Bib. 32/88

Case no. 522/86

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE CABINET OF THE TRANSITIONAL GOVERNMENT

FOR THE TERRITORY OF SOUTH WEST AFRICA ..... Appellant

AND

ULRICH DETLEF STEPHAN EINS ..... Respondent.

Coram: RABIE ACJ, JANSEN, VAN HEERDEN, HEFER et

GROSSKOPF JJA.

Heard: Delivered:

29 February 1988. 30 March 1988

J U D G M E N T

RABIE ACJ:/.....

RABIE ACJ:

This is an appeal against the order of the Supreme Court of South West Africa in which it declared sec. 9 of the Residence of Certain Persons in South West Africa Regulation Act, 1985 (Act 33 of 1985) to be unconstitutional, invalid and unenforceable for want of compliance with the Bill of Fundamental Rights incorporated in Proclamation R 101 of 1985.

The facts of the case are as follows. On 17 June 1985 the State President of the Republic of South Africa, acting in terms of sec. 38 of the South West Africa Constitution Act, 1968 (Act 39 of 1968), issued Proclamation R 101 of 1985 in which he made

provision for the establishment of a legislative body, to be known as the National Assembly, and of an executive authority, to be known as the Cabinet, for the territory of South West Africa. The statutory provisions relating to the National Assembly and the Cabinet are set out in a Schedule to the Proclamation. There are several annexures to the Schedule. The first of these, Annexure 1, is headed "Fundamental Rights contained in Bill of Fundamental Rights and Objectives". It consists of (a) a Preamble, which concludes with the statement that " ... we, the people of SWA/Namibia, claim and reserve for ourselves and guarantee to our descendants the following Fundamental Rights which shall be protected and upheld by our

successive/.....

successive governments and protected by entrenchment in the Constitution", and (b) eleven "Articles" in which the "Fundamental Rights" are set out.

Sec. 3(1) of the Schedule confers on the Legislative Assembly the power -

> "(a) to make laws for the territory which shall be entitled Acts; and
>
> (b) in any such law to amend or repeal any legal provision, including any Act of the Parliament of the Republic of South Africa in so far as it relates to or applies in the territory .....".

Sec. 3(2)(b) imposes certain restrictions on the powers of the National Assembly. It reads as follows:

> "3.(2) The assembly shall not have power -
>
> (a) .....
>
> (b) to make any law abolishing, diminishing or derogating from any fundamental right."

The aforesaid restriction on the powers of the Legislative Assembly is, however, not an absolute one, for sec. 3(3) provides:

> "3(3) The provisions of paragraph (b) of subsection (2) shall not be construed as prohibiting the Assembly from amending the provisions of any law -
>
> (a) which were in force in the territory immediately before the first meeting of the Assembly;
>
> (b) which abolish, diminish or derogate from any fundamental right; and
>
> (c) which have as their aim the security of the territory,
>
> in such a manner that the last-mentioned provisions abolish, diminish or derogate from any such fundamental right to a lesser extent, or to repeal any such law and to re-enact the provisions thereof in any other law which amends some of the provisions so repealed in such a manner that it abolishes, diminishes or derogates from any fundamental right to a lesser extent."

"Fundamental/.....

"Fundamental Right" is defined in sec. 1(1) as meaning "any of the fundamental rights contemplated in articles 1 to 11 of the Bill of Fundamental Rights and Objectives". Sec. 19 of the Schedule contains provisions relating to the power of the Supreme Court of South West Africa to pronounce upon the validity of Acts passed by the National Assembly. Subsections (1) and (4) of the section read as follows:

> "19(1) The Supreme Court of South West Africa shall be competent to inquire into and pronounce upon the validity of an Act of the Assembly in pursuance of the question -
>
> (a) whether the provisions of this Proclamation were complied with in connection with any law which is expressed to be enacted by the Assembly; and

(b)/.....

(b) whether the provisions of any such law abolish, diminish or derogate from any fundamental right.

.....

(4) Save as provided in subsection (1), no Court of law shall be competent to inquire into or pronounce upon the validity of an Act of the Assembly."

The aforesaid Act 33 of 1985 was passed by the Legislative Assembly in 1985. It came into operation on 1 April 1986. Sec. 9 thereof, which was held to be invalid by the Court a quo, reads as follows:

"9./.....

