of the statute, the Court can give relief. Supposing the licensing court had wished to take a considerable time to consider the position, I think they would have been entitled, under sec. 27, to issue a conditional licence to the applicants, saying, "You can carry on your business meantime, while we are considering this matter, or for such and such a period, till we can determine exactly what is to be done with your licences." I propose acting on what I believe to be the power of the licensing court, and, under the circumstances, directing the president of the licensing court to sign a certificate for a licence to the various applicants until such time as the licensing court has reconsidered and dealt afresh with the matter.

With reference to the duty on such licences, I do not think that I am authorised to make any definite decision. My own impression is that the applicants will be well-advised, as they are probably liable, to pay for six months, even though they may get their licences for a shorter period. But that is a matter they must settle themselves with the proper revenue officer. The applicants are entitled to costs, not against the members of the licensing court *de bonis propriis*, but against the licensing court as such.

Attorneys for Morkel and Others: *Roux & Jacobsz;* Attorneys for Hahne: *Wagner & Klagsbrun.*

[A. D.]

KEEN v. COMMISSIONER OF POLICE.

1914. *July* 2. MASON, J.

Gold Law.—Regulation 65 (4) *promulgated under sec.* 106 (2) *of Act* 35 *of* 1908 *as amended by sec.* 4, *Act* 18 *of* 1913.—*Grant of licence to jeweller.—Certificate of commissioner of police.*—Ultra vires.

Costs.—Application to declare regulation ultra vires.—*No other relief.*

Act 35 of 1908, sec. 106 (2), as amended by sec. 4 of Act 18 of 1913, empowered the Governor-General to make regulations as to the licensing of persons carrying on the business of jewellers. A regulation so made provided that no jeweller's permit or renewal thereof should be issued unless the commissioner of police certified that the applicant was a fit and proper person to hold such permit. *Held*, that the said regulation was *ultra vires* as the Governor-General was not authorised to confer upon an official the power of refusing a licence.

Where an applicant is injured by the operation of a regulation and has no other remedy than to have the regulation declared *ultra vires* so far as its particular subject matter is concerned, he is entitled to the costs of the application.

Application for an order compelling the respondent to grant a certificate to the effect that the applicant, a jeweller, was a fit and proper person to have a jeweller's licence.

Manfred Nathan, for the applicant: Under sec. 106 (2) of Act 35 of 1908, as amended by Act 18 of 1913, sec. 4, the Governor-General may make regulations regarding the licensing of persons authorised to buy, sell, make up, smelt or otherwise deal in or dispose of unwrought precious metal, including the licensing of persons to carry on the business of jewellers. Sec. 65 (4) of the regulations so made by the Governor-General provides that "No jeweller's permit or renewal thereof shall be issued unless the commissioner of police certifies that the applicant is a fit and proper person to hold such permit." The commissioner has refused to grant such a certificate to the applicant, but has given no valid reason therefor. He should exercise his discretion in a judicial manner, and state the facts upon which he bases his refusal. Unless it be shown that the applicant is a person in the habit of carrying on an illegitimate business he is *prima facie* entitled to a certificate. He has never had a conviction of any kind against him. See *Judes* v. *Distr. Regr. of Mining Rights, Krugersdorp* (1907 T.S. 1,046). The regulation in question is *ultra vires*: see *Howard* v. *Receiver of Revenue* (1908 T.H. 41); *Rossi* v. *Lord Provost of Edinburgh* (1905 A.C. 21).

D. de Waal (with him *J. Grindley-Ferris*): The applicant is not entitled to challenge the validity of the section on which he relies. This application should have been directed against the Receiver of Revenue and not the respondent. The reasons for refusal by respondent should not be disclosed on grounds of public policy. The applicant must prove that respondent acted arbitrarily in refusing, see *Nathalia* v. *Principal Immigration Restriction Officer* (1912 A.D. 23) and *Judes* v. *Registrar of Mining Rights* (*supra*); *Shidiack* v. *Union Government* (1912 A.D. 642 at p. 651).

It is clear that the Governor-General is given wide powers in regard to making regulations. The test as to whether a regulation is *ultra vires* or not is whether the regulation is vague, unreasonable or outside the scope of the parent ordinance. None of these objections apply to this section. The Act requires an applicant to qualify for a licence ; see sec. 107.

Nathan, in reply: In *Nathalia's'* case (*supra*) the wording of the Act was different. The scope of the statute was not to prohibit certain persons from trading. The Court will construe the enabling Act strictly.

