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Case No 426/96

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the appeal of:

JAN ABRAHAM DU PREEZ . . . . . First Appellant

and

NICOLAAS JACOBUS JANSE VAN RENSBURG . . . . . Second Appellant

versus

THE TRUTH AND RECONCILIATION COMMISSION . . . . . Respondent

CORAM: Corbett CJ, E M Grosskopf, Eksteen, Marais *et* Olivier JJA.

Date of Hearing: 22 November 1996

Date of Judgment: 18 February 1997

J U D G M E N T

/CORBETT CJ: . . .

CORBETT CJ:

The respondent in this appeal, the Truth and Reconciliation Commission ("the Commission"), was established by the Promotion of National Unity and Reconciliation Act 34 of 1995 ("the Act"). In terms of sec 3 of the Act the objectives of the Commission are to promote national unity and reconciliation by (i) establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period 1 March 1960 to 6 December 1993; (ii) facilitating the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective; (iii) establishing and making known the fate or whereabouts of victims of the violation of human rights and by restoring the human and civil dignity of such victims by granting them an opportunity to relate their own accounts of the violations of which they are the victims and by recommending reparation measures in respect of them; and (iv)

compiling a report providing a comprehensive account of the activities and findings of the Commission and containing recommendations of measures to prevent the future violation of human rights.

The Act also establishes (in sec 3 (2)) three committees: the Committee on Human Rights Violations, the Committee on Amnesty and the Committee on Reparation and Rehabilitation. The names indicate the general sphere of the respective duties and functions of each of these Committees. This appeal is concerned with the activities of the Committee on Human Rights Violations ("the Committee").

The powers, duties and functions of the Committee are to achieve the objects of the Commission by, *inter alia*, (see sec 14 of the Act) —

(i) instituting inquiries into gross violations of human rights; the identity of all persons, authorities, institutions and organizations involved in such violations; the question whether such

violations were the result of deliberate planning on the part of the State or of any political organization, liberation movement or other group or individual; and accountability for any such violation;

(ii) gathering information and receiving evidence which establish the identity of the victims of such violations, their fate or present whereabouts and the nature and extent of the harm suffered by them; and

(iii) recording allegations and complaints of gross violations of human rights.

At the conclusion of its functions the Committee is required to submit to the Commission a comprehensive report of all its activities and findings.

On Thursday, 11 April 1996 the Chairperson of the Commission addressed to the Commissioner, South African Police Services, a letter which read as follows:

"Dear Sir

Re Brigadier JAN DU PREEZ

We have been advised that the above person is/was in the employ of the Ministry of Safety and Security and at the relevant time based at Security Police Headquarters in Pretoria.

In terms of Section 30 of the Promotion of National Unity and Reconciliation Act, No. 34 of 1995, we hereby serve notice on you that a witness will testify before the Human Rights Violations Committee of the Truth and Reconciliation Commission between the 15th and the 18th April 1996 at the City Hall, East London. A written statement was previously submitted to us by the aforementioned witness and the substance of the allegations made against the said person is contained in Annexure A attached hereto. The relevant section of the Act is also annexed hereto marked Annexure B, for your information. In terms of the said section, we invite the abovementioned person to submit written representations to us, no later than 30 days from the date of this letter.

Please attend to this matter and forward this letter to the abovementioned person. Should the abovementioned person no longer be in the employ of the Ministry of Safety and Security, kindly advise us as a matter of

urgency. Kindly further let us have the present address of the said person.

Yours faithfully."

Annexure A to this letter read:

"The allegations against Brigadier Jan Du Preez are that he was involved in or had knowledge about the poisoning and disappearance in Port Elizabeth in 1981/2 of a person whose family has approached the Commission for assistance. We understand that he was acting as a member of the South African Police at the time. The case is expected to be heard at the Commission's hearings in East London next week."

Annexure B does not form part of the record before us, but evidently it consisted of a copy of sec 30 of the Act, about which more anon.

The Brigadier Jan du Preez referred to in these documents is the first appellant in the proceedings before us. He retired from the South African Police on 31 July 1982 and at the time when this letter was sent was living in Pretoria.

Also on Thursday, 11 April 1996 the Chairperson of the Commission addressed to the Commissioner, South African Police Services, a letter in substantially the same terms as the letter concerning the first appellant but this time headed "re Colonel Nick van Rensburg", who is described in the letter as a person who -

". . . is/was in the employ of the Ministry of Safety and Security and at the relevant time based in Port Elizabeth, probably with the Security Police".