"9.(1) Notwithstanding the provisions of this Act or any provisions to the contrary contained in any other law, the Cabinet may, if it has reason to believe that -

(a) any person, excluding any person referred to in section 3(2)(d) or (e) or any person born in the territory, endangers or is likely to endanger the security of the territory or its inhabitants or the maintenance of public order ;

(b) any such person engenders or is likely to engender a feeling of hostility between members of the different population groups of the territory,

by notice in the Official Gazette or by notice in writing to the person concerned, issue an order prohibiting any such person to be in the territory or, in the case of any such person within the territory, ordering any such person

to/.....

to depart after a period specified in any such notice from the territory or any particular place in the territory or any portion of the territory defined in such notice and not to return to the territory or such place or portion of the territory.

(2) Any order issued under subsection (1) shall be of force during the period specified in the order or, if no period is so specified, until it is withdrawn.

(3) No court of law shall have jurisdiction to pronounce upon the validity of an order issued under subsection (1)."

The persons mentioned in sec. 3(2)(a) and (e) of the Act, to which reference is made in sec. 9(1)(a), are persons "rendering active service in the territory in terms of the Defence Act, 1957" (sec. 3(2)(d)), and persons "employed in the territory in the service of the

Government of the Republic of South Africa or the Government of Rehoboth or in the government service of the territory" (sec. 3(2)(e)). Act 33 of 1985 repealed several earlier Proclamations and Ordinances which empowered the authorities in South West Africa to remove persons from the territoty in certain circumstances and, also, to exercise control over certain persons' entry into and residence in the territory. Sec. 1 of the earliest of these measures, the Undesirables Removal Proclamation, 1920 (Proclamation 50 of 1920), read as follows at the time of its repeal (I have omitted certain parts thereof):

"1/.....

"1.(1) It shall be lawful for the Administrator -

(a) if he is satisfied that there are reasonable grounds for believing that any person within this Territory is dangerous to the peace, order or good government of the Territory if he remained therein; or

(b) if he is satisfied that any person has directly or indirectly inflicted or threatened to inflict upon any person any harm, hurt or loss ..... ; or

(c) if he is satisfied that any person who is not a British subject has engaged actively in political propaganda in the Territory; or

(d) on the conviction of any person of any offence under sections 3, 4 or 5 of the South West Africa Affairs Proclamation, 1937;

to direct the Secretary of the Territory to issue an order to such person to leave the Territory within such time after service of such order as may be stated therein.

.....

(2).....

(3) No Court shall have jurisdiction in respect of any direction issued by the Administrator ..... under this section."

On 21 May 1986, i.e. about seven weeks after Act 33 of 1985 had come into operation, the attorneys of the respondent caused a letter in the following terms to be delivered to the appellant in this appeal:

> "We act on behalf of our abovenamed client. It is our submission that our client at all times has enjoyed an unqualified and unchallenged fundamental right to reside in South West Africa, having been resident in South West Africa since 1973, but not born in the Territory, ... and being a South African citizen by virtue of the fact that there is at present no South West African or Namibian citizenship, in the absence of a sovereign government.
>
> We are advised that the effect of Act 33 of 1985 (the Residence of Certain Persons in South West Africa Regulation Act) is to purport

to deprive our client of such fundamental right and to supplant it with a licence revocable in your discretion. Our client's position is accordingly imperilled by the promulgation of such Act.

It is further our view that such Act, by virtue of the provisions of Section 9 and 15 is contrary to the Bill of Fundamental Rights as contained in Proclamation R101 of 1985 and that the National Assembly had no power to pass such provisions in conflict with the provisions of Section 3(2)(b) of Proclamation R101.

Unless we hear to the contrary within fourteen (14) days from date hereof to the effect that:

(a) You accept our view that such Act is in conflict with the Bill of Fundamental Rights as contained in Proclamation R101; and

(b) You undertake within a specified time to propose the repeal thereof accordingly,

our client will accept that you are not in agreement with (a) and do not intend to implement (b).

In/.....

> In those circumstances, our client will be obliged to approach the Supreme Court of South West Africa for an order declaring that Act 33 of 1985 be struck down."

Similarly worded letters were on the same day delivered to the Speaker of the National Assembly and the Administrator-General for South West Africa. There was no response to any of these letters, and in a Notice of Motion dated 5 June 1986, in which the National Assembly, the Administrator-General and the appellant were cited as respondents, the present respondent (Eins) gave formal notice of his intention to apply to the Supreme Court of South West Africa for an order declaring that sec. 9 of Act 33 of 1985 was "unconstitutional, invalid and unenforceable for want of compliance with the

Bill of Fundamental Rights incorporated in Proclamation R 101 of 1985", and declaring that he was "not liable to be prohibited in terms of section 9 of Act 33 of 1985 from being in the Territory of South West Africa, or to be ordered to depart from the Territory."

