And (by twelve votes to two)

"...the Union of South Africa continues to have the international obligations stated in Article 22 of the Covenant of the League of Nations and in the Mandate for South West Africa...and the reference to the Permanent Court of International Justice is replaced by a reference to the International Court of Justice, in accordance with Article 7 of the Mandate and Article 37 of the Statute of the Court."[41]

1962 Judgment

"The Court concludes that Article 7 of the Mandate is a treaty or convention still in force within the meaning of Article 37 of the Statute of the Court.."[42]

1966 Judgment

"..its 1962 decision on the question of competence was equally given without prejudice to that of the survival of the Mandate, which is a question appertaining to the merits of the case. It was not in issue in 1962, except in the sense that survival had to be assumed for the purpose of determining the purely jurisdictional issue which was all that was then before the Court..."[43]

Separate opinion

JUDGE VAN WYK

"While it is true that the Court remarked in the course of its judgment that "the Mandate as a whole is still in force", this remark could not possibly have been intended to constitute a decision of any of the issues

41 *Ibid.*

42 *South West Africa Cases, Preliminary Objections, Judgment of 21 December 1962* : I.C.J. Reports 1962, p. 347.

43 *South West Africa (second phase) Judgment, 1966*, p. 19.

embraced by the Submission No. 1 or 2 or any other part of the merits. The preliminary objections were argued on the assumption that the Mandate was still in force, and even a preliminary finding on this matter was therefore not necessary."[44]

Dissenting opinions

JUDGE TANAKA

"At the preliminary objection stage the question of the survival of the Mandate was examined. But this examination was made from the viewpoint of Article 7, paragraph 2, of the Mandate and Article 37 of the Statute, i.e., mainly from the angle of the jurisdiction of the Court and more thorough and exhaustive investigations and arguments might be expected at the merits stage. Therefore, the Court's reasoning underlying its finding in the 1962 Judgment does not prohibit or make superfluous *de novo* arguments on the question of the survival or otherwise of the Mandate after the dissolution of the League.."[45]

JUDGE JESSUP

"...the Court's present Judgment does not decide that the Mandate or Article 7 thereof has lapsed and the authority of the Court's prior utterances on that subject remain unimpaired."[46]

Comments

Both in its 1950 Advisory Opinion and its 1962 Judgment the Court held that the Mandate as a whole, including Article 7 (2) thereof, survived the dissolution of the League of Nations and was still in force. However, in 1966 the Court expressed the view that at the time of its 1962 Judgment the Court had merely assumed survival of the Mandate purely for the purpose

44 *Ibid.*, p. 72.

45 *Ibid.*, p. 261.

46 *Ibid*,. p. 338.

of determining the jurisdiction and did not, at that time, dispose of the issue finally. "For the purpose of that question the existence of the Mandate was assumed but not conceded." [47] Judge van Wyk, in his separate opinion, agreed with this view. Judge Tanaka, in his dissenting opinion, does not say that the survival of Mandate was "assumed" by the Court in 1962. According to him the question of survival was examined (not "assumed") mainly from the viewpoint of the Court's jurisdiction and as such *de novo* arguments on the said question may be entertained in the second phase of the case for the purposes of a thorough and exhaustive examination thereof.

It may be pointed out here that in 1962 the Court held that the Mandate was a "treaty or convention in force" within the meaning of Article 37 of the Statute of the Court, and did not, 'at that time, join the issue of survival of the Mandate to the merits of the case. Moreover, in its 1962 Judgment the Court nowhere said that it had assumed the survival of the Mandate, but specifically dealt with, and disposed of, the issue. Since, as pointed out by Judge Jessup, the 1966 Judgment did not decide against survival of the Mandate or Article 7 thereof, the aforesaid decision of 1962 on the issue remains binding.

88. Distinction between the question of Applicants' interest and the question of the Court's jurisdiction

1962 Judgment

> "...the manifest scope and purport of the provisions of this Article (Article 7 of the Mandate) indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of Fits obligations both towards the inhabitants of the Mandated Territory, and towards the League of Nations and its Members."[48]

47 Pointed out by Judge M. Hidayatullah of the Supreme Court of India in his book on *The South West Africa Case*, p. 38.

48 *South West Africa Cases, Preliminary Objections, Judgment of 21 December 1962* : I.C.J. Reports, 1962, p. 343.

1966 Judgment

> "...The faculty of invoking a jurisdictional clause depends upon what tests or conditions of the right to do so are laid down by the clause itself...all that the applicants had to do in order to bring themselves under this clause and establish their capacity to invoke it, was to show (a) *ratione personae*, that they were members of the League. . .and (b) *ratione materiae*, that the dispute did relate to the interpretation or application of one or more provisions of the Mandate. If the Court considered that these requirements were satisfied, it could assume jurisdiction to hear and determine the merits without going into the question of the Applicants' legal right or interest relative to the subject-matter of their claim; for the jurisdictional clause did not, according to its terms, require them to establish the existence of such a right or interest for the purpose of founding the competence of the Court."[49]

And

> "...It is a universal and necessary, but yet almost elementary principle of procedural law that a distinction has to be made between, on the one hand, the right to activate a Court and the right of the Court to examine the merits of the claim,—and, on the other, the plaintiff party's legal right in respect of the subject-matter of that which it claims, which would have to be established to the satisfaction of the Court."[50]

Separate opinion

JUDGE MORELLI

"An analysis of that part of the 1962 Judgment which

49 *South West Africa (Second phase) Judgment*, I.C.J. Reports, 1966, pp. 37-38.

