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185/87

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THEMBI MAKHASA Appellant

and

MINISTER OF LAW AND ORDER

LEBOWA GOVERNMENT Respondent

CORAM: RABIE, ACJ JANSEN,CORBETT,VAN HEERDEN,GROSSKOPF, JJA

HEARD: 16 May 1988

DELIVERED: 27 May 1988

J U D G M E N T

GROSSKOPF, JA

The question for decision in this appeal is whether the Lebowa Indemnity Act, no. 3 of 1986, is valid. In the Transvaal .....

Transvaal Provincial Division JURLEWIS J held that it was, and accordingly gave judgment in favour of the respondent.

With the leave of the Court a quo the matter now comes on appeal before us. This issue arose pursuant to a claim for damages in the Court a quo by the present appellant. As a result of admissions in the respondent's plea and of an agreement reached during the pre-trial conference, all the facts were common cause. They may be summarized as follows.

The appellant is an adult woman. On 21 July 1985 members of the Lebowa police force wrongly and intentionally assaulted and belittled her. In doing so, they injured and impaired her dignity and self-esteem and caused her certain

bodily .....

bodily injuries. As a consequence she sustained damages in the amount of R1 200,00. At all relevant times the said members of the Lebowa police force were servants of the respondent and were acting within the course and scope of their employment as such.

It was common cause in the Court a quo as well as on appeal that, but for the provisions of the Lebowa Indemnity Act, the appellant was entitled by virtue of the admitted facts set out above, to succeed in her claim against the respondent. The issue between the parties was expressed as follows in the pre-trial minute:

"3.

In defence of Plaintiff's claim, the Defendant relies solely on the provisions of the Lebowa Indemnity Act, No. 3 of 1986.

4.

The issue which remains in dispute between the parties and which is to be tried by the above Honourable Court shall be confined solely to the question of law being whether:

4.1 The Lebowa Indemnity Act, Act No. 3 of 1986 promulgated in the Official Gazette, Lebowa, No. 918 in Notice No. 1 of 1987 dated the 13th February 1987, has the force of law or not, and

4.2 in particular, in enacting the said Act, the Lebowa Legislative Assembly acted intra vires its legislative powers or not?"

It was also expressly stated that if the Act was intra vires it provided a complete defence to the appellant's claim. In particular the appellant abandoned her right to rebut the presumptions in sec. 1(3) of the Act (quoted hereunder) as well as her right to impugn the validity of the Act on any ground other than that the legislature acted

ultra .....

ultra vires in purporting to pass it.

It is necessary at the outset to set out the terms of the Lebowa Indemnity Act. They are as follows:

"ACT

To indemnify the government, its officers and all other persons acting under its or their authority in respect of acts, announcements, statements or information advised, commanded, ordered, directed, done, made or published in good faith for the prevention or suppression of internal disorder or the maintenance or restoration of the good order or public safety or essential services or the preservation of life or property in any part of Lebowa; and to provide for matters connected therewith.

BE IT ENACTED by the Lebowa Legislative Assembly, as follows:-

1.(1) No civil or criminal proceedings shall be instituted or continued in any court of law against -

(a) the Government of Lebowa; or

(b) any member of the Cabinet of Lebowa; or

(c) any officer or member of the Lebowa Police Force; or

(d) any person employed in the public service

of .....

of Lebowa; or

(e) any person acting under the authority or by the direction or with the approval of any member, officer or person mentioned in paragraph (b), (c) or (d),

by reason of any act, announcement, statement or information advised, commanded, ordered, directed, done, made or published by him in good faith during the period commencing on the first day of June 1985 and ending on the eleventh day of June 1986, with intent to prevent or suppress internal disorder in any part of Lebowa or to maintain or restore good order or public safety or essential services therein or to preserve life or property therein.

(2) Every such proceeding which may have been brought or commenced prior to the coming into operation of this Act, shall lapse and shall be deemed void.