In his founding affidavit the respondent states that he was born in Germany in 1941; that he came to South Africa in 1953; that he has lived in South West Africa, which he regards as his permanent home, since 1973, and that he is a South African citizen by naturalisation. He says, too, that there are thousands of people who reside in South West Africa who were, like himself, not born there. He submits

in his affidavit that the provisions of sec. 9 of Act 33 of 1985 are in conflict with the aforesaid Bill of Rights and that the National Assembly was, by reason of the provisions of sec. 3(2)(b) of Proclamation R 101 of 1985, not empowered to pass sec. 9. He submits, too, that he had "at all times prior to the promulgation of Act 33 of 1985 had an unqualified and unchallenged fundamental right to reside in South West Africa", and that "the effect of Act 33 of 1985 is to purport to deprive me of such fundamental right and to supplant it with a licence revocable in the discretion of the Second Respondent", i.e. the Cabinet (the appellant in this appeal.) The respondent says in his affidavit

that section 9 of the Act is in conflict with article 9 of the Bill of Rights, but the argument presented on his behalf in this Court was that sec. 9 offends against articles 3, 4, 9 and 10 of the Bill of Rights. Article 3 reads as follows:

> "Everyone shall be equal before the law and no branch or organ of government nor any public institution may prejudice nor afford any advantage to any person on the grounds of his ethnic or social origin, sex, race, language, colour, religion or political conviction."

Article 4 contains provisions relating to the right to a fair trial. Article 9 relates to the right of all ethnic, linguistic and religious groups and their members to enjoy, practise, profess and promote their

cultures, languages, traditions and religions, and article 10, which is headed "The Right to Freedom of Movement and Residence", reads as follows:

> "Everyone lawfully present within the borders of the country shall have the right to freedom of movement and choice of residence subject to the obligation not to infringe upon the rights of others and to such provisions as are properly prescribed by law in the interests of public health and public order. No citizen shall be arbitrarily deprived of the right to enter the country. Everyone shall have the right to leave the country in accordance with the procedures properly prescribed by law."

In its answering affidavit, which was deposed to by its Chairman, Mr A N Matjila, the appellant denied the various submissions made by the respondent in his founding affidavit. The appellant stated, also,

that it had no reason to suppose ("vermoed") that the respondent was a person as referred to in sec. 9(1)(a) or (b) of Act 33 of 1985, i.e. a person who endangers or is likely to endanger the security of the territory or its inhabitants or the maintenance of public order, or a person who engenders or is likely to engender a feeling of hostility between members of the different population groups of the territory. In his replying affidavit the respondent did not react to this averment.

The appellant contended in the Court a quo, as it did in this Court, (i) that the respondent did not have locus standi to apply for the relief he sought; (ii) that sec. 9 of Act 33 of 1985 does not abolish,

diminish or derogate from any of the fundamental rights set out in the Bill of Fundamental Rights, and (iii) that, in any event, sec. 9 is in effect an amendment or re-enactment of laws repealed by Act 33 of 1985; that such amendment or re-enactment constitutes a lesser inroad into the fundamental rights mentioned in the Bill of Fundamental Rights than the laws repealed by Act 33 of 1985, and that sec. 9 is, therefore, protected by the provisions of sec. 3(3) of the Schedule to Proclamation R 101 of 1985 (quoted above). The Court a quo held against the appellant on all three of these contentions.

I am of the opinion, for reasons which will appear below, that the Court a quo erred in rejecting

the/.....

the appellant's objection to the respondent's locus standi, and that it should have held, as was argued by the appellant, that the respondent's attack on sec. 9 of Act 33 of 1985 was not, when considered in the light of the factual averments in the affidavits, justiciable at his (the respondent's) instance at the time when the application was brought. My view is not affected by the consideration that sec. 9 may possibly constitute an infringement of some of the articles of the Bill of Rights, and that it may not be protected by sec. 3(3) of the Schedule to Proclamation R 101 of 1985.. My view is, therefore, to put it briefly, that the respondent did not establish that he had a sufficient interest in

the matter to entitle him to bring his application, and that the Court should, therefore, not have made the order that it did.

A person who claims relief from a Court in respect of any matter must, as a general rule, establish that he has a direct interest in that matter in order to acquire the necessary locus standi to seek relief. Reference to a few cases, mentioned in the next paragraph, will be sufficient to illustrate the point.

In Dalrymple and Others v. Colonial Treasurer 1910 TS 372 at 390 Wessels J stated that -

> "The person who sues must have an interest in the subject-matter of the suit, and that interest must be a direct interest."

and that -

"Courts/....

