

IN THE SUPREME COURT OF SOUTH AFRICA
APPELLATE DIVISION

In the matter between:

E. BINGA

Appellant

and

THE CABINET FOR SOUTH WEST AFRICA

First Respondent

THE MINISTER OF DEFENCE

Second Respondent

THE EXEMPTION BOARD FOR THE SOUTH
WEST AFRICAN TERRITORIAL FORCE

Third Respondent

CORAM: RABIE ACJ, CORBETT, VAN HEERDEN, HEFER
et GROSSKOPF JJA

HEARD: 19 NOVEMBER 1987

DELIVERED: 24 MARCH 1988

JUDGMENT

/VAN HEERDEN JA ...

VAN HEERDEN JA:

S 37 (1) of the South West Africa Constitution Act (39 of 1968) provides that nothing in the Act contained shall be construed as in any manner abolishing, diminishing or derogating "from those full powers of administration and legislation over the territory as an integral portion of the Republic which have hitherto been vested in the Republic". In terms of s 37 (2) those full powers of administration are expressly reserved to the State President who may exercise them himself or delegate them to be exercised by the Administrator-General. S 38 (1) reads as follows:

"(1) The State President may by proclamation in the Gazette make laws for the territory, with a view to the eventual attainment of independence by the said territory, the administration of Walvis Bay and the regulation of any other matter and may in any such law -

/(a) ...

- (a) repeal or amend any legal provision, including this Act, except for the provisions of subsections (6) and (7) of this section, and any other Act of Parliament in so far as it relates to or applies in the territory or is connected with the administration thereof or the administration of any matter by any authority therein; and
- (b) repeal or amend any Act of Parliament, and make different provision, to regulate any matter which, in his opinion, requires to be regulated in consequence of the repeal or amendment of any Act in terms of paragraph (a)."

S 38 (6) and (7), read with s 35 of Act 101 of 1980 and s 97 of Act 110 of 1983, provides that any proclamation issued under s 38 (1) shall be tabled in Parliament which may by resolution disapprove of such proclamation or any provision thereof. Should this happen, the proclamation or provision concerned shall cease to be of force, but not with retrospective effect.

/It ...

It was under the powers vested in him by s 38 that the State President promulgated the proclamations to which reference is made hereinafter.

S 153 (1) of the Defence Act (44 of 1957) provides that the Act is also applicable in South West Africa ("the territory"). Of immediate relevance for present purposes is s 2 (1) (b) in terms of which the Act does not apply, save for immaterial exceptions, to females or persons who are not White persons as defined in s 1 of Act 30 of 1950.

By Proclamation 198 of 1980 (Government Gazette 4300) the State President amended s 2 of the Defence Act as regards its application in the territory. All that need be mentioned, is that in terms of s 1 (1) (b) of the Schedule to the Proclamation the words "or persons who are not White persons as defined in section one of Act No 30 of 1950" were deemed not to form part of s 2 (1) (b) of the Defence Act. A consequence of the amendment, if valid, was that non-White inhabitants of the

/territory ...

territory could also be called up to render national service in terms of the Defence Act.

On 1 August 1980 the Administrator-General by A G 105 (Official Gazette 4237) notified for general information that in terms of a determination made by the Minister of Defence under s 7 of the Defence Act certain units of the Defence Force had been organised in and as the South West African Territory Force ("SWATF"). On the same date Proclamation 131 of 1980 was published by the State President. S 2 (1) of the Schedule to the Proclamation provides for the vesting in the Administrator-General of the administration of the provisions of Chapters IV, V, VII, VIII and IX of the Defence Act in and in respect of the territory in so far as those provisions apply or relate to or in respect of, inter alia, any unit or member of the SWATF by virtue of the fact that such unit or member is a unit or member of the South African Defence Force, and the registration, enrolment and allotment of

/persons ...

persons as contemplated by Chapter VIII of the Act. For the purposes of s 2 (1) any reference to the Minister of Defence in sections 21, 22, 35, 37, 44, 56, 62, 66 A, 67, 68 and 70 bis, and to the Minister of Labour in section 68, 69 and 70 bis, of the Act has to be construed as a reference to the Administrator-General (s 2 (2)).

