B1b

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JAMES HAMUPANDA KAULUMA ..... First Appellant

BONAFATIUS HAUSHIKU ..... Second Appellant
KLEOFAS DUMENI ..... Third Appellant
THE ANGLICAN DIOCESE OF NAMIBIA ..... Fourth Appellant
THE ROMAN CATHOLIC CHURCH DIOCESE
OF WINDHOEK ..... Fifth Appellant
THE EVANGELICAL LUTHERAN CHURCH
IN NAMIBIA ..... Sixth Appellant

and

THE CABINET FOR THE INTERIM GOVERNMENT
OF SOUTH WEST AFRICA ..... First Respondent
THE MINISTER OF DEFENCE ..... Second Respondent
THE ADMINISTRATOR-GENERAL OF
SOUTH WEST AFRICA ..... Third Respondent

Coram: JOUBERT, HEFER, VIVIER, EKSTEEN JJA
et VILJOEN AJA

Heard: 5 September 1988

Delivered: 8 November 1988

JUDGMENT

JOUBERT, JA

/2....

On 16 January 1987 the Full Bench (composed of 5 members) of the Supreme Court of South West Africa dismissed, with costs, an application brought by the six appellants against the three respondents for an order declaring section 3(1)(a)(v) and (vi) of Proclamation AG 9 of 1977, (as amended) promulgated by the Administrator-General on 11 November 1977, as well as two so-called Orders, viz Order AG 26 of 1978 and Order AG 50 of 1979, issued by the Administrator-General pursuant to the provisions of section 3(1)(a)(v) and (vi) respectively of the said Proclamation, to be invalid and of no force and effect. With leave of the Court a quo the appellants now appeal to this Court against the whole of its judgment and order.

Invalidity of section 3(1)(a)(v) and (vi) of Proclamation AG 9 of 1977.

At all times relevant to the present inquiry

the South African Parliament was the sovereign legislative authority in and over the Territory known as South West Africa. See sec 37(1) of the South West Africa Constitution Act No 39 of 1968 (hereinafter referred to as "the Act"). As originally enacted sec 38(1) of the Act empowered the State President by proclamation in the Gazette and in the Official Gazette to make laws for South West Africa in relation to any matter in regard to which the Assembly for South West Africa could not make ordinances, Moreover, according to sec 38(2) a proclamation of the State President could not be repugnant to or inconsistent with an Act of the South African Parliament which applied in South West Africa. At that stage the State President obviously had limited non-plenary powers to legislate for South West Africa. An important development of the legislative powers of the State President took place when sec 38, as amended and substituted by sec 1 of the South

West Africa Constitution Amendment Act No 95 of 1977, came into operation on 1 July 1977. At that stage it provided in its new form 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) repeal or amend any legal provision, including this Act, except for the provisions of subsections (6) and (7) of this section, and any othe Act of Parliament in so far as it relates to or applies in the territory or is connected with the administra tion thereof or the administration of any matter by authority therein;

(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 term of paragraph(a).

/5.....

"(2): If any authority is by law made in terms of subsection (1) empowered to make laws, a law made by any such authority by virtue of that power, shall not be in force and effect until it has been approved by the State President.

"(3) - - - - - - - - - - - - - -

"(4) - - - - - - - - -- - - - - -

"(5) No Act of Parliament and no ordinance of the Assembly passed on or after the first day of November, 1951, shall apply in the Eastern Caprivi Zipfel, unless it is expressly declared so to apply.

"(6) Any proclamation issued under subsection (1) shall be laid on the Tables of the Senate and of the House of Assembly within fourteen days after promulgation thereof if Parliament is in ordinary session, or if Parliament is not in ordinary session, within fourteen days after the commencement of its next ensuing ordinary session,

and shall remain on the said Tables for a period of not less than twenty-eight consecutive days, and if Parliament is prorogued before the necessary twentyeight days have elapsed, such proclamation shall again be laid on the said Tables as aforesaid within fourteen days after the commencement of its next ensuing ordinary session.

"(7): If the Senate and the House of Assembly by resolutions passed in the same session (being a session during which a proclamation has been laid before Parliament in terms of subsection (6)) disapprove of any such proclamation or of any provision in any such proclamation, such proclamation or such provision thereof shall thereafter cease to be in force and effect to the extent to which it is so disapproved, but without prejudice to the validity of anything done in terms of such proclamation or of such provision thereof

/7.....

> up to the date upon which it so ceased to be of force and effect, or to any right, privilege, obligation or liability acquired, accrued or incurred as at the said date under and by virtue of such proclamation or such provision thereof."

