

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE STATE PRESIDENT OF THE REPUBLIC OF

SOUTH AFRICA ..... First Appellant

THE GOVERNMENT OF THE REPUBLIC OF

SOUTH AFRICA ..... Second Appellant

THE MINISTER OF LAW AND ORDER..... Third Appellant

THE MINISTER OF JUSTICE ..... Fourth Appellant

and

UNITED DEMOCRATIC FRONT ..... First Respondent

DURBAN HOUSING ACTION COMMITTEE ..... Second Respondent

NATAL ORGANISATION OF WOMEN ..... Third Respondent

CURNICK NDLOVU ..... Fourth Respondent

Coram: RABIE ACJ, JOUBERT, HEFER, VIVIER et STEYN JJA.

Heard:

29 Augustus 1988.

Delivered:

29 September 1988.

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J U D G M E N T

RABIE ACJ:

The issue in this appeal is the validity of the declaration made by the State President (the first appellant in the appeal) in respect of the United Democratic Front (the first respondent in the appeal) in Proclamation No. 190 of 1986. The Proclamation, which was published in the Government Gazette on 9 October 1986, reads:

"Under the powers vested in me by section 2(1) of the Affected Organizations Act, 1974 (Act 31 of 1974), I hereby declare the organization known as the UNITED DEMOCRATIC FRONT to be

.....3/

an affected organization.

Given under my Hand and the Seal of the Republic of South Africa at Pretoria this Sixth day of October, One thousand Nine hundred and Eighty-six.

P.W. BOTHA,

State President.

By Order of the State President-in-Cabinet:

L. LE GRANGE,

Minister of the Cabinet."

Sec. 2(1) of the Affected Organizations Act, 1974

(Act 31 of 1974) provides as follows:

"2(1) If the State President is satisfied that politics are being engaged in by or through an organization with the aid of or in cooperation with or in consultation with or under the influence of an organization or person abroad, he may, without notice to the first-mentioned organization, but subject to the provisions of section 8, by proclamation in the Gazette declare that organization to be an affected organization."

Sec 8 of the Act reads:

"The power conferred upon the State President by section 2

to declare an organization to be an affected organization, shall not be exercised unless the Minister has given consideration to a factual report made in relation to that organization by a committee consisting of three magistrates appointed by the Minister, of whom at least one shall be a chief magistrate or a regional magistrate."

"Minister" is defined in sec. 1 of the Act as meaning the Minister of Justice. The effect of a declaration under sec. 2(1) of the Act is, briefly put, that the organisation concerned is prohibited from receiving, whether directly or indirectly, money from abroad. (See sec. 2(2) of the Act.)

The applicants in the Court a quo were: first, the United Democratic Front (now the first respondent); second, the Durban Housing Action Committee (said to be a voluntary association affiliated to the first respondent; now the second

respondent); third, the Natal Organisation of Women (also said to be a voluntary association affiliated to the first respondent; now the third respondent); and fourth, Curnick Ndlovu (the chairman of the executive committee of the first respondent; now the fourth respondent.) They attacked the aforesaid Proclamation 190 of 1986 on various grounds. The learned Judge, as will appear more fully below, upheld one of those grounds (without giving a final decision on the others) and issued an order declaring (1) that the declaration by the State President contained in the aforesaid Proclamation 190 of 1986 was of no force and effect; (2) that the Registrar of Affected Organisations (the fifth respondent in the application) was not entitled to take any steps against the first respondent pursuant to the declaration contained in Proclamation 190 of 1986; and (3) that the Minister of Justice, the fourth respondent in the application, (now the fourth appellant) was not entitled

to exercise any powers vesting in him in terms of the aforesaid Act against the first respondent arising from the declaration contained in Proclamation 190 of 1986. The Government of the Republic of South Africa (the second respondent in the application now the appellant) was ordered to pay the costs of the application. The appeal is against these orders. (The fifth respondent in the application abides the decision of the Court and is not a party of the appeal.)

The present respondents contended in their founding affidavit, deposed to by the aforesaid Curnick Ndlovu, that in terms of sec. 2(1) and sec. 8 of the aforesaid Affected Organizations Act the Minister of Justice had to give consideration to a factual report made by a committee of three magistrates appointed by him concerning the first respondent before the State President could make a declaration declaring it to be an affected organisation, but that it appeared from the terms of a telex sent to the respondents' attorneys by the private secretary to the State President on 24 October 1986 that there

had been a failure to comply with the provisions of the said sections 2(1) and 8. The telex showed, they said, that no committee as envisaged in sec. 8 was appointed by the Minister of Justice, and that the first appellant made the declaration contained in Proclamation 190 of 1986 after the Minister of Law and Order (the third appellant) had given consideration to a report made by a committee appointed by him, i.e., the third appellant. This being so, the respondents contended, the State President had no jurisdiction to exercise the powers given to him by sec. 2(1) of the Act. The appellants admitted in their opposing affidavits that it was the third appellant, and not the fourth appellant, who appointed a committee of magistrates and who considered its report before the State President issued Proclamation 190 of 1986, but denied that there had not been compliance with the provisions of sec. 8 of the Act. They stated that the State President was by virtue of the powers given to him by sec. 20 A(1) of the Republic of South Africa Constitution Act, 1961 (Act 32 of 1961) entitled

to transfer to the Minister of Law and Order the powers, duties and functions entrusted to the Minister of Justice by sec. 8 of the Act, and that the State President (the predecessor of the first appellant) effected such transfer by the issue of Proclamation R30 of 1984 on 9 March 1984. Sec. 20 A(1) of Act 32 of 1961 (since repealed) read as follows:

"The State President may assign the administration of any provision in any law which entrusts to a Minister any power, duty or function, to any other Minister, either specifically or by way of a general assignment of the administration of any law or of all laws entrusting powers, duties or functions to such first-mentioned Minister."