Attached to this letter was an Annexure A in terms identical (save for the name Colonel Nick van Rensburg in place of Brigadier Jan du Preez) to the Annexure A to the letter concerning the first appellant and also, apparently, a copy of sec 30 of the Act.

The Colonel Nick van Rensburg here referred to is the second appellant in these proceedings. At the time of the letter he was living in retirement at Hartenbos, in the Southern Cape. On 8 March 1996 he had suffered a burst appendix and had thereafter been

hospitalized for three weeks, two of them in intensive care. As at 11 April 1996 he was convalescing and was under doctor's orders not even to drive a motor car.

On Saturday, 13 April 1996 the first appellant received the letter concerning him from a General J van der Merwe, a former Commissioner of the South African Police. He instructed an attorney, Mr J H Wagener of Wagener Muller and Du Plessis, practising in Pretoria, to reply to the letter. Mr Wagener received similar instructions from second appellant. On the same day Mr Wagener wrote to the Chairperson of the Commission referring to the letters of 11 April 1996, which "purport" to be notices in terms of sec 30 of the Act, and stating:

> "My clients are of the opinion that the said letters do not comply with the said Section, and for the reasons set out hereunder, you are hereby formally requested to postpone for a reasonable time the matter in which they are to be implicated (Reference number EL 34):

1. Annexure A to the said letters are vague in the extreme and my clients are unable to identify the incident of which they are about to be accused by some unknown witness.

2. My clients have had no opportunity whatsoever to investigate this matter so as to be able to protect their fundamental rights, and will not be in a position to do so before 15 April 1996.

3. The procedure presently adopted by your Commission is a procedurally unfair action as contemplated in section 24(b) of the Constitution of the Republic of South Africa Act, 200 of 1993."

Mr Wagener's letter went on to demand that the addressee thereof should indicate before 10h00 on Sunday, 14 April 1996 whether the proceedings would be postponed as requested; to demand that his clients be provided with copies of all statements in the Commissioner's possession pertaining to the matter; and threatening legal action should this postponement not be granted. This letter was transmitted by telefax.

At 07h45 on Sunday, 14 April 1996 Mr Wagener was telephoned by the Vice-Chairperson of the Commission, who informed

him that because of logistical problems ("logistieke probleme") the Commission was not in a position to reach a decision before 10h00 and asked that the matter be held over to 12h00. After a later request for further time the Vice-Chairperson eventually (at 13h10) informed Mr Wagener that the final decision was that the Commission would not accede in any way to the appellants' requests.

On 15 April 1996 the appellants launched an urgent application in the Cape of Good Hope Provincial Division citing the Commission as respondent and claiming, in substance, an order interdicting the Commission from proceeding to hear the matter involving the appellants before (a) proper, reasonable and timeous notice had been given of (i) the Commission's intention to hear evidence in the matter which would detrimentally implicate the appellants and of (ii) the relevant facts of the matter; and before (b) appellants had been given access to relevant documentary evidence. The application was opposed by the Commission. The application

came before King J who (on 30 April 1996) gave judgment in appellants' favour and issued an order in the following terms (appellants being referred to as "applicants" and the Commission as "respondent"):

> "IT IS ORDERED:
>
> 1. That Respondent through its committee on Human Rights Violations, is interdicted and restrained from receiving or allowing evidence during its hearings which would affect First and/or Second Appellants unless and until
>
> (a) Respondent has given proper, reasonable and timeous notice to Applicants of Respondent's intention to hear evidence to be presented by any person in Respondent's case, reference EL 34 - or in any event - whereby Applicants may be detrimentally implicated or prejudicially affected, and of the time and place of such proposed hearing.
>
> (b) Respondent has furnished Applicants with such facts and information, by way of witnesses' statements and/or other relevant documentation as may reasonably be necessary so as to enable Applicants to identify the events, incidents and persons concerning which or whom it is proposed to present or allow evidence which may detrimentally implicate Applicants.

2. That such notice and such facts and information are to be sufficient and adequate so as to enable Applicants properly to exercise their rights in terms of Section 30 of Act 34 of 1995 (as amended).

