

# THE SOUTH AFRICAN LAW REPORTS

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# THE ALL SOUTH AFRICA LAW REPORTS

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DECISIONS OF  
THE SUPREME COURT OF SOUTH AFRICA  
THE HIGH COURT OF SOUTHERN RHODESIA  
THE HIGH COURT OF SOUTH WEST AFRICA

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1953 (2)  
APRIL-JUNE

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JUTA & CO., LTD.,  
CAPE TOWN AND JOHANNESBURG  
AND  
BUTTERWORTH & CO. (AFRICA), LTD.  
DURBAN.

(APPELLATE DIVISION.)

1953. March 2, 23. CENTLIVRES, C.J., GREENBERG, J.A.,  
 A SCHREINER, J.A., VAN DEN HEEVER, J.A., and HOEXTER, J.A.

*Railway.—Reservation of railway premises for exclusive use of particular races.—Administration not entitled so to reserve as to result in partial and unequal treatment to a substantial degree.—Act 22 of 1916, sec. 7 bis (1) (a) as amended.*

B The Railway Administration may not, when reserving railway premises or any portion thereof as waiting-rooms for the exclusive use of males or females of particular races or different classes of persons under Act 22 of 1916, section 7 bis (1) (a) (as inserted by section 4 of Act 49 of 1949), exercise unfettered discretionary rights and powers where the exercise of such rights and powers  
 C may result in partial and unequal treatment to a substantial degree as between such persons, races and classes (*per* CENTLIVRES, C.J.; GREENBERG, J.A., SCHREINER, J.A., and HOEXTER, J.A., concurring; VAN DEN HEEVER, J.A., dissenting).

Appeal by the *Attorney-General* from a decision in the Cape  
 D Provincial Division (DE VILLIERS, J.P., and HERBSTEIN, J.; HALL, J., dissenting), dismissing an appeal by the *Attorney-General* from a decision in a magistrate's court. The facts appear from the judgment of CENTLIVRES, C.J.

A. B. Beyers, Q.C. (with him D. P. de Villiers), for the appellant: Sec. 7 bis of Act 22 of 1916 is not a provision delegating legislative powers. It does not confer a general power of regulating certain subject-matters by subordinate legislation. It confers specific powers of taking administrative action in *ad hoc* cases, e.g. sec. 7 bis (1) (a) and (b). Whenever, therefore, the question arises  
 F whether the Administration has acted properly in terms of sec. 7 bis, the enquiry can relate only to a specific thing done by the Administration under cover of the section. The fact that sec. 7 bis is not a provision delegating legislative powers but is a provision authorising administrative action, renders the test of unreasonableness inapplicable in the present case for such test, as  
 G formulated by LORD RUSSELL and accepted in our Courts, applies only to delegated legislative authority and not at all to administrative action in the exercise of discretionary powers conferred by statutes. Such administrative action can be set aside only on the grounds stated in *Shidiack v. Union Government (Minister of Interior)*, 1912 A.D. at pp. 651-2. For the reason that the test of  
 H unreasonableness is inapplicable in the present case, it is distinguishable from *Rex v. Abdurahman*, 1950 (3) S.A. 136. On the assumption that LORD RUSSELL's test does apply in the present case, it would be entirely irrelevant to enquire whether the reservation in question, viewed in conjunction with other reservations or the absence of other reservations, has produced partiality and inequality between races in a wider sphere, or whether Parliament

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intended such partiality or inequality in a wider sphere. For Parliament was, in the enabling section, concerned only with particular reservations of particular places or vehicles and not with the general regulation of a series or system of reservations; *cf.* sec. 7 bis (1) (b). In conferring the powers enumerated in sec. 7 bis (1) (b), Parliament specifically authorised inequality on a large scale and there is therefore no room for a presumption that in authorising reservations on a smaller scale in sec. 7 bis (1) (a), e.g. of waiting-rooms, Parliament intended that inequality should be avoided by counter-reservations. Such interpretation would  
 B mean that one of the particular authorisations contained in sec. 7 bis, viz. the far-reaching power to reserve all trains travelling over a particular route, is to be read without qualification, whereas all the other authorisations, much less important in effect are to be read subject to a proviso that the particular reservation authorised  
 C must be counteracted by corresponding reservations so as to achieve substantial equality in some sphere or other. Such an interpretation is untenable. *Rex v. Abdurahman, supra*, is distinguishable. In that case the Court had to consider the effect of the exercise of subordinate legislative powers regulating the subject  
 D of reservations generally and to apply LORD RUSSELL's test thereto. The enquiry was whether the exercise of the general power produced inequality and partiality and, if so, whether the provision conferring the general power authorised such inequality and partiality. In the present case the Court is not concerned with  
 E the effect of the exercise of a general power but, as submitted *supra*, with the effect of specific powers. The powers are conferred separately and they authorise the doing of specific things. The effect of the exercise of any such power is, therefore, to be considered separately and there is no justification for considering the  
 F joint effect of a number of them in a sphere or spheres not indicated or even referred to in the enabling section.

