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

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1950. March 23, 24; May 22. WATERMEYER, C.J., CENTLIVRES, J.A., GREENBERG, J.A., SCHREINER, J.A., and MURRAY, A.J.A.

A *Railway.—Regulation framed whereunder portion of train reserved for European race without restricting them to the use of that portion.—Non-Europeans not permitted to use reserved portion.*

B *—Criminal sanction only imposed in respect of breach by non-Europeans.—Regulation as applied resulting in partial and unequal treatment to a substantial degree.—Such treatment not authorised by Act 22 of 1916.—Effect.*

C Acting under paragraph (c) of Regulation 20 of the General Railway Regulations (as amended) framed under section 4 of Act 22 of 1916, the Railway Administration reserved a portion of trains for the exclusive use of Europeans without restricting members of that race to the use of that portion: non-Europeans were not allowed to use the reserved portion and had to share the remainder of the train with members of the race in whose favour the reservation was made. Members of the European race were not subjected to criminal sanctions, while members of the other race were. Appellant had been charged with and convicted of inciting a number of non-Europeans to commit the offence of contravening section 36 (b) of Act 22 of 1916 read with the above Regulation in that he had incited such non-Europeans to enter coaches reserved for the exclusive use of Europeans.

D *Held*, as the Regulation had been applied in a manner which had resulted in a partial and unequal treatment to a substantial degree as between Europeans and non-Europeans, and, as such partial and unequal treatment was not authorised by Act 22 of 1916, that any action taken under the Regulation was void.

E *Held*, further, as the Regulation could be applied with impartiality and equality that it should not be declared *ultra vires*.

F Appeal from a decision in the Cape Provincial Division [DE VILLIERS, J.P., and OGILVIE THOMPSON, J.; HERBSTEIN, J., dissenting] leave having been granted, upholding a conviction in a magistrate's court. The facts appear from the judgment of CENTLIVRES, J.A.

G *G. Gordon, K.C.*, for the appellant: There was no regulation or properly promulgated regulation reserving coaches for Europeans only. Sec. 36 (b) of Act 22 of 1916, requires the entry into the coach to be in contravention of a regulation; see *Rex v. Chasle* (1946, N.P.D. 431). As to the meaning of "regulation" and of "Administration", see sec. 2 of the Act. Secs. 126 and 127 of the South Africa Act were interpreted by sec. 2 (1), Act 17 of 1916, and the effect is that "Administration" means the "Governor-General-in-Council"; see *Winter v. South African Railways and Harbours* (1929, A.D. at p. 104); regulations may therefore be framed by the Minister of Railways or even by the general manager, but in every case their validity would require the approval of the Governor-General; see *Wilson v. S.A.R. & H.* (1946, N.P.D. at p.

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768). As they require this approval, they fall within sec. 16, Act 5 of 1910 (*cf.* sec. 14 (1)), and must therefore be published in the *Government Gazette*. This power of making regulations must be properly exercised and an administrative act is insufficient; see *Wilson's case* (*supra*, at p. 769), and *cf.* *Rex v. Ningia* (1933, C.P.D. 320); *Donges & Van Winsen, Municipal Law* (pp. 689-90); *Johannes and Others v. Rex* (1908, T.S. at p. 184); *Rex v. Volkmar* (1929, C.P.D. 16); *Rex v. Olley* (1931, S.R. 22); *Rex v. Carto* (1917, E.D.L. 87); *Rex v. Roderick* (1915, O.P.D. 67); *Segal v. Johannesburg Municipality* (1913, W.L.D. 113). Therefore reg. 20 should have specified which particular race or races is, or are, covered by the reservation; reg. 20 (b) does so indirectly; reg. 20 (g) does so directly; but reg. 20 (a) and (c) leaves it to the Administration "whenever it deems expedient". A regulation purporting to confer such a discretionary power on the Administration is *ultra vires*; see *Wilson's case* (*supra*, at p. 769) and *cf.* *Stanton v. Johannesburg Municipality* (1910, T.P.D. at pp. 748-50). If, and when the Administration "deems it expedient" to reserve coaches for Europeans, it must then draft a regulation to this effect, obtain the Governor-General's approval and publish the regulation in the *Gazette*; but the Minister, to whom, acting with the Governor-General's approval and subject to promulgation in the *Gazette*, Parliament has, by sec. 4 of the Act, delegated power to reserve coaches, is in the present case acting without the fetter of Governor-General's approval and without the requisite of publication in the *Gazette*. A person, in the present case the Minister, to whom power has been delegated by the body delegated by sec. 4, cannot be in a better position than the person originally delegated; see *Rex v. Koenig* (1917, C.P.D. at p. 230). For a case similar to the present one where the Minister exceeded his powers, see *Union Government v. Hill* (1914, A.D. at p. 200). See also *Rex v. Schaper* (1945, A.D. 723). Appellant accordingly contravened no regulation. Reg. 20 (a) in fact "regulates nothing"; *cf.* *Stanton's case* (*supra*, p. 750). It was necessary that appellant should know that there had been a reservation by regulation; a regulation particularising the reservation had therefore to be promulgated; see *Rex v. Gluck* (1923, A.D. 151); *Rex v. Schaper* (*supra*, at p. 720) and *Byers v. Chinn and Another* (1928, A.D. at p. 331), where promulgation is not necessary although the direction may not be given *in camera*; *cf.* *Rex v. Tatton* (1915, C.P.D. at p. 393). While the Administration may perhaps have power under sec. 3 (c) of the Act to reserve a compartment for a particular passenger, though even this may possibly fall within sec. 4 (4), and any passenger entering such compartment commits an offence under sec. 35 (j), the reservation for persons of a particular race must be done by regulation under sec. 4 (6). While the *de facto* putting up of notice boards "Europeans only" is obviously an administrative act only, there must first be a regulation empowering the Administration to act thus in respect of Europeans; this is what is meant