3. That Respondent is to pay First and Second Applicants' costs of these proceedings, including the costs of two Counsel."

On 3 June 1996 the Commission filed an application for leave to appeal against the judgment of King J. The application was out of time by seven court days. Accordingly the Commission also sought condonation for this non-compliance with the Rules of Court. The application was opposed by the appellants. It was due to have been heard by King J on 12 June 1996, but on that date King J (for reasons which need not be canvassed but which cast no reflection whatever on King J) recused himself. Thereafter, on 21 June 1996 and by agreement with the parties, the application for condonation of the late filing of the application for leave to appeal was heard and

argued together with the merits of the appeal, by a Full Bench consisting of Friedman JP and Van Zyl and Farlam JJ, on the basis that if the condonation application should be dismissed, the appeal would fall away, whereas if the condonation application should succeed, the Court would consider the merits of the appeal itself.

On 25 June 1996 the Full Bench delivered judgment granting the applications for condonation and for leave to appeal, upholding the appeal and substituting for the order of King J an order dismissing the application with costs. The judgment of the Full Bench has been reported (see Truth and Reconciliation Commission v Du Preez and Another 1996 (3) SA 997 (C)). With special leave the appellants now appeal to this Court against the whole of the judgment and order of the Full Bench.

In order to adjudicate this appeal it is necessary to examine the bases upon which King J and the Full Bench came to their respective - and contrary - conclusions. Before doing so,

however, I propose to take a closer look at sec 30 and the context in which it appears in the Act.

Chapter 6 of the Act, headed "Investigations and hearings by Commission" comprises sections 28 to 35 inclusive. Sec 28 empowers the Commission to establish "an investigating unit" with the function of investigating any matter falling within the scope of the Commission's powers, functions and duties. Sec 29 defines the powers of the Commission in regard to investigations and hearings. Sec 30 prescribes the procedure to be followed at investigations and hearings of the Commission and any committee or sub-committee. (Under sec 5(c) of the Act the Commission is empowered to establish sub-committees to carry out duties and functions assigned to them by the Commission.) Sec 31 deals with the compellability of witnesses and the inadmissibility in subsequent criminal proceedings of incriminating evidence given before the Commission. Sec 32 confers certain powers of search and seizure on members of the Commission.

Sec 33 provides that, save in certain instances, the hearings of the Commission shall be open to the public. Sec 34 concerns legal representation for persons questioned by an investigation unit or required to appear before the Commission. And sec 35 makes provision for a witness protection programme.

Sec 30, as amended, which is headed "Procedure to be followed at investigations and hearings of Commission, committees and subcommittees", reads as follows:

> "(1) The Commission and any committee or subcommittee shall in any investigation or hearing follow the prescribed procedure or, if no procedure has been prescribed, the procedure determined by the Commission, or, in the absence of such a determination, in the case of a committee or subcommittee, the procedure determined by the committee or subcommittee, as the case may be.
>
> (2) If during any investigation by or any hearing before the Commission —

(a) any person is implicated in a manner which may be to his or her detriment;

(b) the Commission contemplates making a decision which may be to the detriment of a person who has been so implicated;

(c) it appears that any person may be a victim,

the Commission shall, if such person is available, afford him or her an opportunity to submit representations to the Commission within a specified time with regard to the matter under consideration or to give evidence at a hearing of the Commission."

With these sections of the Act must be read sec 1 (2), which provides that for the purposes of, *inter alia*, chapter 6 of the Act "Commission" shall be construed as including a reference to committee or subcommittee, as the case may be; and "Chairperson", "Vice-Chairperson" or "commissioner" shall be construed as including a reference to the chairperson, vice-chairperson or a member of a committee or subcommittee, as the case may be.

The word "victim" in sec 30 (2)(c) must be read in

conjunction with the definition of "victims" in sec 1(1) as including -

> "(a) persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights —
>
> (i) as a result of a gross violation of human rights; or
>
> (ii) as a result of an act associated with a political objective for which amnesty has been granted;
>
> (b) persons who, individually or together with one or more persons, suffered harm in the form of physical or mental injury, emotional suffering, pecuniary loss or a substantial impairment of human rights, as a result of such person intervening to assist persons contemplated in paragraph (a) who were in distress or to prevent victimization of such persons; and
>
> (c) such relatives or dependants of victims as may be prescribed."

