

BUSFARE INCREASES AND ADMINISTRATIVE IRREGULARITIES

The administrative state is upon us and is growing. So it is not surprising that one of the most rapidly expanding areas of law is administrative law. Indeed, it has become fashionable to talk of an 'explosion' of administrative-law cases. Something else which is 'explosive' is inflation, especially when coupled with a fuel 'crisis'. Not unnaturally we tend to get excited when those who run public transport systems propose to increase the fares, although we must, of course, appreciate that this is sometimes inevitable. Thus, when City Tramways Ltd (the 'bus company'), which operated 734 buses carrying 100 million passengers per year in the Cape Peninsula and Western Cape, applied to the Local Transportation Board, Cape Town (the 'Board') for an increase in its tariffs, Mr Roberts became something of a folk hero when he decided, at considerable expense to himself, to object. His objection ended in two reported cases: *Roberts v Chairman, Local Road Transportation Board and another* (1) 1980 (2) SA 472 (C) (*Roberts (1)*) and *Roberts v Chairman, Local Road Transportation Board and others* (2) 1980 (2) SA 480 (C) (*Roberts (2)*).

In *Roberts (1)* Mr Roberts had successfully challenged the Board's grant to the bus company of its application for a tariff increase. He was successful on two grounds. In the first place, the Board had held its hearing too soon after advertisement of the notice of application in the *Government Gazette*, as the period for objections had not expired. The court (Friedman J, Watermeyer AJP concurring) held that the period of notice was peremptory and constituted a jurisdictional fact (1980 (2) SA 472 at 476F-477A) which was justiciable by the court. In the second place, the notice of application that had been published in the *Government Gazette* (twice in fact) did not comply with the statutory requirement (s 14(1) of the Road Transportation Act 74 of 1977) that it contain 'full particulars'. This the court held (at 479H) was a peremptory requirement, and failure to observe it rendered the publication, and therefore the subsequent hearing, invalid.

With respect, *Roberts (1)* seems to be unimpeachable. However, *Roberts (2)* is particularly problematic and is, I believe, worthy of comment. I submit that for administrative law it constitutes a small step forward and quite a few steps backward. In this note I wish to examine those parts of the case with which I find myself in respectful disagreement. Finally, in the light of recent legal developments in this regard in England and Canada, I shall also consider the one welcome feature of *Roberts (2)*: namely, an apparent recognition of the *duty to act fairly*.

I *Roberts (2)*

The first decision of the Board having been set aside in *Roberts (1)*, the bus company proceeded to lodge a fresh application on 31 August

1979 for an increase in tariffs. However, shortly afterwards the three members of the Board recused themselves, and on 12 September the Minister of Transport appointed an *ad hoc* Board (the '*ad hoc* Board') to consider the application. One of the appointees to the *ad hoc* Board recused himself and shortly thereafter another person was appointed in his place. The *ad hoc* Board advised objectors (including Mr Roberts) that they would hear the application on 23 October 1979.

At the commencement of proceedings on 23 October Mr Roberts's counsel objected to the jurisdiction of the *ad hoc* Board. The *ad hoc* Board ruled that it had jurisdiction, but, at counsel's request, agreed to a postponement of the hearing so that this ruling could be tested by way of review proceedings in the Supreme Court. Before this could be done, the managing director of the bus company, together with its counsel, went to Pretoria, where they held interviews with the Chief State Law Adviser and the Secretary for Transport (as he was then termed) on 24 October (that is, the day after the *ad hoc* Board agreed to postpone its hearing). The same afternoon a meeting of the National Transport Commission (the '*Commission*') was convened to consider a memorandum placed before it at the request of the Secretary for Transport. The memorandum requested the Commission to take action in terms of s 7(2) of the Road Transportation Act. Section 7(2) empowers the Commission to direct a local road transportation board to refer to the Commission any application (such as the one made by the bus company) for the Commission's consideration and decision. Three of the existing ten members of the Commission attended the meeting. It was resolved to comply with the request and issue a directive to the Board in Cape Town. This resolution, together with the minutes of the meeting of the Commission on 24 October, were confirmed at the next meeting of the Commission on 26 October. All these events seem to have taken place without the knowledge of the other parties, including Mr Roberts.