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by "reserved by the Administration" in sec. 36 (b); the words "so reserved" in sec. 4 (6) mean "reserved by regulation"; sec. 4 (6) leaves no room for the Administration's discretion; contrast sec. 4 (22). The Administration should have promulgated regulations applying the general principles of the enabling Act to the particular circumstances; such regulations should therefore (a) specify the particular race or class for whom the coaches are reserved, (b) give an adequate specification or definition where certain races are not to be covered by a general group, e.g., "Chinese" not to fall under "Non-Europeans", and provide procedure for border-line cases; (c) specify the area of operation, e.g., "the Suburban Railways, Cape Town to Simonstown"; (d) specify the time of commencement of this particular reservation; (e) specify the proportion for a particular race; (f) provide for the manner in which the *de facto* reservation should be effected, e.g., by notice boards on the carriages; alternatively, the enabling statute should have been differently worded, as it now is; see sec. 2 of Act 49 of 1949. If there was a properly promulgated regulation, there was partial or unequal treatment although the enabling statute does not authorise this; reg. 20 (c) in effect permits the race for whom the coaches are reserved to use the whole train; if reservation is not coupled with restriction, reg. 20 (b) cannot operate; an enabling Act must not be construed to confer the power to do unreasonable things unless that power is specifically given; see *Minister of Posts and Telegraphs v. Rasool* (1934, A.D. at p. 173); "unreasonableness" means "partial or unequal in their operation"; see *Kruse v. Johnson* (1898 (2), K.B. 91); see also *Donges & Van Winsen* (*supra*, at p. 714); *Swarts v. Pretoria Municipality* (1920, T.P.D. 187); *Moses v. Boksburg Municipality* (1912, T.P.D. 659); *Rasool's case* (*supra*, at p. 174); *Rex v. Carelse* (1943, C.P.D. 242); *Sinovich v. Hercules Municipality* (1946, A.D. at pp. 790, 792). There is no express sanction in sec. 4 (6); on the contrary the language shows that the reservation must be accompanied by a corresponding restriction. While to divide people at public counters into A to M and N to Z is reasonable (the example given in *Rasool's case* (*supra*)), it would be absurd to have one counter from N to Z for certain people and another counter from A to Z for other people; the wording might have been "provided that any such reservation shall be accompanied by a corresponding restriction". In *Moller v. Keimoes School Committee and Another* (1911, A.D. 635) the statute specifically prescribed favourite treatment for white children; furthermore, in the present case, the section in question is a penal section, creating a new offence, and must receive a restrictive interpretation; see *Sitole v. Johannesburg City Council* (1933, A.D. at pp. 6, 7); *Rex v. Taweel and Another* (1937, T.P.D. 387). To interpret sec. 4 as permitting reservation for Europeans without restriction of Europeans thereto, enables regulations to be drafted creating offences committed by only one section of the community, namely,

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non-Europeans; regulations must likewise be interpreted restrictively; cf. *Rex v. Chasle* (*supra*); *Rex v. Ishmail* (1924, E.D.L. 306). Courts scrutinise more critically regulations of a non-representative body than of a public representative body entrusted by the Legislature with delegated authority to legislate for local conditions; see *Sinovich's case* (*supra*, at p. 790); *Donges & Van Winsen* (*supra*, at p. 707); *Rasool's case* (*supra*, at p. 175).

The regulation in question is void for vagueness in that no definition of Europeans, etc., is given, and questions arising from border-line cases or relating to such persons as Chinese and Japanese are left to administrative discretion; also, Europeans are not a race and therefore are not covered by sec. 4 (5) of Act 22 of 1916; cf. *Donges & Van Winsen* (*supra*, at p. 712); although *Rex v. Herman* (1937, A.D. at p. 171) and *Moller's case* (*supra*, at pp. 649, 655) have held that Europeans as such may be grouped, that the term has a special meaning in South Africa, and that there is no need to particularise the specific races within that group, it does not appear that evidence was led as to the meaning of the terms in question. The evidence in the present case throws a different light on these terms; in consequence of the discretion which is given to a subordinate official of the Railways to determine the races of various persons, the law is left in a state of complete uncertainty. The regulations should be explicit as to who are non-Europeans for purposes of the reservation; furthermore, the absence of the word "Europeans" or "non-Europeans" from either the Statute or the Regulation leave the reservation of coaches for "Europeans only" in a state of vagueness and it is therefore impossible for a person to know whether he is contravening sec. 36 or not; further, "Blankes" is not a translation of "Europeans".