> "Courts of law .... are not constituted for the discussion of academic questions, and they require the litigant to have not only an interest, but also an interest that is not too remote".

A little later in his judgment (at 392) the learned Judge said that since the actio popularis has disappeared,

> "courts of law have required the applicant to show some direct interest in the subject-matter of the litigation or some grievance special to himself."

In Geldenhuys and Neethling v. Beuthin 1918 AD 426 Innes CJ referred to the function of Courts of law in terms similar to those employed in Dalrymple's case, supra. The learned Chief Justice said (at 441):

> "After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to

pronounce upon abstract questions, or to advise upon differing contentions, however important."

In Ex parte Mouton and Another 1955(4) SA 460 (A) Van den Heever JA cited (at 463 H) the passage in Geldenhuys and Neethling v. Beuthin which I have just quoted and said that it contained a statement of a procedural rule of the common law ("gemeenregtelike prosesreël"). He indicated, too (at 464 A-B), that an applicant who asks the Court to make certain declarations as to the meaning of a will has to show an actual and existing interest ("'n aktuele en teenswoordige belang") in the matter. Finally, in Roodepoort-Maraisburg Town Council v. Eastern Properties

(Prop) Ltd 1933 AD 87 at 101 Wessels CJ referred to the requirement that a plaintiff has to show a direct interest in the matter in issue in the following terms:

> ".... by our law any person can bring an action to vindicate a right which he possesses (interesse) whatever that right may be and whether he suffers special damage or not, provided he can show that he has a direct interest in the matter and not merely the interest which all citizens have. Nemo enim privatorum populares persequitur actiones quoad interesse publicum. Pro suo autem interesse cuilibet sive per se sive per procuratorem agere licet - Groenewegen, de Leg. Abr. ad D. 47.23".

In the Court a quo - so we were informed from the Bar - counsel for the appellant (Mr Van der Byl) relied on the above-quoted passage in the judgment of Wessels CJ in the Roodepoort-Maraisburg case in support

of his contention that the present respondent (Eins) did not have the necessary locus standi to apply for the relief which he claimed. The learned Judge (Hendler AJ) rejected counsel's contention and held that the respondent did have locus standi. In coming to this conclusion the learned Judge relied on the decision of this Court in Ex parte Nell 1963(1) SA 754 (A) and on the judgment of Boshoff JP in Veriava and Others v. President, SA Medical and Dental Council and Others 1985 (2) SA 293(T). He did not refer to, or discuss, the above-quoted passage in the judgment of Wessels CJ in the Roodepoort-Maraisburg case. Ex parte Nell and Veriava's case will be discussed later in the judgment.

I consider, as I have said above, that the Court a quo erred in holding that the respondent had locus standi to claim the relief he did, even if it be assumed in his favour that the Legislative Assembly exceeded its powers in passing sec. 9 of Act 33 of 1985 and that the section is not saved by the provisions of sec. 3(3) of the Schedule to Proclamation R 101 of 1985. It appears from the respondent's founding affidavit that he is one of thousands of people who are permanent residents of South West Africa but who were not born in the territory, and there is nothing which suggests that his position differs in law from that of any of those residents as far as the operation of sec. 9 may be concerned. Even if it be assumed in the respondent's

favour that sec. 9 makes a greater inroad into the funda-
mental rights mentioned in the Bill of Fundamental Rights
than the statutory provisions repealed by Act 33 of 1985,
the respondent cannot, and will not, in fact be affected
by this change in the law unless and until the Cabinet
should decide to take steps against him under sec. 9
of the Act. In the respondent's founding affidavit
there is no suggestion that he believed, or had any
reason to believe or suspect, that the Cabinet contemplated
taking any action against him under sec. 9. In the
letters (mentioned above) which he wrote to the appellant,
the Speaker of the General Assembly and the Administrator-
General he also did not suggest that he believed, or
suspected or feared that action might be taken against
him under the said section. The purpose of the

letters/.....

letters was merely to inform the recipients thereof of the respondent's contention that sec. 9 was invalid for being in conflict with the provisions of sec. 3(2)(b) of Proclamation R 101, and of his intention to ask the Court to make a declaration to that effect if steps were not taken to have Act 33 of 1985 repealed. (The letters also made mention of sec. 15 of the Act, but the Court a quo made no order in respect thereof and it may, therefore, be left out of account.) In its answering affidavit the appellant stated that it had no reason to suppose ("vermoed") that the respondent was a person as described in sec. 9(1) of the Act, i.e. a person who "endangers or is likely to endanger the security of the territory or its inhabitants or the maintenance of