On 25 October the Board received the directive, whereupon its chairman instructed its secretary to refer the application to the Commission. This was done on 26 October, and the chairman notified the other two members of the Board of the directive. Shortly thereafter the three members of the *ad hoc* Board resigned. As a result of these occurrences, the review proceedings concerning the jurisdiction of the *ad hoc* Board fell away. Proceedings for the hearing of the application by the Commission were then set in motion. But, before the hearing, Mr Roberts decided to challenge the legality of the sudden turn of events.

Roberts (2) was the result. It was presided over by Friedman J (who again gave the judgment) and Fagan J (who concurred). Judgment was delivered exactly one month after the hearing.

The relief sought by Mr Roberts was comprehensive and a tribute to his counsel. In view of its complexity, I have not followed the order in which it was claimed (see the report, 1980 (2) SA 480 (C) at 484H–485H) but have adopted the following classification for present purposes. (I shall ignore the particular *remedies* claimed.) Mr Roberts sought:

- (a) an order setting aside the decision of the *Commission* to issue the *directive* (paras *b*, *e*, *j* and *k* of the notice of motion);
- (b) an order setting aside the *referral* of the application by the *Board* to the *Commission* in compliance with the *directive* (paras *a* and *d* of the notice of motion); and, in consequence
- (c) an order restraining the *Commission* from hearing the application, for lack of jurisdiction (paras *f* and *g* of the notice of motion).

Further incidental relief need not concern us here. In this note I wish only to consider the judgment of the court in respect of (a) above. It was the *Commission's* conduct which was crucial, and the answers to (b) and (c) largely follow from an answer to (a). With respect, one can agree with Friedman J's findings only in respect of (b) and (c) (see the report at 502E–505H).

In order to attack the validity of the decision of the *Commission* to issue the *directive*, Mr Roberts relied on six grounds, namely that:

- (i) the proceedings were *sub judice* in view of the contemplated review proceedings, and that it was at least improper for the bus company to disturb the arrangements by approaching the *Commission*;
- (ii) the *Commission* had failed to observe the principle *audi alteram partem* in reaching its decision to issue the *directive*;
- (iii) the *Commission* had failed to observe 'basic fairness' in reaching its decision;
- (iv) the *Commission* had not been properly constituted for the purposes of its meeting on 24 October;
- (v) the meeting of the *Commission* had not been held in public; and
- (vi) at the meeting the matter had not been properly considered.

His lordship, in the course of a lengthy judgment, found all these grounds to be without substance. With respect, it is difficult not to agree with the learned judge's views on the first, fourth and sixth grounds. For the first ground to have succeeded, unlawful action on the part of the *Commission* would have had to be established; in other words, contempt of court for breach of the *sub judice* rule. However, the learned judge refused to follow an early Transvaal case, *Li Kui Yu v Superintendent of Labourers* 1906 TS 181, where Mason J held that contempt of court could be committed even

where there was no *dolus* on the part of the offender. Friedman J preferred to follow two subsequent cases, *Fein and Cohen v Colonial Government* (1906) 23 SC 750 and *Yamomoto v Athersuch* 1919 WLD 105, which cast doubt on the decision in the *Li Kui Yu* case and held that *dolus* in the form of an intention to defeat the course of justice was required (see also *Clements NO v Banks and Murray* 1921 EDL 337 at 343). (See the *Roberts* (2) report at 486H–488D.) Certainly there seems to be no reason why the Commission, if it had had no intention of defeating the ends of justice by obstructing the contemplated review proceedings regarding jurisdiction, should not have been free to continue exercising its own statutory powers. Only where its own powers would have been affected by any possible order of the court in the review proceedings could it have intended, or even been legally able, to obstruct those review proceedings. The fact that its action served to preclude the *ad hoc* Board from hearing the matter further did not obstruct Mr Roberts, but, as Friedman J pointed out (at 488F–H), served to contribute towards Mr Roberts's very objective in bringing the review proceedings. Regarding the fourth ground, Friedman J found that the state of affairs in this particular case, that only three of the ten members of the Commission had been present on 24 October, was attributable to the fact that, of those who had received notice of the meeting, some had been unable to attend, one special member (the Defence representative) did not attend as it was the practice for him to attend only where the interests of the Defence Force would possibly be affected, and one (the Railways representative) was disqualified from attending. The remaining two members who were entitled to attend had not been summoned, as they would not have been able to attend at such short notice. Three constituted a quorum in terms of s 6(4) of the parent Act: the Transport (Co-ordination) Act 44 of 1948. Relying on English law and South African cases, his lordship held that only those members for whom it was physically possible to attend need have been given notice. (See the report at 497B–501D.) As there was a quorum, the Commission had to be deemed to have been duly constituted. The sixth ground of objection was likewise a long shot. Neither Mr Roberts nor any of the other parties from Cape Town was at the meeting of the Commission on the 24th. Thus it was pure guesswork, in the absence of any other evidence, to allege that the decision of the Commission 'was in fact a dictated decision by the chairman' and that the other persons present merely 'went through the motions of a normal decision-making process' (501H). This may have been the case, but it is one of the features inherent in administrative law that such allegations are extremely difficult to prove other than by way of inference. The court had no option but to accept the denial on affidavit by the acting chairman that this was