By virtue of the powers conferred upon the Administrator-General by Proclamation 131 of 1980 he appointed an exemption board for the territory (the third respondent in this appeal). The function of the third respondent was and is to consider in terms of s 69 of the Defence Act applications for deferment of or exemption from service under the Act.

In November 1982 the appellant, an inhabitant of the territory who was then still a minor, was notified by the SWATF that he had been allotted to the Second South African Infantry Battalion for the purpose of

/rendering ...

rendering national service at Walvis Bay from 10 January 1983 to 4 January 1985. The appellant then applied in terms of s 69 of the Defence Act for exemption from service but his application was turned down by the third respondent. This led to the institution of proceedings on behalf of the appellant in the Supreme Court of South West Africa. In the main prayers as set out in the Notice of Motion orders were sought (a) declaring that the appellant was not liable for national service in the SWATF or the South African Defence Force, and (b) setting aside the aforesaid notice directing the appellant to render national service at Walvis Bay. The alternative relief sought was a review of the third respondent's decision to reject the appellant's application for exemption. As far as the main prayers were concerned, it was alleged that the South African Parliament was not competent to legislate for the territory and that laws made for the territory under s 38 of the South West Africa Constitution

/Act ...

Act were therefore invalid, and that in any event the appellant was not obliged to render national service at Walvis Bay which does not form part of the territory.

The first and second respondents cited were the Administrator-General and the Minister of Defence, but the application was opposed only by the third respondent.

The application was heard by a full bench of the Supreme Court of South West Africa. Judgments were delivered by Mouton J and by Strydom J, in whose judgment Berker JP concurred (1984 (3) SA 949). It appears from the judgment of Mouton J (at p 958) that at some stage, probably during the hearing of the application, the appellant abandoned his alternative prayer. It furthermore appears from the judgments that the appellant contended:

- 1) that as a result of the adoption of Resolution 2145 (XXI) by the General Assembly of the United Nations the mandate for the territory was terminated;

/that ...

that consequently as from the date of revocation of the mandate South Africa has only been in de facto control of the territory, and that its powers in this regard do not include the power to conscript residents of the territory for military service;

- 2) that, if the mandate still exists, Parliament is not competent to legislate in conflict with the mandate and that Proclamation 198 of 1980, which is repugnant to article 4 of the mandate, is therefore invalid;
- 3) that, if the Proclamation is valid, the appellant is not obliged to render national service outside the territory.

The court a quo rejected contentions (1) and (2) but, for reasons which are not apparent, did not deal with

/the ...

the third contention. The application was consequently dismissed with costs but the appellant was granted leave to appeal to this court.

In their original heads of argument in this court counsel for the appellant advanced the same contentions as in the court a quo. Shortly before the hearing of the appeal, however, this court was informed that the appellant was abandoning the contentions that the mandate had been terminated and that Parliament may not legislate in conflict with the mandate. In the result the only submissions made in this court were:

- a) that Parliament did not intend to empower the State President to make laws in conflict with the mandate and that Proclamation 198 of 1980 was consequently invalid, and
- b) that the appellant could not have been called up to render national service at

/Walvis ...

Walvis Bay.

At the hearing of the appeal a few preliminary points arose. Firstly, because of the transfer of powers from the Administrator-General to the Cabinet for South-West Africa effected by s 29 of Proclamation 101 of 1985, application was made for the substitution of the Cabinet for the Administrator-General as first respondent. There was no objection to this application and there does not appear to be any reason why it should not be granted.

Secondly, the appellant sought leave to supplement the application. Neither the founding nor the supporting affidavit contained a specific allegation that the appellant is a non-White person. In their heads of argument counsel for the third respondent relied upon this lacuna and the purpose of the application made to this court was to adduce evidence that the appellant is in fact a non-White. Accordingly it was alleged in an affidavit made in support of the application that the appellant

/is ...

is a Black inhabitant of the territory. The application was not opposed by the third respondent and since the main prayers of the original application were clearly based upon the premise that non-White inhabitants of the territory may not validly be called up for military service under the Defence Act, and also because argument in the court a quo proceeded, and the court's judgment was based, upon the assumption that the appellant was indeed a non-White, the application should in my view be granted.

