

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

CASE NO. SA 13 / 90

MINISTER OF POLICE

APPELLANT

and

PAULUS HAUNAWA

RESPONDENT

CORAM: BERKER, C.J. et MAHOMED, A.J.A, et
DUMBUTSHENA, A.J.A.

Delivered on: 1990/11/12

APPEAL JUDGMENT

MAHOMED, A.J.A. : The appellant in this matter was the second defendant in an action instituted by the respondent in the Court a_ quo. The respondent alleged that he had suffered damages in an amount of R30 795 in consequence of an unlawful assault perpetrated upon him on 3 February 1985 by members of "the South West African Police and/or South West African Territory Force and/or the South African Defence Force".

The first defendant in the action was cited as "the Cabinet for the Territory of South Wdst Africa" and the thrid defendant was cited as "the Minister of Defence".

It was common cause that the respondent had served a notice

purporting to be a notice in terms of Section 32 of the Police Act upon the Administrator-General of the former territory of South West Africa on 12 June 1985, prior to the Independence of Namibia. It was also common cause that a similar notice had been served on the Minister of Defence in terms of Section 113 of the Defence Act of 1957.

A pre-trial Conference which was held between the legal representatives of the parties on 29 April 1987, it was agreed that no such notice had been served upon or received by the appellant personally or by his office or by the Commissioner of the South African Police. Based on this ground, the appellant filed a special plea in the Court quo contending that the claim of the respondent against the appellant should be dismissed.

The appellant's special plea was dismissed by the trial Court on 17 September 1987 and an appeal against that judgment to the Full Court of the then Supreme Court of South West Africa was lodged. That appeal was dismissed with costs on 2 September 1988. Leave to appeal to the Appellate Division of the Supreme Court of South Africa was thereafter given on 2 December 1988 by the Chief Justice of South Africa. Following the subsequent independence of Namibia and pursuant to the provisions of Article 138(2)(b) of the Constitution of Namibia, this appeal was prosecuted and heard by the Supreme Court of Namibia.

Mr Van der Byl (assisted by Mr Swanepoel) who appeared for the appellant, vigorously contended that the special plea

should have been upheld by the Courts *a quo*, because no cause of action was sustainable against the appellant in the absence of a notice of intended action in terms of Section 32 of the Police Act of 1958, served either on the appellant or the South African Commissioner of Police.

The word "Minister" which appears in Section 32 of the Police Act of 1958, is indeed defined in Section 1 of that Act to mean "the Minister of Police". Section 32 itself provides as follows:

"32. Limitation of actions, notification of action and cause thereof, and service of certain process -

1. Any civil action against the State or any person in respect of anything done in pursuance of this Act, shall be commenced within six months after the cause of action arose, and notice in writing of any civil action and of the cause thereof shall be given to the defendant one month at least before the commencement thereof.
2. If any notice contemplated in subsection (1) is given to the Commissioner, it shall be deemed to be notification to the defendant thereof.

"(3) Any process by which any action contemplated in subsection (1) is instituted and in which the Minister is the defendant or respondent, may be served on the Commissioner."

It was common cause that Section 32 of the Police Act of South Africa has at all relevant times been of application to Namibia, but it must be read subject to the provisions of certain subsequent proclamations of special application within the territory of Namibia itself which had been made by the former Administrator-General, pursuant to powers vesting in him at that stage in terms of Proclamation 181 of 1977 of the Republic of South Africa.

The first of these proclamations of the Administrator-General which is relevant is AG.7 of 1977, which deals inter alia, with the transfer of the administration of the affairs of the territory of Namibia from a minister of the Republic of South Africa to the Administrator-General. Section 2 of Proclamation AG.7 of 1977 provides as follows:

"2. The provisions of this Proclamation shall, as from the commencement of a transfer proclamation and save in so far as that transfer proclamation provides otherwise, apply in respect of any law relating to a matter which in terms of that

transfer proclamation is administered by the Administrator-General."

Section 3(1) of this Proclamation further provides:

"3.(1) Subject to the provisions of subsection (2), any reference in any law referred to in section 2 -

3. to the Minister or to the Minister of Finance or State President or Parliament (including the Senate or the House of Assembly) or Government of the Republic, shall be construed as a reference to the Administrator-General;

4. to the State, shall be construed as including a reference to the Administrator-General;

(c) to the Republic, shall be construed as a reference to the territory;

(d) to the Government Gazette of the Republic, shall be construed as a reference to the Official Gazette."

The effect of these two sections of Proclamation 7 of 1977

is that where the administration of any law which is applicable in the territory of Namibia is transferred from a Minister of the Republic of South Africa to the Administrator-General, any reference in such law to the Minister is to be construed as a reference to the Administrator-General and any reference to the State in any such law, is similarly to be construed as including a reference to the Administrator-General.

Proclamation AG.7 of 1977 was thereafter known as "the General Proclamation" and pursuant thereto there were a number of Proclamations transferring the administration of various laws from different Ministers of the Republic of South Africa to the Administrator-General. As far as the Department of Police (subsequently also referred to as "Law and Order") is concerned, the relevant Proclamation is 169 of 1980.

