Coram: AMES-HOFF, J. MORICE, J.

THE ARGUS PRINTING AND PUBLISHING CO., LTD.

v.

THE STATE.

1897

12 *April.*
14 ,,

SECT. 5 OF THE PRESS LAW OF 1896 (*a*)—PRINTED OR PUBLISHED WORKS.

Sect. 5 of the Press Law of 1896 *must, regard being had to sect.* 19 *of the Grondwet of* 1896, *be strictly construed.*

The expression in sect. 5 of the Press Law of 1896, "*printed or published works*," *can only mean those works which have already been printed or published, and not those which have still to be printed or published.*

When an order is issued by the State President by which the private rights of a party are infringed, such party may at once appeal to the Court for redress, and the Court, on being satisfied that the order is illegal, will set it aside.

(*See* United Langlaagte Gold Mining Co., Ltd. *v.* The State and the Langlaagte Royal and Rand Gold Mining Co., Ltd., *Official Reports*, *vol.* 1, *p.* 48.)

THIS was an application for an order directing the State Secretary of the South African Republic to set aside a certain written order, issued by His Honour the State President. On the 23rd March, 1897, the State President, with the advice and consent of the Executive Council, issued an order whereby the publication of *The Star*, a newspaper published at Johannesburg, was stopped for the period of three months from the date of the order, on the ground that in their opinion the contents of the said newspaper were dangerous to the peace and quiet of the Republic. The Argus Printing and Publishing Company, Limited, thereupon applied to the Court and prayed that the State Secretary should be ordered to withdraw the said order. The petition alleged that the applicant was the owner and publisher of *The Star;* that the State President had no power to issue such an order, on the ground that it was contrary to the London Convention and sect. 19 of the Grondwet of 1896, for the Convention gave the applicant company the right of at all times defending itself against any charge

(*a*) Law No. 26, 1896.—TR.

brought against it, and sect. 19 of the Grondwet of 1896 (*b*) gave it the right of the liberty of the press; that, moreover, sect. 5 of Law No. 26 of 1896 only referred to what had already been printed and not to what may yet be printed.

The section in question reads: "The State President has at all times the right, with the advice and consent of the Executive Council, to prohibit altogether, or for a certain time, the circulation of printed or published presswork, the contents of which are in his judgment contrary to good morals or dangerous to the peace and quiet of the Republic."

Wessels (with him *Esselen* and *Curlewis*), for the applicant: The State President has not the power to issue this order. It concerns the suspension of a business. It is not an administrative, but a judicial act. It is not an executive act. The Volksraad itself does not possess such a power, and therefore it cannot delegate it. (See *Sigcau* v. *Col. Government*, Cape L. J. 1895, p. 276.) The Volksraad itself does not possess the power to decide whether a contravention of Law 26 of 1896 has occurred. If it has not this power, then it cannot delegate it to the State President. Granted that the Volksraad possessed this right, even then the law does not entitle the President to do what he has done. Compare further sect. 5 of the Press Law with Article 19 of the Grondwet. This section must therefore be strictly construed, with a view to the liberty of the press. Sect. 5 mentions "printed," that is, already printed; and "published" means already published. The State President can therefore not prohibit what is still to be printed or published.

The Attorney-General did not wish to discuss the question of the Grondwet. The present was only a matter of police law. The power of the State President over the natives should be borne in mind. Police law is a generally understood legal expression. Sect. 5 does indeed confer the power. The application is, moreover, premature, for it is an attempt to draw forth an opinion from the Court. If *The Star* has not the right to appear, then it will become aware of this through a criminal proceeding. "Published" is an adjective used by way of contrast, for instance, to "litho-

(*b*) Cf. § 19, Grondwet, 1858.—TR.

1897

THE ARGUS PRINTING AND PUBLISHING CO., LTD. v. THE STATE.

graphed." As originally drafted the section read "works printed or published abroad." The word "abroad" fell away when the matter was considered in the Volksraad. The order can refer to the circulation of certain particular issues. As the application stands the Court can never entertain it. The Court cannot direct the State Secretary to withdraw an order.

Wessels, in reply: One submits, in the first instance, to acts of the police and then appeals to the judge. A matter of police is not on the same footing as a question relating to natives. The press is free. There is no equality between whites and natives. The application is not premature and is in accordance with the practice of the Court. I may appeal to the Court whenever I am threatened. There is a sanction to the law. (See sect. 9.) The Court can declare the order *ultra vires*. The mere prohibition against circulation is nonsense. (See further, *Hess* v. *The State* (*c*).)

Cur. ad. vult.

Postea. 14th April.

