

136
IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

PUPSEY NTSANYANA SEBOGODI Appellant

and

THE STATE PRESIDENT First Respondent

and

MINISTER OF EDUCATION

AND DEVELOPMENT AID Second Respondent

Coram: JOUBERT, NESTADT, KUMLEBEN, F H GROSSKOPF JJ A

et PREISS A J A.

Heard: 2 May 1991

Delivered: 23 May 1991

J U D G M E N T

JOUBERT, JA:

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This is an appeal against a judgment of VAN DER MERWE J in the Transvaal Provincial Division, discharging a rule nisi and dismissing an application of the appellant against the respondents. Leave to appeal to this Court was granted by the Court a quo. For the sake of convenience I shall refer to the first respondent as "the State President" and the second respondent as "Minister Viljoen".

This appeal concerns the validity of Proclamation R220 of 1988 issued by the State President on 30 December 1988, in so far as it relates to the farm Braklaagte situated in the district of Marico, Transvaal.

Shortly after the turn of the present century the Bahurutshe Ba Sebogodi tribe under the chieftainship of the appellant's grandfather settled on the farm Braklaagte which had been bought by the tribe. Braklaagte was registered

/3.....

in the name of a Minister of State in trust for the exclusive use and occupation of the tribe. In 1965 the South African Government in pursuance of its official policy expropriated the farm Braklaagte in order to remove and resettle the tribe in Bophuthatswana as a "Black homeland." From 1965 onwards the farm Braklaagte was State property, earmarked for White settlement. In the meantime members of the tribe continued to reside on the farm Braklaagte, growing crops and raising cattle.

In a letter, dated 27 December 1988, Minister Viljoen informed the attorneys of the appellant that "(T)he two farms Braklaagte and Leeuwfontein as well as certain farms situated between them and Bophuthatswana, will therefore be incorporated into Bophuthatswana as from 31 December 1988 by Presidential Proclamation in terms of section 1 of Act 2 of 1980 as amended". The upshot was the launching

/4.....

by the appellant of an urgent application to the Transvaal Provincial Division on 29 December 1988. The original relief sought was the issue of a rule nisi calling upon the State President and Minister Viljoen as respondents to show cause why they should not be interdicted from publishing the proposed proclamation pending the institution of an action by the appellant to have the publication declared unlawful.

Before the urgent application was heard by SPOELSTRA J on 29 and 30 December 1988 it was, however, established that Proclamation R220 had already been signed by the respondents and that the Government Gazette in which it appeared had already been printed and published and was in the course of being distributed via the post office. On 30 December 1988 SPOELSTRA J, without stating reasons, granted a rule nisi calling upon the respondents to show cause on 7 March 1989 why Proclamation R220 published in Government Gazette

/5.....

No 11644 of 30 December 1988 should not, in so far as it related to the farm Braklaagte, be declared to be null and void and why the respondents should not be ordered to pay the costs of the application. The matter was heard on or after the return day by VAN DER MERWE J who gave the judgment referred to supra.

Proclamation R220 of 1988 was published in the Government Gazette. In terms thereof the State President purported to determine under the powers conferred on him by sec 1 (1) of the Borders of Particular States Extension Act 2 of 1980 that certain land, including the farm Braklaagte, would with effect from 31 December 1988 cease to be part of South Africa and would become part of Bophuthatswana. It was signed on 20 December 1988 by P W Botha, the State President, and co-signed by Minister Viljoen by Order of the State President-in-Cabinet.

/6.....

Owing to illness the State President was unable to file an answering affidavit. Mr Cilliers, a civil servant in the Department of Development Aid, was authorised to file an answering affidavit on behalf of the State President and Minister Viljoen as respondents. An affidavit of Minister Viljoen has, however, been filed in which he elected to deal with certain matters which were within his personal knowledge.

The background to the case may be outlined as follows:

During 1983 the Commission for Co-operation and Development proposed to the Government that the farm Braklaagte and another farm Leeuwfontein should remain Black areas but were to be incorporated into Bophuthatswana. This Commission had after due notice held meetings at Zeerust during August 1983 to hear evidence and receive representations from

/7.....

interested parties who were affected by its consolidation proposal to incorporate certain land, including the farm Braklaagte, into Bophuthatswana.

On 15 October 1984 the Government decided that the farm Braklaagte would remain a Black area but that it would be incorporated into Bophuthatswana.

On 30 August 1985 a formal agreement was concluded between the State President and the State President of Bophuthatswana regarding the incorporation into Bophuthatswana of the farms Braklaagte, Leeuwfontein and certain other farms situated between them and Bophuthatswana.

