

KAHN v. LOUW AND SWART.

ARGUMENT.

1. JURISDICTION.

- (a) Respondents threaten a delict in the Cape because placing of name on list has consequences operative throughout Union. (Noboa v. Master of the S.S. "Russel Haverside" 1921 C.P.D. 136 at page 142.
- (b) Section 98 (3) (a) of South Africa Act gives jurisdiction to any Provincial Division in actions in which the Government is a party.

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2.

REQUISITES OF INTERDICT:

- (a) The test is has Applicant a "prima facie right" even though open to some doubt. (Setlogelo v. Setlogelo 1914 A.D. 221 at page 227; Webster v. Mitchell 1948 (1) S.A.L.R. at 1187 T.P.D.). This is if there is irreparable harm in prospect. This is clearly so here because once Applicant's name is on list the very serious consequences of Section 5 read with Section 11 follow.
- (b) Balance of convenience is weighed even though there be no balance of probability that Applicant will succeed in the case. (Ndauti v. Kgami 1948 (3) S.A.L.R. (W.L.D.) at page 37; Court has a Discretion Ibid).
- (c) In present case there is mixed law and fact. Respondent's case will rest upon contention that Act is retrospective. Presumption in law is against this and, therefore, Applicant has a prima facie case.
- Cf. Onus of establishing an exception and certifying probabilis causa.

ARGUMENT ON MERITS.

1. In terms of Section 3(1) (b), the Minister can only designate a liquidator of the "assets" of an organisation. Whether or not a given ^{organisation} opportunity has any assets, it is only legally capable of having them if it exists as a legal persona or an unincorporated association of legal personae, i.e. bound together by contract.
2. Section 3 (1) (b) cannot refer to an organisation that existed in the past, but has ceased to exist, since it expressly provides for the vesting of assets in a liquidator "as from the date upon which an organisation becomes an unlawful organisation."
3. Unless such date is expressly specified as being before the Act is promulgated, the "organisation" concerned must be in existence, i.e. be legally capable of owning assets, when the Act come into operation. Section 3 (1) is in the present tense.
4. "The Communist Party" for the purposes of Section 2 (1) is defined by Section 1 (xv) as "the organisation known by that name on the fifth day of May, 1950"
5. Hence if on the date of the operation of the Act, the "organisation" known on the 5th May, 1950, as "the Communist Party" has ceased to exist, Section 2 (1) could have no operation, nor could Section 3 (1) (b) empower the.....

the designation of a liquidator unless:-

- (a) "The Communist Party" referred to the individuals who are members thereof on the 5th May, 1950.
- OR (b) The Act itself had the effect of keeping the Communist Party, as an "organisation", alive - i.e. if it actually rendered it a concept of statute.
- OR (c) If the date on which the Communist Party became unlawful was, in terms of the Act, a date prior to the operation thereof - i.e. if the Act is retrospective for this purpose.

6. As to 5 (a):

- (i) Section 1 (xv) defines the Communist Party as an "organisation".
- (ii) Section 1 (x) defines an organisation as an "association of persons, incorporated or unincorporated" - i.e. as a legal persons or a voluntary association.
- (iii) Unlawful organisation is also defined in such a way as not to refer to the past but only to the present or future. See "is" and "forming".
- (iv) Even if the Communist Party had been a mere voluntary association (which can be assumed for the purposes of argument) such an association owes its existence to a contractual bond between its members as understood in the constitution or rules.
- See Maasdorp (7th Edition, Vol. 1, p. 341).
- (v) Witken v. Brebner at 186 & 193.
- (v) On first principles, such contractual bond can be dissolved by the consent of the parties to it, as is the case with any other contract.

(vi) If this occurs there is no "association".

See paragraph 11.

(vii) Where it means individuals, it says so - see para. 9 (c) infra.