AMESHOFF, J., gave the following judgment: This is an application heard on 12th April before my brother Morice and myself. The applicant, a company having a legal status in the Republic, is represented by its chairman, Thomas Sheffield. He complains (1) that the Argus Printing and Publishing Company, Limited, is the owner and publisher of a daily newspaper, appearing at Johannesburg, called *The Star;* (2) that on 23rd March, 1897, the State President, with the advice and consent of the Executive Council, issued an order, which was served on the Argus Company, prohibiting the circulation of the said daily newspaper; (3) that this order was issued in terms of sect. 5 of Law No. 26 of 1896; (4) that this law is contrary to Article 19 of the Constitution (Grondwet) of this State, and to the terms of the London Convention of 1884, for the London Convention guarantees the right of at all times defending oneself against accusations brought against one, and that no one can in this manner be stopped or interfered with in his business without being heard in his defence. That further, if Law No. 26 of 1896 has indeed the force of law in this State, the order has not been lawfully issued under sect. 5 of the law, inasmuch as by this section only the circulation can be

(*c*) 2 Off. Rep Transvaal (1895), p. 112.—TR.

1897

THE ARGUS PRINTING AND PUBLISHING CO., LTD. v. THE STATE.

Ameshoff, J.

prohibited of that which, having been already printed, is found to be prejudicial to the peace and quiet of the country, whereas the order of the State President prohibits that which is not yet printed, that is to say, the issues of *The Star* to be printed during the next ensuing three months.

It is for these reasons that the said Sheffield, in his aforesaid capacity, prays that by an order of this Court the State Secretary of the South African Republic, representing the Honourable the Government, shall be ordered to withdraw the order complained of, and that the respondent shall further be condemned in the costs.

The order complained of is of the following tenor:—

> "I, Stephanus Johannes Paulus Kruger, State President of the South African Republic, acting herein with the advice and consent of the Executive Council, as appears from the Resolution of the Executive Council dated 23rd March, 1897, Article 258, in accordance with section 5 of Law No. 26 of 1896, prohibit hereby the circulation of the newspaper *The Star*, appearing at Johannesburg, for the period of three months from the date hereof, on the ground that the contents of the said newspaper are in my judgment dangerous to the peace and quiet of the Republic.
>
> Given at Pretoria this twenty-fourth day of March, 1897.
>
> (Sgd.) S. J. P. KRUGER,
> State President.
>
> Dr. W. J. LEYDS,
> State Secretary."
>
> True copy.
>
> (Sgd.) F. E. T. KRAUSE,
> First Public Prosecutor.

The argument of the applicant's counsel is two-fold. The first argument is as follows:—By Law No. 26, 1896, a certain power is given to the State President, the exercise of which entails certain consequences. These consequences are suspension and hindrance of business. These are consequences which may not result from an administrative act on the part of the Government. *Ergo*, when a printer is by law prohibited from doing a certain act,

1897

THE ARGUS PRINTING AND PUBLISHING CO., LTD. v. THE STATE.

Ameshoff, J.

and the law prescribes that suspension of business shall be the consequence of the doing of such an act, then the Judge alone is competent, after having heard the parties, to decide whether the prohibited act has been committed or not. If the act has been committed, then only the Judge can apply the sanction, namely, in the present instance, to suspend the business. The Volksraad itself does not possess the power to adjudicate and apply the sanction, and if the Volksraad itself has not this power, then it can still less delegate it to the State President. Reference was made to the case of *Sigcau* v. *The Colonial Government* (C. L. Journal, 1895, p. 276).

The second argument was, that if the first argument be not sufficient, and the Court should hold that Law No. 26 of 1896 is maintainable, the law itself does not give the State President the power which he claims by referring to sect. 5 thereof.

Article 19 of the Grondwet recognizes the liberty of the press. The Volksraad, therefore, having also in the same year passed Law No. 26, must be taken to have intended that the limiting provisions introduced by this law shall not be extended, for otherwise the Legislature would on one day make laws which on the next it would unmake again, and this would be contrary to sound reason. Sect. 5, then, gives no power to prohibit what is yet to be printed, but only what is already printed.

The Attorney-General, in his argument, denies that there has been any exercise of judicial power in the present instance; it was the mere exercise of police law as understood under a well-recognized legal term. The main argument was, however, that the application was premature. On the applicant an invalid order was either served or not. If the order was invalid, then the applicant should quietly have pursued his way, and not have taken any notice of the order; and then, too, there would have been no reason for coming to the Court. If the order of the State President was valid, then the applicant was *ipso facto* out of Court. The applicant would have discovered his position in a lower Court. If *The Star* had notwithstanding been published, then proceedings under Law No. 26 could have been taken against it, and then it would have appeared from the consequent trial whether the position taken up by the State President was justifiable or not. From this point of view the application had the appearance of a covert attempt to obtain from the Supreme Court an expression of opinion,

1897

THE ARGUS PRINTING AND PUBLISHING CO., LTD. v. THE STATE.

Ameshoff, J.

in order by that means to exercise pressure on the lower Courts. It was further argued that by the order of the State President the circulation, and not the printing, was prohibited. The order might mean the circulation of certain issues of the newspaper. The expression "printed" presswork is a qualification by way of contrast, *e.g.*, to "lithographed" presswork.

With regard to the argument that we have here to do with an exercise of police law, it was submitted by Mr. Wessels, by way of answer, that if that be so, then there remained no other means for the applicant than just the very one adopted by him, viz., of at once applying to the Court. A man must bow before the acts of the police, but if prejudiced thereby, then he appeals to the Judge.