In terms of the Status of Bophuthatswana Act 89 of 1977 Bophuthatswana on 6 December 1977 received its independence from South Africa as an independent national state. According to sec 1(1) its territory was defined in Schedule A thereto. This description of its territory

was taken over in sec 6 of the Republic of Bophuthatswana Constitution Act 18 of 1977 "together with such other land as may be added thereto". The draftsmen of the Constitution of Bophuthatswana were hopeful that Bophuthatswana's territory would be augmented in the future.

The method initially adopted by the South African Legislature to transfer further South African territory to Bophuthatswana was by means of legislation. The Bophuthatswana Border Extension Act 8 of 1978 was an instance of such legislation. In this manner the Legislature determined and controlled the transfer of South African land to Bophuthatswana.

The Legislature thereafter introduced a new method to transfer South African land to the independent national states. Sec 1 (1) of the Borders of Particular States Extension Act 2 of 1980 provides as follows:

/9.....

"The State President may from time to time by proclamation in the Gazette determine that part or all of the land defined in the appropriate Schedule shall, as from a date mentioned in such proclamation, cease to be part of the Republic of South Africa and become a part of the sovereign and independent state mentioned in such Schedule."

At the time of its enactment Act 2 of 1980 had three Schedules which related to "Land in Relation to Transkei", "Land in Relation to Bophuthatswana" and " Land in Relation to Venda" respectively. At that stage the farm Braklaagte was

not mentioned in Schedule 2. In 1983 Schedule 4 was added by sec 3 of Act 25 of 1983 to make provision for Ciskei.

The inclusion of the land in the schedules by the Legislature would seem to have been based on inter-State agreements between the South African Government and the Governments of the relevant

independent national states. See Annual Survey of South African Law 1980, p 28. According to the new method provided for in Act 2 of 1980 the Legislature conferred on the State President a discretionary power to order "from time to time by proclamation" the transfer of "part or all of the land" specified in the appropriate schedule to the relevant independent national state as from a specific date. The Legislature, however, decided which land was to be included in the schedules. The discretionary power of the State President was circumscribed as stated above. He had no power in respect of land not included in the schedules. An advantage of the new method was that the transfer of scheduled land could be effected by the State President's proclamation when he considered the time opportune to do so irrespective of whether or not Parliament was convened at the time.

On 10 September 1986 the State President assented to the Borders of Particular States Extension Amendment Act 112 of 1986 which came into operation on 30 April 1987.

Sec 2 (e) thereof amended Schedule 2 to Act 2 of 1980 in order to include in it a description of an area comprising the farms Braklaagte, Leeuwfontein and certain other farms.

The effect of the amendment was that the Legislature had earmarked the farm Braklaagte for incorporation into

Bophuthatswana by enlisting it in Schedule 2, as amended.

If and when transfer of the farm Braklaagte as scheduled land was to be made to Bophuthatswana the matter fell to be determined by the exercise of the State President's discretionary power in terms of sec 1 (1) of Act 2 of 1980.

On 22 September 1986 the State President's Office received from the appellant and three co-signatories an undated letter in which they expressed grave misgivings

/12.....

regarding the incorporation of the farm Braklaagte into Bophuthatswana. They also requested the State President to reconsider the matter. The private secretary of the State President in a letter dated 25 September 1986 acknowledged on behalf of the State President receipt of the undated letter. It was recorded that the State President had taken note of its contents "with interest". It was suggested that the matter should be taken up with the Minister of Constitutional Development and Planning. A further response in writing, dated 28 November 1986, to the undated letter came from Mr Wilkens, the Deputy Minister of Development and of Land Affairs. In his letter Mr Wilkens stated that "- - - I regret to inform you that the relative amendment to the Borders of Particular States Extension Act, 1980 (Act 2/1980), cannot be withdrawn". No reference was made to the State President's discretionary power in terms of sec 1 (1) of Act 2 of 1980.

/13.....

On May 20 1987 the attorneys of the Braklaagte tribal authority wrote to the Deputy Minister of Constitutional Development and Planning to record the strong opposition of their client to the intended inclusion of the farm Braklaagte into Bophuthatswana. It was also stated that their client had never been consulted by the Government about the aforesaid inclusion. This letter evoked a written reply, dated 17 August 1987, from Minister Viljoen in which he gave a brief resumé of the history of the Government's attitude in regard to the farm Braklaagte. He pointed out that the residents of the farm Braklaagte had raised no objections to the proposals of the Commission for Co-operation and Development in 1983. Reference was made to the "final decision of the Government" on 15 October 1984 to incorporate the farm Braklaagte into Bophuthatswana, the agreement concluded on 30 August 1985 with the State President of

/14.....