G. Gordon, Q.C., for the respondent: The decision in *Rex v. Abdurahman*, 1950 (3) S.A. 136, gives an authoritative interpretation of the words "for the exclusive use of" where they appear  
 G in sec. 7 bis, the language of which is substantially identical with that of sec. 4 (6) of Act 22 of 1916. Sec. 7 bis gives the Administration no greater power of discrimination than it had under sec. 4 (6). The new section merely empowers the Administration to do directly by executive action what previously it had, under sec. 4 (6), to do by regulation. Appellant's contention that the enquiry  
 H relates to a specific thing only, namely, to the particular reservation, done by the Administration, begs the question. The issue, as stated in *Minister of Posts and Telegraphs v. Rasool*, 1934 A.D. at p. 173, is, has the enabling Act conferred the power to do unreasonable things. The presumption is against such power; *cf.* *Rex v. Abdurahman, supra* at p. 143; *Tayob v. Ermelo Local Road Transportation Board*, 1951 (4) S.A. 440; *Bindura Town Manage-*

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*ment Board v. Desai & Co.*, 1953 (1) S.A. at p. 364. Appellant's contention that administrative action can be set aside only on the ground, *inter alia*, of *mala fides* overlooks the principle that before there can be an enquiry as to whether a public officer has acted *bona fide* or *mala fide*, it must be clear that such officer has acted in the spirit of the statute and within the limits and for the objects intended by the Legislature; see *Britten and Others v. Pope*, 1916 A.D. at pp. 158, 169; *Abdurahman's case*, *supra* at pp. 142-3; *Shidiack v. Union Government (Minister of Interior)*, 1912 A.D. at p. 652; *Ramsay v. Zoutpansberg Liquor Licensing Board*, 1950 (3) S.A. at p. 655. The enquiry therefore is, what are his powers?—*cf. Bindura Town Management Board case*, *supra* at p. 364. The question here, therefore, is, has the Act conferred the power on the Railway Administration to do unreasonable things? The answer is that just as the original Act did not do so, as held in *Rex v. Abdurahman*, *supra*, so the amendment has not taken the matter any further in this direction. Appellant's contention that sec. 7 *bis* (1) (b) confirms his submissions is not supported by the language of this sub-section. This sub-section deals with trains travelling over a particular route and even if it does permit discrimination with inequality (which is denied), this, if anything, supports respondent's contention. For, on the principle of *expressio unius*, the power to discriminate with inequality could not have been intended in sec. 7 *bis* (1) (a).

*Beyers, Q.C.*, in reply.

*Cur. adv. vult.*

*Postea* (March 23rd).

CENTLIVRES, C.J.: The respondent, a Native, was charged in a magistrate's court with contravening sec. 36 (b) of Act 22 of 1916 as amended, read with reg. 20 (a) of the General Railway Regulations. I shall for the sake of brevity refer to Act 22 of 1916 as amended as the Railway Act. The charge sheet contained the following:

"... whereas the South African Railways and Harbours Administration has in terms of sec. 7 (*bis*) of the said Act 22 of 1916 reserved certain Railway premises or a portion thereof for the exclusive use thereof of persons of particular races or different classes of persons. Now therefore the Administration having reserved the Waiting-room, Cape Town Railway Station, being Railway premises, in terms of the aforesaid sec. 7 (*bis*) for the exclusive use of Europeans, being persons belonging to a particular class or race, the accused being a Native and being a person who does not belong to the category of persons for whose benefit the reservation had been made, did on or about the 3rd day of August, 1952, and at the European Waiting-room, Cape Town Railway Station, in the district of the Cape, wrongfully and unlawfully make use of the aforesaid premises or portion thereof, or having so entered the said waiting-room, remained therein after having been desired by a servant of the South African Railways and Harbours Administration, Constable Johannes Hendrik Basson, to leave it."

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Sec. 7 (*bis*) (1) of the Railway Act is as follows:

"7 (*bis*) (1) The Administration may, whenever it deems expedient and in such manner or by such means as it may consider most convenient to inform any person affected thereby of the fact of such reservation—

(a) reserve any railway premises (including conveniences) or any portion thereof, or any train or any portion of a train for the exclusive use of males or females or persons of particular races, or different classes of persons or Natives;

(b) reserve all or certain trains travelling over a particular route for the exclusive use of persons of particular races or different classes of persons or Natives."

Sec. 36 (b) of the Act provides that:

"any person who knowing . . . that a railway coach . . . or other place is reserved by the Administration for the exclusive use of . . . persons of particular races . . . or Natives enters that . . . other place in contravention of a regulation and without lawful excuse, or having so entered it remains therein after having been desired by a servant to leave it . . . shall be liable on conviction to a fine. . . ."

Reg. 20 (a) is as follows:

"Whenever the Administration has, in terms of sec. 7 *bis* of the Act, reserved any railway premises (including conveniences), or any portion thereof for the exclusive use of males or females or of persons belonging to a particular race or class, no person who does not belong to the category of persons for whose benefit the reservation has been made shall make use of the premises or portion thereof so reserved."