in fact the case and his assertion that due consideration had been afforded the matter (502B).

However, with respect, Friedman J's disposal of the remaining three grounds do not seem to me to be quite as convincing; if anything, the effect is to drag administrative law deeper into a morass from which courts in other countries have taken years to extricate themselves. I propose to deal with each ground in turn, adopting my own numbering.

1 *The Commission failed to observe the principle audi alteram partem.* A long time ago Schreiner JA issued this warning:

'The classification of discretions and functions under the headings of "administrative", "quasi-judicial" and "judicial" has been much canvassed in modern judgments and juristic literature; there appears to be some difference of opinion, or of linguistic usage, as to the proper basis of classification, and even some disagreement as to the usefulness of the classification when achieved. . . . [O]ne must be careful not to elevate what may be no more than a convenient classification into a source of legal rules' (*Pretoria North Town Council v A1 Electric Ice-Cream Factory (Pty) Ltd* 1953 (3) SA 1 (A) at 11).

Although this warning has been repeated in recent times (for example in *South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 263 (A) at 277ff; *Oberholzer v Padraad van Outjo* 1975 (4) SA 870 (A) at 875-6; *Carr v Jockey Club of South Africa* 1976 (2) SA 717 (W) at 720 and *Terblanche v Minister van Vervoer* 1977 (3) SA 462 (T)), this classification process *has* in fact been so elevated and it has become the bane of our administrative law. (See, for instance, the discussion in (1979) 96 SALJ 607 at 609-17 and Marinus Wiechers *Administratiefreg* (1973) 127ff.) The significance of such a classification, it seems, is that it is thought to be an infallible test for determining whether the principles of natural justice apply to the administrative act in question, and faith in this test is as strong today as ever. (For some of the most recent cases, see *Meyer v Prokureursorde van Transvaal* 1979 (1) SA 849 (T) at 853 and *Lek v Estate Agents' Board* 1978 (3) SA 160 (C) at 170-2.) And *Roberts* (2) is no exception (see 1980 (2) SA 480 at 489ff). Now this test would be acceptable if it were used properly, bearing in mind the reasons for which it was adopted. The 'quasi-judicial' classification was adopted to describe the sort of administrative decision-making process to which the principles of natural justice seemed particularly appropriate (see (1979) 96 SALJ 607 at 609-14). It concerns the situation where the decision-maker must, before arriving at a decision, inform himself or itself of the facts or the facts and the law relating to the particular circumstances at hand. The principles of natural justice are primarily aimed at facilitating the accuracy of such information as well as the objectivity of the assessment of the decision-maker ((1979) 96 SALJ 607 at 635-7). Thus one way of determining whether a decision is quasi-judicial is whether it involves 'an inquiry into matters of fact, or of fact and

law' (*Hack v Venterspost Municipality* 1950 (1) SA 172 (W) at 190; *Roberts* (2) at 489E–H). However, problems arise concerning the word 'inquiry' (see below). Unfortunately, because of these problems this method of determining whether the decision is quasi-judicial is unreliable and leads to abuse of the classification process. Moreover, the courts have seen fit to impose an additional requirement, which is often used instead as an alternative test: viz, whether the act affects 'the rights of, and involve[s] civil consequences to, individuals' (*Hack loc cit*). Although this seems to me to be a purposeless, misleading and superfluous test (see (1979) 96 SALJ 607 at 617–25), it is nevertheless a part of our law (*Roberts* (2) at 490G). Friedman J considered the decision of the Commission to issue the directive from both points of view.