Bophuthatswana and that Parliament had amended Act 2 1980 during 1986 "(T)o enable the State President of the R S A to implement this decision - - -" Minister Viljoen in conclusion stated that if the Braklaagte tribal authority still wanted to discuss the matter he would grant them an interview.

In a departmental Memorandum, dated 24 November 1988, Mr Cilliers, the Deputy Director General of Development Aid, made certain recommendations to Minister Viljoen concerning the "noodsaaklikheid" that the farm Braklaagte should be transferred to the Minister of Education and Development Aid in trust on behalf of the Bahurutshe Ba Ga Moilwa tribe before 1 January 1989 and that it should be incorporated into Bophuthatswana. By an endorsement, dated 28 November 1988, in his own handwriting on the Memorandum Minister Viljoen approved the recommendations contained therein.

/15.....

Registration of the transfer of farm Braklaagte in trust as recommended was effected on 22 December 1988.

On 15 December 1988 a meeting took place between a delegation representing the Braklaagte community and Minister Viljoen accompanied by members of his staff. The delegation consisted of the appellant and some of his supporters assisted by their legal advisers. A Memorandum containing the reasons for the opposition of the Braklaagte community to the incorporation of the farm Braklaagte into Bophuthatswana was handed to Minister Viljoen. According to the minutes of the meeting full discussions were held. Minister Viljoen undertook without delay to consider all arguments advanced before steps would be taken in the matter although the Government also had problems "as decisions have already been accepted by the Government of Bophuthatswana and the R S A which will be difficult to change".

/16.....

The Rubicon was crossed when Proclamation R220 was signed on 20 December 1988 by the State President and Minister Viljoen. In doing so the State President had elected to exercise his discretionary power to incorporate the farm Braklaagte into Bophuthatswana with effect from 31 December 1988. As far as the State President was concerned the publication of Proclamation R220 in the Gazette on 30 December 1988 rendered the exercise of his discretionary power final and irreversible in respect of the farm Braklaagte.

Minister Viljoen in his letter, dated 27 December 1988, informed the appellant's attorneys that careful consideration had been given to the Memorandum handed to him as well as the arguments put forward by the delegation of the Braklaagte community on 15 December 1988. After outlining the history of the matter from the Government's point of view he disclosed that by presidential Proclamation

/17.....

the farm Braklaagte would be incorporated into Bophuthatswana as from 31 December 1988.

I now turn to consider the submissions made by Mr Unterhalter on behalf of the appellant. He contended that there was a fundamental objection to the exercise of the State President's discretion which he based on the following premises. In the first place the Government had taken a final decision on 15 October 1984 concerning the incorporation of the farm Braklaagte from which it was not prepared to deviate. The Government had accordingly fettered its discretion before the State President acquired on 30 April 1987 a vested statutory discretion in respect of the incorporation of the farm Braklaagte. Secondly, the State President by entering into an agreement with the State President of Bophuthatswana on 30 August 1985 fettered his discretion before he had even acquired the discretion on 30 April 1987.

Thirdly, Mr Unterhalter in para 3.8 of his written Heads of Argument contended as follows: "The incorporation of Braklaagte in 1988 was not preceded by the exercise of a discretion vesting in the First Respondent for the first time after Act 112 of 1986 came into operation. It was merely an administrative act to give effect to discretions and decisions already purportedly exercised and made before the legal power and duty to exercise such discretion came into existence."

In my judgment the fundamental objection contended for by Mr Unterhalter is manifestly unsound for the following reasons:

1. The finality of the Government's decision of 15 October 1984 should be seen in its proper setting in the historical background to the case. This decision was taken after the Commission for Co-operation and Development had canvassed during

1983 the opinions of interested persons as regards its proposal for the incorporation of the farm Braklaagte. No objections were, however, raised to its proposal by interested persons or parties, including the residents of the farm Braklaagte. The "finality" of the Government's decision of 15 October 1984 was actually of a relative nature which amounted to a reversal of its earlier policy to resettle the occupants of the farm Braklaagte in Bophuthatswana and to make the farm Braklaagte available for settlement by White farmers. In principle nothing precluded the Government from abandoning or altering its "final decision". Moreover, there was no nexus between the Government's "final decision" and the statutory discretion which vested in the State President on 30 April 1987. There

is nothing on record to indicate that the State President considered his statutory discretion to have been fettered by the Government's "final decision" of 15 October 1984. The submission that the decision of 15 October 1984 fettered the Government's discretion cannot prevail. The case turns on the exercise by the State President of his statutory discretion and not on the immutability of the Government's decision of 15 October 1984.

