

4. A CHALLENGE

We publish in this issue of REALITY, by courtesy of the Civil Rights League, a challenge to the Judges of South Africa to stand up and be counted, to refuse to continue to apply, **without comment**, laws which bear no relation to justice.

The arguments for Judges to make this stand are cogently argued by the League. And it can happen too. Witness the following review judgement given by Mr. Justice Didcott (with Mr. Justice Milne concurring) in the Natal Provincial Division not long ago.

IN RE DUBE

(Natal Provincial Division)

1979 May 1 Milne J and Didcott J

Bantu – Bantu (Urban Areas) Consolidation Act 5 of 1945 – “Idle person” – Declaration of by commissioner under s 29 (2) (a) (i) – Person incapable of being employed – Declaration not competent under s 29 – Declaration and consequent order for removal to, and detention in, a farm colony set aside on review.

The provisions of s 29 (2) (a) (i) of the Bantu (Urban Areas) Consolidation Act 25 of 1945, whereby unemployed male persons may, in certain circumstances, and subject to certain exceptions, be declared “idle persons”, do not extend to persons who are incapable of being employed.

Where a commissioner of the Department of Plural Relations and Development had declared a person an “idle person” and ordered his removal to, and detention in, a farm colony unless he got employment within 30 days or left Durban of his own accord within 35, it appeared that such person was an epileptic who suffered from frequent fits and received constant medication from King Edward VIII Hospital, and was only fit for light duties.

Held, that he was incapable of being employed and thus fell outside the ambit of the section. The declaration and consequent order by the commissioner accordingly set aside on review.

Review of a decision of a commissioner of the Department of Plural Relations and Development. The facts appear from the reasons for judgment.

Didcott J: If you happen to be a male “Bantu”, to use the terminology still found in the legislation, you are governed by the Bantu (Urban Areas) Consolidation Act 25 of 1945 as amended from time to time.

You are then an “idle person”, once you are capable of being employed but have no lawful employment and have had none for a total of 122 days or more during the past year. Section 29 (2) (a) (i) makes you one. True, there are some exceptions. Your unemployment is not held against you if you are younger than

15, or as old as 65, or a pupil or student at an educational institution, or someone *bona fide* engaged in an officially approved business, trade, profession or “other remunerative activity”, or a registered work-seeker who has had no offer of lawful employment for 122 days. Otherwise, however, it is, and your “idleness” is beyond question. It does not matter whether you actually need work and its rewards. Perhaps your family supports you adequately and is content to carry on doing so. That does not count. The section says so in as many words. Nor apparently do any other lawful means you may be fortunate enough to have.

An official who has reason to believe that you belong to the class of “idle persons” may arrest you at any time and in any place outside a special “Bantu” area. You are then brought before a commissioner of the Department of Plural Relations and Development. He calls on you to give a “good and satisfactory account” of yourself, whatever that may be. Unless you do manage to do so, he formally declares you to be an “idle person”. Nobody is required to prove that you match the definition. You must prove you do not.

Once you are officially “idle”, all sorts of things can be done to you. Your removal to a host of places, and your detention in a variety of institutions, can be ordered. You can be banned forever from returning to the area where you were found, or from going anywhere else for that matter, although you may have lived there all your life. Whatever right to remain outside a special “Bantu” area you gained by birth, lawful residence or erstwhile employment is automatically lost.

Perhaps you have never broken the law in your life, or harmed anyone, or made a nuisance of yourself by your activities or the lack of them. To complete our example, let us take that to be so. It makes no difference.

When the commissioner has finished with you, the papers in your case go on review to a Judge of the Supreme Court.

He is expected, if everything is in order, to certify that what happened to you appears to him to have been “in accordance with justice”.

The trouble is that it was not. It may have been in accordance with the legislation and, because what appears in legislation is the law, in accordance with that too. But it can hardly be said to have been “in accordance with justice”. Parliament has the power to pass the statutes it likes, and there is nothing the Courts can do about that. The result is law. But that is not always the same as justice. The only way that Parliament can ever make legislation just is by making just legislation.

I have before me the case of Jabulani Sydney Dube, an “idle person” by decree. The commissioner consigned him to a farm colony for two years, and sus-

pended the order on condition that he either got employment within 30 days or left Durban of his own accord within 35 days.

Dube is 24. He lives in Lamontville with his mother. Welfare funds support him. He is not a registered workseeker. Nor has he worked for some years. He would like to, so it seems. He is, however, an epileptic who suffers from frequent fits. One has not only his word for it. The district surgeon, having examined him, says the same, and adds that he is fit for nothing but light duties. He needs constant medication. King Edward VIII Hospital gives him pills and injections regularly.

The question is whether Dube is capable of being employed. If he is not, he falls outside the section altogether. That, in my opinion, is indeed the case. In the ordinary sense, he is not capable of being employed, he can tackle only special work of a sheltered kind, and none seems to be available.

This, at any rate, is what I infer. The commissioner specifically instructed an inspector to find such employment for him. There is nothing to suggest that the inspector succeeded, and it looks unlikely that he did.

The proceedings were therefore contrary not only to justice, but to the Act as well, with the result that, on this occasion at least, it is possible to apply the Act and to do justice simultaneously.

The declaration stamping Dube an "idle person" is set aside. So is the consequent order for his removal to, and detention in a farm colony.

But this kind of thing doesn't happen often. Most judges apply the most obnoxious laws without any public evidence

that they feel any qualms about it. As Advocate Sydney Kentridge argues, the South African judiciary's largely uncritical acceptance of its role in applying the mountain of discriminatory legislation which has gone on to the statute book since 1910, and particularly since 1948, will not stand our judicial system in good stead when black South Africans start to exercise real power. They will remember then that most judges applied, **without comment**, laws which, amongst many other things:

Destroyed title deeds which they had been told were inviolate;

Uprooted whole communities lawfully established and consigned them from the centre of our cities to places miles away;

Separated husbands from their wives and families as a matter of deliberate policy.

This is to say nothing of the Security laws, an area in which most Judges seem quite unable to appreciate the nature and consequences of our detention system and regularly accept the evidence produced by it.

How do black South Africans feel about preserving such a system, then? Unenthusiastic, one would guess.

But if Judges started, even at this late hour, to take the stand the Civil Rights League is asking for, they might indeed leave us with a tradition of fearless judicial independence sufficiently respected throughout our whole community to survive whatever traumas the future may have in store for us.