W. M. van den Berg, for the Crown: The Railway Administration is empowered by sec. 36 (a) of Act 22 of 1916, to reserve a train or any portion thereof for the exclusive use of persons of particular races or different classes of persons and the reservation does not require the authority of a regulation. Sec. 36 (b) supports the view that the Administration may make reservations without the authority of a regulation; cf. the words "reserved by the Administration" in secs. 36 (b), (j) and (k). The wording of sec. 4 (6), as amended by sec 3 (a) of Act 21 of 1931, shows that the reservation itself need not be effected by regulation; cf. sec. 4 (5), (9) and (17); sec. 4 (6) authorises the framing of regulations making reservations effective, e.g., (a) prescribing the way in which the fact that a reservation has been made should be communicated to the public or (b) imposing sanctions. Sec. 4 (6) must be interpreted in the light of the subject matter with which it deals and the contingencies for which the regulations have to provide; the Court will infer, from the powers given, that the Legislature had, by necessary implication, empowered that to be done which was necessary in order to accomplish the ultimate object; see Craies, *Statute Law* (4th ed., p. 106); Maxwell, *Interpretation*

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of *Statutes* (8th ed., p. 310). It would be wholly impracticable to specify in the regulations every race or every class of persons in view of the infinite variety of races and classes of persons; it would also be wholly impracticable to specify in the regulations certain other matters, such as i.a., the area of operation. The need for a

A reservation may arise urgently and it may be necessary to reserve a train or portion thereof at short notice; it would be impossible for any regulation, however comprehensive, to make detailed provision for every possible contingency; in a complex matter such as the present one, it is essential to leave a discretion to an official to

B decide in the light of the actual circumstances of the moment; see *Rex v. Lewis* (1910, T.P.D. 413); *Rex v. Sokkies* (1916, T.P.D. 482); *Farah v. Johannesburg Municipality* (1928, T.P.D. 169); *Kharwa v. Inspector of Police, Durban* (1931, N.P.D. at p. 203); *Rex v. Zondo* (1942, T.P.D. 187); *Rex v. du Preez* (1942, C.P.D.

C at p. 153); *Lutchman v. Durban Corporation and Another* (1946, N.P.D. at p. 224); *Rex v. Ngati and Others* (1948 (1), S.A.L.R. 596). In any event, if the particular races or classes of persons must be specified in the regulations, reg. 20 does in terms authorise the Administration to reserve coaches for Europeans; *vide para. (b)*

D of the regulation. The Court will not ignore the universal meaning attached to the term "European" throughout South Africa; see *Moller v. Keimoes School Committee and Another* (1911, A.D. at pp. 642-3), and *cf. W. P. Swarts, A. Swarts and D. Appel v. Pretoria Town Council* (1905, T.S. 621). The reservation for

E "Europeans only" is a reservation for persons of particular races; see *Rex v. Herman* (1937, A.D. 168), and *cf. Rex v. Radebe and Others* (1945, A.D. at p. 603). Sec. 4 (6) shows that the Legislature contemplated a separation of the travelling public according to races or classes of persons. A discrimination is not unreasonable

F merely because it is made on grounds of race; such a discrimination can only be unreasonable if it is accompanied by inequality of treatment. The burden of showing that there was inequality of treatment is upon the person who objects to the discrimination. Appellant has not shown that, by reason of the "apartheid"

G policy followed, the train accommodation afforded to non-Europeans has been rendered inadequate; see *Minister of Posts and Telegraphs v. Rasool* (1934, A.D. 167); *Rex v. Carelse* (1943, C.P.D. 242); and *cf. George and Others v. Pretoria Municipality* (1916, T.P.D. 501). The fact that one portion of a train is reserved for Europeans

does not *ipso facto* make it necessary to restrict Europeans to that portion; sec. 4 (c) of the Act is permissive; a reservation need not

H be accompanied by a counterpart restriction.
Gordon, K.C., in reply.

Cur. adv. vult.

Postea (May 22nd).

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CENTLIVRES, J.A.: The appellant was charged before a magistrate with inciting other persons to commit an offence in terms of sec. 15 (2) (b) of Act 27 of 1914 as amended by sec. 4 of Act 39 of 1926 read with sec. 36 (b) of Act 22 of 1916 read with reg. 20 of the General Railway Regulations of 1937 as amended. The particulars alleged that the appellant on September 5, 1948, unlawfully incited a large number of coloured people, Natives and Indians, to commit the offence of contravening sec. 36 (b) of Act 22 of 1916 read with the above-mentioned regulation. The particulars further alleged that the appellant

"while knowing . . . that railway coaches or compartments were reserved by the Administration for the exclusive use of persons of a particular race, or different classes of persons, to wit Europeans only",

incited the persons referred to above "to unlawfully enter such coaches or compartments". The appellant was found guilty by the magistrate and fined. His appeal to the Cape Provincial Division was dismissed and, that Division having granted leave to appeal, he now appeals to this Court.