Thirdly, the question was raised whether the registering officer who had issued the call-up notice should not have been joined as a respondent. S 62 of the Defence Act provides that the Minister of Defence, or any person acting under his authority, shall appoint an officer of the South African Defence Force ("SADF") as the registering officer for the purposes of Chapter VIII of the Act. The officer so appointed must prepare selection lists (s 66 (1)) and allot each year to the Citizen Force, the commandos or

/the ...

the South African Police inter alios persons whose names have been included in a selection list for the year concerned (s 67 (2)). S 2 (1), read with s 2 (2) (a) of Proclamation 131 of 1980 and with s 62 of the Defence Act, empowers the Administrator-General, or any person acting under his authority, to appoint a registering officer for the territory, and s 2 (2) (e) provides that any reference to a registering officer in Chapter VIII of the Defence Act shall, in relation to the registration and allotment in terms of that Chapter of persons who are resident in the territory, be construed as including a reference to a registering officer appointed by or under the authority of the Administrator-General.

As already stated, the call-up notice in question was issued in the name of the SWATF and at the hearing of the appeal it was assumed that the appellant had been allotted to the Second South African Infantry Battalion by a registering officer appointed by or under the authority of

/the ...

the Administrator-General. The question raised by this court was consequently whether this officer should have been joined as a respondent.

Subsequent to the hearing of the appeal the appellant's attorneys requested this officer to sign a consent to be joined as a party. In response colonel Potgieter filed an affidavit from which it appears that on 6 August 1980 he was appointed under the authority of the Minister of Defence as the representative, in the territory, of the registering officer for the SADF; that on 3 October 1980 - i.e. subsequent to the promulgation of Proclamation 131 of 1980 - he was appointed by the Administrator-General as registering officer for the SWATF; that he still holds both appointments, and that the notice calling up the appellant was issued under his authority. Colonel Potgieter also stated that he was prepared to abide the judgment of this court provided that his affidavit was received in amplification of the record. Counsel for the appellant reacted by filing a supplementary note - to which I shall

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revert - and in effect consented to the evidence set out in the affidavit being placed before this court. In the result it is unnecessary to decide whether the deponent should have been joined as a respondent.

I now turn to the first main contention advanced by counsel for the appellant in this court, viz, that Proclamation 198 of 1980 is invalid because it is in conflict with article 4 of the mandate, the material part of which reads as follows:

"The military training of the natives, otherwise than for the purposes of internal police and the local defence of the territory, shall be prohibited."

The thrust of the contention was that the mandate became part of the statute law of South Africa; that although Parliament may repeal or amend the law incorporating the mandate, it has not done so, and that in enacting s 38 of the South West Africa Constitution Act the legislature did not intend to confer upon the State President the power to make laws in conflict with the mandate. In this regard it was argued that in S v Tuhadeleni and Others,

1969 (1) SA 153 (A), this court did not find that the mandate had not become part of the constitution of the territory, but merely concluded that the mandate had not become entrenched against repeal or amendment by Act of Parliament.

In Tuhadeleni's case the appellants had been arraigned on charges of contravention of provisions of Act 83 of 1967 (the main charges) and of Act 44 of 1950, as amended by Act 62 of 1966 (the alternative charges). They were convicted on the main charges and for present purposes it is unnecessary to refer to the proceedings in regard to the alternative charges. Before the charges were put to the appellants notice had been given that they would plead that the trial court had no jurisdiction to try them on the main charges. The ground upon which the appellants relied was that Act 83 of 1967 was invalid in so far as it purported to apply in the territory in that it was enacted subsequent to the termination of the mandate

/by ...

by General Assembly Resolution 2145 (XXI). In reply the State contended that by virtue of the provisions of s 59 (2) of the Republic of South Africa Constitution Act, 32 of 1961 ("the Constitution Act"), the trial court had no jurisdiction to pronounce upon the validity of the statutory provisions under which the charges were framed.