50 *Ibid.*, p. 39.

relates to the third preliminary objection leads to the conclusion that the decision represented by the dismissal of that preliminary objection amounts solely to a finding that the dispute submitted to the Court, held by the Judgment to exist, was a dispute, within the meaning of Article 7 of the Mandate... this decision does not give such action the quite universal characterization according to which it could be utilised without the need for the applicant to rely on a substantive right of its own."[51]

Dissenting opinions

JUDGE WELLINGTON KOO

"It will also be recalled that the possession of this legal right is the basis of the Court's finding in the 1962 Judgment that the dispute is one envisaged within the purport of Article 7, to establish its jurisdiction.."[52]

JUDGE KORETSKY

"...If one wants to differentiate in these cases between a right to invoke the jurisdiction of the Court and the substantive right (which underlies the claims) it is practically impossible to do so as in these cases the substantive right of the applicants, their legal right or interest, in the subject-matter of the claims, one may say, coincides with their right to sumbit to the Court their dispute relating to the interpretation or the application of the provision..."[53]

JUDGE JESSUP

"The Court (in 1962, p. 344) expressly decided that the objection (the third preliminary objection) must be dismissed because there was a dispute within the

51 *South West Africa (second phase) Judgment*, I.C.J. Reports, 1966, p. 63

52 *Ibid.*, p. 222.

53 *Ibid.*, p. 248.

meaning of Article 7. This decision that the dispute could concern "the well-being and development of the inhabitants" and need not include material interests of the Applicants, is *res judicata*."[54]

And

"The (1966) Judgment of the Court rests upon the assertion that even though—as the Court decided in 1962—the Applicants had *locus standi* to institute the actions in this case, this does not mean that they have the legal interest which would entitle them to a judgment on the merits. No authority is produced in support of this assertion which suggests a procedure of utter futility.."[55]

JUDGE MBANEFO

"...when the Court has found that the dispute in the present cases is within the orbit of the compromissory clause, Article 7 (2) of the Mandate, as it did in 1962 Judgment on the preliminary objections, the Applicants do not have to show again in order to succeed that they have individual legal interests, in the subject-matter of the dispute unless their claims are founded on damage or prejudice to such interests.."[56]

And

"...The question of Applicants' interest was treated by the Parties and by this Court in 1962 as an element of the issue of the capacity of the Applicants to invoke the compromissory clause in respect of the present dispute.."[57]

54 *South West Africa (Second phase) Judgment*, I. C. J. Reports, 1966, p. 336.

55 *Ibid.*, p. 382.

56 *Ibid.*, p. 484.

57 *Ibid.*, p. 491.

Comments

In its 1962 Judgment, the Court treated the question of Applicants' interest as being covered by the provisions of Article 7, paragraph 2, of the Mandate for South West Africa. On the other hand, in its 1966 Judgment, the Court made a distinction between the question of its jurisdiction under Article 7 (2) and the question of Applicants' interest, and held that in 1962 only the question of the Court's jurisdiction and not that of the Applicants' interest, was disposed of. By making the said distinction the Court was trying to tell the Applicants : Alright, we agree that we have jurisdiction over the subject-matter of your claims under the provisions of Article 7 (2) of the Mandate, but the question before the Court is also whether you have a legal right or interest or *'locus standi'* in respect of the matter of your claim. Such legal right or interest of yours you will have to establish separately from the question of our jurisdiction over the subject-matter of your claims. The Court expressed the view that in 1962 it considered only the question of its jurisdiction and the Applicants proved only two things...(1) that they were the *ratione personae* and (2) that there was *ratione materiae*. The question of Applicants' interest was not considered at that time, since the same was not then regarded to be necessary for deciding upon the Court's jurisdiction. Judge Morelli, in his separate opinion, supported the aforesaid view. "He did not read the discussion on the third preliminary objection (overruled in 1962) as a decision on the right of the Applicants to commence the action. All that the Court found was a dispute and that required by implication that there should be a conflict of interests."[58]

Judge Wellington Koo, Judge Koretsky, Judge Jessup and Judge Mbanefo, in their dissenting opinions, criticised the distinction between the question of Applicants' interest and the question of the Court's jurisdiction being without any legal

58 Pointed out by Justice M. Hidayatullah of the Supreme Court of India in his book on *The South West Africa Case*, p. 44

foundation. (Judge Koretsky also pointed out that it is practically impossible to make such a distinction). They expressed the view that the question of Applicants' interest was a part, and included within the purport, of the right to invoke the Court's jurisdiction under Article 7(2) of the Mandate. Since the latter question was disposed of by the Court in 1962 while dismissing the third preliminary objection, the former question was also disposed of thereby.

The aforesaid distinction provided the foundation upon which the Court claimed a right to consider the question of Applicants' intererest in the second phase of proceedings, inasmuch as it held that, whereas the existence of dispute within Article 7(2) of the Mandate was a jurisdictional question, the question of Applicants' interest was a matter appertaining to merits. If it is said that the distinction has no legal validity, it would have to be conceded that the question of Applicants' interest was disposed of by the Court in 1962 at the time of its dismissing the third preliminary objection.

12. Whether the Court in 1962 decided the question of its jurisdiction or the question of admissibility of the claims?

1962 Judgment

Dissenting opinion

JUDGE MORELLI

"The question of terminology is of only secondary importance. It will be sufficient to observe that if the term is used in the very wide sense to which I have just referred, it must be recognised at the outset that among the conditions for admissibility there are others than those relating to jurisdiction. But what is above all of interest here is the fact that among these latter conditions there are some which must be considered before the question of jurisdiction is considered. One of these,

for example, is the condition of validity of the application, because a Court which is not validly seized cannot adjudicate even on its jurisdiction. Another such is the condition of the existence of a dispute, since it is only with relation to a genuinely existing dispute that it is possible to decide whether such a dispute is subject or not to the jurisdiction of the Court to which it has been referred."[59]

1966 Judgment

". . . The Court in 1962 did not think that any question of the admissibility of the claim, and distinct from that of its own jurisdiction arose, or that the Respondent had put forward any plea of inadmissibility as such: nor had it,—for in arguing that the dispute was not of the kind contemplated by the jurisdictional clause of the Mandate, the purpose of the Respondent was to show that the case was not covered by that clause, and that it did not in consequence fall within the scope of the competence conferred on the Court by that provision.

"If therefore any question of admissibility were involved, it would fall to be decided now, as occurred in the merits phase of the *Nottebohm* case (I.C.J. Reports, 1955, p. 4)..[60]

Dissenting opinions

JUDGE JESSUP

"The Judgment of the Court today concludes that all of these objections are to be considered as objections to the jurisdiction. As explained in the 1962 Judgment and as emphasised in the dissenting opinion of Judge Morelli, they include objections to the admissibility of the claim.