The magistrate found that the facts alleged in the charge sheet had been proved but acquitted the respondent on the ground that the action of the Administration in reserving waiting-rooms on Cape Town Railway Station had resulted in partial and unequal treatment to a substantial degree as between Europeans and non-Europeans, the facilities provided for non-Europeans being substantially inferior to those provided for Europeans. The magistrate held, on the authority of *Rex v. Abdurahman*, 1950 (3) S.A. 136 (A.D.), that this action of the Administration was void.

Acting in terms of sec. 104 of Act 32 of 1944 the *Attorney-General* of the Cape Province required the magistrate to state a case for the consideration by the Cape Provincial Division of the following question of law:

"Whether the correct interpretation of Act 22 of 1916, as amended, and more particularly sec. 7 *bis*, is not such that the Railway Administration may, when reserving railway premises or any portion thereof as waiting-rooms for the exclusive use of males or females of particular races or different classes of persons, exercise unfettered discretionary rights and powers even where the exercise of such rights and powers may result in partial and unequal treatment to a substantial degree as between the said persons, races and classes."

In terms of sec. 104 of Act 32 of 1944 the *Attorney-General* appealed to the Cape Provincial Division, the ground of appeal being the question of law referred to above. The Provincial Division by a majority dismissed the appeal. The *Attorney-General* now appeals to this Court in terms of sec. 105 of the Act.

At the outset I should point out that the question which we

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have to consider is a question of pure law. Presumably that question was framed deliberately in the language in which it is couched. It does not ask the Court to consider, what would also have been a question of law, viz.: whether there was evidence on which it could reasonably be held that the action of the Administration in reserving waiting rooms at Cape Town Railway Station resulted in partial and unequal treatment to a substantial degree as between European and non-European. Had such a question been raised it would have been necessary to consider the evidence but that question not having been raised we must accept as a fact that the action of the Administration has resulted in partial and unequal treatment to a substantial degree as between Europeans and non-Europeans. I may add, moreover, that the appellant's counsel did not ask this Court to consider the evidence which was led before the magistrate: he argued the matter on the basis that the question before the Court was a pure question of law which involved the proper interpretation to be placed on sec. 7 *bis* (1) of the Act.

On appeal before this Court Mr. *Beyers*, who appeared for the appellant, stated that he was not questioning the correctness of the decision in *Rex v. Abdurahman* (*supra*) but contended that that case was distinguishable from the present case for the following reasons. In that case sec. 4 (6) of the Railway Act, before it was amended by Act 49 of 1949, delegated, subject to the approval of the Governor-General-in-Council, legislative powers to the Railway Administration, whereas in the present case sec. 7 *bis* (1) is not a provision delegating legislative powers but confers upon the Administration specific powers of taking administrative action in *ad hoc* cases. The test of unreasonableness as formulated by LORD RUSSELL in *Kruse v. Johnson*, 1898 (2) Q.B. 91 applies, so the argument proceeded, only to delegated legislative authority and not to administrative action in the exercise of discretionary powers conferred by statutes; such administrative action cannot be set aside by the Court on the ground of unreasonableness—even in the special sense in which a by-law or regulation can be set aside on such ground—but only on the grounds stated in *Shidiack v. Union Government (Minister of Interior)*, 1912 A.D. 642 at pp. 651, 652, i.e. *mala fides*, ulterior and improper motives, failure to exercise a discretion and disregard of the express provisions of a statute. This contention, which was forcibly advanced, merits serious consideration. As it was not raised in the Provincial Division we have not the advantage of having the views of that Division on the point.

The principles enunciated in *Shidiack's* case are firmly established in our law in relation to acts of public officials which they are by statute authorised to perform. In such cases the Courts cannot question such acts on the ground that they are unreasonable: those acts can only be set aside on the grounds mentioned in *Shidiack's* case. But a person can always attack an act performed

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by a public official on the ground that that official was not in law entitled to perform that act. This is an elementary proposition for which it is hardly necessary to quote any authority. It is interesting to note that KOTZE, J.A., in *Rex v. Padsha*, 1923 A.D. 281 at p. 308, after referring to *Shidiack's* case, said:

"It is a generally accepted rule of universal application that a power must be exercised within the prescribed limitations and for the purpose intended and no other. It has been well said by Alexander Hamilton that 'there is no position which depends on clearer principles than that every act of delegated authority, contrary to the tenor of the commission under which it is exercised, is void' (The Federalist, No. 78). This principle, traceable to the *Pandects* whence so many other sound rules are derived, is incontrovertible. And it is equally incontrovertible that it is the peculiar and exclusive province of the courts to declare and expound the law, and to determine whether in any given case, where the authority of a Minister of the Crown, in exercising a power conferred upon him by a statute, is questioned, to test the exercise of this power by the terms in which the Legislature has chosen to confer it."