This contention was upheld by the trial court which eventually reserved two questions of law for consideration by this court. The first question concerned the ambit and effect of s 59 (2) of the Constitution Act and the second question the validity of that subsection in so far as it related to legislative provisions applying in the territory.

This court, per Steyn CJ, found that there was nothing ambiguous in the phrases "no court of law" and "any Act passed by Parliament" which were employed in s 59 (2) of the Constitution Act, and having considered the context of s 59 (2) in the Act as a whole and the historical background to the subsection came to the conclusion

/that ...

that it was also applicable to Acts of Parliament applying in the territory.

Steyn CJ went on to consider a submission relative to the second question of law which ran along these lines: Parliament recognised the limitation imposed on its legislative powers by the provisions of the mandate; the courts were consequently vested with jurisdiction to declare invalid any Act of Parliament which offended against the mandate, and hence s 59 (2) was, to the extent that it derogated from the above limitation, of no force and effect.

Steyn CJ rejected this submission on two grounds. The first was that the mandate itself did not place an express or implied limitation upon the powers of Parliament to legislate for the territory. (Part of the reasoning of Steyn CJ in this regard was assailed by counsel for the appellant in the present matter, but since it was conceded that Parliament may legislate in conflict with the mandate nothing appears to turn on the criticism.) The second

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ground was that had a curb on the legislative powers of Parliament been contemplated, it would not have been made part of the law of the land enforceable by the courts unless South Africa as mandatory had introduced the curb into its constitution, and that that had not been done.

Counsel for the appellant submitted that Steyn CJ was only dealing with the question whether the mandate had become incorporated into South African law in such a way that Parliament itself could not repeal or amend its provisions, and that he did not address himself to the further question whether the mandate had become part of the constitution of the territory and therefore applied unless repealed or amended by Parliament. Relying on Act 49 of 1919, Act 42 of 1925 and dicta in the judgments of this court in R v Christian 1924 AD 101, Verein Für Schutzgebietsanleihen E V v Conradie N O 1937 AD 113 and Winter v Minister of Defence and Others 1940 AD 194, counsel went on to submit that the mandate had indeed

/become ...

become part of South African statute law, although not entrenched against conflicting Acts of Parliament.

For reasons which will appear, I find it unnecessary to deal with this submission. I shall therefore assume, in favour of the appellant, that in some way or another the provisions of the mandate became part of the so-called composite constitution of the territory.

On this assumption the real question, as regards the first main contention of counsel for the appellant, is whether s 38 (1) of the South West Africa Constitution Act empowers the State President to make laws in conflict with the mandate. It will be recalled that the subsection is couched in very wide terms. It confers upon the State President the power to make laws for the territory not only with a view to the eventual attainment of independence by the territory and the administration of Walvis Bay, but also "the regulation of any other

/matter" ...

matter". In particular the State President may repeal or amend any legal provision, including the Act (except for the provisions of subsections (6) and (7)) and any other Act of Parliament in so far as it relates to or applies in the territory or is connected with the administration thereof or the administration of any matter by any authority therein.

It is instructive to compare the present wording of s 38 (1) with that of the subsection as originally enacted. Until it was amended by s 1 of Act 95 of 1977, s 38 (1) merely empowered the State President to make laws for the territory in relation to any matter in regard to which the Assembly for South West Africa could not make ordinances. S 38 (2) moreover provided that a law so made would have effect in and for the territory so long and as far only as it was not repugnant to or inconsistent with an Act of Parliament which applied in the territory. These limitations on the powers of the State President were removed by s 1 of Act 95 of 1977 which substituted s 38 (1) and (2), as they

/now ...

now read, for the original subsections. In particular the new s 38 (1) expressly empowered the State President to legislate in conflict with Acts of Parliament applying in the territory and authorised him to make laws for the territory with a view to "the regulation of any matter". In short, what Parliament did, was to confer upon the State President plenary powers of legislation (in respect of the territory) as wide as those possessed by Parliament itself, or, to adapt the words of Lord Fitzgerald in Hodge v The Queen, 9 A C 117, 132, powers as ample as Parliament in the plenitude of its powers could bestow. It bears repetition to emphasise that those powers include the power to repeal or amend any legal provision or Act of Parliament relating to or applying in the territory, and if the mandate was indeed incorporated in an Act of Parliament or in some legal provision, it may be repealed or amended by the State President. The only relevant curb on these wide powers is to be found in s 38 (7) which in effect gives Parliament the