public order", or a person who "engenders or is likely to engender a feeling of hostility between members of the different population groups of the territory". The respondent, as I have already said above, did not reply to this statement in his replying affidavit. It appears, therefore, that when the respondent brought his application he had no direct or real interest in the matter on which he asked the Court to adjudicate. The position would have been different if he had shown that the respondent intended, or contemplated, taking action against him under sec. 9 of the Act, but he made no suggestion of this kind. He failed, therefore, to show that he had what Van den Heever JA (in Ex parte Mouton and Others, supra) described as "'n aktuele en teenswoordige belang" in the matter, and what he asked

the Court to do was, in effect, to make a declaration which would be of mere academic interest as far as he was concerned. The Court should, in the circumstances, have upheld the appellant's objection to the respondent's locus standi.

The Court a quo relied on Ex parte Nell, supra, and Veriava and Others v. President, Medical and Dental Council and Others, supra, when it came to the conclusion that the respondent had the necessary locus standi to bring his application. It appears that Mr Gauntlett, who appeared for the respondent in both the Court a quo and in this Court, did not rely on Ex parte Nell when arguing the respondent's case in the Court a quo. He did not rely on it in this Court either, and it will therefore not be necessary

to dwell on it at any length. Hendler JA held on the strength of what is said in that case (Ex parte Nell) that it would be "grossly injust" if the respondent were to wait until his "fundamental rights were actually infringed" before he could approach the Court for relief. Ex parte Nell is, however, not authority for the learned Judge's view that the respondent had the necessary locus standi to approach the Court. The case was concerned with a declaration of rights in terms of sec. 19(1)(c) of the Supreme Court Act, 1959 (Act 59 of 1959), which provided (as worded at the time), that -

> "19.(1) A provincial or local division ... shall .... have power -
>
> .....

(c)/.....

(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination".

The application brought by the respondent in the present case was not one for a determination of the kind envisaged in sec. 19(1)(c) of Act 59 of 1959, and it is not necessary to say more about the case of Ex parte Nell.

In Veriava's case, supra - the second case on which the Court a quo relied -, the applicants, who were medical doctors, sought an order compelling the respondent Council to investigate complaints of improper or disgraceful conduct made against certain medical

practitioners/.....

practitioners. Objection was taken to the applicants' locus standi. Boshoff JP held that section 41 of the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act 56 of 1974), which provides for the inquiry by the said Council into complaints of improper or disgraceful conduct against members of the medical profession, was intended by the Legislature to be for the benefit of the medical profession, and that the applicants, being members of the profession, therefore had a direct interest in requiring the Council to exercise its powers under the section. The Court held, in other words, that sec. 41 of the said Act had been enacted for the benefit of a certain class of persons,

and/.....

and that the applicants, being members of that class, were therefore entitled to approach the Court for relief if the Council should fail or refuse to exercise its powers or to perform its duties under the section. It is clear that the applicants in Veriava's case were held to have locus standi on grounds which do not apply to the present case, and that the decision of Boshoff JP cannot be regarded as authority for the view at which the Court a quo arrived.

In this Court Mr Gauntlett relied on Veriawa's case, supra and on Bamford v. Minister of Community Development and State Auxiliary Services 1981(3) SA 1054 (C). It is not necessary to say anything more about

Veriawa's/.....

Veriava's case. In Bamford's case the applicant, a resident of Rondebosch, applied for a temporary interdict, pending the outcome of an action he had instituted for a permanent interdict, restraining the respondent from continuing with the erection of certain residences on the Groote Schuur Estate at Rondebosch. In terms of sections 1 and 2 of the Rhodes Will (Groote Schuur Devolution) Act, 1910 (Act 9 of 1910), read with the Preamble to the Second Schedule thereto, the Government held the Estate subject to servitudes, rights and privileges affecting the said land as set out in the Second Schedule to the Act. Paragraph 1 of the Second Schedule provided for "The preservation of continued public access to the

park on the Groote Schuur Estate.... ". Clause 13(2) of the will, which was recited in the Preamble to the Act, provided that no suburban residences "shall at any time be erected on the said property.....". One of the defences raised by the respondent was that the applicant did not have locus standi to approach the Court for the relief he claimed. The Court (Watermeyer JP) held that sec. 2 of the Act, read with paragraph 1 of the Second Schedule, conferred a right of access on all members of the public, and that any member of the public could, therefore, restrain any unlawful interference with that right without proof of special damage. It was therefore not necessary, the Court held, for the applicant to allege that he had used the park in the