I have not overlooked the fact that the above quotation is taken from a dissenting judgment but it is not in conflict with anything that was said in the majority judgments. For instance DE VILLIERS, J.A., who formed one of the majority, said at p. 290:

"The function of the Court is to ascertain what was the intention of the Legislature as expressed in the Act, and then simply to test the Minister's notice in the light of that intention. I agree that the Minister is not to go outside the limits of his powers. . . . As a general proposition it may be laid down that when a person travels outside his powers, the Court will set him right."

The principles laid down by KOTZE, J.A., and DE VILLIERS, J.A., in *Rex v. Padsha*, *supra*, apply both to acts which public officials claim to have the right to perform and to regulations which may be made under statutory authority. In each case the enquiry is whether the matter questioned falls within the authority of the statute concerned. It is true that a particular regulation may be declared invalid on the ground of unreasonableness but

"what is really meant is that the regulation is *ultra vires* the enabling statute, because Parliament did not intend to give authority to make such a regulation".

*Vide Rex v. Abdurahman*, *supra*, at p. 150.

This brings me to consider whether sec. 7 *bis* (1) (a) authorises the Administration to discriminate between members of different classes or races on a footing of partiality and inequality. The answer to this question depends on the proper construction to be placed on that section. A similar section viz.: sec. 4 (6) in its unamended form was construed by this Court in *Rex v. Abdurahman*, *supra*, at p. 149, and it was there held, applying the principles laid down in *Minister of Posts and Telegraphs v. Rasool*, 1934 A.D. 167, that that section did not authorise partiality and inequality as between members of different races. It is unnecessary for me to discuss what was said on this point in *Rex v. Abdurahman*, for, as I have already said, Mr. *Beyers* did not question that decision. For the reasons given in that decision it seems to me that the same construction should be placed on sec. 7 *bis* (1) (a).

The fact that sec. 4 (6) in its unamended form authorised the making of regulations providing for the reservation of railway premises, etc., for the exclusive use of persons of particular races whereas sec. 7 *bis* empowers the Administration, without promulgating any regulations, to make such reservation, cannot, in my view, affect the position. In each case the question at issue is the same: Did Parliament intend that the right of reservation, whether conferred by a regulation made under the authority of the old sec. 4 (6) or conferred by the Act itself in sec. 7 *bis*, could be exercised in such a manner as to result in partial and unequal treatment to a substantial degree between males and females, persons of particular races or different classes of persons. The passage quoted in *Rex v. Abdurahman, supra*, from *Rasool's case, supra*, and as explained in the later case shows that when a statute confers a power, the statute must not be construed to permit partial and unequal treatment of members of different races, unless such power is specifically given either in express terms or by necessary implication. See too the remarks of my Brothers VAN DEN HEEVER and HOEXTER in *Bindura Town Management Board v. Desai and Company, 1953 (1) S.A. 358 at pp. 363 and 369 (A.D.)* which are to the same effect.

Mr. *Beyers* further contended that whenever the question arises whether the Administration has acted properly in terms of sec. 7 *bis* (1), the enquiry can relate only to a specific thing done by the Administration under cover of the section: thus, if the question arises whether a particular reservation has been validly made in terms of that section, that particular reservation alone is relevant to the enquiry and the application of LORD RUSSELL'S test to such test would be as follows:

- “(a) Has the reservation in question brought about partiality and inequality between races as regards the use of the particular place reserved? The answer would undoubtedly be: Yes, for that is the inevitable effect of the reservation.
- (b) Has Parliament specifically authorised such partiality and inequality? Again the answer would undoubtedly be: Yes, for the same reason, viz.: that such partiality and inequality is the inevitable consequence of the reservation.”

The above contention is in conflict with the *ratio decidendi* in *Rex v. Abdurahman, supra*. In that case the point in issue was whether it was in the circumstances of the case, an offence for a non-European to enter a first-class coach reserved for Europeans only and in considering that point this Court took into account the fact that no first-class coach had been reserved for non-Europeans. The Court held in that case that the Administration in reserving first-class coaches for Europeans only and not reserving any first-class coaches for non-Europeans only had treated members of different races on a footing of partiality and inequality to a

substantial degree and that its action in doing so was therefore void. In other words the Court held that the exercise of a power to reserve portion of a train can and should (in the absence of specific authority in the statute to the contrary) be exercised without the inevitable result that members of different races are treated on a footing of partiality and inequality to a substantial degree. The same reasoning applies to the exercise of a power to reserve portion of railway premises. If the Crown's contention were correct, it would follow that the Administration could, under sec. 7 *bis* (1), reserve conveniences on railway premises for members of a particular race only and provide no conveniences for members of any other race. This could not, in my opinion, have been the intention of Parliament, for, as was stated in *Abdurahman's case*, at p. 149:

“The State has provided a railway service for all its citizens, irrespective of race, and it is unlikely that the Legislature intended that users of the railway should, according to their race, have partial or unequal treatment meted out to them.”