/right ...

right to veto a law made by the State President. But apart from these provisions relating to a disapproval of a proclamation issued by the State President under s 38 (1), the section imposes no limitations on the ambit of the State President's legislative powers in respect of the territory. And as was stated in Collins v Minister of the Interior and Another 1957 (1) SA 552 (A) 565, if a legislative authority has plenary power to legislate on a particular matter no question can arise as to the validity of any legislation on that matter.

In The Queen v Burah 3 A C 889, a decision of the Privy Council concerning the legislative powers of the Indian Legislature in terms of an Imperial Act, Lord Selborne said (at pp 904-5):

"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have,

/plenary ...

plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

This passage was quoted with approval in James v Commonwealth of Australia 1936 A C 578, 613-4, and if restrictions on the plenary powers of a legislature are not constructively to be enlarged, then a fortiori in a case where no limitations have been imposed a court should not be astute to find that a restriction is implied.

/Counsel ...

Counsel for the appellant also sought to rely on a presumption that Parliament does not intend to violate its international obligations; i e that Parliament intends to fulfil, rather than to break, such obligations. In casu, so it was argued, there is consequently a presumption that Parliament did not intend to confer upon the State President the power to legislate in conflict with the international obligations created by the mandate. In this regard counsel placed particular reliance on the following dictum of Lord Denning in R v Secretary of State for Home Affairs and Another, ex parte Bhajan Singh (1975) 2 All E R 1081, 1083, relating to a convention to which the United Kingdom was a party:

"The Court can and should take the convention into account. They should take it into account whenever interpreting a statute which affects the rights and liberties of the individual. It is to be assumed that the Crown, in taking its part in legislation, would do nothing which was in conflict with treaties."

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It is clear, however, from other English cases that in interpreting legislation one does not start with the a priori assumption that Parliament intended to fulfil its treaty obligations; i e, an assumption that can only be displaced by indications of a contrary intention. Thus, in Salomon v Commissioners of Customs and Excise (1966) 3 All E R 871 (CA) 875, Diplock LJ said:

"Where by a treaty Her Majesty's Government undertakes either to introduce domestic legislation to achieve a specified result in the United Kingdom or to secure a specified result which can only be achieved by legislation, the treaty, since in English law it is not self-operating, remains irrelevant to any issue in the English courts until Her Majesty's Government has taken steps by way of legislation to fulfil its treaty obligations. Once the government has legislated, which it may do in anticipation of the coming into effect of the treaty as it did in this case, the court must in the first instance construe the legislation, for that is what the court has to apply. If the terms of the legislation are clear and unambiguous, they must be given effect to whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties

/and ...

and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own courts. If the terms of the legislation are not clear, however, but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred."

See also The Andrea Ursula (1971) 1 All E R

821.

In Salomon's case Diplock LJ went on to point out (at p 876) that even for the limited purpose of resolving ambiguities in legislation an international convention is to be consulted only if there is cogent evidence that the statute concerned was intended to give effect to the convention.

In the present case there is nothing ambiguous in s 38 (1) of the South West Africa Constitution Act. As

/already ...

already pointed out, it confers in clear terms extensive powers of legislation upon the State President in regard to the territory, without imposing any restrictions whatsoever on the ambit of the State President's legislative competence. Moreover, there is no indication that, in enacting the Act, Parliament intended to give effect to such international obligations as the mandate imposed and may still be in existence. Indeed, the Act contains no reference whatsoever to the mandate. The aforesaid presumption consequently finds no application in this appeal.