past, or that he wanted to use it in the future. (See 1060 A-B of the report of the judgment.) It seems clear that the Court was of the view that the applicant had locus standi to claim the relief he did on the ground that the Act conferred on him, being a member of the public, a right of access to the park and that he was, by virtue of that right, entitled to ask the Court to restrain the erection of buildings which would interfere with his right of access to the land. It may be pointed out that it has been argued (see Andrew Beck, Locus Standi in Judicio or Ubi Jus Ibi Remedium, in 1983 SA Law Journal, at 285-287) that Watermeyer JP erred in holding that the applicant in Bamford's case had locus standi to approach the Court "in the absence of proof

of special damage or that the statute was passed in the interest of a class of persons of which he was a member." I do not propose to discuss this criticism of the judgment. For present purposes I find it sufficient to say that the applicant in Bamford's case was held to have locus standi on grounds which are not of application to the case with which we are here concerned.

Mr Gauntlett also submitted that decisions in other countries in which Bills of Rights are to be found and where testing powers have been accorded to the Courts are of relevance to the present matter and that they should be considered by us.

As to the law in Canada, we

were referred to three recent decisions of the Supreme Court of Canada, viz. Minister of Justice of Canada et al. v. Borowski (1981) 130 DLR (3d) 588; Thorson v. Attorney-General of Canada et al. (No. 2) (1974) 43 DLR 1, and Nova Scotia Board of Censors v. McNeil (1975) 55 DLR (3d) 632. In Borowski's case, the most recent of the three cases, the respondent (Borowski) brought an action against the appellants in which he claimed that subsections (4), (5) and (6) of sec. 251 of the Criminal Code were invalid for being in conflict with the Canadian Bill of Rights. These sub-sections allowed for exceptions (viz. therapeutic abortions) to provisions of the Criminal Code which made it a punishable offence (i) for anyone who, with intent to

procure/.....

procure the miscarriage of a female person, used any means for the purpose of carrying out his intention, and (ii) for any woman who, being pregnant, used any means or permitted any means to be used for the purpose of procuring her own miscarriage. The respondent's complaint was that the said subsections provided relief against criminality for procuring abortions, that they violated the fundamental right of the individual to life, and that they were, therefore, illegal. He contended that he had locus standi to bring his action on the ground that he was a taxpayer and that the expenditure of public money to support therapeutic abortions, as provided for in the said subsections, was unlawful. Seven members

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of the Court held that the respondent should be accorded locus standi, whereas two held that he should not. A reading of the majority and minority judgments - written by Martland J and Laskin CJ respectively - shows that the disagreement between the learned Judges was not as to the general rule which governs the question of locus standi, but as to the question whether the respondent should be accorded locus standi under a recognised exception to that general rule. Laskin CJ held that the general rule should be applied. As to this rule, he said (at 591):

> "I start with the proposition that, as a general

rule, it is not open to a person, simply because he is a citizen and a taxpayer or is either the one or the other, to invoke the jurisdiction of a competent Court to obtain a ruling on the interpretation or application of legislation, or on its validity, when that person is not either directly affected by the legislation or is not threatened by sanctions for an alleged violation of the legislation. Mere distaste has never been a ground upon which to seek the assistance of a Court. Unless the legislation itself provides for a challenge to its meaning or application or validity by any citizen or taxpayer, the prevailing policy is that a challenger must show some special interest in the operation of the legislation beyond the general interest that is common to all members of the relevant society. This is especially true of the criminal law. For example, however passionately a person may believe that it is wrong to provide for compulsory breathalyzer tests or wrong to make mere possession of marijuana an offence against the criminal law, the Courts are not open to such a believer, not himself or herself charged or even threatened with a charge, to seek a declaration against the enforcement of such criminal laws."

The learned Chief Justice proceeded to deal with the rationale of this rule in terms consonant with the language used by Innes CJ in the passage in Geldenhuys and Neethling v. Beuthin, supra, which I quoted above. Laskin CJ said (at 592):

> "The rationale of this policy is based on the purpose served by Courts. They are dispute-resolving tribunals, established to determine contested rights or claims between or against persons or to determine their penal or criminal liability when charged with offences prosecuted by agents of the Crown. Courts do not normally deal with purely hypothetical matters where no concrete legal issues are involved, where there is no lis that engages their processes or where they are asked to answer questions in the abstract merely to satisfy a person's curiosity or perhaps his or her obsessiveness with a perceived injustice in the existing law."

Having said this, the learned Chief Justice went on to say that there were exceptions to the general rule and that one of these had been applied in Thorson v. Attorney-General of Canada et al., supra, and Nova Scotia Board of Censors v. McNeil, supra. In Thorson's case, Laskin CJ said, a taxpayer sought to obtain a declaration of the invalidity of the Official Languages Act and of the illegality of the appropriation of money to administer it, and he was accorded locus standi on the ground that, unless "a citizen or taxpayer action was permitted to question its validity, there would be no way in which its validity could be tested unless the federal Attorney-General did so through a reference and a request to this end had been denied." (See 593 of the report.)