Mr. *Beyers* sought to fortify his contention by referring to para. (b) of sub-sec. (1) of sec. 7 *bis*. He contended that in that paragraph Parliament specifically authorised inequality on a large scale and that there is therefore no room for a presumption that in authorising reservations on a smaller scale (e.g. of waiting rooms), Parliament intended that inequality should be avoided by counter-reservations. It is not necessary for the purpose of this case to place a construction upon para. (b) of the sub-section but assuming that Mr. *Beyers's* contention is correct, viz.: that that paragraph authorises inequality on a large scale, it does not follow that inequality of treatment is necessarily implicit from the wording of para. (a). Assuming that it is impossible for the Administration to exercise its powers under para. (b) without creating inequality of treatment the reasoning in *Rex v. Abdurahman, supra*, shows that effect can be given to the language of para. (a) without creating inequality of treatment as between members of different races.

For these reasons it seems to me that the question of law raised by the *Attorney-General* in his notice of appeal must be answered in the negative and the appeal consequently fails. I may add that after the decision of this Court in *Rex v. Abdurahman, supra*, the Legislature amended the Railway Act on two occasions; see Act 63 of 1951 and Act 45 of 1952. On neither occasion did it amend the Railway Act so as to allow the Administration to treat members of different races on a footing of partiality and inequality.

I should perhaps mention that the *ratio decidendi* of the learned Judge who dissented in the Provincial Division was not relied on by the appellant's counsel in this Court. Nevertheless it is desirable to say why I am unable to agree with the reasoning of the learned Judge. In so far as his reasoning may seem to be in conflict with the decision in *Abdurahman's case* all that it is necessary to say is

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that that case was binding upon him. The learned Judge laid some stress on the words "whenever it deems expedient" in sec. 7 *bis* (1) and, relying on cases such as *Rex v. McGregor*, 1941 A.D. 493, seemed to favour the view that those words serve to show how "untrammelled" a "discretion" (to quote the words of FEETHAM, J.A., in *Rex v. McGregor* at p. 498) is vested in the Administration for the purpose of carrying out the powers the Act confers on it. The Administration has, of course, an untrammelled discretion whether it will or will not exercise the powers of reservation conferred on it by sec. 7 *bis* (1) but the enquiry is, what are those powers: do they include a power to reserve on a footing of partiality and inequality as between members of different races? That enquiry raises quite a different issue to the issue that was raised in *Rex v. McGregor*. In that case the Governor of Southern Rhodesia was empowered by Act of Parliament to

"make such Defence Regulations as appear to him to be necessary or expedient for securing the public safety, the defence of the Colony, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged and for maintaining supplies and services essential to the life of the community."

As regards this provision FEETHAM, J.A., said at p. 498:

"A special form of words has been chosen, the effect of which may be to enlarge the powers of 'the Governor', so as to leave to him what amounts to an untrammelled discretion to decide what regulations are to be regarded as required for the general purposes mentioned in the section, save for two limitations",

which are irrelevant as far as the present enquiry is concerned. In the present case an untrammelled discretion is left to the Administration whether it will or will not do a specific act, viz.: reservation but, for the reasons already given by me, the statute does not authorise the Administration in performing that act to treat members of different races on a footing of partiality and inequality to a substantial degree.

Mr. Gordon, who appeared for the respondent, asked that the Court should order that the costs to which the respondent has been put in opposing the appeal to this Court should, in terms of sec. 105 (2) of Act 32 of 1944, be paid by the appellant. Mr. Beyers contended that no order as to costs should be made because the evidence showed that, when the respondent entered the waiting room reserved for Europeans only, he intended in doing so to defy the law deliberately and not to test the validity of the law. Under sec. 105 (2) of Act 32 of 1944 costs are in the discretion of the Court. No order as to costs was made in the Provincial Division in relation to the costs in that Division, probably because the respondent did not ask for any costs. I shall assume that the contention of Mr. Beyers would have been sound, if the respondent had asked for an order as to costs in the Provincial Division, but the position on appeal to this Court is different. I can see no reason why the *Attorney-General*, having failed on appeal to the Provincial Division and having appealed against the judgment

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of that Division to this Court, should not pay the costs in this Court.

The appeal is dismissed with costs.

GREENBERG, J.A., SCHREINER, J.A. and HOEXTER, J.A., concurred. A

VAN DEN HEEVER, J.A.: I have had the advantage of reading the judgment prepared by the CHIEF JUSTICE in this appeal. As I have come to a different conclusion I propose to state as briefly as the subject will allow, the reasons which have led me to that conclusion. For the sake of brevity I will not repeat the facts stated in that judgment and I refer to the decided cases mentioned therein by means of a short method of citation. B

This is an appeal under sec. 105 of the Magistrates' Courts Act, 1944, from a judgment of the Cape Provincial Division brought under the provisions of sec. 104 of that Act. The latter section provides that when in criminal proceedings a magistrate's court has given a decision in favour of the accused on any matter of law, the magistrate may be required to state a case for the consideration of the Court of appeal, setting forth the question of law and his decision thereon, and, if evidence has been heard, his findings of fact, in so far as they are material to the question of law. D

In compliance with the requirement of that section the following case was stated:

"A. Facts found to be proved:

1. In terms of sec. 7 *bis* of Act 22 of 1916, as amended, read with General Railway Regulations framed under the said Act, the Railway Administration has reserved certain three portions (hereafter referred to as waiting-rooms Nos. 1, 2 and 3) of Railway premises at Cape Town railway station for the exclusive use of Europeans, and certain two portions (hereafter referred to as waiting-rooms Nos. 4 and 5) at the said station for the use of non-Europeans. F
2. Accused is a Native and not a European.
3. On 3/8/1952 accused sat on a bench in waiting-room No. 1.
4. Accused refused to leave this waiting-room (No. 1) when requested to do so by Constable J. H. Basson, who is in employ of the S.A. Railways and Harbours Administration.
5. Many more non-Europeans than European passengers use Cape Town railway station. G
6. The Administration intended the waiting-rooms concerned principally for the use of main line passengers.
7. There are more European than non-European main line passengers.
8. The total area of the waiting-rooms set aside for Europeans is greater than that set aside for non-Europeans.
9. The standard equipment and facilities provided in the waiting-rooms for non-Europeans are much inferior to those provided in the waiting-rooms for Europeans. H
10. The three waiting-rooms for Europeans are intended for 1st and 2nd class passengers. One of the waiting-rooms for non-Europeans (No. 4) is for 1st and 2nd class, and one (No. 5) is for 3rd class passengers.
11. There is provision for European males in waiting-room No. 1, but there is no similar provision for 1st and 2nd class non-European passengers.
12. This action of the Administration, when it so reserved waiting-rooms,

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has resulted in partial and unequal treatment to a substantial degree, as between Europeans and non-Europeans.

14. In view of the finding in para. 12 above and of the principles laid down in the case of *Rex v. Abdurahman*, 1950 (3) (S.A.) 136 (A.D.), this action was held to be void."

A Thereupon at the request of the *Attorney-General* the following question of law was posed:

"Whether the correct interpretation of Act 22 of 1916, as amended, and more particularly sec. 7 (*bis*), is not such that the Railway Administration may, when reserving railway premises or any portion thereof as waiting rooms for the exclusive use of males or females or persons of particular races or different classes of persons, exercise unfettered discretionary rights and powers even where the exercise of such rights and powers may result in partial and unequal treatment to a substantial degree as between the said persons, races or classes."

B I may observe in passing that I am aware of the fact that this is an appeal on a question of law and that I cannot question the facts found by the magistrate. I would point out, however, that the statement contained in para. 12 of the stated case is not a factual conclusion. In *Platt v. Commissioner for Inland Revenue*, 1922 A.D. 42 at p. 49, JUTA, J.A., in discussing a similar distinction remarked:

"The proper rule has, I venture to think, been laid down by LORD PARKER in *Farmer v. Cotton's Trustee*, 1915 A.C. 922, and it seems to me to be confirmed by the weight of judicial decision in English Courts. He said: 'Where all the material facts are fully found, and the actual question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law.'"

(Cf. *Commissioner for Inland Revenue v. Stott*, 1928 A.D. at p. 259.)

F I make this observation, not because I wish to go behind any finding of fact stated by the magistrate, but because I do not think it could ever have been the intention of the Legislature in enacting sec. 104 of the Magistrates' Courts Act that a Court of Appeal should be called upon to answer a hypothetical and abstract question. In the abstract I have no notion what may be "partial and unequal treatment to a substantial degree as between the said persons, races or classes". Before answering that question I must know what it means. Moreover, as appears from the provisions of sub-secs. (4) and (5) of sec. 104 of that Act and sub-sec. (1) of sec. 105, this type of appeal was not conceived merely with the object of clarifying the law, but in order that justice be done in individual cases. I am of opinion, therefore, that I am entitled to interpret the phrase "partial and unequal treatment" in the question posed in the light of the findings and the statement of case out of which it arises.

The question deals only with the reservation of waiting rooms for the exclusive use of males or females or persons of particular races or different classes of persons. We are concerned with only

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two classes of persons, Europeans and non-Europeans. One gathers, therefore, that in this connection the phrase "partial and unequal treatment" means:

- (1) To allocate more floor space to the Europeans than to the non-Europeans;
- (2) failing to provide equipment and facilities of equal standard in both sets of waiting rooms;
- (3) to make provision for European males in one waiting room set aside for Europeans without making equivalent provision in the waiting rooms reserved for non-Europeans.

Mr. *Beyers* did not question the correctness of the decision of this Court in *Abdurahman's* case. He sought to distinguish that case from this on grounds with which I cannot agree. He suggests that there is an antinomy between what I may for the sake of brevity call the principle of equality applied by the Court *a quo* in this case and the rule laid down in *Shidiack's* case and followed in a long line of decisions.

On a proper appreciation of the "two principles" concerned there is no antinomy, for upon closer examination they will appear to be one and the same. In *Shidiack's* case (at p. 651) INNES, A.C.J., observed:

"Now it is settled law that where a matter is left to the discretion and determination of a public officer and where his discretion has been *bona fide* exercised or his judgment *bona fide* expressed, the Court will not interfere with the result."