(i) His lordship seems to have searched for formal criteria as means of answering the question whether the Commission's exercise of discretion involved an inquiry into matters of fact or of fact and law. He appears to have been primarily concerned with the *form* of the proceedings leading to the decision. This approach, it is submitted, is just what should *not* be adopted. It was where the Donoughmore Report went wrong (see (1979) 96 SALJ 607 at 612; H W R Wade in (1949) 10 *Cambridge LJ* 216 at 228), and it defeats the object of the distinction between 'judicial' and 'quasi-judicial'. True, our courts have stopped looking for a *lis inter partes* (see L A Rose Innes *Judicial Review of Administrative Tribunals in South Africa* (1963) 39–41). But they have not got over looking for the other trappings of a court. Accordingly, 'inquiry' is frequently interpreted to mean something analogous to a formal hearing. Thus Friedman J, after surveying the various powers of the Commission in terms of the Transport (Co-ordination) Act and the Road Transportation Act (at 491A–493E), concluded as follows:

'In all these instances [including the power of issuing directives under s 7(2) of the Road Transportation Act] the Commission exercises a discretion which does not necessarily involve an inquiry into matters of fact or of fact and law, although they may involve civil consequences to individuals who are affected thereby. It is, of course, unnecessary for the purposes of the present case to deal with any of the powers exercised by the Commission except that in terms of s 7(2) of [the Road Transportation] Act 74 of 1977. When it acts in terms of that section the Commission is not required, if regard be had to the scheme of the legislation as a whole, to inquire into matters of fact or of fact and law. Accordingly, in issuing a direction under that section the Commission does not exercise a quasi-judicial function; such a decision is purely administrative. When it comes to consider the application itself, however, the position is entirely different. The Commission is then holding an inquiry and is required to act in a quasi-judicial capacity. See *City and Suburban Transport (Pty) Ltd v Local Board Road Transportation, Johannesburg* 1932 WLD 100, where Greenberg J, in relation to a board appointed under the Motor Carrier Transportation Act 39 of 1930 (the predecessor to Act 74 of 1977), held that, in considering an application for the renewal of a certificate by a bus company, the board was required to act judicially. In this regard Greenberg J said the following at 104:

'In *Frome United Breweries Co v Bath Justices* [1926] AC 586 Viscount Cave LC (at 591) said of the justices concerned 'they are performing a judicial act, for it

is their duty after hearing evidence and listening to arguments to pronounce a decision which may vitally affect the interests of the persons appearing before them. This being so, the justices who are members of the authority are bound to act judicially.' (See also at 602, per Lord Atkinson.) I think that the Board in the present case falls within these definitions or descriptions and is bound to act judicially."

'In considering an application the Commission must, as it is then acting in a quasi-judicial capacity, give both third respondent and objectors like applicant an opportunity of making representations. Indeed, interested persons are entitled to submit representations. (See s 14(2) of [the Road Transportation] Act 74 of 1977.) And the Commission is obliged to take such representations into consideration. (See s 15(1)(i) of that Act.) See also s 9(1) of [the Road Transportation] Act 74 of 1977, which deals with the procedure to be followed by the Commission in dealing with any matter before it, and which provides that the Commission may allow interested persons to appear before it and give evidence or make oral representations' (at 493E-494B).