In Binga v Cabinet for South West Africa and Others, 1988(3) SA 155 (A) at p 183G-184A this Court held that in the new sec 38(1), as quoted supra, the South African Parliament conferred on the State President full or plenary legislative powers in respect of South West Africa, which were as wide as those possessed by the South African Parliament itself, subject to the limitations imposed by the provisions of subsections (6) and (7) of sec 38. That is to say, the State President could not by means of sec 38(1)(a) over-ride the limitations upon his plenary legislative powers imposed by the provisions of subsections (6) and (7) of sec 38. The position of the State President's legislative

powers under sec 38 was therefore analogous to the plenary legislative powers possessed by provincial councils (until their demise on 1 July 1986 in terms of sec 2 of the Provincial Government Act No 69 of 1986) within the limits imposed by the South African Parliament. It follows that the validity of the exercise of the State President's plenary legislative powers could, like the legislation of the former provincial councils, be attacked as being ultra vires. His legislation could not, however, be invalid on the ground of being unreasonable or because it involved some restriction on the liberty of the subject or of his rights to property. See Rex v Dickson, 1934 AD 231 at p 233, Joyce & Mc Gregor Ltd v Cape Provincial Administration, 1946 AD 658 at p 669, Moreover, by conferring the plenary legislative powers on the State President the South African Parliament did not divest itself of its supreme legislative authority in respect of

South West Africa. Notwithstanding the conferment the supreme legislative authority of the South African Parliament remained unimpaired in respect of South West Africa and could be asserted at will.

Pursuant to the power given to him by sec 38(1) of the Act the State President on 19 August 1977 by Proclamation 180 of 1977 established the office of Administrator-General for South West Africa. On 19 August 1977 the Department of the Prime Minister published in the Gazette No 5719 Government Notice No 1666 stating that the State President had appointed Mr Justice M. T. Steyn as Administrator-General for South West Africa with effect from 1 September 1977.

On 19 August 1977 the State President promulgated Proclamation 181 of 1977 which provided as follows:

"Under section 38 of the South West Africa Constitution

Act, 1968 (Act 39 of 1968), I hereby empower the Administrator-General, subject to the provisions of subsection (2) of the said section 38 -

(1) to make laws, by proclamation in the Official Gazette of the Territory of South West Africa, for that territory;

and

(2) in any such law to repeal or amend any legal provision, including any Act of Parliament in so far as it relates to or applies in that territory or is connected with the administration thereof or the administration of any matter by any authority therein, save the said section 38."

In promulgating Proclamation 181 of 1977 the State President acted in pursuance of the powers granted him by the South African Parliament in sec 38 of the Act. These powers are contained in sec 38(1) and (2) of the Act. As I have already

indicated, this court in Binga's case supra held that the South African Parliament in sec 38 (1) of the Act conferred full or plenary legislative powers, subject to certain limitations, on the State President in respect of South West Africa. In terms of sec 38(2) of the Act the South African Parliament empowered the State President to confer upon "any authority" the power to make laws for South West Africa subject to his approval. The crucial question which now falls to be decided is whether or not the State President in turn by Proclamation 181 of 1977 conferred full or plenary legislative powers, subject to certain limitations, on the Administrator-General. In other words, did the State President as the recipient of full or plenary legislative powers, subject to certain limitations, from the South African Parliament in turn confer full or plenary legislative powers, subject to certain limitations, on the Administrator-General as a

third legislative authority (tertius)? The answer to this question is, in my judgment, to be sought in the intention of the South African Parliament as appears from sec 38(2) of the Act read in conjunction with the State President's intention as expressed in Proclamation 181 of 1977.

On behalf of the appellants Mr De Villiers in his written supplementaty heads of argument, as augmented by his oral argument in this Court, contended that subordinate or non-plenary legislative powers were conferred by the State President in Proclamation 181 of 1977 on the AdministratorGeneral.

His line of reasoning was that, while the South African Parliament remained the supreme legislature, the State President, on whom the South African Parliament conferred full or plenary legislative powers, as decided in Binga's case supra, retained his legislative powers in toto despite the promulgation of Proclamation 181 of 1977. These steps

in his line of reasoning up to this state are, in my judgment, sound. Mr De Villiers proceeded, however, to contend that the Administrator-General who required the assent of the State President to legislate had mere subordinate or non-plenary legislative powers. Accordingly, he contended that the Administrator-General as a third legislative authority (tertius) was a mere agent or delegate (delegatus) of the State President without full or plenary legislative powers.