The material provisions of Proclamation 169 of 1980, relevant to this appeal, are contained in Sections 2 and 3(1)(a). These sections read as follows:

"2. Notwithstanding anything to the contrary contained in any other law but subject to the provisions of this Proclamation and the General Proclamation, the administration of the affairs of the territory of South West Africa in relation to any matter which at the commencement of this Proclamation is administered by the Minister of Police of

the Republic, shall be carried on by the Administrator-General.

3,(1) The provisions of subsection (1) of section 3 of the General Proclamation shall, without detracting from the provisions of subsection (2) of that section, not apply to

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(a) any reference to the Minister of Police or the State President or the Government Gazette in the Police Act, 1958 (Act 7 of 1958), except the reference to the said Minister in sections 4 and 32 of that Act in so far as those sections are connected with the functions of the South African Police in the territory in terms of section 5 of that Act or any other law but excluding such functions as may in relation to paragraph (a) of the said section 5 ordinarily be performed by the branch of the South African Police known as the Security Police."

Applying these provisions (read with the relevant provisions of "the General Proclamation" referred to previously) to the Police Act of 1958, with reference to the territory of Namibia, the following conclusions would

seem to follow:

5. In the application of the Police Act within the territory of Namibia any reference to the Minister' shall, notwithstanding the provisions of Section 3(1) of Proclamation 7 of 1977, generally continue to be read as a reference to such Minister.
6. With reference to Section 4 and Section 32 of the Police Act however, any reference to the Minister is to be construed as a reference to the Administrator-General, insofar as those sections are connected with the functions of the South African Police in Namibia.
3. If the relevant functions of the South African Police in the territory of Namibia are such, however, that they are ordinarily performed by the Security Police Branch of the South African Police, the reference to the "Minister" in Sections 4 and 32 of the Police Act must continue to be construed as a reference to the Minister of Police in South Africa.

Save therefore in the circumstances referred to in paragraph 3 above, involving the Security Branch of the South African Police, the command, superintendence and

control of the Police Force vesting in the Commissioner subject to the direction of the Minister in terms of Section 4 of the Police Act, became a command, superintendence and control subject to the directions of the Administrator-General (with regard to the functions of the Police in the territory of Namibia). "From this", it was held by STRYDOM, J., in the Court of first instance,

"the amendment of Section 32, to replace the word 'Minister' by 'Administrator-General' , follows logically. In my opinion it also follows that after this transfer of powers/ and the consequent amendment of the above sections, which became operative on 1 September 1980, notice in respect of any civil action against the State whereby members of the Force are involved, had to be given to either the Administrator-General or the Commissioner."

In my view the approach adopted by STRYDOM, J. , was correct with respect to the exercise of the functions of the Police (other than the members of the Security Branch) in the territory of Namibia. Although Section 32(2) of the Police Act provides that a notice given to the Commissioner is deemed to be notification, to the defendant concerned, a notice given to the Commissioner's superior, subject to whose direction the Commissioner exercises his functions, is clearly sufficient (Minister of Police v Mamazela, 1977(1) SA 113 (T); Groepe v The Minister of Police and

Others, 1979(4) SA 182 (E); Sibeko & Another v The Minister of Police and Others, 1985(1) SA 149 (W)), and that superior of the Commissioner in the instant case was the Administrator-General to whom notice was in fact given.

Mr Van der Byl submitted however that the special plea should have succeeded, notwithstanding this conclusion. He advanced two main contentions in this regard.

His first contention was that even if the provisions of Proclamation AG.169 of 1980 could ordinarily be applied in this way in the interpretation and application of Section 32 of the Police Act with reference to the territory of Namibia, it would be impermissible to do so in the instant case because of his further submission that Proclamation AG.169 of 1980 was repealed by Proclamation AG.9 of 1981.

It was conceded by Mr Van der Byl that there was no express repeal of Proclamation AG.169 of 1980 by Proclamation AG.9 of 1981 but, he contended, that there was such a repeal by implication.

Section 2(1) of Proclamation AG.9 of 1981 establishes a Police Force for the territory of Namibia known as the South West African Police ("SWAPOL") and the Proclamation thereafter goes on to make elaborate amendments to the Police Act of 1958 with reference to its application within the territory of Namibia. Mr Van der Byl submitted that -

"in consequence thereof the provisions of

the Police Act 1958 ceased to exist in Namibia in relation to the SAP because a new and different Police Force was thereby established by the Administrator-General over which he himself had full control in all respects (otherwise than the limited control that vested in him in relation to the SAP) ."

In my view this is based on a non sequitur. The Police Act of 1958 does not cease to exist in the territory of Namibia merely because Proclamation AG.9 of 1981 establishes SWAPOL. Indeed the entire structure of Proclamation AG.9 of 1981 is premised on the continuing operation of the Police Act which it seeks to amend in various respects with reference to its application to the territory of Namibia. STRYDOM, J., was correct in holding that -

"after Proclamation No.9 of 1981 came into effect, there existed two Police Forces in the territory viz., the SWA Police Force operating according to Act No.7 of 1958 as amended by Proclamation 9 of 1981, and the SA Police, operating under Act No. 7 of 1958 unamended by the said proclamation."

