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## DE BRUIN v. SECRETARY FOR THE INTERIOR.

(WITWATERSRAND LOCAL DIVISION.)

1972. *April* 4. 1973. *January* 3. CILLIÉ, J.P.

*Population registration.—Act* 30 *of* 1950.—*Board confirming Secretary's classification as a Bantu.—Appeal to the Court.—Person unrepresented before the Board.—Board failing to explain to him why he should give evidence himself.—Such an irregularity.—Classified as Coloured.*

The appellant appealed against an official classification as a Bantu and not a Coloured person by the respondent, and against a confirmation of the classification by the Board appointed under the provisions of Act 30 of 1950. It appeared that he had not been represented before the Board and that he himself had not given evidence in the proceedings. He had not been deprived of the opportunity but he had not been aware of the desirability thereof.

*Held,* that the Board's failure to explain to him that there was no evidence of his own before it was an irregularity.

*Held,* further, that somebody who looked like a Bantu could nevertheless be classified as a Coloured because he is one.

*Held,* further, on the facts, that the appellant should be classified as a Coloured.

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Appeal from a decision of the respondent. The facts appear from the judgment.

*B. Gudelsky,* for the appellant.

*I. W. B. de Villiers,* for the respondent.

*Cur. adv. vult.*

*Postea* (January 3rd).

CILLIÉ, J.P.: The appellant appeals against an official classification as a Bantu and not a Coloured person by the respondent, the Secretary for the Interior, and against a confirmation of the classification by the Board appointed under the provisions of the Population Registration Act, 30 of 1950.

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The appellant also requests the setting aside of the Board's confirmation and an order that he is a member of the Cape Coloured group. In the alternative he requests a declaration that he is a member of any other group than the Bantu group. He also requests that the costs of the hearing be awarded to him.

Sec. 11 of the Act provides that if any person is dissatisfied with the Secretary's classification, he must object in writing to the Secretary. The Secretary must then submit the objection to a Board. When the Board is in session the objector or his representative may cross-examine the witnesses and submit relevant evidence. The Board's decision is conclusive and binding except that he, as in the present case, may appeal.

The appellant was dissatisfied with his classification by the respondent. His next step was prescribed by sec. 11 (3). This sub-section reads as follows:

"Every such objection shall be lodged in the form of an affidavit setting forth fully the grounds upon which the objection is made and stating the date on which the classification in question became known to the objector."

The last part of this provision is probably to determine whether the objection was submitted timeously, but this document is no ordinary notice with grounds of appeal, because the grounds must be set out in full in an affidavit. This also contains undoubtedly facts given on oath by the objector. It must be the intention that it also sets out the objector's case to the Board.

In the present case this document does not form part of the record. The Court asked for it, but it was not available at the hearing. At the conclusion of the sitting, when the Court reserved judgment, a request was made to send the document to the Registrar. This was not received, and the Court has no knowledge of its contents. No reference is made in the proceedings or in the oral or written judgment of the Board to this document or its facts. The appellant was still unaware of this defect

at the hearing. In all the circumstances it must be assumed that it forms no part of the record, and that the evidence was not submitted to the Court. The appellant states the following in one of his affidavits before this Court:

"I want to draw this Honourable Court's attention to the fact that I was not represented before the Board. I myself did not give evidence in the proceedings. I was not deprived of the opportunity, but I was not aware of the desirability thereof."

This means that there was no evidence of the appellant himself before the Board. The Board should have informed the unrepresented appellant of this fact. Then it might have become clear to him that he had to testify.

The respondent objected to an affidavit submitted to the Court by the appellant. This contains facts which most probably could have swayed the Board, especially on further investigation. I shall not quote those facts or again refer to them. In my opinion the Board's failure to explain to appellant that there was no evidence of his own before it, was an irregularity.

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It is expedient to give appellant's history in broad outline. A Coloured, Jeremiah de Bruin, took as his wife a certain Johanna or Annie—in the record spelled "Ennie". Johanna had a daughter Mollie, apparently born before Johanna had met Jeremiah. Johanna had a previous relationship with a man called Sekali. The appellant is the illegitimate child of Mollie; none of the witnesses knows who his father is or was. Shortly after Johanna married Jeremiah, Mollie died and the appellant was reared by his grandmother and Jeremiah. They lived in various places and the appellant also attended school at Vredefort. He is now employed on the Rand.

At the commencement of the proceedings before the Board, the Board first investigated the appearance of the appellant, i.e. whether he looked like a Bantu or a Coloured. The Board came to the conclusion that appellant looked like a Bantu. Thereupon the chairman explained to him the meaning of this, and that this finding resulted in the fact that he, the appellant, now had to prove that he was not a Bantu and that he did not pass for one. (Sec. 19 (1) and sec. 19 (1A)). It was the Board's duty to give this provisional decision according to appellant's appearance, but afterwards the Board should have seen to it that the person's appearance was not unduly stressed. We have already warned in the past that appearance when determining a person's race, can be deceptive and dangerous. See *Lambert* v. *Director of Census and Another*, 1956 (3) S.A. 452 (T) at p. 456.