Counsel for the appellant also placed some reliance on the decision of the Privy Council in Jerusalem-Jaffa District Governor and Another v Suleiman Murra and Others 1926 A C 321. That case concerned an Order in Council which authorized the High Commissioner for Palestine to make ordinances for the peace, order and good government of Palestine subject to a provision that no order should be passed which should in any way be repugnant

/to ...

to or inconsistent with the provisions of the mandate for Palestine. The question arose whether an ordinance made by the High Commissioner was invalid on the ground that it was an infringement of article 2 of the mandate, and in this regard Viscount Cave said that if the ordinance was in fact inconsistent with the provisions of the mandate it would infringe the conditions of the Order in Council and would therefore be invalid. Now, had s 38 of the South West Africa Constitution Act contained a provision similar to that in the Order in Council - in other words, had it provided that the State President could not make a law in conflict with the mandate for South West Africa - this case would have been in point. But since, as has repeatedly been emphasised, s 38 (1) contains no such limitation, the remarks of Viscount Cave have no relevance for the purposes of this appeal.

It follows that the contention that s 38 (1) does not empower the State President to legislate in

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conflict with the mandate, cannot be upheld. It is accordingly unnecessary to consider whether Proclamation 198 of 1980 is repugnant to article 4 of the mandate.

I proceed to deal with the second main contention of counsel for the appellant, viz, that the appellant is in any event not liable to render national service at Walvis Bay which has never been part of the territory and which, since 31 August 1977, has again been administered as part of the Cape Province (Proclamation R202, Regulation Gazette 2525 of that date). The essence of this contention is that Proclamation 198 of 1980 applies only in the territory and therefore does not have extra-territorial operation.

As already pointed out, s 2 (1) (b) of the Defence Act provides that the Act shall not apply to persons who are not White persons as defined in s 1 of Act 30 of 1950. In terms of s 3 (2) of the Act any member of the Defence Force may be employed at any time on, inter alia, service

/in ...

in defence of the Republic, service in the prevention or suppression of terrorism and service in the prevention or suppression of internal disorder in the Republic.

The Republic includes the territory and "service in the defence of the Republic" includes military service for the prevention or suppression of any armed conflict outside the Republic which, in the opinion of the State President, is or may be a threat to the security of the Republic (s 1).

S 153 provides that the Act shall apply also in the territory and in terms of s 138 any training required to be undergone and any service to be performed under the Act, shall be undergone or performed in such areas or at such places, whether within or outside the Republic, as the Minister of Defence may direct.

It seems clear, therefore, that prior to the amendment of s 2 of the Act by Proclamation 198 of 1980 any White male citizen of South Africa, including an

/inhabitant ...

inhabitant of the territory, who had been included in a selection list prepared under s 66, could have been called up to render national service in any area or at any place, in or outside the Republic, designated by the Minister. That much was indeed conceded by counsel for the appellant.

In so far as Proclamation 198 of 1980 is material to this appeal, s 1 (b) merely provides that in the application of the Defence Act "in the territory" the words "or persons who are not White persons as defined in Act no 30 of 1950" shall be deemed not to form part of s 2 (1) (b) of the Defence Act. The effect, and only effect, of this amendment was that from the date of promulgation of the Proclamation the Act was applicable to all the male inhabitants of the territory whereas it did not apply to non-White inhabitants of South Africa. Apart from amendments of sections 62, 63 and 64 of the Act, which are not relevant in the present context, the Proclamation did not modify any of the other provisions of the Act, and in particular did not amend s 138. It

/would ...

would appear, therefore, that since the promulgation of the Proclamation both White and non-White inhabitants of the territory are liable to be called up to render national service at any place designated by the Minister, whether inside or outside the Republic (including the territory).

Counsel for the appellant, however, laid stress on the words "in the territory" which appear in s 1 (1) of Proclamation 198 of 1980, and submitted that there are in effect two Defence Acts, one applying in South Africa and having extra-territorial effect (but not applicable to non-Whites), and another applying only in the territory. In my view the submission is without merit. There is in substance and form only one Defence Act which, however, has a wider application in respect of the inhabitants of the territory than in respect of those of South Africa. Far from restricting the operation of the Act in the territory, Proclamation 198 of 1980 extended its scope. In so far as s 1 (1) (b) of the Proclamation, read with s 2

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(1) (b) of the Act, is concerned, the only purpose of the qualifying phrase "in the territory" was to restrict the deeming provision to the territory. It was clearly not intended to qualify the other provisions of the Act to which reference has been made above.