Sec 30(2) is awkwardly worded in several respects. One

issue which has arisen is whether the postulates contained in paras (a), (b) and (c) should be read conjunctively or disjunctively. King J adverted to the problem, but found it unnecessary to resolve it. In the judgment of the Full Bench (delivered by Friedman JP) it is stated that paras (a) and (b) —

> ". . .are clearly conjunctive: one cannot subsist without the other. Thus, once the situations postulated in these two subparagraphs arise, the Commission or Commitee is obliged to afford the person concerned an opportunity to submit representations to it within a specified time, or to give evidence at a hearing."
> (See reported judgment at 1006 D.)

There are problems with this interpretation, which was not supported by respondents counsel in oral argument before us. I mention but one. It is not suggested - and cannot, in my view, be suggested - that para (c) should be read conjunctively with paras (a) and (b). The interpretation adopted by the Full Bench thus involves the untidy, and unlikely, conclusion that paras (a) and (b) should be

read as if linked by the conjunction "and", whereas para (c) should be read as if linked to what precedes it by the word "or". Had such an unusual syntax been intended one would have imagined that the draftsman would have expressly used these conjunctive words. The absence of any conjunctive word suggests that all three paragraphs were intended to bear the same relationship to one another, either a disjunctive one or a conjunctive one. Since the relationship of para (c) to paras (a) and (b) is clearly disjunctive, it would follow that the relationship *inter se* between paras (a) and (b) was intended also to be disjunctive.

On the view I take of the case, however, it is not necessary to resolve this issue; and I refrain from doing so. I come now to the reasons given by King J for granting the relief which he did. I preface this by some further reference to the facts.

It appears from the answering affidavits filed on behalf of the Commission (and deposed to by Dr W Orr, a member of the

Commission) that in the performance of its functions and with the aim of gathering information and receiving evidence from persons, including persons claiming to be victims of gross violations of human rights, or the representatives of such victims, the Committee scheduled certain public hearings, which were to take place in East London as from 15 April 1996. Preparatory to these hearings members of the public were invited to approach the Commission with information concerning gross violations of human rights. Statements were then taken by specially trained statement-takers employed by the Commission. Where necessary, further investigations were conducted by an investigating unit (established in terms of sec 28 of the Act) to verify the correctness of the information provided and to obtain further details. Thereafter the Committee conducted a screening process to establish which matters would be dealt with at the public hearing and to identify the witnesses who would testify thereat. (See paras 3.7 and 3.8 of Dr Orr's affidavit.)

It is further alleged (in para 3.9 of Dr Orr's affidavit) that the Committee, on the strength of the statements which it had in its possession, foresaw that the persons who were scheduled to testify before it between 15 and 18 April 1996 would implicate to their detriment certain alleged perpetrators of gross violations of human rights. These alleged perpetrators included the appellants. The Committee accordingly sent to the appellants (and others) the letter of 11 April 1996. This was done in compliance with sec 30 of the Act and in order to afford them an opportunity to submit representations, as contemplated in sec 30 (2), to the Commission.

Annexure A to the letter of 11 April which, in the case of the appellants, was supposed to comprise "the substance of the allegations" against them, has been quoted above. All that it tells each of them is that it is alleged that he was "involved in" or "had knowledge about" the poisoning and disappearance in Port Elizabeth in 1981/82 of "a person"; and that he was acting as a member of the

South African Police at the time. In order, it would seem, to explain this manifest paucity of information Dr Orr stated the following in para 3.10 of her answering affidavit:

> ". . . Many, if not most of the persons whom the Committee proposes to hear, were victims in one way or another of these violations. Many of them were and remain traumatised by their experiences and fear the prospect of testifying against the alleged perpetrators and the prospect of intimidation befalling them or their families should it be made known that they intend so testifying. In order to meet this fear, the Respondent considered it prudent to withhold the identity of the proposed witnesses as well as their statements from the persons whom they were likely to implicate in their evidence, until such time as they had testified before the Committee. This procedure, I submit with respect, is authorised by Section 11 of the Act. Having now taken legal advice, the Committee has no objection to providing so much of the statements of any witness who has testified, which implicates any person so as to enable such person to exercise his rights in terms of Section 30 of the Act."