When I weigh the arguments, I come to the conclusion that the first portion of the argument may very well be left out of consideration. The reference to the case of *Sigeau* does not seem to me to be very applicable. In that case the Chief Justice of the Cape Colony to a certain extent applied the testing right, by investigating what was the scope of the delegation of legislative power given by Parliament to the High Commissioner (enabling him) to make laws for Pondoland, and by concluding that this delegation did not give the power of making a special law directed against a special individual, whereby the Courts of law were entirely excluded. The answer of the Attorney-General to this likewise appears to me very inconclusive. The statement that we have here to deal with the exercise of police law, as well as the answer given by him, upon a question put by the Court for a description of what that law embraces, that he had not come into Court to explain generally recognized legal principles, are very weak. A generally received doctrine as to what must be understood by police law does not exist. Very divergent notions are entertained with respect to it. The Court cannot and may not allow itself to be influenced by such an unsupported argument.

I will therefore proceed to the second portion of the argument, which deals with the interpretation of sect. 5 of Law No. 26 of 1896. Apart from the otherwise sound argument that the Court must interpret sect. 5 in the supposition that Article 19 of the Grondwet of 1896 has a meaning, it is sufficient to refer to what has already been laid down in the case of *Hess* v. *The State* (*d*).

(*d*) 2 Off. Rep. Transvaal (1895), p. 112.—TR.

1897

THE ARGUS PRINTING AND PUBLISHING CO., LTD. v. THE STATE.

Ameshoff, J

And so here, too, the Court is bound to adhere strictly to the letter of the law. If the Court does so, then only one interpretation is possible. The contention of the Attorney-General that the word "*printed*" is a qualification rendered necessary by the wording of sect. 1, I do not consider tenable, and simply because a meaning must likewise be given to the subsequent words "*or published.*" The word *or* can only have two meanings: it may mean either, by way of explanation, *id est;* or by way of counter-position, *aut.* If this meaning be given to *or*, then we suppose an error in draftsmanship. Very probably the law-giver intended *and* instead of *or;* then these words will at least obtain a meaning which they do not now possess. To read "printed, that is, published," productions of the press has no sense; as little sense will it be to read "printed, or by way of counter-position thereof, published," productions of the press. The explanation given by the Attorney-General with respect to the wording of this section, viz., that the section merely refers to printed matter, printed or circulated abroad, abundantly shows that this section has been forcibly disconnected from the composite whole.

A second argument of the Attorney-General was that the order of the President does not prohibit the printing, but only the circulating. I cannot comprehend this contention. The strength, however, of the Attorney-General's argument is the point that the application was unnecessary and premature, and that the Court will not give opinions. The argument in support of this is strange, and very strange—as, indeed, already observed at the hearing of the application—from the lips of the Attorney-General. To the highest official of the State a power is given, and a duty is imposed upon him in a legal way by the representatives of the people. The State President, using his judgment, exercises this power. The applicant, although of opinion that the power is wrongly and illegally exercised by the State President, nevertheless begins by obeying, and appeals to the Judge. He is now reproached for having done so. If the act of the State President were illegal, then the applicant ought to have disobeyed it. No one would have prevented him, for the Attorney-General is free and untrammelled in his decision with regard to prosecution, and he would not institute proceedings if the act were illegal. Therefore, the applicant should first have awaited the, to him, unknown decision of the Attorney-General. Although it may be

1897

THE ARGUS PRINTING AND PUBLISHING CO., LTD. v. THE STATE.

Ameshoff, J.

supposed that the Attorney-General had advised in the matter of the order, and accordingly was of the same opinion as the State President, that would make no difference. In the one case, therefore, we have to do with an openly disobeyed order of the State President, and in the other with a criminal prosecution. This, too, the applicant would have to undergo before he could appeal to the Court, and of what use would all this have been to him? The same Attorney-General, whose decision whether he will prosecute or not is still unknown, appears personally in Court to oppose the granting of the application. It therefore seems to me that this argument is likewise untenable.

I have said that sect. 5 of Law No. 26 of 1896 only admits of one reading, and by that I mean that the power there given to the State President merely refers to presswork already printed and published, and does not confer on him power to prohibit future printed matter. If this be so, the State President was not empowered to issue the order in question, and the applicant is entitled to redress. What the applicant, however, asks is improper. No provision appears in Law No. 26 as to how a prohibition is to be issued by the State President. The State President has chosen to do so by means of an order. This, to my mind, is equivalent to a proclamation. The best will, therefore, be to follow the practice of this Court as laid down in the case of *United Langlaagte Gold Mining Co. Limited* v. *The State* and *The Langlaagte Royal and The Rand Gold Mining Companies, Limited* (1 Off. Rep. p. 48). The order will accordingly be set aside, while the applicant is entitled to the costs of this application.

MORICE, J., expressed his concurrence in this judgment.

Attorneys for applicant: *Tancred* and *Lunnon*.

Attorney for the State: *C. Ueckermann, sen.*