Proclamation 30 of 1984 reads as follows:

"By virtue of the powers vested in me by section 20A of the Republic of South Africa Constitution Act, 1961 (Act 32 of 1961), I hereby approve the transfer of all the powers, duties and functions which at present are entrusted to the Minister of Justice in terms of the Public Safety Act, 1953, the Tear Gas Act, 1964, and the Affected Organizations Act, 1974, to the Minister of Law and Order.

Given under my Hand and the Seal of the Republic of South Africa at Pretoria this Second day of February, One thousand Nine hundred and Eighty-four.

M. VILJOEN, State President.

By Order of the State President-in-Council:

H.J. COETSEE."

The reply of the respondents (who had, it would seem, not been aware of the existence of Proclamation 30 of 1984 until the appellants referred thereto) to the appellants' contention was that this proclamation did not have the effect contended for by the appellants. They advanced two grounds for their submission, which I propose to quote because they seem to me to contain a concise statement of the two grounds on which the respondents attacked proclamation 30 of 1984 both in the Court a quo and in this Court. They read as follows:

- (1) "Section 20A of Act No 32 of 1961 only authorises the State President to assign the administration of any provision in any law which entrusts to a Minister any power, duty or function, to any other Minister. It does not authorise the assignment of such power, duty or function directly.  
Proclamation R30 of 9 March 1984 purports not to assign the administration of any provision in any law which entrusts to the Fourth Respondent any power, duty or function to the Third Respondent.

It purports to transfer directly the powers, duties and functions entrusted to the Fourth Respondent in terms of the Act, to the Third Respondent. This is ultra vires."

- (2) "A proper assignment envisaged by section 20 A is different from a mere approval to do so. Proclamation 30 of 9 March 1984 does not purport to constitute the assignment itself. It merely purports to constitute an 'approval' (or 'goedkeuring') of the First Respondent to 'the transfer'. To approve a transfer is not to effect a transfer, let alone to effect an assignment. In the result, even if Proclamation R30 of 1984 was not ultra vires, it does not have the effect in law of substituting the Third Respondent for the Fourth Respondent in section 8 of the Act."

As to the first ground, Mr Mahomed's argument on behalf of the respondents in this Court may be summed up as follows: sec. 20 A(1) of Act 32 of 1961 conferred on the State President the authority to assign "the administration of any provision in any law which entrusts to a Minister any power, duty or function, to any other Minister"; if the Legislature had intended to confer upon the State President the authority to assign a power, duty or function vesting in one Minister to another Minister, it would have been a simple matter to say so; sec. 20 A(2) of Act 32 of 1961 authorised the Prime

Minister to assign "any power, duty or function entrusted to him by any law, to any other Minister .....", without making any reference to a power to assign the administration of any law; this difference in the wording of sec. 20A(1) and sec. 20 A(2) of the same Act denotes prima facie a change of intention; there is a distinction between an assignment of powers, duties and functions vesting in a Minister in terms of a law to another Minister and an assignment of the administration of the provisions of any law (in which such powers, duties or functions are described) from one Minister to another; an assignment in terms of sec. 20 A(1) of Act 32 of 1961 involves that the administration of the relevant Act "falls under the civil service and the infra-structure of the department headed by the Minister to whom the assignment takes place". In the present case, counsel submitted, an assignment in terms of sec. 20 A(1) of Act 32 of 1961 of the administration of the powers entrusted to the Minister of Justice by sec. 8 of the Affected Organization Act, 1974,

to the Minister of Law and Order would mean that the Minister of Justice would remain vested with the powers mentioned in sec. 8, whereas the Minister of Law and Order would be given the responsibility of seeing to it that those powers were exercised by the Minister of Justice. This would, it seems to me, be a strange result which the Legislature could hardly have intended. The submission that it did so intend, is occasioned by interpreting the expression "the administration of any provision in any law ...." in the manner suggested by counsel, i.e., that it is limited to managerial and administrative powers, duties and functions. I am not persuaded that it should, as a matter of interpretation, be so limited, but I do not propose to say more about this since the question is, as will be indicated below, settled by the provisions of sec. 10(5) of the Interpretation Act, 1957 (Act 33 of 1957).

Sec. 10(5) of the Interpretation Act, as worded at the time when Proclamation 30 of 1984 was issued, i.e., 9 March 1984, read as follows:

" Whenever the administration of any law or any provision of any law which confers a power or imposes a duty upon or entrusts a function to any Minister of State, has under section 20 A(1) of the Republic of South Africa Constitution Act, 1961 (Act No. 32 of 1961), been assigned by the State President to any other Minister, that power may be exercised by such other Minister and that duty shall and that function may be performed by him ....".