Sec 11 of the Act, entitled "Principles to govern actions of Commission when dealing with victims", provides, *inter alia*, that when dealing with victims the Commission should take appropriate measures in order to minimize inconvenience to victims and, **when necessary**, to protect their privacy, to ensure their safety, as well as that of their families and of witnesses testifying on their behalf, and to protect them from intimidation (see para (e)).

In para 3.11 of her affidavit Dr Orr further stated that the witnesses "who would in all likelihood implicate" the appellants were scheduled to be heard on 17 April 1996. She accordingly averred that the letters of 11 April 1996 complied with sec 30(2) as the appellants were informed of the nature of the allegations against them and were further afforded an adequate opportunity to take cognisance of the evidence at the hearings and thereafter to submit their representations to the Commission. The deponent further emphasized that such representations did not have to be made prior to the hearings:

on the contrary such representations were only due some three weeks after the scheduled hearings concerning the appellants.

In regard to this there are two comments to be made. This is the first mention of 17 April 1996 as the scheduled date for the hearing concerning the appellants. At all times prior to this the appellants were entitled to infer that the scheduled date could be as early as 15 April 1996. The second comment is that in para 3.11 Dr Orr does not appear to regard the letters of 11 April 1996 as notification to the appellants so as to enable them or their legal representatives to be present at the hearing at which the relevant evidence is to be given. Later, however, (in para 5.7.2 and 3) she does aver that the appellants were notified of the hearings concerning them and were "at liberty" either personally or through some person, to attend the hearings and take cognisance of the evidence implicating them. After the hearing of the evidence the appellants would be provided with the statements of the witnesses "who testified against

them" and copies of transcripts of the relevant evidence. Dr Orr further averred (in para 5.8) that the appellants did not have the right to test or in some way challenge, at the hearing of the evidence, the admissibility or probative value thereof. (See also para 5.9.2.)

Shortly before the hearing before King J and after the filing of appellants' replying affidavits, Dr Orr filed a further affidavit from which it appears that the witness who was going to implicate the appellants was a Mrs Joyce Mtimkhulu and that her evidence related to the death of her son.

In his judgment King J referred to certain provisions of chapter 3 of the interim Constitution, Act 200 of 1993, as amended, in particular to sec 8, which affords every person equality before the law and equal protection of the law; sec 10, which accords to every person the right to respect for and protection of his or her dignity; sec 23, which relates to the right of access to information; sec 24(b), which gives every person a right to procedurally fair administrative

action where any right or legitimate expectation is affected or threatened; and finally sec 35(3), which enjoins the court, "in the interpretation of any law and the application and development of the common law and customary law" to have due regard to the spirit, purport and objectives of chapter 3.

Quoting Administrator, Cape and Another v Ikapa Town Council 1990 (2) SA 882 (A), at 889 I, King J held that the appellants' legitimate expectation was to a fair hearing, including the application of the *audi alteram partem* principle. He further concluded as follows:

> "In my view a fair hearing in the context of this matter includes due notice of the hearing at which Applicants are to be detrimentally implicated, timeous receipt of implicating statements and/or other relevant documentation with sufficient particularity so as to enable Applicants to identify the incident, and also as to enable Applicants, either personally or by legal representation or both, to be informed of and be present at such hearing".

Later in his judgment the learned Judge elaborated upon this:

> "S 30 does not specifically provide for the giving of notice, but neither does it dispense with it and not only does an opportunity to be heard presuppose adequate notice, but it is consonant with the rules of natural justice (i.e. a fair hearing) that personal notice of an impending hearing be given to persons who may be adversely affected thereat. It will occasion neither hardship nor prejudice to respondent to adopt this procedure of prior notification and it could be the means of avoiding damage to the implicated person. One example should suffice - suppose an implicated person was to attend the hearing and submit representations establishing beyond doubt that he could not have committed the act which is alleged against him, because e.g. he was out of the country or in prison or in hospital at the material time."

In the judgment of the Full Bench (delivered by Friedman JP) the appeal against the judgment of King J is characterized as essentially involving the interpretation of sec 30 of the Act. It was argued, on behalf of the appellants, that before a witness testified the person to be implicated should be informed of the proposed hearing and be given access to the relevant statements and documentary

evidence. The judgment points out that counsel for the appellants (respondents before the Court *a quo*) conceded that sec 30 (2) did not expressly provide for such rights; and the judgment further concludes that such rights could not be implied in sec 30(2) since such an implication would run counter to the express wording of the subsection. (See reported judgment, at 1006 F - 1007 A.) The judgment also deals with secs 23 and 24(b) of the interim Constitution and concludes that they too do not require such prior notice. (See reported judgment, at 1007 J - 1008 H.)