MASON, J.: This application raises questions of considerable importance. The applicant, according to the petition which has been presented to the Court, is a jeweller who has been carrying on business in Johannesburg. He has been in the Transvaal for twenty-one years. For six and a half years he was foreman of List Brothers, manufacturing jewellers, of Johannesburg. Since 1899 he has carried on business in Johannesburg, on his own account as a manufacturing jeweller. He has stock-in-trade of the value of some £6,000. Under the regulations to which I shall refer, he applied to the Commissioner of Police for a certificate to enable him to obtain a permit or licence from the Revenue officer to enable him to carry on his business. The application for the certificate was apparently made in the ordinary way. It was refused without any reason being given. The Commissioner of Police declines to give any reason, and counsel on his behalf maintains that he is under no obligation to give any reasons. That is a startling result. Here is a man's business practically destroyed, without his being given any intimation as to any reason why. If the state of the law allows such a thing to be done, there is nothing to be done but to submit to it. But one naturally scrutinises jealously any law which is said to authorise the infliction of hardship, and, in fact confiscation, of that character. It is a punishment—a fine, really, amounting to hundreds of pounds—without any trial, and without any charge.

The legal question at issue depends upon the regulations which have been framed under the substituted sec. 106 of the Gold Law, which was enacted in Act 18 of 1913. I propose following the order which counsel have adopted in dealing with the regulation—first, upon the assumption that it is *intra vires*. Sub-sec. (4) of the 65th regulation states: "No jeweller's permit or renewal thereof shall be issued unless the Commissioner of Police certifies that the applicant is a fit and proper person to hold such permit." It was contended by Mr. *Nathan* that that is a certificate of a statement of fact; that it must therefore be founded upon fact, and that the applicant is entitled to know upon what facts the Commissioner relies for his refusal. The contention on behalf of the Commissioner of Police is that a discretion is given to him by the regulation, that he has *bona fide* exercised that discretion, and that under these circumstances the Court can inquire no further into the matter.

Now, first, does the regulation intend to give the Commissioner of Police a discretion? It says, application is to be made for a certificate from the Commissioner of Police that the applicant is a fit and proper person to hold a permit. Is that meant to be a certificate of facts or a certificate of opinion? I think it is clear that it is meant to be a certificate of the opinion of the Commissioner of Police. The Commissioner of Police has stated that he has personally considered the matter, and declines, for what he believes to be good reasons, to give a certificate. There is no suggestion that the Commissioner has acted otherwise than *bona fide*, and, as he believes, in the interests of the public. The cases which have been referred to—*Judes'* case, *Nathalia's* case, and *Shidiack's* case—as also the case of the *African Realty Trust* v. *Johannesburg Municipality* (1906 T.S. 908) show what is the position of the Courts with reference to an officer entrusted with a discretion of that nature. I quote from p. 913 of the judgment in the *African Realty Trust* case: "If a public body or an individual exceeds its powers, the Court will exercise a restraining influence. And if, while ostensibly confining itself within the scope of its powers, it nevertheless acts *mala fide* or dishonestly, or for ulterior reasons which ought not to influence its judgment, or with an unreasonableness so gross as to be inexplicable except on the assumption of *mala fides* or ulterior motive, then again the Court will interfere. But once a decision has been honestly and fairly arrived at upon a point which lies within the discretion of the body or person who has decided it, then the Court has no functions whatever. It has no more power than a private individual would have to interfere with the decision merely because it is not one at which it would have itself arrived." That, I think, upon a proper construction of the regulation, represents the position of the Court. If the regulation is valid, I do not think the Court is entitled to make enquiry of the Commissioner as to why he arrived at his decision.

But that construction of the regulation at once brings us face to face with this position. Substantially the Commissioner of Police is constituted a despot—it may be a benevolent despot, but nevertheless a despot. It is true the legislature is entitled to create official despots whenever it chooses. But we must be satisfied that that was the intention of the legislature before we give that effect to language which may perhaps be construed in another sense. The substituted sec. 106 is contained in that part of the Gold Law which deals with offences in connection with unwrought precious metal.