It follows from the provisions of this section that if the State President had in Proclamation 30 of 1984 transferred the administration of the provisions mentioned in sec. 8 of the Affected Organizations Act from the Minister of Justice to the Minister of Law and Order, the transfer would have

included the power to exercise the powers mentioned in the section. By transferring to the Minister of Law and Order the powers entrusted to the Minister of Justice by sec. 8 of the Affected Organizations Act, the State President would, therefore, have given effect to what is, according to the said sec. 10(5) of the Interpretation Act, the effect of the assignment of the administration of the provisions of a law as contemplated in sec. 20 A(1) of Act 32 of 1961. In the

circumstances the contention that Proclamation 30 of 1984 was ultra vires sec. 20 A(1) of Act 32 of 1961 cannot be sustained.

I should perhaps say in this regard that the learned Judge in the Court a quo also had regard to the provisions of sec. 10(5) of the Interpretation Act. He began his discussion of the question in issue by quoting sec. 10(5) of the said Act in its present form, i.e., as amended by sec. 101, read with Schedule 2 Part 1 B, of the Republic of South Africa Constitution Act, 1983 (Act 110 of 1983). The wording of the section as so amended is precisely the same as that of the earlier sec. 10(5) which I quoted above, save that the words "section 26 of the Republic of South Africa Constitution Act, 1983" have been substituted for <sup>the</sup> words "section 20 A(1) of the South Africa Constitution Act, 1961 (Act 32 of 1961)". The learned Judge then proceeded to say that if sec. 10(5) in its present form applied to the present case, it would decisively support the view that sec. 20A(1) of Act

32 of 1961 authorised the State President to transfer the powers, duties and functions mentioned in sec. 8 of the Affected Organizations Act from one Minister to another,

as he purported to do. But, he said, "The difficulty ..... is that this is no longer in force, and it is far from clear to me whether I may pay any attention to it at all, except insofar as it has any importance to the interpretation of the current section as part of the history of that section."

(The word "this" is a reference to sec. 20 A(1) of Act 32 of 1961.) It seems that the learned Judge thought, mistakenly so, that sec. 26 of Act 110 of 1983, which is the successor to sec. 20 A(1) of Act 32 of 1961, was in operation at the time of the issue of Proclamation 30 of 1984, or, to put it differently, that sec. 20 A(1) of Act 32 of 1961 had ceased to be in operation by the time Proclamation 30 of 1984 was issued. The true position is that Act 110 of 1983 only came into operation on 3 September 1984, which means that when Proclamation 30 of 1984 was issued on 9 March 1984 sec. 10(5)

of the Interpretation Act still referred to an assignment under sec. 20 A(1) of Act 32 of 1961. I may add that the respondents labour under the same misapprehension as the Court a quo did. They say in their heads of argument that the appellants' reliance on sec. 10(5) of the Interpretation Act is ill-founded since the section "expressly limits itself to an assignment which has taken place under section 26 of the 1983 Constitution", and that "Proclamation No. 30 of 1984 does not appear to be such an assignment. It purports to be an assignment in terms of section 20 A of the 1961 Constitution." As indicated above, sec. 26 of Act 110 of 1983, and sec. 10(5) of the Interpretation Act in its present form, only came into operation on 3 September 1984, whereas Proclamation 30 of 1984 was issued on 9 March 1984. It follows that sec. 10(5) of the Interpretation Act, worded as it was before its amendment by Act 110 of 1983, is of application to sec. 20 A of Act 32 of 1961.

The Court a quo upheld the second of the grounds, quoted above, on which the respondents attacked Proclamation 30 of 1984. It found, briefly put, that the State President did not, and did not purport to, transfer or assign the powers entrusted to the Minister of Justice by sec. 8 of the Affected Organizations Act to the Minister of Law and Order, but merely stated that he approved of such transfer. The learned Judge's discussion of the matter appears from the following extract from his judgment:

"Quite clearly, the State President indicated that he was in favour of the transfer of these powers, duties or functions. But there is a distinction, and a real distinction which is not simply a matter of semantics, between approving of the doing of something and actually doing it. One may approve of something which has been done already. One may equally approve of something which has not yet been done at all, but which is likely or expected or about to be done in the future. One may approve of that which in the event is never done at all. Then one may approve, indeed one usually approves, of that which is done by somebody else. One does not, if words mean anything, appropriately approve of something being done by oneself.

Under section 20A the State President and nobody else has the power to assign or transfer powers, duties and functions, assuming that to be what is assigned and transferred. No one else has that power to do it, with or without his approval.

He must do it himself. And it must be plain that it is being done at the moment when he does it, not that he is in favour of something which may have happened before, which may yet happen in the future or which may never occur at all.