In my view, the solution to the problems raised by the issues in this case may be found in the common law, and more particularly the rules of the common law which require persons and bodies, statutory and other, in certain instances to observe the rules of natural justice by acting in a fair manner. In recent years our law in this sphere has undergone a process of evolution and development, focusing upon that principle of natural justice encapsulated in the

maxim *audi alteram partem* (which for the sake of brevity I will call the "*audi* principle"). In this process the classification of decisions of a person or body into quasi-judicial on the one hand and administrative on the other as a criterion for determining the applicability of the rules of natural justice has in effect been abandoned (see Administrator, Transvaal, and Others v Traub and Others 1989 (4) SA 731 (A), at 762 F - 763 J; Administrator Cape and Another v Ikapa Town Council, *supra*, at 889 G-I; South African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A), at 10 J - 11 B; Knop v Johannesburg City Council 1995 (2) SA 1 (A), at 19 H - 20 F).

The *audi* principle was described in the South African Roads Board case, *supra*, (at 10 G - I) as being -

> " . . . a rule of natural justice which comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an

individual in his liberty or property or existing rights, or whenever such an individual has a legitimate expectation entitling him to a hearing, unless the statute expressly or by implication indicates the contrary; . . ."

This formulation treats the principle as a rule of natural justice which comes into play when the circumstances stated above exist and is contrary to the view which requires the *audi* principle, if it is to apply, to be impliedly incorporated by the statute in question. The latter view which was followed in, for instance, the majority judgment in South African Defence and Aid Fund and Another v Minister of Justice 1967 (1) SA 263 (A), at 270 B-H, has also been discarded (see Attorney-General, Eastern Cape v Blom and Others 1988 (4) SA 645 (A), at 661 C - 662 I; South African Roads Board case, *supra,* at 10 H-I).

In R v Ngwevela 1954 (1) SA 123 (A), at 131 H, Centlivres CJ stated that the *audi* principle should be enforced unless it is clear that Parliament has expressly or by necessary implication

enacted that it should not apply or that there are exceptional circumstances which would justify the Court's not giving effect to it.

The *audi* principle is but one facet, albeit an important one, of the general requirement of natural justice that in the circumstances postulated the public official or body concerned must act fairly. (*Cf* the remarks of Farlam J in Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others 1996 (1) SA 283 (C), at 304 A - 305 D.) The duty to act fairly, however, is concerned only with the manner in which decisions are taken: it does not relate to whether the decision itself is fair or not (Traub's case, *supra*, at 758 H - I).

What does the duty to act fairly demand of the public official or body concerned? In the answering of this question useful guidance may be derived from some of the English cases on the subject. In Doody v Secretary of State for the Home Department and Other Appeals [1993] 3 All ER 92 (HL) Lord Mustill stated the

following in a speech concurred in by the remaining members of the Court (at 106 d-h):

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive the following. (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf

> either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

(See also R v Secretary of State for the Home Department, *ex parte* Hickey and others (No 2) and other appeals [1995] 1 All ER 490 (QBD), at 497 a-h.) Though Lord Mustill was dealing with the power of the Secretary of State to release on licence prisoners who had received mandatory sentences of life imprisonment, I understand his statement to be of general application. Other English cases have emphasized the need for flexibility and for each case to be considered individually (see R v Monopolies and Mergers Commission, *ex parte* Elders IXL Ltd [1987] 1 All ER 451 (QBD), at 461 b-f and the authorities there cited).

It is the appellants' contention that in carrying out their statutory functions the Commission and the Committee were under a duty to observe the principles of natural justice and, therefore, to act fairly. I did not understand respondent's counsel seriously to dispute this. And indeed the Court *a quo* appears to have accepted this to be the position and to have held that the procedures adopted by the Committee were "perfectly consonant" with the rules of natural justice. (See reported judgment at 1007 B-H.)

