the further features mentioned by STRATFORD, J.A., in the above-cited passage (see Clan Transport Co. (Pvt.) Ltd. v. Swift Transport Services (Pvt.) Ltd. and Rhodesia

Railways and Others, 1956 (3) S.A. 480 (F.C.) at pp. 487-491). Unless that is fully appreciated, statements to be found in the cases to the effect that the Court can interfere if a decision

'is so unreasonable that no reasonable authority could ever have come to it'

(per LORD GREENE, M.R., in Associated Provincial Picture Houses, Ltd. v Wednesbury Corporation

(1947) 2 All E.R. 680 (C.A.) at p. 683, are apt to be misleading. Similarly, a correlative qualification must, in my opinion, be added to the observation of GREENBERG, J., in Scottes and Callinicos v. City Council of Johannesburg, 1935 W.L.D. 100 at p. 104, where, after stating that a local authority is presumed to be composed of reasonable men, he went on to say that when such an authority

'gives a decision which is such that it could not properly have been given by a reasonable man, then the Court is fully justified in assuming that the authority has been moved by improper motives or has not properly applied its mind to the matter'.

The learned Judge had, immediately before, referred to the Union Steel Corporation

decision, supra, and his above-cited remarks should not, in my opinion, be read as intended to modify what was said in that decision."

In Goldberg and others v Minister of Prisons and others

1979(1) S A 14 (A) at p 38 WESSELS ACJ said that

"(there) is abundant authority for the proposition that interference by the Court in a case such as this on the ground of unreasonableness is only justified if it is gross to so striking a degree as to warrant the inference that the repository of the discretionary power has acted in bad faith and from an ulterior or improper motive. See eg. National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd (supra at 735F); Northwest Townships (Pty) Ltd v Administrator, Transvaal and Another 1975(4) SA 1 (T) at 8B-G; Union Government v Union Steel Corporation (S A) Ltd (supra at 237)."

The learned judge in the Court a quo could not have been

unaware.....51

unaware of these authorities or of the long line of decisions to the same effect in the Provincial Divisions; and yet he adopted an approach plainly at variance therewith, without even attempting to justify his departure from the traditional one enunciated in a number of binding decisions of this Court.

Be that as it may, however, it cannot be said that the respondent's decision not to permit the meeting to be held was unreasonable to the extent that it is inexplicable save on the assumption of mala fides. The learned judge did not find that it was nor did applicant's counsel suggest it; and, speaking for myself, I have not been persuaded that it was unreasonable at all.

It follows from the foregoing that interference with the decision was not justified on the ground of mala fides. The remaining question is whether there were other grounds for doing so. The possibility that the respondent did not properly direct himself in the law may immediately be dismissed. What his approach was and what the learned judge considered to be the correct one, appear from p 287F - H of the report. In my view the respondent was correct and the learned judge wrong. For the reasons stated earlier, I am unable to agree that "authority should have been granted if the proposed gathering was such that it would not be expedient to prohibit it for the maintenance of the public peace". As explained

before.....53

before, what the respondent had to consider, was not whether the gathering should be prohibited, but whether the already existing prohibition should be lifted. That is precisely how he approached the application. His view that it was for the applicant to justify the lifting of the prohibition "by reference to facts and circumstances" cannot be faulted either.

Applicant's counsel submitted that the factors on which the respondent relied in forming the opinion that a disturbance of the public peace might result from the meeting were speculative, irrelevant to the maintenance of the public peace and, in any event, wholly insufficient. The factors relied on are listed at p 287 I-

288F of the report. I do not agree that anything mentioned there, was irrelevant to the maintenance of the public peace. The fact that the area around Curries Fountain would be very busy at the time of the proposed gathering was plainly relevant, and so was the fact that a large gathering during such a busy period would place a heavy burden on traffic authorities and the police in the area. It is absurd to suggest that the respondent, in making this observation, had the interests of the police and the traffic authorities at heart. Obviously, the heavier the burden on these authorities became, so much easier it could be for a public disturbance to develop. And as to the factors in (b), (c) and (d) at

p 288, I fail to see how it can be contended that they did not legitimately reflect on the question whether the gathering could lead to a breach of the public peace.

It does not matter that they were to some extent speculative. The respondent could not foresee the outcome of the meeting with any measure of certainty; he could only assess the possibility of a breach of the peace; and that is what he attempted to do. And as to the sufficiency of respondent's reasons, I need only refer the well-known passage in BRISTOWE J's judgment in African Realty Trust Ltd v Johannesburg Municipality 1906 T H 179 at p 182 to the effect that

"once a decision has been honestly and

fairly56

fairly arrived at upon a point which lies within the discretion of the body or person who has decided it, then the Court has no functions whatever. It has no more power than a private individual would have to interfere with the decision merely because it is not one at which it would have itself arrived."

(See also Schock N O and others v Bhattay and others

1974(4) S A 860 (A) at p 866E _ F).

There are , in my view, no grounds for interfering with the respondent's decision and the Court a quo erred in doing so. It follows that the appeal must succeed but before I make the order there is one last matter that I wish to mention. In the Court a quo the applicant, apart from seeking the review of respon-

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dent's refusal to authorise the meeting, also challenged the validity of the notice. The question of its validity was argued but not decided in view of the applicant's success in the review. It was raised again in the written heads of argument in this Court; but at the hearing of the appeal applicant's counsel abandoned this contention and argument proceeded on the basis that the notice was valid. In S v Mahlangu and others 1986(1) S A 135 (T) the Full Bench of the Transvaal Provincial Division held (by a majority) that the notice was void for vagueness. In view of the turn of events in the present case it is unnecessary to consider the correctness of that decision.

The appeal accordingly succeeds with costs,
 including the costs of two counsel. The order of the
 Court a quo is set aside. Substituted for it is the
 following :

"The application is dismissed with costs
 including the costs of two counsel."

J J F HEFER JA.

JANSEN JA	)	
VILJOEN JA	)	
SMALBERGER JA	)	CONCUR.
VIVIER JA	)	