I have been reminded that the State President under the Constitution at that time - and I do not have to deal with the present constitutional position - acted invariably on the advice of the Executive Council, which is to say the Cabinet, and that indeed he was obliged in law to accept and act on such advice. I take it for granted that in this case he issued this proclamation on the advice of the Executive Council. It is said that the word 'approve' is appropriate to indicate that process, that it indicates this sequence of events. The Cabinet decides that the assignment should take place. It advises the State President accordingly. And he, acting on that advice, does so by approving of it. But, although I do not for one moment suggest that this contention is devoid of substance, indeed I think it is a contention which has some weight to it, I find myself in great difficulties in accepting it. I repeat, under the section the State President must himself assign and transfer. And that is no less so because he must take, is bound to take, advice to do so. Section 20A says he is the person who must do it. And one can think of other examples. There are many. Clemency in favour of a condemned prisoner is granted by the State President. And whether to grant it or not is a matter which the Cabinet will decide and on which it will advise him. But the act of clemency is nonetheless one which can be granted only by the State President, no less so because he has to take and act on advice. Judges are appointed by the State President, on advice. Senior counsel are appointed by the State President, on advice. I have never heard it suggested that an appropriate formula for the appointment of a judge or senior counsel would be the State President 'approving' of the appointment of that person. He must appoint that person or surely that person is not appointed

at all, because no one else has the power to appoint that person."

The learned Judge concluded:

"It may seem that all of this is rather formal. But lawmaking is a formal business, and the right forms must be used if the result is to be effective lawmaking. I therefore come to the conclusion that Mr Mahomed is right, although I readily concede there is ample room for a contrary view to be taken; that he is right in contending that the form of words used by the State President did not have the effect of bringing about an actual transfer of the powers, duties and functions of the Minister of Justice to the Minister of Law and Order."

The respondents adopted the reasoning of the Court

a quo.

According to sec. 16(1) of Act 32 of 1961 the executive government of the Republic of South Africa was vested in the State President, "acting on the advice of the Executive Council", and sec. 19(1) provided that "The will and pleasure of the State President as head of the Executive Government of the Republic shall be expressed in writing under his signature, and every instrument signed by him shall be countersigned by a Minister." The Executive Council consisted

of Ministers appointed by the State President under sec. 20 of the said Act. In the present case one must accept that the State President was advised by the Executive Council that the powers, duties and functions which were at the time entrusted to the Minister of Justice in terms of the Affected Organizations Act should be transferred to the Minister of Law and Order. It is clear, too, that he approved of, or accepted, that advice, and it seems to me that by doing that he intended to give effect to the advice given him. It is true, of course, that the State President did not actually say (i.e., by using the word "transfer", or "assign") in Proclamation 30 of 1984 that he was transferring the powers, duties and functions then entrusted to the Minister of Justice to the Minister of Law and Order, but merely that he approved of such transfer. It is true, too, that the word "approve" may be used in the senses, or circumstances, indicated by the learned Judge in the first paragraph of the extract from his judgment which I quoted above. I do not think, however, that the word

"approve", as used by the State President in Proclamation 30 of 1984, can reasonably be construed as applying to any of the possible meanings referred to by the learned Judge. The proclamation cannot be read as an expression of approval of a transfer of powers which had already taken place: there had been no such earlier transfer. It cannot reasonably be said that the State President wished, or intended, to say that he was approving of something which he had not yet done, but which he might do in the future, or which he might, in the end, not do at all; it would have been a purposeless and senseless thing for him to say, and his statement that he was acting under the powers vested in him by sec. 20A of Act 32 of 1961 would, in such an event, have been wholly inappropriate. As to the learned Judge's observation that "one usually approves, of that which is done by someone else. One does not, if words mean anything, appropriately approve of something being done by oneself", the position in the present case is that the State President did not indicate that he

approved of anything done by himself, but that he approved, following the advice given him by the Executive Council, of the transfer of powers as contemplated in sec. 20A of Act 32 of 1961. I am of the opinion that when one bears in mind that the State President was advised by the Executive Council that there should be a transfer of powers as envisaged in the said sec. 20A, that the State President stated in Proclamation 30 of 1984 that he "approved" of such transfer and that he did so in terms of the powers vested in him by sec. 20 A, the reasonable and correct construction to place on Proclamation 30 is that the State President therein indicated that he was, as from the date of the Proclamation (9 March 1984), transferring the powers, duties and functions entrusted to the Minister of Justice by the Affected Organizations Act to the Minister of Law and Order. I therefore hold that the Court a quo erred in declaring Proclamation 30 of 1984 to be of no force and effect on the ground that it did.

Mr Mahomed contended that even if this Court were to hold that the Court a quo erred in declaring the first appellant's aforesaid declaration to be of no force and effect on the ground that it did, the appeal should nevertheless be rejected because the orders made by the Court are supportable on other grounds. These grounds, as summed up in counsel's heads of argument, are: (i) the first appellant's failure to comply with the audi alteram partem rule, and (ii) his "failure to exercise a proper discretion."