In the English case of Re Pergamon Press Ltd [1970] 3 All ER 535 (CA) the Court was also concerned with procedures in an investigative inquiry conducted in this instance by inspectors in terms of the Companies Act. The directors of the company concerned claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a court of law. Lord Denning MR said of this (at 539 a-f):

"It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that counsel for the inspectors went too far on the other . . . he did suggest that in point of law, the inspectors were not bound by the rules of natural justice . . . He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply . . . I cannot accept counsel for the inspectors' submission. It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings . . . They are not even quasi-judicial for they decide nothing; they determine nothing. They only investigate and report. They sit in private. . .

But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal proceedings or to civil actions . . . Seeing that their work and their report may lead to such consequences, I am clearly of opinion that

the inspectors must act fairly."

(See also judgment of Sachs LJ at 541 h - 542 d, and R v Secretary of State for Trade, *ex parte* Perestrello and another [1980] 3 All ER 28 (QBD).)

I am of the view that likewise in the present case the Commission and the Committee are under a duty to act fairly towards persons implicated to their detriment by evidence or information coming before the Committee in the course of its investigations and/or hearings. As I have indicated, the subject-matter of inquiries conducted by the Committee is "gross violations of human rights". Many of such violations would have constituted criminal conduct of a serious nature, or at any rate very reprehensible conduct. The Committee is charged with the duty of establishing, *inter alia*, whether such violations took place and the identity of persons involved therein. The Committee's findings in this regard and its report to the

Commission may accuse or condemn persons in the position of appellants. Subject to the grant of amnesty, the ultimate result may be criminal or civil proceedings against such persons. Clearly the whole process is potentially prejudicial to them and their rights of personality. They must be treated fairly.

But what does fairness demand in the circumstances of the present case? That is the critical question. Sec 32 requires that persons detrimentally implicated should be afforded the opportunity subsequently to submit representations to or to give evidence before the Commission. But does that exhaust the requirements of fairness? The appellants say "No; we require, in the first place, reasonable and timeous notice of the time and place when evidence affecting us detrimentally or prejudicially will be presented to the Committee". King J was of the view that fairness required such notice to be given. I agree.

I have already emphasized the very serious nature of the

allegations likely to be made against persons detrimentally affected by evidence to be heard by the Committee. In the case of the appellants these allegations related to the "poisoning and disappearance" of a person, evidently a Mr Mtimkhulu. This vague allegation has overtones of murder. Unlike the inquiry in the Pergamon Press case, *supra*, hearings by the Committee are normally conducted in public; and certainly in the case involving the appellants that was to be the procedure. This is a very important factor because it means that allegations made by a witness implicating the appellants would immediately gain wide publicity.

There are important advantages to be gained by having reasonable and timeous notice of such a hearing. The person likely to be implicated is thereby enabled to be personally present, and/or to be legally represented, at the hearing. This will enable him and/or his legal representative to actually hear the implicating evidence and see the demeanour of the relevant witness or witnesses. Conceivably, as

pointed out by King J, the implicated person might be able readily to rebut the allegations of the witness. In such a case the Committee might well be under a duty to hear the rebutting evidence forthwith or to permit immediate cross-examination.

Normally the giving of such reasonable and timeous notice would not occasion the Committee any difficulty or inconvenience. The fact that a witness to be called at a hearing before the Committee was to implicate detrimentally a third party would be apparent from the statement taken from the witness and if those responsible for leading the evidence make proper arrangements beforehand there should be no problem about giving notice. It may be that, exceptionally, reasonable and timeous notice is not practically feasible. For instance, a witness might implicate a third party for the first time when giving *viva voce* evidence. And one can visualize other cases where the exigencies of the situation might prevent the giving of such notice. There is, however, no suggestion

that this was the position in the case before us. Had there been a practical problem in giving timeous notice to the appellants I would have expected this to have been canvassed in the respondent's affidavits.

In my view, there is nothing in the Act itself which, expressly or by implication, restricts or negates the general duty to act fairly and in particular the duty to give reasonable and timeous notice. Nor do I consider that there are any exceptional circumstances which would justify such restriction or negation. In her affidavit Dr Orr did emphasize the legislative time limits set for the completion of the work of the Commission and the volume of that work, but I do not read her affidavit as pleading exceptional circumstances or as attempting to make out the case that the giving of reasonable and timeous notice to persons in the position of the appellants was not practically feasible.

In this case prior notice was actually given to the

appellant. This incidentally seems to indicate a recognition on the part of the Commission of a duty to do so. Be that as it may, there is no doubt in my mind that such notice was not reasonable or timeous. Notice received on Saturday that evidence was to be given as from Monday, possibly on Monday, was, in my opinion, in all the circumstances not reasonable or timeous.