59 *South West Africa Cases, Preliminary Objections, Judgment of 21 December 1962*: I.C.J. Reports, 1962, p. 574.

60 *South West Africa (Second phase) Judgment, 1966*, pp. 22-43.

The distinction is well established in the jurisprudence of the Court."[61]

JUDGE MBANEFO

"The Court in the present Judgment, although it says that the question of Applicants' legal interest is an issue on the merits, deals with it in the context of the scope and applicability of Article 7 (2)—an approach which relates more to admissibility than to the merits."[62]

Comments

As explained by Judge Morelli, in his dissenting opinion to the 1962 Judgment, the conditions of admissibility of a claim include, apart from the condition of existence of the Court's jurisdiction in the case, certain other conditions, such as the condition of validity of the claim and the condition of existence of a dispute. In its 1966 Judgment, the Court was of the view that, in 1962, it dealt with only the question of its jurisdiction and not with the whole question of admissibility of the claims of Applicants. As such, the latter question was left to be dealt with by the Court in the second phase of the case.

On the other hand, Judge Jessup was of the view that the Court in 1962 dealt with and disposed of the question of admissibility of Applicants' claims at the time of its dismissing the preliminary objection since the preliminary objection then before the Court included objections to the admissibility of the claim. Judge Mbanefo expressed the view that, since the Court has dealt with the question of Applicants' interest in the context of Article 7 (2) of the Mandate, the question relates more to admissibility of the claim (which was dealt with and disposed of by the Court in 1962 while dismissing the third preliminary objection) than to the merits of the case (to be dealt with by the Court in the second phase).

61 *South West Africa (Second phase) Judgment*, 1966, pp. 42-43.

62 *Ibid.* p. 336.

A careful examination of the 1962 Judgment reveals that the question of Applicants' interest was dealt with by the Court while looking into, and dismissing, the third preliminary objection. Such examination also reveals that the Court, in 1962, dealt with the whole question of admissibility of claim, and not the question of its jurisdiction alone.

13. Whether the question of Applicants' interest was disposed of in 1962

1962 Judgment

"For the manifest scope and purport of the provisions of this Article indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both towards the inhabitants of the Mandated Territory, and towards the League of Nations and its Members."[63]

1966 Judgment

Separate opinion

JUDGE MORELLI

"... There is nothing in the (1962) Judgment to the effect that to establish whether the claim is well-founded it is not necessary to ascertain whether it is based on rights pertaining to the Applicants."[64]

Dissenting opinions

JUDGE KORETSKY

"So the question of the Applicants' interest in their claims was decided as, one might say, should have been decided, by the Court in 1962 ...."[65]

63 *South West Africa Cases, Preliminary Objections, Judgment of 21 December 1962, I. C. J. Reports 1962*, p. 343.
64 *South West Africa (Second phase) Judgment, 1966*, p. 60.
65 *Ibid.*, p. 239.

And

"The reason of the 1962 Judgment relating to 'a legal right or interest' of the Applicants served as a ground for the Court's decision to dismiss the third preliminary objection submitted by the Respondent. And what was then decided with the reason 'on which it is based' is finally not provisionally decided. And I repeat that these reasons cannot be reversed in the way chosen by the Court."[66]

JUDGE PADILLA NERVO

"I disagree - as I said before - with this finding of the Court which, in my opinion, is unjustified. This point was not in issue in the proceedings at the present stage, the question of the legal right or interest of the Applicants was already decided by this Court - expressly or by implication - in its 1962 Judgment."[67]

And

"It appears conclusive to me that in 1950 and 1962 the question of the legal interest of any Member of the League of Nations in the conduct of the Mandate was determined by the Court in holding that they had the right to invoke the compromissory clause against the Mandatory."[68]

Comments

If we look back at the excerpts included in, and the comments under, the preceding items 11 and 12, we discover two different lines of reasoning among the Judges of the Court. The dissenting Judges were of the view that, in 1962, the Court determined the whole question of admissibility of the claim, and not that of its jurisdiction alone. The Court and the concurring Judges, on the other hand, expressed the view that in 1962 the Court

66 *South West Africa (Second phase) Judgment, 1966*, p.241.
67 *Ibid.*, p.452.
68 *Ibid.*, p.471.

considered and disposed of only the question of its jurisdiction, and not the whole question of admissibility; and that the question of Applicants' interest is different from that of the Court's jurisdiction. As such, it would not be correct to conclude that the question of Applicants interest was disposed of in 1962. The dissenting Judges, however, pointed out that any distinction between the question of the Court's jurisdiction and the question of the Applicants' interest is impossible as also without any legal foundation; and since, in 1962, the Court disposed of the whole question of admissibility of the claim, the question of the Applicants' interest was also disposed of at that time.

The excerpts from the 1962 Judgment quoted under the present item show clearly that the Court decided the question of legal right or interest in the claim without making any distinction either in the question of Applicants' interest and the Court's jurisdiction or in the questions of admissibility of the claim and the Court's jurisdiction.

The dissenting Judges to the 1966 Judgment followed this line of reasoning, while pointing out that the question was disposed of as a ground for the Court's decision dismissing the third preliminary objection. However, the Court as well as the concurring Judges, in 1966, pointed out that any findings of the Court in 1962 on the question are not binding (and the merits phase was the proper phase for dealing with the question) for another reason, viz., that the question of Applicants' interest is a matter appertaining to merits. The dissenting Judges, on the other hand, regarded the question as a jurisdictional question, one on which the 1962 Judgment would be binding. This aspect of the matter has been discussed in the next three items, viz., items 14, 15 and 16 of this Chapter.