In my judgment, this contention is not warranted by the terms of sec 38(2) of the Act read in conjunction with the empowering provisions of Proclamation 181 of 1977. The effect of sec 38(2) is that the rule delegatus delegari non potest does not apply to the State President in empowering a third legislative authority (tertius) to legislate in respect of South West Africa. Moreover, contrary to the contention of Mr De Villiers, the requirements of the

State President's assent as a limitation in the legislative powers of the third legislative authority (tertius) does not render such legislative powers non-plenary. Compare the position of the provincial councils which had plenary legislative powers to legislate on certain topics entrusted to them by the South African Parliament notwithstanding the requirement of the State President's assent in terms of secs 84(1) and 90(1) of the Republic of South Africa Constitution Act No 32 of 1961 in order to render their ordinances valid. See LAWSA, vol 21, s.v. Provincial Government, paras. 274, 275. Proclamation 181 of 1977 confers extremely wide legislative powers on the Administrator-General. His legislative powers to make laws for South West Africa, subject to certain limitations, include the power "to repeal or amend any legal provision, including any Act of Parliament in so far as it relates to or applies in that territory or is connected with

the administration thereof or the administration of any matter by any authority therein, save the said section 38." It is clear from the provisions of this Proclamation that the State President did not purport to confer on the Administrator-General greater legislative powers than he himself had. Moreover, the State President did not divest himself of his full or plenary legislative powers under sec 38 of the Act. In substance the legislative powers conferred on the Administrator-General, subject to the limitations contained in sec 38 of the Act, are as extensive as those of the South African Parliament itself. It follows that his legislative powers are full or plenary and not merely subordinate or non-plenary. Contrary to the contention of Mr De Villiers the Administrator-General is not a mere agent or delegate (delegatus) of the State President without full or plenary legislative powers.

To sum up the position of the legislatures:

at all relevant times to the present inquiry three legislatures have legislative powers in respect of South West Africa, viz.:

1. The South African Parliament as supreme legislature.
2. The State President with full or plenary legislative powers, subject to certain limitations.
3. The Administrator-General with full or plenary legislative powers, subject to certain limitations.

On 11 November 1977 the Administrator-eneral by virtue of the powers conferred on him by Proclamation 181 of 1977 promulgated in the Official Gazette Proclamation AG 9 of 1977 with the approval of the State President. Sec 3(1)(a)(v) thereof provides as follows:

> "The Administrator-General or any person acting on his authority may, in such manner as he may deem fit, issue an order -
> (i) - - - - - - - - - - - - - - - - -

(ii) - - - - - - - - - - - - - - - - - -

(iii) - - - - - - - - - - - - - - - - - -

(iv) - - - - - - - - - - - - - - - - - -

(v) prohibiting any person in a security district mentioned in the order, or any person at a place or in an area situated within a security district and indicated in the order, from being outside the boundary of a stand, lot or site or other place intended or normally used for human habitation, at any time during the night."

On 13 June 1978 the Administrator-General with the approval of the State President promulgated in the Official Gazette Proclamation AG 34 of 1978 which added the following subparagraph to section 3(1)(a) of Proclamation AG 9 of 1977, viz.:

(vi) prohibiting any person from putting in motion or driving or travelling by any vehicle or being in or upon any vehicle that is in motion, at any time during the night at any place within a security district mentioned in the order, or at any place within an area situated in a security district and indicated in the order."

Since sec 3(1)(a)(v) and (vi) of Proclamation AG 9 of 1977 (as amended by Proclamation AG 34 of 1977) fall within the ambit and scope of the full or plenary legislative powers of the Administrator-General which were exercised by him with the approval of the State President they are intra vires his powers. Moreover, its validity cannot be impugned on the grounds of unreasonableness or vagueness as set out in the written main heads of argument on behalf of the apppellants.

See by analogy the decided cases referred to supra in regard to the validity of ordinances made by provincial councils.

/19.....

Invalidity of Order AG 26 of 1978 and Order AG 50 of 1979.

In Government Notice AG 1 of 11 November 1977 the Administrator-General declared the provisions of secs 3, 4 and 5 of Proclamation AG 9 of 1977 (called the Security Districts Proclamation) applicable to certain districts including Owambo. The latter thereby became a security district as defined in sec 1 of Proclamation AG 9 of 1977. The Administrator-General also declared a certain area in the district of Owambo, as defined in the Schedule to the Government Notice, a prohibited area.

Order AG 26 of 1978 and Order AG 50 of 1979 are night-time curfew measures. Order AG 26 of 1978 issued by the Administrator-General pursuant to the enabling provisions of sec 3(1)(a)(vi) of Proclamation AG 9 of 1977, as inserted by sec 1(a) of Proclamation AG 34 of 1978, reads as follows:

/20.....

> "Under the powers vested in me by section 3 of the Security Districts Proclamation, 1977 (Proclamation AG 9 of 1977), I hereby order that no person shall put in motion, drive or travel by any vehicle, or be therein or thereon, at any time during the night in the district of Owambo without the permission in writing of a peace officer, as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977), or any officer of the security forces."