On and after August 16, 1948, the Railway Administration reserved on every train on the Cape Town-Simonstown, Cape Town-Bellville and Cape Flats routes some of the first-class coaches for Europeans only. The coaches so reserved had boards marked as follows:

SLEGS BLANKES.	EUROPEANS ONLY.
EUROPEANS ONLY.	SLEGS BLANKES.

The remainder of the first-class coaches were not reserved and both Europeans and non-Europeans were allowed to use those coaches.

The facts are not in dispute. It appears from the evidence that the action taken by the Railway Administration in reserving some of the first-class coaches for Europeans only was resented by, among others, the appellant. A committee, called the "Train Apartheid Resistance Committee", was formed on August 18, 1948, and appellant was a member of this committee. The committee held a protest meeting on the Grand Parade at Cape Town on September 5, 1948. The appellant addressed this meeting and, in effect, told his audience, which consisted mainly of non-Europeans, that they could get into any part of the train when they went home, notwithstanding the notice boards on some of the first-class coaches that such coaches were for Europeans only. These remarks of the appellant, as amounting to an incitement of non-European holders of first-class tickets to enter the reserved coaches, led to the charge being made against him.

On appeal a number of legal issues were raised on behalf of the appellant. In view of the conclusion at which I have arrived it is unnecessary to consider all those issues. I ought to say at the outset that the amendments made to the Railways and Harbours Regulation and Control Act, 22 of 1916, by secs. 2 and 4 of Act 49 of 1949 are irrelevant, as those amendments were not in force when the offence was alleged to have taken place.

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Sec. 3 (c) of Act 22 of 1916 empowers the Administration to control, manage and superintend railways. Sec. 4 (6) is as follows:

"Subject to the approval of the Governor-General, the Administration may make regulations, not inconsistent with this Act, with respect to any of the following matters, that is to say, with respect to—

A (6) the reservation of railway premises (including conveniences), or of any railway coach, or of any portion thereof, for the exclusive use of males or females, persons of particular races, or different classes of persons or natives, and the restriction of any such person to the use of the premises, coach, or portion thereof so reserved."

B In 1937 general railway regulations were promulgated under sec. 4 of Act 22 of 1916, which cancelled all previous railway regulations. One of these regulations was Reg. 20 which provided for "separate accommodation on trains and railway premises for persons of different races, sexes, etc.". This regulation was amended by *Government Notice 2366* in the *Government Gazette* No. 3724 and dated November 8, 1946. In its amended form the regulation in so far as it is material to the present case is as follows:

"(a) The Administration may, whenever it deems expedient, reserve 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. Whenever a train or a portion of a train has been reserved, the following provisions shall apply:—

D (i) In the case of the reservation of a train or a portion of a train, no person who does not belong to the category of persons in respect of whom the reservation has been made, shall enter or remain in that train or in that portion of the train as the case may be; and

E (ii) In the case of the reservation of a portion of a train every passenger belonging to the category of persons in respect of whom the reservation has been made shall, subject to the provisions of sub-regulation (c) be restricted to the use of that portion of the train which has been so reserved.

F (b) Save where the contrary is indicated by express notices affixed to a train or any portion thereof, but subject to the provisions of sub-regulation (c), coaches forming part of any train which bear on the outside the figure '1' or the figure '2' shall be deemed to have been so reserved by the Administration for the exclusive use of Europeans and coaches forming part of any train which bear on the outside the inscription '1 Reserved' or '2 Reserved' or '3' shall be deemed to have been so reserved by the Administration for the exclusive use of non-Europeans.

G (c) Where one or more coaches forming part of a train bear notices indicating in express terms that the exclusive use thereof has been reserved for persons of a particular race, the other coaches forming part of that train, whether or not they bear any such inscription as is mentioned in sub-regulation (b), shall not be deemed to be reserved for the exclusive use of persons of any particular race and the provisions of para. (ii) of sub-reg. (a) shall not apply in the case of a reservation effected in the manner contemplated by this sub-regulation."

H Sec. 36 (b) of Act 22 of 1916 provides that

"Any person . . . who knowing . . . that a railway coach . . . is reserved by the Administration for the exclusive use of . . . persons of particular races . . . enters the coach . . . in contravention of a regulation and without lawful excuse . . . shall be liable on conviction to a fine . . ."