Properly construed, there is nothing in Proclamation 9 of 1981 which is so inconsistent with and repugnant to the relevant provisions of the Police Act of 1958 read with Proclamation AG.169 of 1980, as to justify the inference

that the effect of Proclamation 9 of 1981 was to repeal by implication Proclamation 169 of 1980. In Government of the Republic of South Africa v The Government of Kwazulu, 1983(1) SA 164 (A) the following passage in New Modderfontein Gold Mining Company v Transvaal provincial Administration, 1919 A.D. 367 at 400 was quoted with approval, namely:

"The books tell us that a repeal by implication of an earlier statute by a later one, is neither presumed nor favoured. It is only when language used in the subsequent measure is so manifestly inconsistent with that employed in the former legislation that there is a repugnance and contradiction, so that the one conflicts with the other, that we are justified in coming to the conclusion that the earlier Act has been repealed by the later one."

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There is considerable other authority in support of approach. (Principal Immigration Officer v Bhula, 1931 345; Ex Parte the Minister of Justice - NVR v Jekela, A.D. 377; Durban Corporation & Another v R, 1946 N. 115) .

In enacting Proclamation AG.9 of 1981, the Administrator-

General not only applied his mind to the continuing operation of the Police Act of 1958 and the relevant provisions of Proclamation 169 of 1980 but he

expressly provided in Section 24 that the provisions of Proclamation 9 of 1981 -

"shall not apply in relation to any member of the South African Police serving as such a member in the territory of South West Africa."

This provision is therefore supportive of the conclusions arrived at by STRYDOM, J., and quite inconsistent with the argument advanced by Mr Van der Byl. In my view therefore Proclamation 9 of 1981 does not repeal Proclamation 169 of 1980 together with the relevant provisions of the Police Act of 1958.

I have also given consideration to the question whether support for the submissions advanced by Mr Van der Byl cannot be found in the maxim cessante racione legis cessat et lex ipsa although Mr Van der Byl himself did not in express terms rely thereon. It is in general true that where the ratio for a law has ceased to exist, that law can in certain circumstances itself be presumed to have ceased to exist. (Head Fortuin v Woolaston N.O. & De Villiers N.O., 1926 T.P.D. 558; Lekhari v Johannesburg City Council, 1956(1) SA 552 (A) at 570; The State v Maharaj, 1962(4) SA 615 (N) at 617), but on the analysis which I have made it cannot be said that the ratio for Proclamation 169 of 1980 ceased to exist with the enactment of Proclamation AG.9 of 1981.

The second contention advanced by Mr Van der Byl was that even on the continuing operation of Proclamation 169 of 1980, it is clear from Section 3(1)(a) of that Proclamation that the substitution of the Administrator-General for the Minister of Police in Sections 4 and 32 of the Police Act, does not extend to such functions as are ordinarily performed by the Security Branch of the South African Police, and for this reason the special plea should have been upheld.

This would undoubtedly have been a persuasive argument if it was clear from the pleadings that the respondent's cause of action was based on a delict perpetrated by members of the Security Branch of the South African Police. There is however nothing whatever in the pleadings to suggest this. No such averment is made in the Particulars of Claim. No such question is canvassed in the Request for Further Particulars. No such issue is raised in the pre-trial conference and none is advanced in the plea. It is therefore not surprising that the contention was not even raised in the Courts a quo. It appears to be clearly an afterthought which is not available to the appellant on the present state of pleadings.

In the result I am satisfied that by virtue of the provisions of Proclamation 169 of 1980 which were operative and subsistent at all relevant times it was perfectly competent for the respondent to comply with the requirements of Section 32 of the Police Act of 1958 by serving the required notice on the Administrator-General

and that the appellant cannot be discharged from liability simply because no such notice was served on him or the Commissioner of Police.

This conclusion has been based on my interpretation of the provisions of Proclamation 169 of 1980 read with the relevant provisions of the Police Act. I should add however that 'Mr Frank' contended in the alternative that irrespective of the provisions of Proclamation 169 of 1980, the true defendant in the action is the State and that it was perfectly competent to comply with the requirements of Section 32 of the Police Act by serving the relevant notice upon the Administrator-General who was the highest representative of the State in the territory of Namibia. There appears to me considerable force in that contention but I find it unnecessary to decide that issue in view of the conclusion to which I have come based on the interpretation and the application of Proclamation 169 of 1980 in the territory of Namibia.

IN THE RESULT I WOULD ORDER THAT THE APPEAL BE DISMISSED WITH COSTS.

Dated at WINDHOEK this day of NOVEMBER 1990.

MAHOMED, A.J.A.

I concur :

BERKER, C.J.

I concur :

DUMBUTSHENA,
A.J.A.
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Advocate for the Appellant: P.C.van der Byl S.C
(With him J.J.Swanepoel)

Instructed by: Theunissen and Van Wyk, Windhoek.

Advocate for the Respondent: T.J. Frank S.C.

Instructed by: Lorentz & Bone, Windhoek.