14. Character of the question of Applicants' interest—whether a jurisdictional question or a matter appertaining to merits

1966 Judgment

"The present Judgment is based on the view that the

question of what rights as separate members of the League the Applicants had relating to the performance of the Mandate, is a question appertaining to the merits of the claims . . ."[69]

And

"Hence, whatever observations the Court may have made on that matter, it remained for the Applicants, on the merits, to establish that they had this right or interest in the carrying out of the provisions which they invoked, such as to entitle them to the pronouncements and declarations they were seeking from the Court. Since decisions of an interlocutory character cannot prejudge questions of merits, there can be no contradiction between a decision allowing that Applicants had the capacity to invoke the jurisdictional clause—this being the only question which, so far as this point goes, the Court was then called upon to decide, or could decide,—and a decision that the Applicants have not established the legal basis of their claim on the merits."[70]

Separate opinions

JUDGE MORELLI

"This is a question which belongs entirely to the merits and one therefore which could not in any way be prejudged by the 1962 Judgment."[71]

JUDGE VAN WYK

"As already stated the 1962 Judgment could not decide any issue forming part of the merits. . ."[72]

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69 *South West Africa (Second phase) Judgment*, 1966, p. 42.
70 *Ibid.*, p. 38.
71 *Ibid.*, p. 64.
72 *Ibid.*, p. 69.

Dissenting opinions

JUDGE KORETSKY

"The question of an applicant's 'interest' (as a question of a "*qualite*") even in national-law systems is considered as a jurisdictional question. For example, "*le defaut d' interet* of an applicant is considered in the French law system as a ground for "*fin de non-recevoir de procedure.*" "[73]

And

The Respondent, as noted above, raised the question of the Applicants' interest. The Court decided this question at that time. It did not consider it unnecessary to join it to the merits as the character of the Applicants' interest in the subject-matter of their claims was evident. Both Parties dealt with this question in a sufficiently complete manner... To join the question of the Applicants' "interests" in their claims to the merits would not "reveal anything new, as became evident at this stage of the cases. And it is worthy of note that in the dissenting opinion of President Winiarski (pp.455 ff.), in the joint dissenting opinion of Judges Sir Percy Spender and Sir Gerald Fitzmaurice (pp.548 ff.), and in the dissenting opinion of Judge *ad hoc* van Wyk (pp.660 ff.), the question of the Applicants' interest was considered on a jurisdictional plane."[74]

JUDGE TANAKA

"One of these preliminary objections rejected by the 1962 Judgment was third preliminary objection which related to the nature of the dispute brought before the

73 *South West Africa (Second phase) Judgment*, 1966, p. 239.
74 *Ibid.*, p. 240.

Court by the Applicants, namely to the question of the existence of their legal right or interest. This matter again, at this stage of the proceedings, has been taken up by the Court and examined, but from the viewpoint of the merits... "The result is that the Applicants' claims are declared to be rejected on the ground of the lack of any legal right or interest appertaining to them in the subject-matter of the present claims and that the 1962 Judgment is substantively overruled concerning its decision on the third preliminary objection."[75]

JUDGE MBANEFO

". . . The need to establish a substantive right or legal interest in the merits phase of the case will, in the circumstances of the present case, arise only if, as a matter of evidence, it is necessary to prove any item of the Applicants' claims. That is not the case here where the Applicants have claimed no damages and where their request is for a declaratory judgment."[76]

And

". . . The question of Applicants' legal interest was raised as an issue of jurisdiction, the submission being that the dispute was one in which neither the national interest of the Applicants, nor that of their own nationals was prejudiced, and consequently, that it was not covered by the compromissory clause of Article 7(2) of the Mandate. The Court and Parties regarded it, as in truth it was, as an issue of jurisdiction and treated it as such."[77]

Comments

The Court, in 1966, treated the question of Applicants'

75 *South West Africa (Second phase) Judgment, 1966*, p, 250.
76 *Ibid.*, p. 490.
77 *Ibid.*, p. 496.

interest as a matter appertaining to merits and held that the 1962 Judgment could not, as such, have prejudged the question. It also said that there was no contradiction between the 1962 Judgment, which only decided "that the Applicants had the capacity to invoke the jurisdictional clause" and the 1966 Judgment which, as a matter of merits, required the Applicants to establish their legal right or interest in the subject-matter of their claims and found that they had not established the same. Judge Morelli and Judge van Wyk, in their separate opinions, also said that the question of Applicants' interest, which is a matter of merits, could not have been disposed of by the 1962 Judgment.

However, Judge Koretsky, Judge Tanaka, and Judge Mbanefo, in their dissenting opinions questioned the very treatment by the Court of the question of Applicants' interest as a matter appertaining to merits. Judge Koretsky pointed out that even in national law systems the said question is regarded to be a jurisdictional question; that in 1962 the question was raised by the Respondent and decided by the Court; that the Court did not think it necessary to join it to the merits of the case; and that even the 1962 dissenting Judges—President Winiarski, Sir Percy Spender, Sir Gerald Fitzmaurice, Judge *ad hoc* van Wyk—treated the question on a jurisdictional plane. Judge Tanaka pointed out that the question of Applicants' interest was considered by the Court in 1962, while examining the third preliminary objection and was disposed of while the latter was dismissed; and that the Court's treatment of the said question in 1966 as a matter of merit had resulted in a substantial overruling of the 1962 decision on the third preliminary objection. Judge Mbanefo pointed out that the question of Applicants' interest cannot be treated as a matter appertaining to merits, inasmuch as it is not necessary to prove any issue of the Applicants' claim as a matter of evidence, and as the Applicants have not claimed any damages and are asking only for a declaratory remedy. He also poined out that in 1962 the said

question was raised, and was treated by the Court and regarded by the parties. as an issue of jurisdiction.

Richard A. Falk is of the opinion that "this setting alone makes it difficult indeed to give an account of why the Court disposed of the case by throwing the plaintiff States out of the Court on technical grounds although the majority took pains to argue that it was deciding on "the merits." This point is confusing. The basis of denial appears procedural in the prevailing sense that the applicant States were denied capacity to obtain a substantive determination, but the majority holds that this kind of a denial of capacity involving the sufficiency of the legal interest to pursue the specific claim is a matter that pertains to the merits of the controversy."[78]

It is doubtful whether it is legally sound to treat the question of Applicants' interest as a matter appertaining to merits, in view of the facts (1) that the Court in 1962, considered the question as a jurisdictional question while examining and dismissing the third preliminary objection; (2) that in 1962 the Court did not join the issue to the merits of the case; and (3) that neither of the Parties raised the question of Applicants' interest in their final submissions during the second (or merits) phase of the proceedings. Regarding the last point, the Court expressed the view that the question was raised by the Respondents in their final submissions. This aspect of the matter has been dealt with in the next item, *viz.* item 15 of this Chapter.