(3) If in any proceedings instituted against the Government or against any member, officer or person mentioned in subsection (1)(b), (c), (d) or (e), the question arises whether any act, announcement, statement or information advised, commanded, ordered,

directed .....

directed, done, made or published by him was advised, commanded, ordered, directed, done, made or published by him in good faith with an intent mentioned in the subsection (1), it shall be presumed, until the contrary is proved, that such act, announcement, statement or information was advised, commanded, ordered, directed, done, made or published by him in good faith with such an intent.

(4) The provisions of this section shall apply also in respect of any default by any member, officer or person mentioned in subsection (1)(b), (c), (d) or (e) to comply with any provision of a law or regulation in connection with advising, commanding, ordering, directing or doing any such act aforesaid.

2. This Act shall be called the Lebowa Indemnity Act, 1986."

Lebowa is a self-governing territory created in terms of the National States Constitution Act, no. 21 of 1971. Its legislative powers are defined by that Act, both

affirmatively ...

affirmatively and negatively. The grant of legislative powers is contained in section 30(1) which, in so far as it is immediately relevant, authorizes the legislative assembly of a self-governing territory "to make laws not inconsistent with this Act with regard to all matters referred to in Schedule 1" (section 30(1)(a)). These powers are, however, limited by section 4, which excludes certain subjects from the competence of legislative assemblies established under the Act. Amongst these subjects are the amendment, repeal or substitution of the Act itself (section 4(j)).

The main question for decision is whether the Lebowa Indemnity Act falls under any of the matters referred to in the first schedule. However, before I deal with the specific

items .....

items in the Schedule relied upon by the respondent, I propose discussing the principles to be applied in interpreting the powers granted to the Lebowa Legislative Assembly. In argument before us it was common cause that these powers were, in the accepted terminology, original and not delegated. This distinction had its origin in British colonial history. The Queen v. Burah (1878) 3 App. Cas. 889 (P.C.) concerned an Act of the Indian legislature, at that time the Governor-General-in-Council, which granted certain powers to the Lieutenant-Governor of Bengal. The majority of the High Court of India had decided that this grant was invalid, relying on the principle of delegatus non delegare potest. This view was rejected by the Privy Council: LORD

SELBORNE .....

SELBORNE, delivering the judgment of the Privy Council, said the following at p. 904:

> "But their Lordships are of the opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. 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 powers of legislation, as large and of the same nature, as those of Parliament itself."

The same principles were later applied to the provinces of Canada (vide Hodge v. the Queen (1383) 9 App. Cas. 117 (P.C.).

See also Dixon, Devolution in Constitutional Law, 1984 TSAR 26 at 36, and Baxter, Administrative Law, at 491).

Hodge's .....

Hodge's case was followed in South Africa with respect to the legislative powers of provincial councils in Middelburg Municipality v. Gertzen 1914 AD 544. In that case, at p. 550, INNES CJ described a Canadian provincial legislature as "a body exercising within its jurisdiction not a delegated, but an original, authority". He pointed out that there were important differences between the Canadian constitution and our own, and that the provincial councils stood in a position of subordination to the Union Parliament, which had no parallel in Canada. He then continued (ibid):

> "But ... both bodies derive their powers from the same enactment, and restricted though the authority of our Councils may be, it is an original authority drawn from the South African Act, and not delegated

by .....

by the Union legislature. The constitutional position thus created is, in some respects, unique; but I entertain no doubt that a Provincial Council is a deliberative legislative body, and that its ordinances duly passed and assented to must be classed under the category of statutes, and not of mere by-laws or regulations. They have full force of law within the Province, so long as they are not repugnant to an Act of the Union Parliament (sec. 86)."