Surely the word 'inquiry' is not to be elevated to this formal level. To use it no differently from its normal lay usage (that is, to connote the process whereby anyone informs himself as to facts or circumstances) would accord more appropriately with Lord Loreburn LC's description of it as 'a duty lying upon everyone who decides anything' (*Board of Education v Rice* [1911] AC 179 (HL) at 182). Section 3 of the Road Transportation Act, which deals with the various powers of the Commission, seems to make no special provision for the Commission when sitting in a 'quasi-judicial capacity'. Neither does the parent Transport (Co-ordination) Act make any concession regarding the composition of the Commission for 'purely administrative' decisions. (The relevant sections are discussed in the *Roberts* (2) report at 497D-498E.) Indeed, the Act goes to great lengths to ensure the impartiality of the Commission (see, for example, s 3(5)(b) and s 3(8)(a)) and that its membership will comprise persons of wide experience (s 3(2)). If anything, one would have thought that a great deal of 'inquiring' would be going on at meetings of the Commission. What better way of ensuring that the members of the Commission have all the facts at their fingertips than by allowing interested parties to state their cases? And the decision to issue a directive would presumably be made only where the matter seems to be sufficiently important to warrant the Commission itself hearing the application right away. The Commission, by not intervening before 24 October, was obviously not of this opinion until it received the memorandum from the Secretary for Transport, who acted after hearing *one* source of information: the agents of the bus company. If it was necessary that this information be placed before the Commission, surely the view of the other side would have been of assistance, too. Or are we to assume that the Commission always follows the advice of the Secretary, thereby fettering its discretion altogether?

(ii) Friedman J also considered whether Mr Roberts's rights had been affected. Citing *Pearlberg v Varty* [1972] 2 All ER 6 (HL),

Friedman J held that the 'decision of the Commission in terms of s 7(2) is not a final determination of the rights of the parties' (at 494C). To cite *Pearlberg v Varty* is a little strange when a page later (at 495C–E) the learned judge refused to 'analyse' three other foreign decisions (*R v Venables, ex parte Jones* (1970) 15 DLR (3d) 355; *Re Hogan and Director of Pollution Control* (1972) 24 DLR (3d) 363; and *Wiseman v Borneman* [1971] AC 297 (HL), [1969] 3 All ER 275) on the ground that these cases involved legislation not related to transport legislation (495E). *Pearlberg*, too, did not involve transport legislation. In fact, the circumstances of that case were barely analogous. What was involved was the decision of a commissioner of taxes to permit the raising of assessments in respect of arrear taxes, without observing the principles of natural justice, where the taxpayer had failed to submit tax returns. This is a good deal different from the case where proceedings are taking place (albeit in a contentious manner) before one tribunal and a directive is issued which has the effect of removing them from that tribunal to a different one altogether. Ironically, their lordships in the *Pearlberg* case were themselves prepared to make extensive use of *Wiseman* (see [1972] 2 All ER at 9, 10–11, 15, 16, 17, 19–20).

It is a pity that Friedman J chose not to consider *Wiseman v Borneman*, for it is a leading case in English law and in it he might have noted with pride, as a South African, that one of England's most brilliant judges in recent times, Lord Wilberforce, derived assistance from, *inter alia*, South African cases which were cited at the bar ([1971] AC at 317H, 318F). He would also have noted that Lord Wilberforce based his decision on broad grounds of principle (see the AC report at 317C) and, in particular, that the learned law lord began his judgment with the words:

'... I cannot accept that there is a difference in principle, as to the observance of the requirements of natural justice, between final decisions, and those which are not final, for example, decisions that as to some matter there is a prima facie case for taking action' (at 317C).

What both *Wiseman* and *Pearlberg* affirm is not that the principles of natural justice do not apply where rights are not finally being determined, but that they apply with varying force depending upon the circumstances (see, for example, *Pearlberg* [1972] 2 All ER at 16d–e (Viscount Dilhorne) and 17g (Lord Pearson); *Wiseman* [1971] AC at 308B (Lord Reid), 309A–B (Lord Morris of Borth-y-Gest), 311E–G (Lord Guest), 314–15 (Lord Donovan) and 318A–C (Lord Wilberforce)).