The Crown contended that sec. 3 (c) of the Act empowered the Administration to reserve a train or any portion thereof for the exclusive use of persons of particular races, or different classes of

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persons; that such reservation does not require the authority of a regulation. I shall assume that the Crown's contention is correct, but, if so, it is subject to the proviso that when such a reservation is made there is substantial equality of treatment as between different races or classes. In order, however, to make a disregard of reservations of a train or a portion thereof for the exclusive use of persons of particular races or classes a criminal offence it was necessary, in view of the provisions of sec. 36 (b), to make regulations forbidding a person of a particular race or class from entering a train or portion thereof which was reserved for members of another race or class.

B I now proceed to consider whether Reg. 20 is *intra* or *ultra vires* in whole or in part, and whether the action taken by the Administration under cover thereof resulted in partial or unequal treatment as between members of different races. The principles enunciated by LORD RUSSELL, C.J., in *Kruse v. Johnson* (1898, 2 Q.B.D., 91) in testing whether a bye-law or regulation is *intra* or *ultra vires* the enabling statute have been accepted by this Court. See *Feinstein v. Baleta* (1930, A.D. 319), *Rasool's case* (1934, A.D. 167) and *Sinovich v. Hercules Municipal Council* (1946, A.D. 783). LORD RUSSELL said:

D "There may be cases in which it would be the duty of the Court to condemn bye-laws . . . as invalid because unreasonable. But unreasonable in what sense? If for instance they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say: 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*.'"

E It is clear from what LORD RUSSELL said that regulations may be declared to be invalid on the ground of unreasonableness in the specialised sense of that word if they are found to be partial and unequal in their operation as between different classes, unless of course the enabling Act specifically authorises such partiality and inequality. STRATFORD, A.C.J., at p. 173 of *Rasool's case* (*supra*) said:

G "I agree with TINDALL, J., who, in effect, says that an enabling Act must not be construed to confer the power to do unreasonable things unless such power is specifically given"; and at p. 180 DE VILLIERS, J.A. said:

"The underlying principle in each case is that the Legislature cannot have intended to give authority to make unreasonable rules, whether in the form of bye-laws or 'instructions'."

H The crisp question in the present case is whether reg. 20 or the application thereof is partial or unequal as between different classes and, if so, whether Act 22 of 1916 authorises such partiality or inequality. If one omits the words "subject to the provision of sub-reg. (c)" in sub-para. (ii) of para. (a) of the regulation it will be seen that if, for instance, a portion of a train is reserved for Europeans only, non-Europeans are prohibited under para. (a) from entering the portion so reserved while Europeans are restricted

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to using that portion only. To this extent reg. 20 appears to aim at impartiality and equality of treatment as between members of different races, but it should be pointed out that the regulation is capable, if literally construed, of being applied in such a manner that partiality or inequality results. For instance, if the Administration were as a regular practice to reserve all first-class coaches in every train for Europeans only, such application would result in partiality and inequality as between different sections of the people. Moreover, to reserve, in a case where a train consists of first, second and third-class coaches, some first-class coaches only for Europeans may (having regard at present only to the provisions of para. (a) of the regulations) operate harshly on those Europeans who may wish to travel in a class other than the first class. For if such a reservation were made, then under para. (a) (still omitting the words "subject to the provisions of sub-reg. (c)") Europeans would be restricted to the use of first-class coaches and would not be allowed to make use of second or third-class coaches.

Para. (c) of the regulation authorises the reservation of portion of a train for the exclusive use of a particular race without restricting members of that race to the use of that portion: members of that race are free to use the whole train (including the reserved portion), whereas members of another race cannot use the reserved portion and have to share the remainder of the train with members of the race in whose favour the reservation is made. Moreover, the members of the race in whose favour no reservation is made are subjected to criminal sanctions while the members of the other race are not. To apply para. (c) in respect of all trains and as an invariable practice, as has been done in the present case by making a reservation in favour of Europeans only, results in partial and unequal treatment as between different races, for, as I have pointed out, Europeans are given the right to use every portion of the train, the non-Europeans cannot use the reserved portion and it is only the latter who can be punished criminally. It seems to me to be obvious that such treatment is partial and unequal to a substantial degree.

The Court *a quo* said:—

"Upon reg. 20 (c) as worded the absence of restriction is entirely impartial in its application: thus on a train predominantly comprising coaches bearing notices indicating in express terms that the exclusive use thereof has been reserved for non-Europeans, non-European passengers would not be restricted to those coaches."

I confess that I do not understand the use by the Court *a quo* of the words "in its application". For, as I have pointed out, the actual application in the present case of para. (c) of the regulations results in partiality and inequality. It is, no doubt, possible to apply para. (c) impartially. For instance, a train may bear notices indicating that certain coaches are reserved for the exclusive use of Europeans and the next train may bear notices indicating that certain coaches are reserved for the exclusive use of non-Europeans, and so on alternately in rotation. But this has not been done in the present case; what has been done is that, as an invariable practice,

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all trains bear notices that certain coaches are reserved for the exclusive use of Europeans and in no case are any coaches reserved for the exclusive use of non-Europeans. Consequently the manner in which the regulation has been applied results in a partial and unequal treatment of one section of the community as compared with the treatment meted out to another section.