The Proclamation could have amended s 2 (1) (b) of the Act to read as follows:

"(1) This Act shall not apply -

.....

(b) except in so far as it relates to any auxiliary or nursing service established under this Act, to females or persons, save inhabitants of South West Africa, who are not white persons"

As I understood counsel for the appellant, he conceded that had s 2 (1) (b) been amended to read as above, White and non-White male inhabitants of the territory could have been called up to render military service outside the territory. In essence, however, Proclamation

198 of 1980 achieved the same effect as the postulated amendment would have had; in other words s 1 (1) (b) merely removed, in respect of the territory, the impediment as to race contained in s 2 (1) (b) of the Act. It follows that the appellant could validly have been called upon to render service outside the territory.

On the assumption that Proclamation 198 of 1980 is valid, counsel for the appellant initially conceded that the appellant could have been allotted to a unit of the South African Defence Force, not being a unit of the SWATF, provided that that unit was stationed in the territory. It was only after the attention of counsel for the respondent had been drawn to the provisions of s 2 (1) (c) of the Schedule to Proclamation 131 of 1980 that counsel for the appellant, in reply, relied thereon. That subsection reads as follows:

"(2) (1) Subject to the provisions of this

/Proclamation ...

Proclamation, the administration of the provisions of the Defence Act contained in Chapters IV, V, VII, VIII and IX thereof shall be carried on by the Administrator-General in and in respect of the Territory in so far as those provisions apply or relate to or in respect of -

.....

- (c) the registration and enrolment as contemplated in the said Chapter VIII, of persons who are required to or may apply for such registration or enrolment in terms of the provisions contained in that Chapter and are resident in the territory, and the allotment as so contemplated of such persons to any unit of the Citizen Force or the commandos forming part of the South West African Territory Force."

(My underlining.)

Counsel for the appellant went on to submit that in view of the underlined words a registering officer appointed by the Administrator-General may allot inhabitants of the territory only to a unit of the Citizen Force or the commandos which has been incorporated into the SWATF, and that the Second South African Infantry Battalion is not such a unit. In this regard counsel

/relied ...

relied on AG 105 of 1980, the schedule to which contains a list of the units of the South African Defence Force which had been organised in and as the SWATF, and which does not include the said Battalion. However, counsel could not give this court the assurance that further units had not been added to the SWATF subsequent to 1 August 1980.

It will be recalled that in the appellant's main prayer (b) an order was sought setting aside "the notice directing the [appellant] to render national service at Walvis Bay." However, nowhere in the appellant's supporting affidavit was the point made that the notice was invalid on the ground that the appellant had been allotted to a unit which did not form part of the SWATF. Nor did the affidavit contain a specific averment that the said Battalion was not a unit of the SWATF. Indeed, in para 4.4 of his affidavit the appellant stated:

"It is a matter of no consequence to me that I have been called up by the South West Africa

/Territory ...

Territory Force and not the South African Defence Force. In truth and in fact there is no essential difference between the two."

In setting out the grounds upon which he had been advised that the call-up notice was invalid, the appellant relied on the alleged invalidity of Proclamations of the State President issued under s 38 of the South West Africa Constitution Act, and furthermore merely stated that he could not have been ordered to render service at Walvis Bay which was not part of the territory, and which did not fall within the area over which the Administrator-General purported to exercise authority. It therefore appears that apart from the attack on the validity of the Proclamations the only case which the respondents were called upon to meet was that the appellant could not have been directed to render national service outside the territory. The questions whether the appellant could have been allotted to a unit not forming part of the SWATF and, if so, whether the Battalion was such a unit, were simply

/not ...

not raised by the appellant.

It follows that should the appellant now be allowed to rely on the provisions of s 2 (1) (c) of Proclamation 131 of 1980 it would amount not merely to the raising of a new point of law in support of a case made out in the court a quo, but in effect to the introduction of a new cause of action which the respondents, two of whom did not oppose the application, were not called upon to meet. And it is certainly not inconceivable that had the appellant averred that he could not have been allotted to a unit not forming part of the SWATF, and that the Second South African Infantry Battalion was such a unit, the second respondent may have opposed the application. Had he done so, then apart from the possibility that he may have introduced relevant evidence, his counsel could have advanced argument on the ambit and interpretation of Chapter VIII of the Defence Act read with Proclamation 131 of 1980. In my view this court should consequently

/refrain ...

refrain from considering the submission in question.