Probably anticipating that the court would raise the point that the decision to issue the directive was not a final determination of rights in respect of the application for increased tariffs, Mr Roberts's counsel argued that the right involved was analogous to the rights enjoyed by parties to litigation when the court makes

interlocutory decisions. (See the report at 494D.) The rights affected were twofold: on the one hand, objectors lost their *right of appeal* to the Commission in terms of s 8 of the Road Transportation Act; and on the other, there was no guarantee that arrangements concerning the subpoena of witnesses agreed upon between Mr Roberts's attorneys and the *ad hoc* Board would be acceptable to the Commission, which would now be hearing the matter. Friedman J dismissed the latter point by saying that it had 'no merit whatsoever', because Mr Roberts could not argue simultaneously that the *ad hoc* Board had no jurisdiction whilst claiming that arrangements entered into with the *ad hoc* Board constituted rights (at 494F). But what if the objection to jurisdiction had been successful? Surely Mr Roberts had rights in the arrangements, even if these may subsequently have proved to be unnecessary. Does the mere objection to jurisdiction necessarily entail the automatic forfeiture of all other rights that would otherwise have been enjoyed by the objector?

Friedman J spent more time dealing with the former point (at 494F–G). However, he dismissed it by holding that s 8 merely gives a right of appeal when a local board has made a decision. Here the local board had not made a decision and hence there was no right of appeal (at 494H). One could reply to this that Mr Roberts was not demanding an appeal; he was merely requesting that he be allowed to put his case before the Commission exercised its powers under s 7(2). To meet this, Friedman J ruled that the decision of the Commission was an 'administrative one': 'the fact that such a directive has consequences for interested parties does not make its decision any less administrative' (at 495A). This, of course, begs the very question his lordship was busy answering! For as long as the proceedings were taking place at the local level, s 8 of the Road Transportation Act conferred upon Mr Roberts a right of appeal when the decision was eventually reached. The Commission has the power to remove that right before it can be exercised. That no one can gainsay. But that does not automatically imply that it can do so without observing the principles of natural justice.

To conclude, even on the test adopted by South African courts it is respectfully submitted that Mr Roberts had a right to a hearing before the Commission issued its directive.

2 *The Commission should, in any event, have observed 'basic fairness' (495H).* I have argued elsewhere ((1979) 96 SALJ 607 at 625ff) that, in order to obviate the difficulties attached to the classification of functions and the connotations of rigidity sometimes borne by the principles of natural justice, our courts should follow the lead of the English courts by introducing the simple doctrine of fairness. Has

the administrative tribunal or body acted fairly? For at bottom fairness is what the principles of natural justice are all about. Thus it was particularly pleasing to observe that Friedman J appeared to accept, in *Roberts (2)*, that the Commission did have a general duty to act fairly (at 496C). Unfortunately, his lordship did not elaborate upon the meaning of this duty, but concentrated on the specific examples which counsel for Mr Roberts had suggested illustrated unfairness. These were (a) the denial of an opportunity to be heard, both in respect of the issue of the directive (at 495H) and in the Commission's 'riding roughshod' over Mr Roberts's right to review the decision reached by the *ad hoc* Board concerning its jurisdiction (at 496B); and (b) that the Commission was prejudiced 'or was at least influenced by the one-sided representations to which it had lent an ear' (at 495H) or that even if this were not the case, 'justice was not seen to be done and fairminded people viewing the transaction would have believed and suspected that the Commission might not have resolved the question before it with a fair and unprejudiced mind' (at 496A)—in other words, bias or the appearance of bias.

With regard to (a), in view of his lordship's previous findings concerning the right to a hearing, that particular aspect of the alleged duty to act fairly fell away, including the 'right' to review of the *ad hoc* Board's decision, since the object of such a review would be to stop the *ad hoc* Board from hearing the matter and this was the very effect of the directive (at 496H). And so far as the allegation of bias was concerned, his lordship found on the facts that the Commission had not been influenced:

'In the circumstances applicant had not established, on a balance of probabilities, that the Commission heard third respondent or that it acted or was influenced by the alleged one-sided representations. As to whether justice was seen to have been done, even assuming that the views of the chairman were known to the meeting, there is nothing to indicate that the members were unduly or improperly influenced thereby or that they did not consider the decision on the merits as they saw them' (at 496D-E).