It was contended on behalf of the appellants that Order AG 26 of 1978 was invalid because it exceeded the empowering provisions of sec 3(1)(a)(vi) of Proclamation AG 9 of 1977. They empower the Administrator-General, or any person acting on his authority, to issue an order prohibiting (absolutely) any person from driving any vehicle or being in or upon any vehicle in motion by night in a security district. On comparing the

contents of Order AG 26 of 1978 with the wording of sec 3(1)(a)(vi) of Proclamation AG 9 of 1977 it would seem that they are virtually alike save for two variations. The first variation is a slight textual difference between their wording. Sec 3(1)(a)(vi) expressly mentions "any person- - being in or upon any vehicle that is in motion" (my underlining) whereas Order AG 26 of 1978 omits this description of the vehicle owing to the intromission of the phrase "or be therein or thereon" which qualifies "no person". Order AG 26 of 1978 prohibits any person to "put in motion, drive or travel by any vehicle, or be therein or thereon" (my underlining) from which it clearly appears that the prohibition is directed at putting a vehicle in motion or driving a vehicle or travelling by vehicle. That is to say, the prohibition relates to causing a vehicle to be in motion or to driving a vehicle or to travelling by vehicle while

the phrase "or be therein or thereon" according to the context refers to a person who is in or on a vehicle that is in motion or being driven or is travelling. There is accordingly, in my opinion, no difference in meaning occasioned by this slight textual difference between the wording of sec 3(1)(a)(vi) and that of Order AG 26 of 1978. The second variation is that whereas sec 3 (1)(a)(vi) empowers the imposition of an absolute prohibition as such, Order AG 26 of 1978 on the other hand also provides for an exemption in writing by a peace officer or an officer of the security forces. This exemption was obviously intended to relax the absolute prohibition by ameliorating any harshness that might be caused by a rigid and inflexible application of the prohibition without taking cognizance of unforeseen contingencies. In my opinion, it would be absurd to hold that the provision for the exemption in Order AG 26 of

/23.....

1978 rendered it ultra vires. Compare Rex v Dekeda, 1950(3) SA 583 (C) at p 586 C-H. The contention on behalf of the appellants that Order AG 26 of 1978 is invalid because it allegedly exceeded the powers conferred by sec 3(1)(a)(vi) is therefore without substance.

It remains to consider the validity of Order AG 50 of 1979 which was issued by the Administrator-General in pursuance of the enabling provisions of sec 3(1)(a)(v) of Proclamation AG 9 of 1977. Order AG 50 of 1979 reads as follows:

> "Under the powers vested in me by section 3 of the Security Districts Proclamation, 1977 (Proclamation AG 9 of 1977), I hereby order that no person shall be at any place in the district of Owambo outside the boundary of a stand, lot or site or other place intended

> or normally used for human habitation, at any time during the night without the permission in writing of a peace officer, as defined in section 1 of the Criminal Procedure Act 1977 (Act 51 of 1977), or any officer of the security forces."

It was contended on behalf of the appellants that Order AG 50 of 1979 was likewise invalid because it exceeded the empowering provisions of sec 3(1)(a)(v) of Proclamation AG 9 of 1977. The latter empowers the Administrator-General, or any person acting on his authority, to issue an order prohibiting (absolutely) any person from being outside the boundary of a stand, lot or site or other place intended or normally used for human habitation by night in an area situated within a security district. Save to make allowances for an exemption in writing, Order AG 50 of 1979 is couched in the ipsissima verba of the

enabling provisions of sec 3(1)(a)(v) of Proclamation AG 9 of 1977. The comments I made supra in connection with the identical exemption contained in Order AG 26 of 1978 are equally applicable here. It is not necessary to repeat these comments. The contention on behalf of the appellants that Order AG 50 of 1979 is invalid because it allegedly exceeded the enabling provisions of sec 3(1)(a)(v) of Proclamation AG 9 of 1977 is entirely without substance.

Since Order AG 50 of 1979 is worded identically with the provisions of sec 3 (1)(a)(v) of Proclamation AG 9 of 1977 (save for the inclusion of the valid exemption in writing) while Order AG 26 of 1978 is, practically speaking, almost identically worded with the enabling provisions of sec 3 (1)(a)(vi) of Proclamation AG 9 of 1977 (save for the inclusion of the valid exemption in writing) it follows that

/26.....

these two Orders, like their respective enabling subsections (v) and (vi) of sec 3(1)(a) of Proclamation AG 9 of 1977, cannot be invalidated on the alleged grounds of unreasonableness or vagueness as set out in the written main heads of argument on behalf of the appellants.

On the papers the respondents objected to the locus standi of the 4th, 5th and 6th appellants but this objection was abandoned at the commencement of the hearing in this Court.

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

C P JOUBERT JA.

HEFER JA)
VIVIER JA)
EKSTEEN JA) Concur.
VILJOEN AJA)