In any event, and as already pointed out, colonel Potgieter alleged in his affidavit that he was not only appointed as registering officer for the territory by the Administrator-General ("his first capacity"), but that he also held a similar appointment in respect of the territory pursuant to a power exercised under the authority of the Minister of Defence in terms of s 62 of the Defence Act ("his second capacity"). He also alleged that by virtue of his dual capacity he was authorised to allot the appellant to the Second South African Infantry Battalion and that he in fact did so. He did, however, concede that the Battalion is not a unit of the SWATF.

In their aforesaid supplementary note counsel for the appellant did not dispute that, acting in his second capacity, colonel Potgieter could have allotted the appellant to the Battalion, but contended that he could not have done so in either his first capacity

/or ...

or in both capacities. In my view, however, colonel Potgieter merely intended to convey that by virtue of the powers vested in him as a result of the dual appointment, he had the necessary authority to allot the appellant either to a unit of the SWATF or to a SADF unit not forming part of the SWATF, and that in allotting the appellant he exercised that composite authority. He certainly did not say that when he made the allotment he was not invoking the authority conferred by his second appointment.

Counsel for the appellant also sought to place some reliance on the fact that the call-up instructions were issued on a form headed "Suidwes-Afrika Gebiedsmag", but this in itself does not justify the inference that colonel Potgieter intended to act only in his first capacity.

It follows that even if it is assumed that colonel Potgieter could not have allotted the appellant to the Battalion in his first capacity, it

/would ...

would appear that he could have done so - and in fact did so - by virtue of the composite powers conferred upon him.

And should there be any doubt in this regard, it cannot be resolved in favour of the appellant who did not in his application advance the proposition that he could not have been allotted to a unit not forming part of the SWATF.

It remains to consider the question of costs.

The only function of an exemption board appointed under s 68 of the Defence Act, as it read in 1982 and applied in the territory, was to consider applications for deferment of or exemption from service. Such an application could be made by any person liable to serve in terms of s 21 (1) or 35 (1) of the Act or any interested person acting on behalf of such person. An exemption board's

/powers ...

powers could therefore be exercised only in respect of a person validly required to render service under the Act. In particular, it was no part of the function of such a board to call up a person for military service or to decide whether a call-up notice had validly been issued.

As already stated, the appellant's application for exemption from service was refused by the third respondent. Since the alternative prayer sought a review of this refusal, it was necessary to join the third respondent as a party. And since the abandonment of the alternative prayer in the court a quo was not accompanied by a tender of costs, the third respondent was entitled to be represented for the purpose of procuring an order of costs in its favour. Such an order was in fact made.

The appellant's notice of appeal was directed against the order dismissing the application as well as against the order of costs. The third respondent was consequently entitled to oppose the appeal for the limited

/purpose ...

purpose of safeguarding the order as to costs. However, the third respondent prepared voluminous heads of argument and presented full argument in this court on the merits of the appeal. The only justification proffered by counsel of the third respondent for this course of action was that the third respondent, as part of the structure of the Defence Force, has an indirect interest in the outcome of the appeal. Such a nebulous interest is, however, clearly not to be equated with a legal interest in the issues raised in this court or in the relief sought in the appellant's main prayers. Hence it is necessary to make a special order as to costs.

The following orders are made:

- 1) The Cabinet for South West Africa is substituted for the Administrator-General as first respondent in this appeal.
- 2) The appeal is dismissed with costs which are to include the costs relating to the

/application ...

application for leave to appeal.

- 3) The costs are to be taxed as if the third respondent opposed the appeal, and one counsel appeared, for the limited purpose of defending the order as to costs made by the court a quo.

H.J.O. VAN HEERDEN JA

RABIE ACJ

CORBETT JA

HEFER JA

GROSSKOPF JA

CONCUR