If one elevates an accidental circumstance of the application of the underlying principle and turns it itself into a principle, only confusion can result. There is no peculiar virtue in the fact that in that case the person concerned was a public (i.e. administrative or executive) officer save that if he had been a judicial officer one would more readily infer an intention on the part of the Legislature that his judicial acts shall be subject to correction by a superior judiciary. Obviously this "settled law" can be applied only if from the terms of the empowering enactment, its objects and the other aids to interpretation, the Court is satisfied that "the matter is left to the discretion . . . of the public officer". Very often the nature of the function which he is empowered to perform will assist in ascertaining whether Parliament did leave the matter to his discretion in that sense.

In *Kruse's* case LORD RUSSELL propounded the test—one of many tests—of equality in the treatment as between various classes of the community as a test of reasonableness in the specialised sense, the result of which again was used as a means of determining whether Parliament did confer the powers contended for. The ultimate question in each case is, therefore, what was the true intention of the empowering Legislature.

There is a tendency to elevate what properly used is only a guide in ascertaining the intention of the Legislature into a rule of substantive law to be used as a general touch-stone of validity.

It is only one of many pointers considered in the interpretation of statutes. It is based on the presumption that, unless the contrary appears from the empowering statute, Parliament must be deemed to have intended that the powers conferred should not be exercised so as to discriminate between different classes of the community on a basis of inequality or partiality. However, other considerations arising out of the statute may overbear this presumption and, as I have indicated, the nature and objects of the power conferred may often be incompatible with the operation of the presumption. A municipality may in one and the same statute be empowered to make by-laws and to conclude contracts for the erection of municipal buildings. To the exercise of the former it is obvious that the test of reasonableness in the specialised sense would readily be applicable; for in performing that function the municipality acts as independent arbiter—or rather law-giver—and holds the scales as between subject and subject. As a contracting party it acts as *syndicus* for the community and as such in its own interests. The test would consequently be quite inappropriate.

Mr. *Beyers* contended that the test formulated by LORD RUSSELL applies only to delegated legislative authority. Apart from this contention being in conflict with the decisions of this Court in *Rasool's* case and *Abdurahman's* case, it follows from what I have said that I cannot agree with that contention. These cases and *Shidiack's* case can be reduced to a single principle: what did Parliament intend?

In my opinion *Abdurahman's* case is not *in pari materia* with this. Sec. 127 of the South Africa Act provides that the railways and harbours shall be administered on business principles; not for profit save such profits as are necessary to meet betterment, depreciation and interest charges; one of the principal objects being to develop the country by means of cheap transport. But besides these things the South African Railways have extensive powers: i.e. to advertise; to build and manage hotels; to lend money to railway servants; to sell houses on the hire-purchase system. In *R. v. Abdurahman* (at p. 149) the CHIEF JUSTICE remarked:

"The State has provided a railway service for all its citizens, irrespective of race, and it is unlikely that the Legislature intended that users of the railways should, according to their race, have partial or unequal treatment meted out to them."

I suppose that if the State has provided a public service such as a postal service and runs a post office, every member of the public has a claim to be served if he is prepared to pay the price and applies for the particular service at the proper time and place. But it must be remembered that although the South African Railways and Harbours are called a department, it is in fact a trading corporation performing many functions. In its own interests and in order to attract revenue it does a number of things which—compared with the activities of a common carrier—are

supererogatory. It furnishes a number of amenities which it is not bound to do. It is not bound to furnish waiting rooms at all, or restaurants. Without authority to do so the Administration will not be able to devote such amenities to particular classes of the community exclusively. But once it is empowered to discriminate between classes, then, in view of the injunction to conduct its affairs on business principles, I cannot see why—in the case of these supererogatory amenities—it cannot favour the more lucrative traffic. When it comes to the reservation of space and not transport service, I cannot see why the reasonable requirements of different classes of the community should come into the picture. Take for example a small station on the high veld of the Transvaal; there are not enough passengers to warrant erecting an elaborate or large waiting room. But it is very cold. Supposing—having the power to discriminate—the Administration erects a small waiting room and reserves it exclusively for women; would that be unreasonable? Would it not be sound business to reserve luxurious waiting rooms for the exclusive use of tourists travelling expensively in trains gorgeous with observation and dining cars?

In terms of sec. 7 *bis* (1) (b) the Administration may reserve all or certain trains travelling over a particular route for the exclusive use of persons of particular races or different classes or Natives. If such a train and route are allocated to Natives exclusively I cannot see anything unreasonable in the reservation of the platforms abutting on the terminals or any waiting-rooms upon such platforms for the exclusive use of Natives. It would facilitate operations.

In *Abdurahman's* case (p. 149), the CHIEF JUSTICE observed:

"For instance, conveniences can be reserved for exclusive use of males and females. It would be absurd to suppose that the Legislature could have contemplated the reservation of one convenience for the exclusive use of males, and the use by both sexes of another unreserved convenience on the same premises."