2. The aforementioned reversal of the Government's policy, viz. to incorporate the farm Braklaagte into Bophuthatswana, compelled the Government to take certain preparatory steps to bring Act 2 of 1980 into effect. In other words, the scene had to be prepared by the Government to make the incorporation of the farm Braklaagte feasible should

/21.....

the State President, after the farm Braklaagte as scheduled land became subject to the jurisdiction of his discretionary power, exercise his discretionary power in favour of the incorporation of the farm Braklaagte into Bophuthatswana.

Inasmuch as incorporation by agreement is a bilateral juristic act based on the consensus of both transferor and transferee, it became necessary to establish the attitude of Bophuthatswana on the question of incorporation. It was for this very purpose that the inter-State agreement of 30 August 1985 was concluded by the Government and the Government of Bophuthatswana. No date was fixed by the inter-State agreement for the incorporation of the farm Braklaagte. There was accordingly no nexus between the inter-State agreement with Bophuthatswana

/22.....

and the statutory discretion which vested in the State President on 30 April 1987. Contrary to what Mr Unterhalter contended for, the inter-State agreement did not fetter the statutory discretion of the State President. The latter never considered his statutory authority to have been fettered by the inter-State agreement.

In addition the Government had to expropriate those White farms which were located between the farm Braklaagte and the border of Bophuthatswana.

3. There is a fallacy in the reasoning underlying the contention of Mr Unterhalter as stated in para 3.8 of his written Heads of Argument. The factual position is that the incorporation of the farm Braklaagte by Proclamation R220 was preceded by

/23.....

the exercise of the State President's statutory discretion between the meeting of 15 December 1988 and the signing by him of the Proclamation on 20 December 1988. In his letter, dated 27 December 1988, Minister Viljoen wrote to the attorneys of the appellant as follows:

"With reference to the interview I had on 15 December 1988 with representatives of the Braklaagte community, I wish to inform you that careful consideration has been given to the memorandum you handed to me as well as the arguments put forward by the various spokesmen in the deputation."

See also para. 18 of Minister Viljoen's affidavit. The appellant, correctly in my view, never challenged the bona fides of Minister Viljoen. In my judgment the contention set out in para 3.8 of Mr Unterhalter's written Heads of Argument

is devoid of real substance.

Finally, Mr Unterhalter submitted that the State President failed to apply his mind to the relevant issue because he and Minister Viljoen merely administratively implemented a decision already taken by the Government on 15 October 1984. According to Mr Unterhalter complete finality had already been reached on 28 November 1988 when Minister Viljoen endorsed the departmental Memorandum. This submission is, however, based on several misconceptions. It overlooks the important fact that effect was only given to the departmental Memorandum on 22 December 1988, i.e. after the signing of Proclamation R220 on 20 December 1988. Moreover, it is abundantly clear from the sequence of relevant events, as stated supra, that the State President and Minister Viljoen did not blindly adhere to any previous decisions taken by the Government. Nor did they administratively implement

/25.....

decisions of the Government. Besides, the very fact that the meeting of 15 December 1988 was held to enable representations to be made on behalf of the Braklaagte community to Minister Viljoen regarding its grievances and opposition to the incorporation of the farm Braklaagte as contained in the Memorandum handed to Minister Viljoen; and the careful consideration thereafter given to the Memorandum and arguments advanced at the meeting as stated by Minister Viljoen, belie the submission that the State President had failed to apply his mind to the relevant issue. It also belies the submission that the State President and Minister Viljoen had merely administratively implemented previous decisions of the Government.

Mr Maritz on behalf of the respondents wisely did not argue the matters concerning the locus standi of the appellant and the prerogative powers of the State

President, as raised in the written Heads of Argument on behalf of the respondents.

All things considered, the appellant, in my judgment, has failed to establish the invalidity of Proclamation R220 in so far as it relates to the incorporation of the farm Braklaagte into Bophuthatswana .

In the result the appeal is dismissed with costs. Such costs are to include the costs of two counsel.

NESTADT JA
KUMLEBEN JA
F H GROSSKOPF JA
PREISS AJA

Concur.

C P JOUBERT J A.