15. Whether the Respondent or the Applicants raised the question of Applicants' interest in their final submissions ?

1966 Judgment

"...the Respondent did in the present phase of the case, particularly in its written proceedings, deny that the Applicants had any legal right or interest in the subject

78 In his article on "The South West Africa Case : An Appraisal", See *International Organisation*, Winter 1967, p. 7.

matter of their claims,—a denial which, at this stage of the case, clearly cannot have been intended merely as an argument against the applicability of the jurisdictional clause of the Mandate. In its final submission the Respondent asks the Court, upon the basis, *inter alia* of "the statements of fact and law as set forth in (its) pleadings and the oral proceedings", to make no declaration as claimed by the Applicants in their final submissions."[79]

Separate opinion

JUDGE VAN WYK

" . . .In the Counter-Memorial, the Rejoinder and the oral proceedings, the Respondent disputed not only the Applicants' legal right or interest in respect of the specific submissions referred to above, but did so also in regard to the claim generally. In the final submissions the Respondent expressly claimed that upon the basis of the statements of fact and law set forth in the pleadings and oral proceedings the Applicants' submissions should be adjudged and declared unfounded, and that no declaration be made as claimed by the Applicants. In these circumstances, no reasonable person could have been unaware of what the submissions were intended to convey."[80]

And

"The question of Applicants' legal right or interest in the claim not only arises generally—as happens at the merits stage of every case of this kind—but actually constitutes an important sub-issue for several specific submissions of the Applicants. The issue raised in

79 *South West Africa (second phase) Judgment 1966*, p. 19.
80 *Ibid.*, p. 69.

their submission No. 1 is whether the Mandate is still in force, and one of the questions bearing on this is the legal effect of Article 7 (2), particularly whether it conferred any substantive legal rights or interests on members of the League. (e.g. Counter Memorials, Book II, Chap. V, Part 3). Another issue included in the merits (by Applicants' Submissions Nos. 3 and 4) is on what basis, if any, Article 2(2) of the Mandate was intended to be justiciable, and here again the aforesaid question arises."[81]

Dissenting opinions

JUDGE JESSUP

"The judgment bases itself on a reason not advanced in the final submissions of the Respondent, namely on Applicants' lack of "any legal right or interest in the subject-matter of the present claims."[82]

JUDGE MBANEFO

"No issue was raised in the final submissions of the Parties in the present phase of the proceedings regarding the non-existence of a legal interest appertaining to the Applicants in the subject-matter of the dispute. The Applicants in their oral arguments regarded the issue of legal interest as settled by the 1962 Judgment on the preliminary objections. The respondent referred to it in Book II of the Counter-Memorial, Chapter V, Part B, only in connection with the scope and purpose of the compromissory clause and in the context of the lapse of the Mandate as a whole...Likewise in their final submissions the Respondent raised

81 *South West Africa (second phase) Judgment, 1966*, p. 68.
82 *Ibid.*, p. 326.

no issue as to lack of substantive rights or legal interest of the Applicants in the subject-matter of the claims . The parties placed before the Court in their final submissions the basic points of difference... the real issues-- between them for decision..." [83]

Comments

It may be recalled that, in the Counter-Memorial and Rejoinder submitted by the Respondent before the Court, the Respondent prayed "that it may please the Court to adjudge and declare that the submissions of the Governments of the Ethiopia and Liberia as recorded in the Memorials and as reaffirmed in reply, are unfounded, and that no declaration be made as claimed by them". (quoted from the Rejoinder). This was also prayed by the Respondent in its oral submissions at the hearing of 5 November 1965. On the basis of these prayers, the Court in 1966 expressd the view that the question of the Applicants' interest was raised by the Respondent in the second phase of the proceedings. Judge van Wyk expressed the view that the Respondent thereby, "disputed not only the Applicants' legal right or interest in respect of the specific submissions ... but did so also in regard to the claim generally."

On the other hand, Judge Jessup and Judge Mbanefo, in their dissenting opinions, denied that the Respondent raised any question of the Applicants' interest in its above-mentioned prayer. Judge Jessup criticised the Court for basing the Judgement "on a reason not advanced in the final submissions of the Respondent." Judge Mbanefo pointed out that the Respondent referred to the question "in Book II of the Counter-Memorial, Chapter V, Part B, only in connection with the scope and purpose of the compromissory clause and in the context of the lapse of the Mandate as a whole" and did not raise the same in its final submissions. Thus, it can hardly be said that the

83 *South West Africa (Second phase) Judgment, 1966*, pp. 493-94.

Respondent specifically raised, or intended to raise, the question of Applicants' interest in its final submissions during the second phase of the proceedings. The above-noted prayer of the Respondent cannot be said to be raising the question of Applicants' interest by any interpretation.

Judge van Wyk, in his separate opinion, also expressed the view that the question of Applicants' interest "constitutes an important sub-issue for several specific submissions of the Applicants." In support he pointed out submission Nos. 1, 3 and 4 by the Applicants. An examination of these submissions reveals that the issue cannot be said to have been raised in them, either specifically or by implication. In this regard, Judge Mbanefo pointed out, in his dissenting opinion that the "Applicants in their oral argument regarded the issue of legal interest as settled by the 1962 Judgment on the preliminary objections."

In the circumstances, it is not legally sound to say that the question had been raised in the final submissions of either or both the parties. In 1966 the Court and some of the concurring Judges also asserted that the Court can deal with the said question, even in case the same is not raised by any of the parties in their submissions. This aspect of the matter has been examined in the next item, viz. item 16 of this Chapter.