The Crown relied on the case of *Rex v. Carelse* (1943, C.P.D. 242), where DAVIS, J., said at p. 253:—

"In my opinion, to entitle a court to interfere with a regulation or bye-law involving a discrimination between white and coloured on the ground of unreasonableness, it must be one as to which it is shewn that that discrimination is coupled with an inequality of treatment which is in all the circumstances manifestly unjust or oppressive."

Bearing in mind that it is the duty of the Courts to hold the scales evenly between the different classes of the community and to declare invalid any practice which, in the absence of the authority of an Act of Parliament, results in partial and unequal treatment to a substantial degree between different sections of the community, I am of opinion that the *dictum* of DAVIS, J., puts the test too high, but in any event that *dictum* must be viewed in relation to the facts in *Rex v. Carelse*. In that case regulations made under sec. 10 of Act 21 of 1935 and approved by resolution of both Houses of Parliament in terms of that section set aside defined portions of a seashore for the exclusive use of Europeans and non-Europeans respectively. There was nothing *ex facie* the regulations to suggest that they were unreasonable, and the *onus* was on the appellant to show on a balance of probabilities that the regulations were unreasonable. For this purpose evidence was obviously necessary to show that the bathing facilities provided for Europeans and non-Europeans were unequal in the sense of such facilities not being reasonably equal: absolute equality can, of course, rarely, if ever, be attained. This *onus* was as a fact discharged by the appellant, and in effect the Court held, in declaring the regulations in question *ultra vires*, that the evidence showed that the inequality of treatment was "in all the circumstances manifestly unjust or oppressive." If I understand the judgment of DAVIS, J., in *Carelse's* case correctly, what the learned judge intended to convey was that mere technical inequality of treatment was not *per se* sufficient to render a regulation unreasonable in its specialised sense; the inequality must be substantial. In the present case the action taken under para. (c) of reg. 20 results, for the reasons which I have given, in a substantial inequality of treatment between members of different races.

The Crown also relied on the case of *George and Others v. Pretoria Municipality* (1916, T.P.D. 501). In that case a Provincial Ordinance provided that a town council might make bye-laws for appointing separate tramcars for the use of white persons and Natives, Asiatics or other coloured persons respectively and restricting the use of such cars to such persons. A bye-law made under that provision enacted that cars bearing no distinctive mark were reserved for the use of white persons only and cars marked "For

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coloured persons only" were reserved for the use of Asiatics or other coloured persons only. A coloured person, at a time when no separate tramcars were provided for the use of Natives, Asiatics or coloured persons, boarded a tramcar reserved for the use of white persons only and refused to leave the car. It was held by a majority of two judges to one that the fact that no accommodation had been provided for coloured persons was no defence and that the accused had rightly been convicted of contravening the bye-law.

It is difficult to follow the reasoning of the majority of the Court in *George's* case. DE VILLIERS, J.P., said at pp. 503, 504:—

"If acting under the powers thus conferred on it (the Town Council), it sets apart cars only for white persons and makes no provision whatever for coloured persons, that is a matter which may be taken into consideration when deciding about the *bona fides* of the Council in framing the bye-law. But it is not a matter which can be decided against the Town Council without evidence, because it may be that no separate cars for coloured persons have been provided as experience shows that there is practically no demand for them. While I am of opinion that the section contemplates that provision should be made for the reasonable demand of every section of the community (the tramway service having been established for the public use) I cannot agree with the contention that if provision is made for white persons, provision must also be made for Natives, Asiatics or other coloured persons. Such provision in my opinion is only necessary where there is a reasonable demand for it on the part of the population concerned, reasonable in point of numbers and without any consideration as to whether the running of such trams by themselves would pay. This being my view of the enabling Ordinance, I am of opinion that the bye-law as such cannot be declared *ultra vires*.

But it was argued that even if the bye-law be valid, the Council are not justified in not making provision for coloured persons, as the Ordinance does not contemplate exclusion. This is no doubt so with the limitations set out above, and a coloured person probably has a remedy, but the non-provision of accommodation would not in my opinion justify him in entering a tramcar appointed for the exclusive use of white persons."

It may be observed that, had there not been a substantial number of persons other than Whites in Pretoria, at the time that the bye-law was made, who would be potential users of tramcars, it is unlikely that the bye-law would have made provision for separate tramcars for White and non-Whites. It is important to note that the real issue in the case was not whether the bye-law itself was *ultra vires* (for it clearly fell within the enabling statute), but whether the application of the bye-law resulted in partial or unequal treatment of members of different sections of the community. Neither the enabling statute nor the by-law sanctioned partiality or inequality; the bye-law was misapplied and brought about a state of affairs which was never contemplated by the Legislature, viz., that there should be municipal transport facilities for Whites but none for non-Whites.