Later he said, referring to the definition of a provincial council's powers (at p. 552):

"The question is where to draw the line; and we shall best answer it, as it seems to me, by bearing in mind the general principle which underlies the position of the Council. As already pointed out, that body possesses under the South Africa Act legislative authority within its Province, but in respect of certain defined subjects only. And in deciding whether or not there has, in any particular instance, been an excess of that authority, regard must be had to the maxim 'Quando lex aliquid

alicui concedit, conceditur et id sine quo res ipsa esse non potest.' The principle therein embodied is of wide application, and bearing in mind the aim and scope of the South Africa Act, I think we may say that the legislative authority committed to the Council must (in the absence of manifest intent to the contrary) be taken to include all powers properly required to effect the purpose for which it was conferred."

And, at p. 552-3:

"I take it, however, that no powers would be implied which were not properly or reasonably ancillary to those expressly conferred. And it seems to me, therefore, that authority given to a Provincial Council to make ordinances in regard to any specified subject must (in the absence of clear intent to the contrary) be taken to include such legislative powers as are reasonably required to carry out the objects of the enactment, that is to deal fully and effectively with the subject assigned. The limits of such reasonable requirements would, of course, fall to be decided by the Court in each particular case."

At .....

At the outset of his judgment (at p. 349) INNES CJ mentioned the "difficulty of laying down a comprehensive test of validity", and contented himself "with a basis of investigation sufficient for the elucidation of the particular case before us", examining no more than "the general lines upon which an enquiry into the validity of ... ordinances should proceed". Nevertheless, the principles enunciated by him have been consistently applied by this Court ever since, although sometimes in somewhat different language. See Johannesburg Consolidated Investment Co Ltd v. Marshalls Township Syndicate Ltd 1917 AD 662 at 666; Orange Free State Provincial Administration v. Luyt 1930 AD 394 at 400-1; R v. Dickson 1934 AD 231 at 233; Joyce & McGregor Ltd v. Cape .....

Cape Provincial Administration 1946 AD 658 at 669, 672-3; Johannesburg City Council v. Chesterfield House 1952(3) SA 808 (A) at 823 F; S v. Le Grange 1962(3) SA 498 (A) at 504 G - 505 B; Brown v. Cape Divisional Council and Another 1979(1) SA 589 (A) at 602 C; Briadacres Investments Ltd v. Hart 1979(2) SA 922 (A) at 932 B-E.

In these cases it has often been emphasized that the validity of an ordinance depends on whether it deals with a matter which falls within the legislative competence of a provincial council, and not on the reasonableness or otherwise with which the council has dealt with it. Thus, in the Joyce & Mc Gregor case (supra at p. 672) SCHREINER JA said the following:

"... the .....

> "... the principle that implied powers are not to be extended beyond what is 'properly' or 'reasonably' 'required' or 'necessary' or 'incidental' or 'ancillary' - all these expressions are to be found in Gertzen's case (supra) and later decisions in this Court - does not permit the introduction, as it were by a side wind, of the test of reasonableness. ... It is the connection between the main purpose of the power and the content of the impugned provision that has to be considered, and once the connection is sufficiently close there is no jurisdiction in the Courts to examine the wisdom or policy of the exercise of the power."

Moreover, "the tendency in interpretation is towards liberality" and a Court will not lightly find that a provincial council has exceeded its powers (R. v. Dickson, supra, at p. 233. See also S. v. Le Grange (supra) at p. 504 G to 505 B).

The reasons given in Gertzen's case for recognizing the original authority of provincial councils were, apparent-

ly, the following. First, INNES CJ mentioned the fact that the provincial council and parliament both derived their powers from the same extraneous source, viz., the South Africa Act, which was a British statute (ibid., p. 555). Even in 1914 this was not strictly accurate, as INNES CJ himself recognized at pp. 549-50. Apart from the legislative powers granted to provincial councils by the South African Act, certain matters had been scheduled in the Financial Relations Act, 1913, as falling within the legislative ambit of the provincial councils if and when the Governor-General-in-Council might so decide and proclaim. In this regard INNES CJ said (at pp. 549-50):

"So that the power to make ordinances may in regard to .....

to different subjects flow along different channels. It may come directly from the South Africa Act, or through a special Union statute, or (within the limits of the Financial Relations Act) by way of a Government Proclamation. It is obvious, however, that the extent of the legislative authority was intended to be the same in each case, and indeed par. 12(2) of the Financial Relations Act expressly so provides. The correct view would seem to be that such authority is in reality always derived from the South Africa Act, even where it is the result of machinery which, though created by the statute, has been extraneously set in motion."