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In McNeil's case the plaintiff challenged the validity of the Theatres and Amusements Act of Nova Scotia, which provided for the appointment of a Board which had complete control over the exhibition of films and over theatres in the Province. Laskin CJ pointed out (at 595) that it was held in McNeil's case that members of the public were affected in what they might view in a Nova Scotia theatre, and that the only way, practically speaking, in which the said Act could be subjected to review was "to have the discretion of the Court exercised in his (i.e. McNeil's) favour to give him standing". ("Standing" appears to be the word that is commonly used in Canadian - and also American - law

to/.....

to denote locus standi.) In Borowski's case, Laskin CJ held, doctors and hospitals, and possibly also the husbands of pregnant wives, had such a direct interest in the administration of the legislation in issue as would accord them locus standi. The respondent's interest, on the other hand, the learned Chief Justice said (at 597), "is not connected with the administration of the legislation but with an emotional response to its operation." In the majority judgment Martland J held that doctors who perform therapeutic abortions and are protected by the provisions of the subsections in issue, hospitals in which such operations are performed, and pregnant women on whom such operations are performed,

would/.....

would have no reason to attack the legislation. As for the husbands of pregnant wives, the learned Judge held that the possibility of their bringing proceedings to attack the legislation was "illusory". In the result the learned Judge, referring to the decisions in Thorson's case and McNeil's case, supra - see the references to "these cases" in the passage quoted immediately below - said (at 606):

> "I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court. In my opinion, the respondent has met this test and should be permitted to proceed with his action."

In view of the discussion of Thorson's case and McNeil's case in Borowski's case, there is no need to devote a separate discussion to either of those two cases.

I find nothing in Borowski's case which would persuade me to hold that the respondent in the case with which we are here concerned was rightly held to have had locus standi to bring his application. Borowski was held to have locus standi on the strength of what is an exception to the general rule relating to locus standi in Canadian law, and even if one were to hold that our law recognises a similar exception, I would not regard the present case as a proper one in

which it should be applied. It seems to me that the appropriate time when the Court should be asked to adjudicate on the validity of sec. 9 of Act 33 of 1985 would be when the Cabinet exercises, or proposes to exercise, its powers under the section, or when there are reasonable grounds for believing that it intends doing so. It would in my view be unrealistic to hold that the respondent in the present case should be accorded locus standi on the ground that it is the only way in which the question of the validity of section 9 of Act 33 of 1985 can be brought before the Court.

I turn now to the law of the United States of America on the question of locus standi in constitutional cases. In a recent work, entitled American Constitutional Law, the learned authors, Shapiro and Tresolini, commence their discussion of the topic "Constitutional Standing" with a paragraph which contains, in effect, a summary of American law on the matter. It reads as follows (at 72):

> "An individual has standing to challenge the constitutionality of a law only if his or her personal rights are directly affected by the operation of the statute. To have standing, one must show 'not only that the statute is invalid, but that he (party invoking judicial power) has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally'.[16]

'The/.....

'The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation' [17]".

The first quotation in the paragraph (at note 16) is taken from the Opinion of the Supreme Court in the case of Frothingham v. Mellon, Secretary of the Treasury, et al. 262 U.S. 447 (1923) at 488, and the second (at note 17) is a quotation from the judgment of Brandeis J in Ashwander et al. v. Tennessee Valley Authority et al. 297 U.S. 288 (1935) at 347, in which he concurred in the Opinion of the Court. In a subsequent paragraph in their discussion of the topic "Constitutional Standing", the learned authors, after stating that the Supreme Court has in a series of recent decisions re-emphasised

that the Court requires that plaintiffs show "something more than a 'generalized grievance' in order to achieve standing", proceed to say (op. cit., at 73-74):

> "They must show 'injury in fact' to themselves and establish that there is more than a speculative likelihood that the remedy requested will cure their own injury. Thus the Court has denied standing to poor persons who alleged that a town's zoning ordinances made it impossible for anyone to build low income housing that they might rent; to indigents who sought to challenge a tax regulation that they argued encouraged private hospitals to deny free services to indigents; and to blacks who sought relief from an alleged continuing pattern of racial discrimination by a local magistrate and judge in bail, sentencing and jury fee payments. In all these cases, the Court argued that the plaintiffs had not shown that they had been concretely injured. The poor in Warth (i.e., Warth v. Seldin 422 U.S. 490 (1975)) had not shown that anyone proposed to build