BRISTOWE, J., differed from the majority of the Court. His *ratio decidendi* is more in consonance with a long line of decisions in South African Courts and with the reasoning in *Rasool's* case. He said, at p. 509:—

"The power to establish and maintain tramways given by sec. 169 (of the Local Government Ordinance, 1912) was, I think, a power to establish them for the use and benefit of the public generally, not for one section or class

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of the population only. . . . If therefore sec. 169 had stood alone the power to establish tramways must in my judgment have been exercised as much in the interest of coloured people as in the interest of white. But it does not stand alone. Sec. 176 unquestionably enables the Town Council by means of bye-laws to appoint separate cars for white people and separate cars for coloured people. It is contended that it goes further and that it authorises all cars to be appropriated to the exclusive use of white persons. I cannot myself adopt this view. I think that what the Legislature contemplated was that of the total number of tramcars *prima facie* some should be appropriated to white and some to coloured persons. The power is not to make bye-laws for appointing separate tramcars for the use of white persons or for natives, etc., but to make bye-laws for appointing separate tramcars for the use of white persons and of natives; the use of the copulative instead of the disjunctive indicating, as it seems to me, that the power is not intended to be executable in favour of one or other of the two classes but in favour of both. It would be startling to find that under this power the whole tramway system of Pretoria could be legally appropriated to coloured persons to the exclusion of whites. Yet that would be a necessary corollary were this argument to prevail."

And on p. 511 the learned Judge continued:—

"Now if it is an offence under the bye-law for a coloured man under any circumstances to board a white car, then the operation of the bye-law is inconsistent with this. Whatever its language may be, its effect is to defeat the statute; and that cannot be permitted. But I am inclined to think that the bye-law admits of a construction which would bring its operation into conformity with the statute. To make it an offence for a coloured person to board a white car, or for a white person to board a coloured car, presupposes that both classes of cars exist, and indeed (if we merely judge by the language) the intention was that both classes should exist. And I feel some doubt whether it should be treated as an offence under the bye-law for a coloured person to board a white car unless and until coloured accommodation has been provided. I think it is quite a possible construction to say that the offence created by the bye-law is and was intended to be contingent on the bye-law itself being carried out.

But if the bye-law must be construed as making it an offence for a coloured man to board a white car notwithstanding that coloured accommodation has not been provided, then in my opinion the bye-law exceeds the power of the section and is *ultra vires*."

In *George's* case the manner in which the bye-law was applied resulted in substantial inequality of treatment as between members of different sections of the community in that no tramcars were provided for persons other than white, and on that ground alone the accused in that case should not have been convicted. *George's* case, like the present one, was an illustration of the kind of regulation which requires executive acts for its operation. Just as the setting aside of tramcars was necessary to the operation of the bye-law in *George's* case, so the reservation of coaches was necessary in the present case to bring reg. 20 (c) into operation. Many, probably most, regulations contain a complete rule of conduct in themselves and no question of executive action under them arises when their validity is being investigated. But in regulations of the kind now under consideration, where executive action is required to complete the operation of the regulation and create the rule breach of which is an offence, both must be taken together in order to see whether, the total effect being unreasonable in the specialised sense, the limits of the enabling statute have been exceeded. In the present

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case the operation of reg. 20 (c) in relation to any one train may, if taken by itself, produce results that would be unreasonable in the specialised sense. But the operation of the regulation in relation to a whole train service could be rendered reasonable in the manner I have described. In a sense, therefore, it can be said that the regulation itself is not unreasonable, for it can be operated reasonably in relation to a whole train service. But to see whether what was done was authorised by the enabling statute the actual operation, which is necessary for the creation of the offence, must be regarded.

In *Rasool's* case the instructions issued by the Postmaster-General directed that the post office at Pietersburg be divided into two portions for the service of "Europeans Only" and "Non-Europeans" respectively. It will be noted that the word "only" does not appear after the word "non-Europeans", but there is nothing in that case to suggest that Europeans were entitled to use that portion of the post office which was set aside for non-Europeans. Moreover, it is clear from the judgments delivered in that case that it was admitted that there was no partiality or inequality in operation as between the two different sections of the community and that the sole point at issue was whether the Postmaster-General was entitled by means of instructions to discriminate on the basis of equal treatment between different sections of the community. The Court held that he was entitled to discriminate in that manner. The Court *a quo* said, in regard to the issue I am now dealing with, that it

"is largely covered by the decision in *Rasool's* case, to which I have made full reference earlier in this judgment and which must be applied with due regard to the fact—which must again be emphasised—that in the present case no complaint has been raised as to the adequacy of the transportation services provided by the Administration for non-Europeans."

As regards *Rasool's* case I have already pointed out that there is nothing in that case to suggest that Europeans and non-Europeans were not restricted to the use of that part of the premises specially set aside for them respectively. The fact that no complaint has been raised as to the adequacy of the services provided for non-Europeans is irrelevant: the fact is that the application of the regulation by the Administration has resulted in partiality and unequal treatment to a substantial degree in that Europeans have the right to use any portion of every train running on the routes in question while non-Europeans are allowed to use only the unreserved portion, and non-Europeans only are liable to criminal sanction.