7. As to 5 (K b):

- (i) A statute can, of course, create an artificial persona (if the appropriate subject matter exists). but there is no precedent for this being done by mere implication.
- (ii) In any event, this would contradict the main purpose of the Act which is called the Suppression of Communism Act.
- (iii) Indeed dissolution would achieve the only object of the Act, since the elaborate liquidation procedure, prescribed by Section 4 (1) - (9) is designed to ensure that the organisation ceases to exist.
- (iv) The prohibitions in Section 3 (1) (a) all clearly postulate the existence of the unlawful organisation - otherwise they would be pointless. Section 3 (3) postulates an existing organisation capable of holding assets, which are to be the sole source of the liquidator's remuneration. Section 3 (4) also postulates the existence of the organisation. (See also Section (c) and Section 4 (10) the word "are").
- (v) There is nothing in Section 2 (2), despite the wording of paragraph (a), to suggest that the Governor-General may declare non-existent organisations unlawful or artificially keep them alive for the purpose of declaring them unlawful. Here, again, the disappearance of prospectively unlawful organisations would achieve the purposes of the Act. The object of the Act is to

declare the Communist Party and other organisations unlawful but not by such declaration in itself to bring about the cessation of such organisation's existence. The organisation continues to exist, though now unlawfully, until it is liquidated. If the organisation has already liquidated itself, then there is no function for the liquidator - e.g. if Government decides to declare the Labour Party an unlawful organisation and the Labour Party prior to the actual declaration, now i.e. after the Act has been promulgated, dissolves itself entirely, ~~then~~ there is no room for any of the machinery under the Act. The policy of the Act is not to enable the Government to carry on a vendetta against ~~past~~ past members of a defunct organisation.

Suppose there never was a Communist Party in South Africa Section 2 (1) could not possibly in itself constitute it.

- (vi) An implication cannot be read into Section 2 (1) reconstituting the Communist Party for the sole purpose of declaring it unlawful. If this might have been intended, it has not been expressed and constitutes a casus omissus which it is for Parliament, not the Courts to remedy.

Craig (4th Edition pages 71 - 4);
Maxwell (page 15 (9th Edition)).
Rex v. Dvott (1882, 9 Q.B.D. 47).
See also Higgs v. Schraeder quoted in
Maxwell page 15 (9th Edition).

8. As to 5 (c):

- (1) This contention is expressly negatived by the word "hereby" in Section 2 (1).

(ii) As reference to 5th May, 1950, in Section 1 (xv) is only to the name of the organisation. The words, "notwithstanding any change in the name of that organisation after the said date" clearly show that all that the definition was intended to prevent was the evasion of Section 2 (1) by a change of name between 5th May, 1950, and the promulgation of the Act. This express provision further negatives any intention to relate Section 2 (1) back to 5th May, 1950.

(iii) The consequence of Applicant's name being placed on a list is to expose him to the unprecedented penalty under Section 5 of unseating him as an M.P. Hence the Court will lean heavily against a construction of the Act so as to give it retrospective effect.

Maxwell (9th Edition pages 221 - 3);

Re Athlumney (1898, 2 Q.B. at 551 - 2).

The Court will not supply a casus omissis.

Dadoo v. Krugherdorp Municipality 1920 A.D.

at page 562;

Rex v. Mloamali 1938 N.P.D. at pages 8 - 9;

Rex v. Stirk 5 E.D.C. 171 at page 172.

Steyn, Die Uitleg van Wette pages 22 - 2.

In other words, Section 2 (1) clearly postulates the continued existence of the Communist Party and makes no provision for the casus of it having entirely ceased to exist at the time of the Act as promulgated.

In any event, retrospectivity is never assumed.

Cuthbert v. Petersen 1945 A.D. at page 432.

Steyn, Uitleg van Wette, page 89.

Furthermore

Furthermore, statutes encroaching on rights are strictly contrued.

Maxwell, 9th Edition, pages 289 - 291.

And statutes creating new offences.

- (iv) Where retrospectivity is intended, the Act says so, e.g., proviso to Section 5 (1).
- 9. (a) The exercise of the liquidator's powers under Section 4 (10) depend on his proper designation under Section 3 (1) (b).
- (b) There is nothing in Section 3 to warrant the view that a liquidator can be appointed merely to compile a list of prescribed individuals, apart from any organisation with which they are associated.
- (c) Where individuals are aimed at as such the Act makes this clear. Cf. the Minister's powers re "communists" under Section 5 and his powers of banishment under Section 10.
- (d) Two stages:
 - (i) Declaration of unlawful organisation (Section 2) and
 - (ii) Designation of a liquidator (Section 3 (1) (b)).