> low rent housing in the town and was being denied permission to do so or that they personally would be in a position to rent the housing even if some were built. The poor in Simon (i.e., Simon v. Eastern Kentucky Welfare Rights Organization 476 U.S. 26 (1926) could not show that any of them had personally been denied services by any particular hospital that they would have received if there had been no such tax regulation. The possibility that the black plaintiffs in O'Shea (i.e., O'Shea v. Littleton 414 U.S. 488 (1974)) would at some future time be arrested and thus subjected to the practices of which they complained was, in the Court's view, purely speculative." (I have inserted the references in brackets.)

The requirement that a plaintiff who attacks the validity of a statute or of action taken thereunder must show, in order to achieve locus standi, an injury in fact, or a real danger of sustaining injury as a

result of the statute's enforcement, is dealt with in some detail in the American Publication Corpus Juris Secundum, Volume 16 (ed. 1984). It will be sufficient to refer to a few of the paragraphs in that work which have a bearing on the question. In paragraph 65, which is headed "Necessity of Injury in General", it is said:

> "In order to have standing to contest the validity of legislation or governmental action, the claimant must show an injury in fact and that he has been deprived of a constitutional right, or that he is adversely affected by a statute or governmental action. In addition, the rights of such person must be actually or directly affected, aggrieved or injured .... Moreover, a constitutional question may not be raised by one whose rights

are/.....

> are not directly and certainly affected, or where no attempt is being made to enforce the provision attacked."

(I have omitted the references to footnotes in the text, as I shall also do in the case of the paragraphs quoted below.) In paragraph 68 the following is said:

> "In order to sustain standing as such, a citizen must show that he has sustained, or is immediately in danger of sustaining, a direct injury as a result of an unconstitutional statute or governmental action, or that his rights .... are affected by the operation of the statute.....".

In paragraph 88 it is stated that the Courts will not determine constitutional questions prematurely, abstractly or in a hypothetical case. It is said

"....in/.....

> ".... in accordance with the general rules governing the necessity of determination of constitutional questions, they will not be determined abstractly, or in a hypothetical case or anticipated in advance of the necessity for determination thereof, by means of an advisory opinion. As a consequence of this rule, generally, no consideration will be undertaken if no injury has as yet resulted from the application of the statute and no rights have been brought within its actual or threatened operation, or where it is not certain that the statute will be applied to the complaining party."

The point that Courts will not decide on the validity of a statute prematurely, is well illustrated by what is said in paragraph 74 as to criminal statutes. When contesting the validity of such a statute, it is said, it is not necessary that the plaintiff should first expose himself to actual arrest or prosecution in order

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to be entitled to challenge the validity of the statute, but he must show that there is a realistic danger of sustaining a direct injury as a result of the operation or enforcement of the statute. Fears of prosecution, it is said, must not be imaginary or speculative.

It is not necessary to say more about the law of America relating to locus standi. It seems to me to be clear that, if one were to apply that law to the facts of the present case, the finding would be that the respondent did not have the necessary locus standi to challenge the validity of Act 33 of 1985 in the Court a quo.

Counsel/.....

Counsel for the respondent referred us, finally, to a work entitled Constitutional Law of India (ed. 1975), by H. M. Seervai. It is stated in this work (at 54) that Courts in India are governed by certain rules in discharging "their solemn duty to declare laws passed by a legislature unconstitutional", and (at 56) that one of these rules is that "The Court will not hear an objection as to the constitutionality of a law by a person whose rights are not affected by it". The authority cited for this statement is Hans Muller Nurenburg v. Superintendent Presidency Jail, Calcutta (1955)1 S C R 1284 at 1295. A report of the case is not available to me. As for the rule referred to by the learned author, it does not appear therefrom pre-

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cisely when rights must be considered to be "affected". But be this as it may, I am in no way persuaded by what the learned author says that it should be held in the case with which we are here concerned that the respondent had locus standi to claim the relief he did.

In view of the conclusion to which I have come as to the respondent's locus standi, the second and third grounds on which the appellant attacked the judgment of the Court a quo, as set out above, do not call for discussion.

The following orders are made:

(1)/.....

(1) The appeal is upheld with costs, including the costs of two counsel.

(2) The order of the Court a quo is set aside, and the following order is substituted therefor: "The application is dismissed with costs, including the costs of two counsel".

P J RABIE
ACTING CHIEF JUSTICE.

JANSEN AR
VAN HEERDEN AR
HEFER AR Stem saam
GROSSKOPF AR