Thus one must accept the learned judge's conclusion on the facts, but, with respect, it is difficult to accept that, although there was no *actual* bias, there was no *appearance* of bias. The very fact that only the bus company's representatives had spoken to the Secretary for Transport and that his memorandum had been considered by the Commission to the exclusion of all other evidence (499G) would, to my mind, raise a *prima facie* inference of prejudice. And it is only the *appearance* (reasonable apprehension) that is necessary (see, for example, *Jacob v Tugela and Mapumulo Rural Licensing Board* 1964 (1) SA 45 (D) at 46-7). The famous statement of Lord Hewart CJ in *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at 259 that 'justice should not only be done, but should manifestly and undoubtedly be seen to be done' is also a principle of our law

(see, for example, *Slade v Pretoria Rent Board* 1943 TPD 246 at 252 and *Smith v Ring van Keetmanshoop van die Nederduitse Gereformeerde Kerk, Suidwes-Afrika* 1971 (3) SA 353 (SWA) at 362F). While there is much more to this test, including two streams of thought (see the *Smith* case at 361ff and *S v Radebe* 1973 (1) SA 796 (A) at 811–12), it need not be examined in greater depth for present purposes.

3 *The Commission did not meet in public.* Mr Roberts's counsel relied on a Canadian case, *R v Tarnopolsky, ex parte Bell* (1970) 11 DLR (3d) 658 (Ont CA), for the proposition that, as a general rule, a statutory tribunal should conduct its proceedings in public 'unless there be good reason to hold them *in camera*' (*per* Laskin JA at 666 of the *Tarnopolsky* report). It is also the general rule applicable to those administrative tribunals in England that are governed by the English Tribunals and Inquiries Act 1958 (see H W R Wade *Administrative Law* 4 ed (1977) 768). As J F Garner (*Administrative Law* 5 ed (1979) 238) puts it, 'the parties concerned will not have as much confidence in the impartiality of the proceedings if they know that the Press and the public have no right to find out what is going on'.

There seems to be no authority in this respect in South African law. Friedman J held that the Commission need not have met in public on 24 October, as it was dealing with 'purely administrative matters. When the Commission meets to discuss matters of this kind it cannot be described as "conducting proceedings" as it would be if it were adjudicating upon an application' (at 501F–G). However, in the light of the foregoing discussion, it is respectfully submitted that the matter in question was not 'purely administrative' and that the same principle of publicity should be applied by our courts with regard to the proceedings of all administrative tribunals except where special circumstances require otherwise.

II *Natural Justice and the Duty to Act Fairly*

In conclusion, I wish to return to a point raised earlier and in more detail in my 'Fairness and Natural Justice in English and South African Law' (1979) 96 *SALJ* 607 at 625ff. There I argued that because of the difficulties associated with the principles of natural justice, in particular with regard to the practice of classification of functions and the distinction between rights and privileges, as well as the tendency of the courts to apply the principles in an all-or-nothing fashion (cf Edwin Cameron in (1980) 97 *SALJ* 189 at 194), it would be preferable to adopt the doctrine of fairness which has been developed in the English courts. *Roberts* (2) seems to be the first South African case in which the *duty to act fairly* has been afforded some direct judicial recognition. This is especially encouraging for two reasons. First, it has been tried and tested for

some years now in England and has at last gained explicit recognition in the House of Lords recently in *Bushell v Secretary of State for the Environment* [1980] 2 All ER 608 (HL) at 612–13, 614, 622j and 631g–h. Secondly, it was by means of the duty to act fairly that Canadian courts extricated themselves from the selfsame predicament in which our courts find themselves. Until recently, Canadian courts adopted the extreme formal approach to the duty to act judicially that had already been rejected in 1963 by *Ridge v Baldwin* [1964] AC 40 (HL) in England. (See especially *Howarth v National Parole Board* (1975) 50 DLR (3d) 349 (CSC) and *Desjardins v Bouchard* (1977) 71 DLR (3d) 491 (Fed Ct).) The doctrine of fairness was suggested as a solution by the Ontario High Court in *Ex parte Beauchamp* [1970] 3 OR 607 and by the Alberta Supreme Court in *R v Industrial Coal and Minerals Ltd* [1977] 4 WWR 35; *Re Alberta Union of Provincial Employees and Alberta Classification Appeal Board* (1978) 81 DLR (3d) 184 and *McWhirter v Governors of the University of Alberta (No 2)* (1978) 80 DLR (3d) 609. In 1978 it was finally adopted by the Canadian Supreme Court in *Re Nicholson and Haldimand–Norfolk Regional Board of Commissioners of Police* (1979) 88 DLR (3d) 671 (CSC), where Laskin CJC, delivering the judgment in which the majority concurred, accepted that even where there is no duty to act judicially the administration nevertheless has a duty to act fairly (see (1979) 88 DLR (3d) at 680–2). Thus in this case a policeman whose post had not been confirmed and who had been dismissed was held entitled to have put his case to the respondent Board after being told why his services were no longer required, even though he was *not formally entitled to the protection of the principles of natural justice*. This was justified on the basis of fairness alone (at 682–3 of the report) and on the obvious rationale that the Board ‘would wish to be certain that it had not made a mistake in some fact or circumstance which it deemed relevant to its determination’ (at 682).