16. Can the Court raise the question of Applicants' interest on its own motion, and deal with the same in the merits phase of the proceedings ?

1966 Judgment

Separate opinions

JUDGE MORELLI

"It follows that if, contrary to the actual terms of the Applications, it were found that in this case the claims had been submitted without reference to any right of the

Applicants, the Court ought, rather than rejecting the claim on the merits, to have found that it had lacked jurisdiction. This would have been possible even in the merits phase of the proceedings, since it is a question which, although relating to the jurisdiction of the Court, was not examined in the Judgment on the preliminary objections."[84]

JUDGE VAN WYK

"There is no substance in the contention that the Court is precluded from considering whether the Applicants have a legal right or interest in the claim merely because the issue was not specifically raised in the Respondents' submissions. Even if Respondent did not raise that question, the Court would nonetheless be bound to determine whether the Applicants have a legal right or interest in the Claim before considering the ultimate merits. . . ."[85]

Dissenting opinions

JUDGE KORETSKY

". . . . The Court itself has now raised the question which was resolved in 1962 and has thereby reverted from the stage of merits to the stage of jurisdiction. . . ."[86]

JUDGE TANAKA

"The result is that the Applicants' claims are declared to be rejected on the ground of the lack of any legal right or interest appertaining to them in the subject-matter of the present claims and the 1962 Judgment is substantially overruled concerning its decision on the third preliminary objection.

84 *South West Africa (second phase) Judgment*, 1966, p. 64.
85 *Ibid.*, pp. 68-69.
86 *Ibid.*, p. 240.

"Although we do not deny the power of the Court to re-examine jurisdictional and other preliminary matters at any stage of proceedings *proprio motu*, we consider that there are not sufficient reasons to overrule on this point the 1962 Judgment and that the Court should proceed to decide the questions of the "ultimate merits which have arisen from the Applicants' final submissions."[87]

JUDGE MBANEFO

". . . . That being so the question might well be asked whether it is open to the Court, of its own motion, to raise as a point for decision on the merits an issue not raised by the Parties in their final submissions. No reason has been given by the Court in its Judgment for adopting such a course. This is particularly important since the question of Applicants' legal interest is not an issue for decision upon the evidence required in support of any of the claims in the Applicants' final submissions. . . ."[88]

Comments

Judge Morelli, in his separate opinion, stressed that even in the merits phase of the proceedings, the Court could look into a jurisdictional question which was not examined by it in the preliminary phase. Dissenting Judge Tanaka agreed with this by saying that the Court had the power "to re-examine jurisdictional and other preliminary matters at any stage of proceedings *proprio motu*." However, he pointed out that the question of Applicants' interest had been dealt with by the Court in 1962 while deciding upon the preliminary objection and that the 1966 Judgment on the point overrules the 1962 Judgment, for which "there are not sufficient reasons." Judge van Wyk stressed the right and obligation of the Court to look into the question before considering the ultimate merits, even

87 *South West Africa (second phase) Judgment*, 1966, p. 250.
88 *Ibid.*, p. 494.

if the Respondent did not raise the same. What is material in this regard is that the Court should determine the question before dealing with the merits. However, where it has already disposed of the question in the preliminary phase (refer to comments under item 13 of this Chapter) without joining the same to the merits of the case— no evidence being necessary to be taken into consideration for deciding upon the question— and where none of the parties raises the same in their final submissions during the merits phase, the Court has no reason to raise the question on its own motion and re-examine the same. In such circumstances, as pointed out by Judge Tanaka, its duty is to "proceed to decide the questions of the 'ultimate' merits."

Judge Koretsky was of the view that, by raising the question of Applicants' interest which it had disposed of in 1962, on its own motion in the merits phase, the Court had "reverted from the stage of merits to the stage of jurisdiction." Judge Mbanefo questioned the right of the Court to raise the question on its own motion in a case where the Parties have not raised the same in their final submissions. He pointed out that in its 1966 Judgment the Court had not given any reasons for raising the question on its own motion in the merits phase of the case, and in the circumstances where the same was "not in issue for decision upon the evidence" required in support of the Applicants' claims.

It may be pointed out in this connection that, in its 1966 Judgment, the Court sought to assert its "recognised right..., implicit in paragraph 2 of Article 53 of its Statute, to select *proprio motu* the basis of its decision." [89] The said Article reads thus :

> "1. Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.

89 *South West Africa (Second phase) Judgment, 1966*, p. 19.

> 2. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well-founded in fact and law."

A careful reading of the above provision makes it obvious that the Article provides (in paragraph 2) for the Court's power to look on its own motion, into soundness of the claim, only in case one of the parties is absent. In the case under consideration, since both the parties were present before the Court, and took part in the proceedings, the aforesaid provision is inapplicable.

In the circumstances, the inference is that the Court in 1966 based its Judgment on (1) its view that in 1962 it had disposed of, not the whole question of admissibility of the claim, but only that of its own jurisdiction, and (2) its view that it is necessary for the Court to decide upon the question of Applicants' interest (which according to the Court, was different from that of its jurisdiction) before dealing with the ultimate merits of the claims, and or (3) its view that the question of Applicants' interest had been raised by the Respondent in its final submissions in the second phase of its proceedings and, as such, it was a matter appertaining to merits. In regard to these points it is necessary to refer to discussion under item Nos. 12, 13 together with the present item (No. 16) and item No. 15 respectively.

If, contrary to the Court's view, we come to a conclusion that the question of Applicants' interest had been disposed of in 1962, we are led to consider whether the Court had a power to revise its 1962 Judgment and if so, under what circumstances. This aspect has been considered under the next item, viz. item No. 17 of this Chapter.