ALTERNATIVE ARGUMENT:

- 10. (a) Section 4 (10) obliges the liquidator to compile a list of persons who "have been" office bearers etc. if directed by the Minister to do so. These words "have been" are capable of either of the following two meanings:
 - (i) "have been" from the time of direction by the Minister extending back to the promulgation of the Act.
 - (ii) From the time of the said direction extending back to any time indefinitely.

The.....

The latter construction is against the principles of non-retrospectivity and also that of liberal interpretation where Statute takes away rights.

But in any event, as read with Sections 2 and a whole and Section 8 (2) can have only the former meaning because in the case of other organisations declared unlawful, the knowledge of its unlawfulness can only exist after the date of the Act.

- (b) If this were not so, absurd results might follow - e.g. a man who had belonged to an organisation a generation ago could be subjected to the Minister's powers under Section 5, even though he might have entirely changed his views and associates.
- (c) For the reasons given in paragraph 8 (iii) (supra) the Court will not construe the Statute retrospectively in this respect.

11. (a) It is alleged on oath that the Communist Party has been in fact dissolved and the Liquidator treats it as such since he alleges that Applicant was a member of the Central Executive Committee.

- (b) In law a political party can be dissolved if the individual members are disabled by the Constitution from objecting to such dissolution.

See Wilken v. Brebner (1935 A.D. 175 at p. 185).

- (c) This principle can rest only on the contractual force of the party constitution which is the vinculum juris between the members.

(d)

- (d) If, therefore, the members unanimously agree to dissolution, the effect is the same.
- (e) The resolutions of the Central Committee and of the Branches would bind those members who are parties to them.
- (f) The publicity given to the resolutions of the Central Committee and the acceptance thereof by the other Party organs without protest or objection from any quarter gives rise to the irresistible inference that these decisions were known to and accepted by the membership as a whole, unless or until such inference is rebutted by evidence of persons who claim still to constitute the Party.

See Cape Indian Congress v. Transvaal Indian Congress (1940, 2. S.A.L.R. (A.D.) at pages 609 - 610)

It may be argued in support of Respondent that Applicant's contention in fact renders Section 2 (1) nugatory because there is no Communist Party and that Parliament must have known this at the time. In construing a Statute regard may be had to all the circumstances which may be proved by extrinsic circumstances, (Hailsham Vol. 31, page 489) and ignorance of the circumstances which render the passing of the statute necessary cannot be imputed upon.

The answer is clear that the object of the Act was to suppress Communism and, notwithstanding the bald announcement of dissolution, Parliament intended by Section 2 (1) to make sure of the liquidation of the Communist Party in case:

(a)

- (a) it continued to function as the same association of persons but under a different name or
- (b) the dissolution was itself only in name and not in fact.

The facts now show, however, unless they be subsequently contradicted by other evidence, that the Communist Party ceased in law and in fact to exist prior to the promulgation of the Act. Accordingly, impossibility of compliance or frustration followed.

Maxwell (9th Edition pages 387 - 9).

"Where, however, the act or thing required by the statute is a condition precedent to the jurisdiction of the tribunal, compliance cannot be dispensed with, and if it be impossible the jurisdiction fails. It would not be competent to a Court to dispense with what the Legislature had made the indispensable foundation of its jurisdiction."

Examples given where woman died and ship was lost.

Cf. Contract null and void where subject matter destroyed.

Cases of ship lost and woman died are relevant to jurisdiction of Minister and Liquidator.

The Minister's jurisdiction to appoint the liquidator is dependent upon the existence of the Communist Party.

This Act in so far as the Communist Party is concerned is specific and not general and compares with a private Bill.

ALTERNATIVE ARGUMENT on Prayer (b): assuming Communist Party continued as an organisation to exist - same argument as above re meaning of "have been". - paragraph 10 supra.

Collection Number: A2535

Collection Name: Abram Fischer Papers

PUBLISHER:

Publisher: **Historical Papers Research Archive, University of the Witwatersrand**

Location: **Johannesburg**

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