Re Nicholson promises to become for Canada what *Ridge* (which also concerned the dismissal of a policeman) was for England: a watershed in administrative law. It has subsequently been followed by a flood of decisions in the state courts (of which the judge in *Re Steinman Transportation Ltd and Ontario Highway Transport Board* (1981) 113 DLR (3d) 336 (Ont Div Ct) seems unaware), indicating ‘that the law in Canada in this respect is now closer to the law in England and elsewhere in the Commonwealth’ (*Calhane v A-G of British Columbia and Harrison* (1980) 108 DLR (3d) 648 (Brit Col CA) at 665), although the meaning of the fairness doctrine seems on occasion to have been misunderstood (see, for example, *Re Provincial Agricultural Land Commission and Pickell* (1980) 109 DLR (3d) 465 (Brit Col SC) at 470ff). The doctrine seems now to be firmly established in Canada. (For extensive analyses, see R A

Macdonald 'Judicial Review and Procedural Fairness in Administrative Law I' (1980) 25 *McGill LJ* 520, 'II' (1980) 26 *McGill LJ* 1; and J H Grey 'The Duty to Act Fairly After *Nicholson*' (1980) 25 *McGill LJ* 598.)

Because of the similarity in approach of our courts to that of the pre-*Re Nicholson* judgments in Canada, it is my submission that we should take careful note of what has happened there. The duty to act fairly may not yet be crystal clear, but it does seem to be a significant advance. Not only has it been accepted in England and Canada, it has also been accepted by the Australian High Court in *Salemi v Minister for Immigration and Ethnic Affairs* (1977) 51 ALJR 538 at 542, and by the Privy Council for New Zealand in *Furnell v Whangarei High Schools Board* [1973] AC 660 (PC). This approach may well have helped Mr Roberts in *Roberts (2)*: all that he wanted was an opportunity to put his case to the Commission. This does not require formalized procedures or, indeed, any significant administrative inconvenience. For while it must be conceded that the duty to act fairly may well require something less than that required by the principles of natural justice—and there is a danger that a hostile court may take such an opportunity to whittle away these procedural rights altogether (it must be conceded that *Cinnamon v British Airports Authority* [1980] 2 All ER 368 (CA) comes pretty close to doing this: cf I R Ward in (1981) 44 *Modern LR* 103)—it must at the same time be appreciated that attempts fully to judicialize procedural protections, such as the duty to act fairly and natural justice, will inevitably be counter-productive. *Fairness* provides the most convenient means of facilitating flexibility without losing procedural rights altogether. (Cf M Elliott 'Appeals, Principles and Pragmatism in Natural Justice' (1980) 43 *Modern LR* 66.)

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CUSTOMARY LAW IN THE SUPREME COURT

Decisions concerning the application of customary law in the Supreme Court have been infrequent of late. With respect, *Maseny v Seleka Tribal Authority and another* 1981 (1) SA 522 (T), which is such a decision, gives rise to a number of difficulties.

The term 'customary law' is used in this note with the meaning given in the present writer's *The Customary Law of Immovable Property and of Succession* 2 ed (1976) 7–8, that is, it refers to what used to be called Native or Bantu or African law. Statutes now refer to Black law. (The present writer's book is referred to hereinafter as *Customary Law*.)