It was not argued on behalf of the respondent that if the Commission, or the Committee, had failed in a duty to give reasonable and timeous notice, the Court of first instance erred in granting the relief contained in para 1(a) of its order. Nor do I think that it erred. I turn now to the relief granted in para 1(b).

It seems to me that in a case such as this procedural fairness demands not only that a person implicated be given reasonable and timeous notice of the hearing, but also that he or she is at the same time informed of the substance of the allegations against him or her, with sufficient detail to know what the case is all about. What

is sufficient information would depend upon the facts of each individual case.

I have already quoted the passage from Dr Orr's affidavit in which she explains the need to withhold the identity of proposed witnesses as well as their statements, from persons likely to be implicated until the witnesses have testified before the Committee. There may be a need for such protection in particular cases, but I do not agree that this justifies the paucity of information given in annexure A to the letters sent to the appellants. Assuming that such protection was necessary in the case of Mrs Mtimkhulu, it seems to me that, without disclosing her identity or otherwise endangering her, the Commission could have disclosed to the appellants the substance and much of the detail of the allegations against them, as contained in her statement. Certainly no cogent case to the contrary has been made out by the respondent.

In the judgment of the Full Bench (see reported judgment

at 1005 F - 1006 A) some reference was made to the provisions of secs 28 (5) and 29 (5), which read respectively as follows:

> "28(5) Subject to section 33, no article or information obtained by the investigating unit shall be made public, and no person except a member of the investigating unit, the Commission, the committee concerned or a member of the staff of the Commission shall have access to such article or information until such time as the Commission or the committee determines that it may be made public or until the commencement of any hearing in terms of this Act which is not held behind closed doors."

> "29(5) No person other than a member of the staff of the Commission or any person required to produce any article or to give evidence shall be entitled or be permitted to attend any investigation conducted in terms of this section, and the Commission may, having due regard to the principles of openness and transparency, declare that any article produced or information submitted at such investigation shall not be made public until the Commission determines otherwise or, in the absence of such a determination, until the article is produced at a hearing in terms of this Act, or at any proceedings in any

court of law."

I do not think that it is necessary to analyse these subsections in any detail. They deal with the making public of information obtained by an investigating unit and access by persons outside the Commission to such information. I do not think that a private diclosure of information to a person implicated would amount to making that information "public". And, in any event, the subsections would not prevent a determination to disclose information to such a person in this way. I do not read these submissions as overriding the common law obligation to act fairly or as precluding the Commission, in the discharge of that obligation, from giving relevant information to the person implicated. And in fact by the time that the information relevant to the case concerning the appellants was due to be disclosed to them, the Commission (and the Committee) had obviously decided to make it public at the hearing scheduled for the following week.

Para 1(b) of the order granted by King J interdicted the Commission (through the Committee) from receiving or allowing during its hearings evidence which would affect the appellants unless and until it had furnished the appellants with such facts and information, by way of witnesses' statements and/or other relevant documentation as might be reasonably necessary to enable the appellants to identify the events, incidents and persons concerning which or whom it was proposed to present or allow evidence which might detrimentally implicate the appellants. In so far as this order would result in compelling the respondent to disclose the identity of a witness in circumstances where such disclosure would be contrary to the guidelines contained in sec 11, particularly those in sec 11(e), it goes too far. Subject to an appropriate qualification to cater for this eventuality, the appellants were, in my judgment, entitled also to the relief contained in para 1(b) of the order of King J. That qualification does not merit any special order in regard to costs.

The following order is made:

(1) The appeal is allowed with costs, such costs to include the costs of two counsel.

(2) The order of the Court *a quo* is altered to read:

"(a) The order made by King J is altered by the addition of a new paragraph 1(c) reading:

'(c) The order contained in paragraph (1)(b) shall not be construed as necessarily obliging the Respondent, in complying therewith, to disclose the identity of any witness whose evidence the Respondent proposes to present or allow to be led.'

(b) Subject to the aforegoing, the appeal is dismissed with costs, such costs to include the costs of two counsel."

M M CORBETT

E M GROSSKOPF JA)
EKSTEEN JA) **CONCUR**
MARAIS JA)
OLIVIER JA)