The importance attached by the Board to appearance appears, however, from the following. When appellant's step-aunt, Sally de Bruin, testified, she was asked "Are you classified." She answered "Yes, as Coloured." Thereupon the chairman said

"this should actually be wrong, because you look just like a Bantu".

In his oral judgment the chairman said:

"You do not know your father. Judging by your appearance your father could only have been a Bantu."

It is said in the Boards' written judgment:

"Judging by his appearance his father could only have been a Bantu."

The judgment reads further:

"Both Jeremiah and Sally who testified, are classified as Coloureds, but there is no relationship between them and the objector. As to Jeremiah's and Sally's appearance and speech it is far more probable that they are smart Bantu who grew up in the country."

It is significant that the Board judged the appearance of two persons classified as Coloureds, as Bantu, and the Board should consequently have been warned that someone with the appearance of a Bantu can nevertheless be classified as a Coloured, because he is a Coloured. It may be that this approach by the Board made it difficult for the Board to judge according to the facts submitted.

As to the evidence, I first want to deal with the matter whether the appellant passes for a Bantu. There were three witnesses before the Board, all three Coloureds, and classified as such. In my opinion the Board had wrongly doubted that they were Coloureds, because of the appearance of two of them. These persons are related to appellant by bonds of friendship and, to a lesser extent, by bonds of kinship. They

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testified that he was reared by his father, that is Jeremiah, and that they lived amongst Coloureds. The following took place during the hearing of evidence. Jeremiah was asked: "Where did you live"—answer: "At Overton." "Chairman: Where is that?"—"Mr. Steyn (appearing for second respondent): It is a Bantu residential area." "Chairman: It is a place where Bantu live?" Answer: "No, purely Coloureds." "Chairman: What do you mean by Coloureds?" Answer: "Smart people do not live in locations." "Chairman: But smart people are also Bantu who grew up on farms?" Answer: "Yes." The place where they lived was not investigated further, and was not again referred to.

The witness, Sally de Bruin, said that the applicant associated with Coloureds; that his friends were Coloureds, and that according to her he looked like a Coloured. The third witness, Elizabeth Pieterse, said: "He is a Coloured and associates with Coloureds." She accepted him as a Coloured.

In the absence of any other evidence I am of the opinion that the appellant hereby proved that he did not pass for a Bantu.

This brings me to the last question, viz., whether he proved that he is not a Bantu. A Bantu is someone who is a member of a native race or native tribe of Africa, or who as a rule passes for one; and someone is classified as a Bantu if his natural parents are classified as Bantu. (See secs. 1 and 5 (*v*) of the Act).

It appears from the confused evidence that nobody knows who was appellant's father. It is impermissible to deduct from his appearance,

as the Board did, that his father was a Bantu. It is not known who his father was and to what race he belonged. It is also not known who his grandfather was. His grandmother lived with a man with the name of Sekali, but it is not sure whether he was the father of her child Mollie. Nothing whatsoever is known about his great-grandfather.

The evidence concerning his parentage on his mother's side is mainly that of Jeremiah de Bruin, an old man of 70, who apparently has trouble with his memory and who is susceptible to suggestions, so that he readily answers in the affirmative or in the negative to a leading question. As Edward said at one stage: "My grandfather's head is in a muddle." He ascribed this to all the questions put to the witness. I have the impression that the questioning, especially when other statements were put to him, could have confused him. Then again he struggled to put his thoughts across. He said several times that his wife was a Bantu and then again contradicted himself by apparently suddenly expressing his thoughts obstinately. The criticism that he lied because he sometimes called appellant his son in his statements, is unjustified. He reared him from babyhood, acted as his father, and the appellant also called him father. When reading his evidence sympathetically the following appears: appellant's mother was also adopted by Jeremiah, but very little is said about her. Her mother, who was married to Jeremiah de Bruin, previously lived with a man named Sekali, and then she was known as Annie or Johanna Sekali. Her maiden

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name was Johanna Louw. It appears from one of the statements that she was a Coloured and a daughter of Molly Louw, also a Coloured. This evidence of Jeremiah de Bruin is not refuted by other evidence or other witnesses. In spite of the confusion referred to above, this witness' evidence can be accepted. All available evidence of his parents and ancestors indicates that they were Coloureds, i.e. on his mother's side, and there is no evidence whatsoever of his parents on his father's side in this connection. In my opinion the Board should have found that he was a Coloured.

In the result the appeal succeeds with costs and the appellant is classified as a Coloured.

Appellant's Attorneys: *Ritch & Burland.* Respondent's Attorney: *Deputy State Attorney.*

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