I shall first discuss the first of these grounds. It is common cause that the first appellant declared the first respondent to be an affected organisation without having given it or any of the other respondents an opportunity of being heard before he made the declaration. In their founding affidavit the respondents aver that they were prejudicially affected by the declaration and they contend that, before there could have been an effective declaration in terms of sec. 2(1) of the Affected Organizations Act, the first

should, as a matter of law, have given them notice of his intention to make such a declaration. The result of the first appellant's failure to give such notice, it was contended in the respondents' founding affidavit in the Court a quo, was that his purported declaration was "of no force and effect in law". Sec. 2(1) of the aforesaid Act states in clear language that the State President may "without notice" to an organisation declare it to be an affected organisation if he is satisfied as to the matters referred to in the section. This being so, it is difficult to accept the proposition that a declaration made by him without notice can nevertheless be held to be invalid on the ground that it was made without notice to the organisation concerned. I therefore consider the aforesaid contention to be ill-founded. I must add at once that I did not understand counsel to advance the aforesaid contention in this Court, at least not in the way it was framed in the respondents' founding affidavit. He did, however, persist in an argument which involves, if I understood it

correctly, that the first appellant should nevertheless have given notice to the first respondent and the other respondents. The argument was to the following effect. Sec. 2(1) of the Affected Organizations Act (referred to simply as "the Act" in the rest of the judgment) empowers the State President to declare an organisation to be an affected organisation without giving it notice of his intention to do so, but this does not mean that notice need never be given. The section gives him a discretion as to whether he should give notice or not, and this discretion must be properly exercised. Notice should be given whenever there is no need to dispense with it. In the present case there was no need to dispense with it: on the contrary, because of the serious prejudice which a declaration in terms of sec. 2(1) of the Act was bound to cause not only the first respondent, but also the other respondents, who receive financial aid from the first respondent, notice should have been given. The first appellant - thus the argument - did not appreciate that he had a discretion

as to whether he should give notice or not: because the Act allows action to be taken against an organisation without prior notice to it, he considered that to be "the end of the matter". A telex (Ann. K1 to the respondents' founding affidavit) sent to the respondents' attorneys by the secretary to the first appellant on 24 October 1986 shows, it is said, that the first appellant "simply refused to consider giving notice because he thought he was not obliged to." This telex was sent to the respondents' attorneys in reply to a telex (Ann. K2) sent by them to the first appellant on 13 October 1986. In Ann. K2 the attorneys said: "In order to advise our clients of their rights we require urgently to be advised what your reasons were for this action and why you decided to give no notice to the organisation before acting as you did." The answer given in Ann. K1 to the question why no notice had been given to the first respondent, was: "The State President gave no notice to the U.D.F. of his intention to declare it an affected organisation since the Act expressly

provides that he does not have to." This reply shows, it is argued, that the first appellant assumed that, because the Act provides that the State President can declare an organisation to be an affected organisation without giving it notice of his intention to do so, he was not obliged to give notice to the first respondent. This attitude on the first appellant's part shows - thus the argument - that he was under a misapprehension as to the nature of the power and the discretion which he has under the Act. It follows, counsel submitted, referring to Union Government v. Union Steel Corporation (South Africa) Ltd 1928 AD 220 at 234, and Granville Estates (Pty) Ltd v. Ladysmith Town Council and Another 1974(3) SA 44 (A) at 50 H, that the declaration made by the first appellant must be set aside.

I have difficulty in accepting the proposition that the absence of notice to the first respondent before it was declared to be an affected organisation can validly be made the basis of a charge that the first appellant did not exercise

a proper discretion and that the declaration should, on that ground, be considered to be invalid. Sec. 2(1) of the Act provides that the provisions of sec. 8 of the Act have to be complied with before the State President can declare an organisation to be an affected organisation, but it expressly authorises him to make such a declaration without giving notice of his intention to do so to the organisation concerned. The words "without notice" in sec. 2(1) constitute an express exclusion of the requirement of audi alteram partem before a declaration is made (see South African Defence and Aid Fund and Another v. Minister of Justice 1967(1)SA 263 (A) at 273 H, 275 A, 285 G-H; R v Ngwevela 1954(1) SA 123(A) at 131 A; Omar and Others v. Minister of Law and Order and Others 1987(3) SA 859(A) at 891 D-H), and, this being so, it is difficult to see how a declaration under sec. 2(1) can be challenged on the ground that the State President failed to exercise a proper discretion in failing to give notice. But I need not dwell on this question. I shall assume, as was contended

by Mr Mahomed, that although sec. 2(1) empowers the State President to make a declaration under the section without notice to the organisation concerned, he must nevertheless consider whether he should give notice, and that if the first appellant in this case did not properly consider the question whether he should or should not give notice, the declaration made by him would be bad in law. In the respondents' founding affidavit it is contended that the reply given to the respondents, in the telex of 24 October 1986, viz. "The State President gave no notice to the U.D.F. of his intention to declare it an affected organisation since the Act expressly provides that he does not have to", shows that the first appellant "simply refused to consider giving notice because he thought he was not obliged to." I am not persuaded that the reply must necessarily be interpreted in this way. It was no doubt stated in the telex that the State President did not give notice "since the Act expressly provides that he does not have to", but this reply is not to be construed as containing

an admission that he never even considered the question whether he should give notice or not. One must, of course, also have regard to what the first appellant said in his affidavit in reply to the respondents' charge that he "simply refused to consider giving notice because he thought he was not obliged to." He stated inter alia:

"Dit is so dat die betrokke maatreël nie vooraf kennisgewing verbied nie en ek het dit ook nie so verstaan nie.

Die bewering dat ek nie die magte aan my verleen deur artikel 2(1) reg verstaan het nie, word uitdruklik ontken. Die bewering dat ek eenvoudig geweier het om oorweging daaraan te skenk om vooraf kennis te gee, is onjuis en 'n opsigtelike wanvertolking van Aanhangsel 'K(1)' tot die funderende eedverklaring.