17. Reconsideration of the 1962 Judgment by the Court 1966 Judgment

Separate opinion

JUDGE VAN WYK

"It is true that a great deal of reasoning of the

present Judgment is in conflict with the reasoning of the 1962 Judgment with regard to the first three preliminary objections (particularly the second) -- so much so the inescapable inference is that in 1962 the Court assumed a jurisdiction it does not possess but these considerations cannot in any way preclude the Court from now basing its judgment on the merits on its present reasoning. The Court is not bound to perpetuate faulty reasoning, and nothing contained in the 1962 Judgment could constitute a decision of any issue which is part of the merits of the claim."[90]

Dissenting opinions

JUDGE KORETSKY

"I can in no way concur in the present Judgment mainly because the Court reverts in essence to its Judgment of 21 December 1962 on the same cases and in fact revises it even without observing Article 61 of the Statute and without the procedure envisaged in Article 78 of the Rules of the Court."[91]

JUDGE JESSUP

"But the rule in Article 60 of the Statute 'cannot..... be considered as excluding the tribunal from itself revising a judgment in special circumstances when new facts of decisive importance have been discovered....." (*Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion*, I. C. J. Reports, 1954, p. 47, p. 55). Moreover, the Court is always free, *sua sponte*, to examine into its own jurisdiction."[92].

90 *South West Africa (second phase) Judgment*, 1966, p. 67.
91 *Ibid.*, p. 239.
92 *Ibid.*, p. 333.

Comments

Judge van Wyk was of the view that there was a conflict between the reasonings of the 1962 and the 1966 Judgments and that in 1962 the Court had assumed jurisdiction wrongfully. He also asserted the right of the Court to reconsider the 1962 decision on a matter appertaining to merits. The latter is admitted. However, whether the question of Applicants' interest can be regarded to be a matter appertaining to merits has already been discussed under items 14, 15 and 16.

If on the basis of the preceding discussion of this Chapter we come to a conclusion that the question of Applicants' interest is not a matter appertaining to merits, and that the same was disposed of by the 1962 Judgment, we are led to the inference that the Court in 1966 reconsidered its 1962 Judgment insofar as the question of Applicants' interest is concerned. Judge Koretsky, in his dissenting opinion, criticised the Court for revising the 1962 Judgment "even without observing Article 61 of the Statute and without the procedure envisaged in Article 78 of the Rules of the Court." Article 61 of the Court's Statute provides in its first two paragraphs:

> "1. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence.
>
> 2. The proceedings for revision shall be opened by a judgment of the Court expressly recording the existence of the new fact, recognising that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground."

Judge Jessup also emphasised that the Court can revise "judgment in special circumstances when new facts of decisive

importance have been discovered." However, in the second phase of the South-West Africa cases no "new facts of decisive importance" were discovered by the Court. Further' the Respondent had neither requested a revision of the 1962 Judgment nor placed any new facts before the Court in the merits phase of the proceedings. "If the Judgement was final and without appeal, said Judge Jessup, South Africa ought to have asked for revision under Article 61 of the Statute of the Court, at the same time showing satisfaction of the conditions in that Article and proceeded in accordance with Article 78ff of the rules of the Court. As this was not done, the decision of the Court, together with the reasons, became final and binding in accordance with the "classic enunciation of the law" by Judge Anzilotti that there is *res judicata* if there is identity of parties, identity of cause, and identity of object in the subsequent proceedings.. *persona petitum, causa petendi* (Judgment No 11, 1927, P.C.I.J., Series A,No 13, pp.23-27)."[93]

Judge Jessup also pointed out that "the Court is always free, *sua sponte*, to examine into its own jurisdiction." However, the 1966 Judgment nowhere stated that the Court was in 1966 examining into its own jurisdiction." On the other hand, the Court asserted again and again in the course of the Judgment that the jurisdictional aspect of the case had been disposed of in 1962.

18. Applicants' right to a declaratory remedy

1966 Judgment

"..An appropriate organ of the League such as the Council could of course have sought an advisory opinion from the Court on any such matter ...But in their individual capacity, States can appear before the Court only as litigants in a dispute with another State, even if their object in doing so is only to obtain a declaratory judgment. The

93 Pointed out by Justice M. Hidayatullah of the Supreme Court of India, in his book on *The South West Africa Case*, p. 54.

moment they so appear, however, it is necessary for them, even for that limited purpose, to establish, in relation to the defendant party in the case, the existence of a legal right or interest in the subject-matter of the claim."[94]

Dissenting opinions

JUDGE KORETSKY

"....In the Applications they did not seek anything for themselves. They asked the Court to declare and adjudicate (if we generalize their final submissions) mainly on the question of the rightful interpretation and application of the Mandate, as the Respondent denied that its official policy of *aparthied* is inconsistent with Article 22 of the Covenant and more specially with Article 2 of the Mandate...."[95]

JUDGE JESSUP

"The Applicants have not asked for an award of damages or for any other material amend for their own individual benefit. They have in effect, and in part, asked for a declaratory judgment interpreting certain provisions of the Mandate for South West Africa. The Court having decided in 1962 that they had standing (*locus standi*) to bring the action, they are now entitled to a declaratory judgment without any further showing of interest."[96]

JUDGE MBANEFO

"....What the Applicants are asking the Court to do is to declare that on a proper interpretation of certain provisions of the Mandate the Respondent by its laws, policies and measures has committed breaches of those provisions. I find myself unable to accept the view that with

94 *South West Africa (Second phase) Judgment, 1966*, p.33.
95 *Ibid.*, p.248
96 *Ibid.*, p.328

respect to the same dispute the Applicants will have the capacity to bring the dispute before the Court but cannot recover unless they can show that their substantive rights or legal interest were directly involved or prejudiced even though they have not alleged any damage and have not asked for reparation."[97]

Comments

In its 1966 Judgment the Court was of the view that, whereas the League could request the Court to render advisory opinions, the Applicants can ask for a declaratory judgment only in dispute and only after showing "the existence of a legal right or interest in the subject-matter of the claim." On the other hand, Judge Koretsky, Judge Jessup and Judge Mbanefo, in their dissenting opinions, expressed the view that a showing of the Applicants' interest is necessary only in case they ask "for an award of damages or for any other material amend for their own individual benefit," and not in the present case, where they sought only a declaratory judgment. Judge Jessup also quoted the separate opinion of Judge Sir Gerald Fitzmaurice in *Northern Cameroon Case*, which stated:

"By not claiming any compensation the Applicant State placed itself in a position in which, had the Court proceeded to the merits, the Applicant could have obtained a judgment in its favour merely by establishing that breaches of the Trust Agreement had been committed, without having to establish, as it would otherwise have had to do (i.e., if reparation had been claimed) that these breaches were the actual and proximate cause of the damage alleged to have been suffered...."[98]

19. Issues left undecided by the Court

1966 Judgment

Dissenting opinions

JUDGE JESSUP

"The Judgment of the Court today does not consti-

97 *South West Africa (second phase) Judgment 1966*, pp. 496-497.
98 I.C.J. Reports, 1963, p. 99.

tute a final binding judicial decision on the real merits of the controversy litigated in this case. In effect reversing its Judgment of 21 December 1962, it rejected the Applicants' claims *in limine* and precluded itself from passing on the real merits...")[99]

JUDGE PADILLA NERVO

"The Court now decided to examine first the questions which it considered of antecedent and fundamental character, in the sense that a decision respecting any of them might render unnecessary an enquiry into other aspects of the case."

I cannot agree with the Court in the assertion that: "it became the Court's duty" to follow that course because such course unavoidably prevented adjudication in respect of the main issues of the official policy of *aparthied* and the compliance with the obligations stated in the Covenant and in Article 2(2) of the Mandate. In my opinion, the duty of the Court was to adjudicate on such main issues."[100]

JUDGE FORSTER

"Since in 1962 the Court upheld its "jurisdiction to adjudicate upon the merits of the dispute" it was its duty, today, to declare whether or not South Africa has committed abuses in South West Africa and is in breach of its obligations under the Mandate. For that is the real merits of the dispute, not merely an arid scrutiny and relentless analysis of the individual legal interest of the Applicant States, Ethiopia and Liberia, which, in the last resort, did no more than have recourse legitimately and legally to "the final bulwark of protection... against possible abuse

99 *South West Africa (second phase) Judgment, 1966*, p. 330.
100 *Ibid.*, p. 453.

or breaches of the Mandate" (to use the Court's own terms)." [101]

JUDGE MBANEFO

"... Both Parties have gone into a great deal of trouble and expense to bring all the facts and arguments relied upon by them before the Court in sittings lasting 100 days and it would have been more rewarding to them if the Court had stated its views or conclusions on the allegations." [102]

Comments

Judge Jessup, Judge Padilla Nervo and Judge Mbanefo, in their dissenting opinions, emphasised that the Court in its 1966 Judgment had not decided upon the main issues of the case Where as Judge Mbanefo was of the view that it would have been "more rewarding ... if the Court had stated its views or conclusions on the allegations." Judge Padilla Nervo and Judge Forster emphasised that it was the Court's duty to adjudicate upon the issues of *aparthied* and contravention by South Africa of its obligations *vis-a-vis* South West Africa, under the Mandate. Judge Padilla Nervo criticized the Court for its approach of proceeding "to examine first the questions which it considered of antecedent and fundamental character" — an approach which "unavoidably prevented adjudication in respect of the main issues" relating to *aparthied* and contravention by South Africa of its obligations. Judge Forster also criticised the Court for its "arid scrutiny and relentless analysis of the individual legal interest of the Applicant States," and not adjudicating upon the question of breach by South Africa of its obligations.

Further, according to Judge Jessup, "the Court in its judgment of 1966 had left some important contentions undecided such as

101 *South West Africa (Second phase) Judgment, 1966*, p.482.
102 *Ibid.*, p.490.

(a) that the whole of Mandate for South West Africa lapsed on the dissolution of the League and there was no obligation as claimed by South Africa; (b) that the Mandatory's obligation to report, to account, and to submit to supervision had lapsed upon the dissolution of the League; and (c) that the Applicants were in error in asserting that the Mandatory had violated its obligations under the Mandate and committed breaches of the sacred trust."[103] He also said that the "Court has not rendered a decision contrary to the fundamental legal conclusion embodied in its Advisory Opinion of 1950 supplemented by its Advisory Opinions of 1955 and 1956 and substantially reaffirmed in its Judgment of 1962."[104]

20. Conclusions

On the basis of the discussions contained in this Chapter, we arrive at the following conclusions:

(1) Where as the Court in its 1966 Judgment attempted to make a distinction between the question of its own jurisdiction and that of the Applicants' interest and asserted that in 1962 it dealt with only the question of its own jurisdiction, and not the whole question of admissibility of Applicants' claims, the fact is that in 1962 the Court dealt with the question of Applicants' interest within the context of its consideration of the third preliminary objection. It also disposed of the question while dismissing the said objection.

(2) The Court, in 1966, treated the question of Applicants' interest as a matter appertaining to merits without any legal foundation inasmuch as ——

(a) a consideration of evidence to be presented by the parties not being necessary, for deciding upon the question, the Court, in 1962, did not join the issue to the merits of the cases;

103 Pointed out by Justice M. Hidayatullah of by Supreme Court of India in his book "*The South West Africa Case*" p. 53.
104 *South West Africa (second phase) Judgment*, 1966 p. 331.

(b) the Court, in 1962, treated the question to be a jurisdictional question;

(c) the question was not raised, either specifically or by implication, in the final submissions of either of the parties made during the second phase of the case; and

(d) having once considered the question in 1962 and no evidence being necessary to decide upon the same, it is highly doubtful that the Court could raise the question in 1966, on its own motion.

(3) The Court, in 1966, revised the 1962 Judgment without there being circumstances or conditions (such as discovery of "new facts of substantial importance" not known to the Court in 1962) which required for a revision.

(4) The Court, in 1966, failed in its duty to adjudicate upon the real merits or main issues of the case, such as those relating to *aparthied* and contravention of obligations under the Mandate, by the Mandatory.

And

(5) Decisions made in 1962 on the issues left undecided by the 1966 Judgment remain binding. These include the Court's conclusion of 1962 that "Article 7 of the Mandate is a treaty or convention still in force within the meaning of Article 37 of the Statute of the Court and that the dispute is one which is envisaged in the said Article 7 and cannot be settled by negotiation."

CHAPTER III

THE MANDATES SYSTEM

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