As far as that *dictum* relates to premises it is *obiter*. However, it was relied on in this case. The *dictum* was merely an illustration and cannot be taken literally. It contemplates discrimination as between males and females and implies that if there is reservation for the exclusive use of males there must also be a reservation for the exclusive use of females. Accepting the correctness of that *dictum*—for it is a judgment passed only on a particular discriminatory division on the basis of sex of the population, the test being reasonableness—it does not follow that it must apply to every other conceivable division.

Supposing a certain tribe is often the centre—either as attackers or as objects of attack—of riots on the Rand and Railway property suffers in consequence. To my mind it would be eminently reasonable on the part of the Administration to reserve a waiting-room for the exclusive use of that tribe, in its own interests and not because of the reasonable requirements of persons belonging to that tribe. I

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cannot imagine that Parliament could have contemplated that in such a case the Administration had either to jettison its idea of reservation or multiply its waiting-rooms on a mathematical or mechanical basis by the number of sections of the community in respect of which reservations are contemplated. If it reserves a particular area of railway premises with certain facilities and safeguards for the exclusive occupation of persons about to be deported, I cannot see on what principle of reasonableness other sections of the community can claim equal rights of sequestration. Such a rule implies that if the Administration erects or acquires and manages an hotel exclusively for foreign tourists or for travellers over long distances it must reduplicate or multiply such facilities to provide for like reasonable requirements of every other section of the populace which the Administration has recognised as a separate class.

A train is an elastic entity; its units may be variously conceived: seats, compartments, coaches. The re-arrangement of accommodation in a train is easily effected. To provide new waiting-rooms or similar structures is not so easy or inexpensive. The two things are not on a par.

Sec. 7 *bis* (1) authorises the Administration to reserve railway premises (including conveniences) for the exclusive use of different classes of persons, which implies discrimination. In the last resort the question whether such discrimination must be on a basis of equality depends upon the intention one must impute to the Legislature. Considering the multitude of activities in which the Administration is authorised to engage on business principles and the diverse objects to which railway premises may be devoted, I cannot imagine that it could possibly have been the intention of Parliament to entrust the Administration with a power from exercising which it must either refrain or exercise it in a manner which will satisfy the reasonable requirements of all sections of the community, but have no relation to the economic consequences or to the value of any particular section as clientele.

I have already indicated that in my opinion the fact that powers are conferred upon a public officer is not conclusive on the question what are the extent of those powers. But that the person or body upon whom such a power has been conferred may be a counterpoise, in arriving at the true intention of the Legislature, to such considerations as that of impartiality is obvious from *Shidiack's* case and the current of decisions following upon it. In *Galloway v. The Mayor and Commonalty of London*, L.R. 1866 (1) H.L. 34, the Lord Chancellor (LORD CRANWORTH) repeatedly remarked that where a public corporation was authorised to do something in the public interest:

"It does not seem to me unreasonable to suppose that the Legislature left it to the respondents to judge of the best means of carrying into effect the duties entrusted to them."

Here we have an organisation at the head of which there is a

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Minister of the Crown responsible to Parliament. By parity of reasoning we may apply those indices which courts have resorted to in determining whether servants of the Crown empowered to do certain things are subject to regulation by local government authorities. In *Gorton Local Board v. Prison Commissioners*, 1904 L.J.; K.B. 113 (Vol. 73), WILLS, J., remarked:

"There is, therefore, a great, high and responsible officer of State in whom is vested the discretion of approving or disapproving of such plans, and in whom was vested the discretion. . . . Can anybody suppose that it was intended that the approval of the Secretary of State should not be effectual, and that, because the *locus in quo* was situated within the area of jurisdiction of a local board, the plans approved by the Secretary of State should not be followed out. It seems to me something like an absurdity to suppose such a thing."

In *Cooper v. Hawkins*, *ibid.*, that judgment was commended by LORD ALVERSTONE, C.J., as being "a very useful contribution to this branch of the law".

As far as reservation of accommodation on trains is concerned I am bound by precedent, the correctness of which is not questioned. To my mind the question of reserving space or buildings on railway premises is still open. I am convinced that the exercise of powers in that regard conferred by sec. 7 *bis* (1) with the limitations suggested is not practically possible and could not have been contemplated by Parliament.

For these reasons, in my judgment, the question posed should be answered in favour of the appellant and consequential amendments should be made in the proceedings of the Court *a quo*. As this is a dissenting judgment, it is unnecessary to enlarge upon the form the corrections should take.

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ISRAELSOHN v. POWER, N.O. AND RUSKIN, N.O. (1).

(WITWATERSRAND LOCAL DIVISION.)

1952. November 5, 10. NESER, J.

*Evidence.—Privilege.—Statement made by client to his attorney.—Document drawn up by attorney for submission to counsel for opinion.—Document found on client's premises during a search.—Client denying that document truly reflected information furnished to attorney.—Document not to be used for purposes of cross-examining client thereon.*

During the search under a search warrant of the house occupied by the applicant and her husband, a document was found purporting to be a statement prepared by her husband's attorneys for submission to counsel for an opinion concerning the income tax payable by the husband. In an application made