Soos reeds daarop gewys verleen artikel 2(1) an my die reg om sonder kennisgewing aan Eerste Applikant, die betrokke proklamasie uit te vaardig. Ek het verkies om dit so te doen. Ek het my diskresie uitgeoefen nadat volledige inligting wat oor 'n lang tydperk aangaande Eerste Applikant bekom is, tesame met die feite verskaf deur die komitee, en Derde Respondent se aanbevelinge daaraangaande behoorlik deur my oorweeg is."

The respondents' answer to these allegations was that they persisted in their previous submissions, and they added:

"The deponent does not explain why, having regard to the facts set out in the founding affidavit, no notice was given to

the affected parties if the deponent had appreciated the need to exercise a discretion in this regard." The submission that the first appellant "simply refused to consider giving notice because he thought he was not obliged to" was also advanced in this Court. It cannot be sustained. The submission is denied by the first appellant, and it is to be gathered from what he states in his affidavit that he appreciated that he had a discretion as to whether he should give notice or not, that he gave consideration to the question whether he should give notice, but that he elected ("Ek het verkies ...") not to do so. Having elected not to give notice, the first appellant was, in my opinion, not obliged in law to tell the first respondent, or anyone else, why he had decided not to give notice. In the circumstances the fact that he did not give notice cannot be held to support the argument that he did not give consideration to the question whether he should give notice.

It was also contended on the respondents' behalf

that even if the first appellant was, by virtue of the provisions of sec. 2(1) of the Act, not obliged to give the respondents a hearing before he made the declaration declaring the first respondent to be an affected organisation, the section did not relieve him of the obligation to afford them a hearing after he had made the declaration, and that his failure to give them such a hearing shows that he did not exercise a proper discretion. The declaration should, therefore, not be allowed to stand. Thus the contention. On my view of the facts relating to this aspect of the case, it is not necessary to decide whether the first appellant was, as a matter of law, obliged to give any of the respondents a hearing after he had made the declaration. The facts are the following:

In a telex dated 13 October 1986 (referred to above) the respondents' attorneys requested the first appellant to furnish them with the reasons why he had made the declaration. The private secretary to the first appellant acknowledged receipt of the telex on the same day and stated that the matter was

"receiving attention". In a telex dated 24 October 1986 (also referred to above) the private secretary to the first appellant informed the respondents' attorneys as follows:

"Although the State President is not obliged by law to disclose any reasons for the declaration of the U.D.F. as an affected organisation under the Act concerned, he nevertheless has no objections to make reasons available to you.

However, in as much as certain of the information which has been taken into account is of such a nature that it cannot be disclosed inter alia because it would prejudice the security of the State, the State President is awaiting advices as to which information may be made known and which not.

As will be appreciated, some of the reasons which caused the State President to issue the proclamation were founded upon information which cannot be disclosed and are so inextricably linked therewith that to furnish such reasons would inevitably lead to the disclosure of such information.

Further communications in this regard will be addressed to you in due course."

The respondents launched their application on 27 October 1986.

In his reply to the allegations contained in the respondents' founding affidavit regarding his failure to furnish the respondents with the reasons why he made the declaration, the first appellant stated:

"Soos blyk uit die telex (K(1) tot die funderende eedverklaring), was ek heeltemal bereidwillig om redes te verstrek vir die onderhawige proklamasie en sou ek dit ook gedoen het. Soos voorts uit die teleks blyk, het ek in daardie stadium advies afgewag aangaande welke inligting verskaf kon word sonder benadeling van die veiligheid van die staat. Voordat die aangevraagde redes egter verskaf kon word, het Applikante die onderhawige aansoek uitgereik - binne drie dae na ontvangs van gemelde telex."

The first appellant also pointed out that when the respondents requested him to furnish them with the reasons for the declaration on 13 October 1986, the first respondent had already, viz. two days before, on 11 October 1986, resolved to launch the application, and that one of the prayers contained in the notice of motion was that he should be ordered to furnish the respondents with the reasons why he made the declaration. In their answering affidavit the respondents say: "Not a single reason exists which could not have been given within a few days after the issue of the Proclamation."

In my view one cannot, in the face of what is said in the first appellant's affidavit, hold that he refused to furnish the respondents with the reasons why he made the

declaration. One cannot say that the first appellant was not entitled to take advice as to what he should, or should not, disclose when giving reasons, and although some 14 days elapsed between the date of the request for reasons and the date on which the application was launched, this delay cannot in my view justify a finding that the first appellant had decided not to give reasons. I accordingly hold that the fact that the first appellant did not furnish his reasons for the declaration after it had been made cannot be regarded as proof that he refused to furnish reasons.

It was also contended on the respondents' behalf that, because of the nature of the first respondent's activities, the first appellant did not have the necessary jurisdiction to declare it to be an affected organisation. The argument is to the following effect: sec. 2(1) of the Act empowers the State President to declare an organisation to be an affected organisation if it is engaged in politics with aid from abroad; this means that an organisation may be declared to be an affected

organisation if it is "engaged in politics alone"(quotation from counsel's heads of argument); the first respondent, while admittedly engaged in politics with the aid of organisations abroad, is also engaged in non-political activities; consequently it is not an organisation which can be declared to be an affected organisation. This interpretation of sec. 2(1) of the Act, the respondents say, accords with common sense and will give expression to the rule of interpretation that a provision which makes an inroad into fundamental liberties and common law rights must be restrictively construed.