The next question is whether Act 22 of 1916 authorises the Administration to discriminate between different races when such discrimination results in partial or unequal treatment. If the Crown's contention is correct, viz., that under sec. 3 (c) of the Act the Administration is entitled to discriminate (in its unobjectionable sense) between persons of particular races or different classes of persons, it is important to observe that there is nothing in that section which entitles the Administration to discriminate on a footing of partiality or inequality. The Crown, however, contends:

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that sec. 4 (6) of the Act is permissive and that a reservation of a portion of a train need not be accompanied by a provision restricting the persons in whose favour such a reservation is made to the use of the portion so reserved. The Court *a quo* accepted this contention of the Crown and said:

"Sec. 4 (6) of the Act is permissive in its terms: it is, in my view, not essential that a reservation, or authority to reserve, must in each and every case be accompanied by a counterpart restriction. The statute has, by the introduction of the words 'exclusive use' in sec. 4 (6) expressly authorised the principle of some measure of differentiation and inequality."

I am unable to agree with the above view. I do not understand how the fact that sec. 4 (6) is permissive is relevant to the issue in this case. To use the language of STRATFORD, A.C.J., in *Rasool's* case at p. 173, that section "must not be construed to confer this power to do unreasonable things unless such power is specifically given." I take it that such power can be specifically given either in express terms or by necessary implication. I can find no express terms in sec. 4 (6) nor can I find anything which by necessary implication authorises such a power. Full effect can be given to sec. 4 (6) if the Administration discriminates between members of particular races or different classes of persons on a footing of impartiality and equality. If the Administration reserves one or more first-class coaches for Europeans only and one or more first-class coaches for non-Europeans only (according to their respective reasonable requirements) and restricts the use thereof to European and non-Europeans respectively, there could be no ground of complaint in law. Similarly, as I have pointed out above, no objection could be raised in law to the reservation of some first class coaches for Europeans and non-Europeans on alternate trains respectively. I may add that a close examination of sec. 4 (6) leads me to hold that the Legislature contemplated impartiality and equality of treatment. 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.

I agree with the Court *a quo* that in using the words "exclusive use" sec. 4 (6) may be regarded as expressly authorising the principle of discrimination, but it does not follow from this that in addition thereto the section authorises partiality and inequality in treatment as between members of different races. It is one thing to authorise discrimination and quite another thing to authorise discrimination coupled with partiality and inequality in treatment. I find it impossible to assume that the Legislature in enacting sec. 4 (6) intended that one section of the community could be treated unfairly as compared with another section. 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.

The conclusion at which I arrive is that the regulations have

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been improperly applied by the Administration in the circumstances of this case. As in my view the regulation can be applied with impartiality and equality between members of different races, it cannot be said that the regulation itself is *ultra vires* the enabling Act. This view is in consonance with what LORD RUSSELL, C.J., said in *Kruse v. Johnson* (*supra*, at p. 99) in regard to by-laws of public representative bodies. His remarks apply, in my opinion, also to regulations made by a Minister or the Governor-General-in-Council under the authority of an Act of Parliament. LORD RUSSELL said:

B “They (bye-laws) ought to be supported if possible. They ought to be, as has been said, ‘benevolently’ interpreted and credit ought to be given to those who have to administer them that they will be reasonably administered. This involves no new canon of construction.”

I have already said that Act 22 of 1916 does not authorise the Administration to discriminate on a footing of partiality or C inequality. If the only possible construction to be placed on the regulation were that it purported to empower to do what was not authorised by the Act, the regulation would have been unauthorised by Parliament and therefore *ultra vires* the Act. When it is said that a particular regulation is bad on the ground of D unreasonableness, 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.

In the present case the regulation, properly construed, cannot be said to be *ultra vires*. It must be construed in such a manner that it E does not authorise discrimination between different races on a footing of partiality and inequality, and from this it follows that any action taken under cover of the regulation which results in substantial partiality and inequality is void. For such action is not authorised either by Parliament or by the regulation properly construed. F If the Crown prosecutes a person under sec. 36 (b) of the Act for entering a reserved coach in contravention of a regulation and it is shown that such reservation was not authorised by or was in breach of the regulation, it is clear that the accused is entitled to a verdict of acquittal.

G The appellant was convicted of inciting non-Europeans to enter coaches reserved for the exclusive use of Europeans. As such reservation was not authorised by the regulation properly construed in that it resulted in partial and unequal treatment to a substantial degree as between Europeans and non-Europeans, a non-European would not have been guilty of an offence if he entered a coach so reserved. Consequently it cannot be said that the appellant incited H a non-European to commit an offence.

The appeal is allowed and the conviction and sentence set aside.

WATERMEYER, C.J., GREENBERG, J.A., SCHREINER, J.A., and MURRAY, A.J.A., concurred.

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