The first part of the section imposes penalties for being unlawfully in possession of unwrought precious metal. The second part of the section is in the following language: "The Governor-General may make regulations as to all or any of the following matters—(*a*) the licensing of persons authorised to buy, sell . . . unwrought precious metal, including the licensing of persons to carry on the business of jewellers or pawnbroking; (*b*) the control of the business so licensed to be carried on; (*c*) the hall marking of articles made up or manufactured in the Union from precious metals; (*d*) the better prevention of theft, unlawful dealing in or unlawful possession of unwrought precious metals." If that section stood by itself we should have to ask ourselves the question whether authority conferred upon the Governor-General to make regulations with respect to the licensing of businesses empowered him to constitute the Commissioner, or anybody else, as a benevolent despot to decide who could carry on business or not, according to his individual and unchallengeable opinion of their fitness. I am not satisfied that that is the necessary result of the section. Where the legislature has intended to confer an absolute discretion upon officials, so far as I know it has always said so. In the licensing Acts of this country that is specifically stated. In the Licensing Acts in England that also has been specifically stated by statutes going very far back in English history. I think that it is not a necessary result of the word "licensing" that it should be a matter of mere individual discretion. Exactly what authority is conferred by the words "power to make regulations in respect of licensing," it is not necessary for me in the present case to consider. But I cannot believe that the legislature intended, by giving a regulating power of that kind, to entrust to the absolute discretion of an individual the fortunes and businesses of large numbers of persons, without their having any appeal or being able to know on what grounds objection is being taken to them. I think if one looks at the succeeding sub-secs. of sec. 106, there is a good deal to strengthen this view. The first sub-section deals with licensing the business of jewellers. The second deals with the control of businesses so licensed; the third deals with the hallmarking of articles made or manufactured from precious metals, and the fourth with the better prevention of theft, unlawful dealing in or unlawful possession of unwrought precious metal. I think one may well give full effect to the whole section by saying that the first part is intended to provide for nobody carrying on such business unless there is a

proper register kept, with details, perhaps, with reference to those persons, and other particulars which would be necessary for the purpose of giving full effect to the section. Then the business could be properly controlled and regulations could be made so far as those persons were concerned which would prevent thefts and carry into effect the other objects of the section. When we take the new sec. 106 of the Gold Law, together with sec. 107, we find this. Sec. 106, which I have already referred to, gives, in the latter part, authority to licence not only those who deal in gold but also jewellers and pawnbrokers. Sec. 107, however, with reference to those who deal in gold specifically, states, in the statute, that nobody shall be entitled to carry on the business of dealing in gold unless he obtains a licence from the Receiver of Revenue, and in order to obtain that licence he has to produce a certificate of fitness under the hand of the resident magistrate or assistant magistrate of the district; "such magistrate shall not issue such licence except after enquiry from the Commissioner of Police and the Mining Commissioner." Now, under sec. 107, a definite statutory power is lodged in the hands of the magistrate, practically to refuse any such certificate if he thinks it right to refuse after making proper inquiry. I do not think that it was intended to incorporate indirectly in the new sec. 106 the wide powers given by sec. 107. If it had been intended to confer such discretionary powers, I think the assumption is the legislature would have said so. It has said so in connection with the Arms Act, with various Immigration Acts, and in connection with Licensing Acts. Therefore, I think we must not assume that sec. 106 was intended to confer this wide discretionary power upon the Governor-General to authorise practically any official he chose to prevent a man carrying on his business if the official thought fit to do so.

I shall declare *ultra vires* that portion of sub-sec. (4) of regulation 65 which says that "No jeweller's permit or renewal thereof shall be issued unless the Commissioner of Police certifies that the applicant is a fit and proper person to hold such a permit." The rest of the regulation seems to me probably to be *intra vires*—at any rate, the greater part is. The applicant, I think, has no right cause of quarrel with the rest of the sub-section.

With reference to the costs of the application, I had to consider this matter in the case of *Maserowitz* v. *Johannesburg Town Council* There the applicant had a remedy outside the mere declaring of the bye-law *ultra vires*. He could carry on his business and risk a

prosecution, and then defend himself on the ground that the bye-law was *ultra vires*. Here there is no remedy to the applicant unless he gets a declaration that the regulation, so far as its particular subject-matter is concerned, is *ultra vires*. Therefore, he obtains substantial success in the only way, I think, in which he could deal with the matter. It is suggested that instead of making the Commissioner of Police the respondent, the Receiver of Revenue ought to have been made respondent in this case. It is possible that the Receiver of Revenue could have been made a respondent in this case. But then he could only have been made respondent in respect of one part of the application, namely, that to declare the bye-law *ultra vires*. I think the Commissioner of Police, who claims the power to refuse a certificate, was the right person to have made respondent in an application of this nature. Therefore I shall, while declaring that portion of the regulation to which I have referred *ultra vires*, direct the respondent to pay the costs of the application.

De Waal asked for reconsideration of the order as to costs; the prayer had not been granted, and the respondent had no interest in whether the regulation was *ultra vires* or not.

MASON, J.: The petition asks for "other relief." The respondent could have written to the applicant, saying, "I have no authority to deal with the matter; the regulation is *ultra vires*." If he had made that tender, I should not have ordered him to pay costs. But if he insists on exercising a power which he has no right to exercise, I think he ought to pay.

Attorneys for Applicant: *Wagner & Klagsbrun;* Attorneys for Respondent: *Roux & Jacobsz.*

[A. D.]