There is no substance in the argument. The language of sec. 2(1) is clear and unambiguous. It appears therefrom clarius luce that the State President has the power to declare an organisation to be an affected organisation if he is satisfied that it is an organisation which is engaged in politics with the aid of an organisation or person abroad, and there is no ground for holding that the power should be cut down

in the manner suggested by counsel. An organisation which is engaged in politics with aid from abroad does not cease to be such merely because it also engages in non-political activities, and the interpretation for which the respondents contend would frustrate the intention of Parliament as expressed in sec. 2(1) of the Act.

It was contended, in the alternative to the contention with which I have just dealt, that even if the first appellant did have the necessary jurisdiction to act against the first respondent, he was not obliged to do so, but that he had a discretion as to whether he should do so or not, and that he exercised that discretion in an improper manner when he made the declaration he did. The contention is based on allegations contained in the respondents' founding affidavit. It is said in that affidavit that although there are many organisations in South Africa which engage in politics with assistance from abroad, the first appellant singled out the first respondent "for special treatment" under sec. 2(1) of

the Act. This, it is said, constitutes "partiality and inequality of treatment" between the first respondent, on the one hand, and all the other organisations which engage in politics with foreign aid, on the other hand. It constitutes, also, it is said, "manifest injustice" towards the first respondent because it makes it impossible for it to pursue its ideals; and furthermore, it is said, it constitutes "a gratuitous interference" with the rights of the first respondent which can find no justification in the minds of reasonable men. In the circumstances, it is contended, the first appellant cannot be said to have exercised a proper discretion when he decided to declare the first respondent to be an affected organisation, and the declaration should, therefore, not be allowed to stand. These submissions were also advanced in this Court, and it was submitted, in addition, that if they were not upheld, the respondents "should have the opportunity of testing the issues through viva voce evidence, regard being had particularly to the fact that the way in

which the mind of the First Appellant worked is to a great extent a matter peculiarly within his own knowledge." (The quotation is from counsel's heads of argument.) The first appellant states in his affidavit that he thoroughly considered the matter before he declared the first respondent to be an affected organisation, and he denies that he acted improperly in exercising his discretion in the way he did. He denies, too, that he singled out the first respondent for "special treatment" and says that if another organisation falls within the terms of sec. 2(1), he will consider whether he should act against it.

The respondents' submissions cannot be sustained. Sec. 2(1) of the Act provides in clear terms that the State President may declare an organisation to be an affected organisation if he is satisfied that it is engaged in politics and does so with aid from abroad. If he is satisfied that organisation A is an organisation as envisaged in the section, he is entitled to declare it to be an affected organisation,

and the fact that organisation B is an organisation in respect of which a similar declaration could justifiably be made, cannot affect the validity of the declaration made in respect of organisation A. The first respondent, it may be added, does not deny that it is engaged in politics and that it does so with the assistance of funds from abroad. On the contrary, it frankly states that it does so, and it vigorously proclaims its right to do so. There is no reason to doubt the first appellant's averment that he was satisfied that the first respondent was an organisation as mentioned in sec. 2(1) of the Act when he declared it to be an affected organisation.

The averment is, in fact, not denied by the respondents, and in all the circumstances there does not appear to me to be any ground on which it could be held that the first appellant did not act within the power given to him by sec. 2(1) of the Act. I can also find no reason why the matter should be referred to the Court a quo for the hearing of oral evidence.

The final contention advanced by the respondents

as to the validity of the declaration made by the first appellant is that it was made "with an objective extraneous to the Act."

In the respondents' founding affidavit it is said that the declaration made by the first appellant "does not have an objective sanctioned by the Act"; that the first respondent "must not be indirectly punished because its policies are so totally in conflict with the political policies of the Second Respondent", and that by this declaration the first appellant "seeks to achieve an objective which is extraneous to the Act." The "objective" which the first appellant seeks to achieve, is alleged to be -

".... to discourage, impede and frustrate the First Applicant from pursuing with the vigour and the style which it has done its policies of seeking to achieve a non-racial, democratic and unfragmented South Africa by opposing the policies of the political party to which the members of the Second Respondent belong and by assisting, in the manner set out in this affidavit, citizens of this country who suffer disadvantages and disabilities caused by the policies of that political party in the perception of the Applicants."

The first appellant replied to these allegations in the following

terms:

"Soos by herhaling daarop gewys, het ek opgetree suiwer binne die magte aan my verleen kragtens artikel 2(1) van die Wet en ek ontken dat ek opgetree het met die doel om n ander gevolg te bewerkstellig of met enige ander oogmerk voor oë as dié wat uitdruklik deur die Wet gemagtig is."

Mr Mahomed, relying on Van Eck N O and Van Rensburg N O v. Etna Stores 1947(2) SA 984(A) at 996, contended that, if the respondents' allegations were true, the declaration made by the first appellant would be invalid. He said, however, that the issue could not be determined on the affidavits, and he submitted, in the alternative to the respondents' prayer that the appeal should be dismissed, that this Court should direct that viva voce evidence should be adduced in respect of the dispute whether "the first appellant had sought to attain an objective extraneous to the Act in purporting to declare First Respondent an effected organisation in terms of the Act." I cannot accept the submission that this Court should make an order which would have the effect of the matter being remitted to the Court a quo for the purpose of hearing

oral evidence. As repeatedly stated above, sec. 2(1) of the Act empowers the State President to declare an organisation to be an affected organisation if he is satisfied that it is engaged in politics and that it does so with aid from abroad.

The first appellant stated in his affidavit that he was satisfied that the first respondent was such an organisation when he declared it to be an affected organisation. I quote from his affidavit:

"Uit hoofde van al die inligting wat deur my oorweeg was, soos reeds gemeld in paragraaf 8.3 hierbo, waarvan dit wat in hierdie eedverklaring weergegee word, slegs 'n geringe illustrerende gedeelte van die geheelbeeld verteenwoordig, het ek tot die oortuiging gekom dat politiek deur en deur middel van Eerste Applikant bedryf word met behulp van, in samewerking met, in oorleg met en onder invloed van organisasies en persone in die buiteland."

He pointed out, too, that the first respondent is, on its own admission, an organisation which engages in politics with aid from abroad. In their reply to these allegations by the first appellant, the respondents did not deny that the first appellant was satisfied that the first respondent engaged

in politics with aid from abroad. Their reply was a denial that "the conclusion arrived at by the deponent was properly arrived at for the reasons which have been set out previously in this affidavit." No reason previously set out in the said affidavit related to an allegation that the first appellant sought to achieve an ulterior objective when he declared the first respondent to be an affected organisation. In his affidavit the first appellant also said the following as to why he made the declaration:

"Ek stem ..... nie saam dat Eerste Applikant 'should be free to receive financial assistance which it has hitherto done from wellwishers and sympathisers abroad' nie. Dit is juis omdat ek oortuig was dat politiek bedryf word deur of deur middel van Eerste Applikant, onder meer met behulp van fondse afkomstig van persone en organisasies in die buiteland dat ek die diskresie aan my verleen daartoe kragtens Artikel 2(1) van die Wet, uitgeoefen het."

In their answer to this allegation the respondents did not deny the first appellant's averment that it was his conviction that the first appellant was engaged in politics and that it did so with the aid of funds from abroad which moved him

to exercise the discretion given to him by sec. 2(1) of the Act. Their reply was that "the discretion vesting in the deponent was not properly exercised for the reasons previously set out." None of "the reasons previously set out" was in any way related to an allegation that the first appellant sought to achieve an ulterior objective when he made the declaration, and the allegation that the first appellant failed to exercise a discretion (a matter dealt with above) was also not related to a charge that the first appellant sought to achieve an improper object. In the absence of a denial of the first appellant's averment that he made the declaration on being satisfied - and because he was satisfied - that the first respondent engaged in politics with the aid of funds from abroad, the allegation by the respondents that the first appellant made the declaration he did strikes one as strange and unconvincing, particularly when regard is had to the fact that the first respondent is, on its own admission, an organisation which is engaged in politics with aid from abroad,

i.e. an organisation against which action can validly be taken under sec. 2(1) of the Act. In my view there is no ground for holding that oral evidence should be heard on the matter.

It remains to deal with a submission which is concerned only with the question of costs. It relates to paragraph 3 of the respondents' notice of motion, in which they sought an order directing the first appellant to furnish them with the reasons why he made the declaration contained in Proclamation 190 of 1986, and to the fact (referred to earlier in the judgment) that although the respondents asked the first appellant for his reasons on 13 October 1986, they had not been furnished with reasons by the time the respondents' application was launched on 27 October 1986. Mr Mahomed's submission is that, even if the appeal should be upheld, the appellants should be ordered to pay the costs of the application up to the date when the first appellant filed his replying affidavit, that being the date when the respondents were first informed why the first appellant had made the declaration.

The submission cannot be upheld. The prayer contained in paragraph 3 of the notice of motion was an alternative to prayers in which the respondents asked the Court to declare that the declaration contained in Proclamation 190 of 1986 was invalid and that the fourth appellant and the then 5th respondent (the Registrar of Affected Organisations) were accordingly not entitled to take any steps against the first respondent pursuant to the said declaration. The respondents continued with their application after the first appellant had filed his affidavit, and there is no reason to suppose that they would not have done so if the information contained in the affidavit had been conveyed to them at an earlier stage. What they really sought was, after all, an order which would declare the declaration made by the first appellant to be invalid. In the circumstances I can see no valid reason for making an order as sought by the respondents.

It is ordered as follows:

- (1) The appeal is upheld with costs, including the costs

occasioned by the employment of two counsel by (a) the first and second appellants, and (b) the third and fourth appellants. The costs are payable by the respondents jointly and severally, the one paying the others to be absolved.

(2) The orders made by the Court a quo are set aside and the following order is substituted therefor:

- (a) "The application is dismissed with costs, including the costs occasioned by the employment of two counsel by (i) the first and second respondents and (ii) the third and fourth respondents".
- (b) "The costs are payable by the applicants jointly and severally, the one paying the others to be absolved."

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P J RABIE  
ACTING CHIEF JUSTICE.

JOUBERT JA  
HEFER JA Concur.  
VIVIER JA  
STEYN JA