The fact that the South Africa Act was a British Act was however, as stated by Baxter, Administrative Law, at p. 491, "merely an accident of history". After 1910 the powers of provincial councils were frequently amended, and the relevant sections of the South Africa Act were themselves repealed by section 120 of the Republic of South Africa Constitution .....

stitution Act, no. 32 of 1961. Since then the legislative powers of provincial councils were, until their abolition by the Provincial Government Act, no. 69 of 1986, governed exclusively by South African statutes. It has never been, and could not be, suggested that this resulted in any change in the status of their legislation. The true position would appear to be that the provincial council's legislative powers were "original" because the legislatures which bestowed those powers, being the British and South African parliaments, wished it so. It is interesting to note that in The Queen v. Burah (supra), which, as far as I could ascertain, contained the first authoritative recognition of the plenary powers of colonial legislatures, the source of the Indian legislature's

powers .....

powers was, in principle, the same as that of provincial councils in South Africa after 1961 - legislative powers had been granted to the Indian legislature direct by the British Parliament, in the same way as in South Africa powers were granted to the Provinces direct by the South African Parliament.

Further reasons given by INNES CJ were that a provincial council was a "deliberative legislative body" having wide powers (ibid. p. 550). These features also, it seems to me, are important in so far as they bear on the legislative intent of the parliaments which established it and which bestowed powers on it.

I turn now to consider the position of legislative assemblies of self-governing territories established under

the .....

the National States Constitution Act. Their legislative powers, as I have said, are granted by section 30 of the Act read with the first schedule. In terms of section 37A of the Act the State President may from time to time by proclamation amend this schedule, and he has frequently done so. It would accordingly serve no purpose to compare the legislative competence of a legislative assembly with that previously exercised by a provincial council, since both have varied over the years. Suffice it to say that, generally speaking, the legislative powers of legislative assemblies would, at least, appear to be no less extensive. And in certain respects the status of a legislative assembly clearly exceeds that previously enjoyed by a provincial council.

Thus .....

Thus legislation of the South African Parliament on any matter reserved for the legislative assembly of a self-governing territory does not apply within that self-governing territory or in relation to its citizens in respect of whom the legislative assembly is empowered to make laws in so far as that matter is concerned (see section 30(3) of the National States Constitution Act). It seems to be accepted that this provision does not impose a binding restriction on the South African Parliament - see, e.g., Baxter, op.cit., p. 133; Ellison Kahn, Some Thoughts on the Competency of the Transkeian Legislative Assembly and the Sovereignty of the South African Parliament, 1963 SALJ 473; and LAWSA, vol. 5, Constitutional Law, para. 69 - but, be that as it may, it provides a strong indication of the light in which the South African Parliament regarded the legislative assemblies. Moreover, a legislative assembly is empowered,

within ...

within its sphere of competence, to amend or repeal any Act of Parliament (section 30(1)(b)). Provincial councils enjoyed no such powers - an ordinance was invalid if repugnant to an Act of Parliament (see section 86 of the South Africa Act, 1909, and section 85 of the Republic of South Africa Constitution Act (later entitled the Provincial Government Act), no. 32 of 1961). And a legislative assembly, unlike a provincial council, has certain extra-territorial powers (section 30(2) of the National States Constitution Act). The extent of a legislative assembly's powers consequently provides a strong indication that this body was intended to have original legislative powers.

This inference is supported by other features of the National States Constitution Act. While the Act itself

does .....

does not provide in detail for the composition of legislative assemblies but leaves this to be determined by the State President after consultation (section 2), one finds in practice that these bodies usually have a substantial elective component. See, in regard to Lebowa, Proclamation R 225 of 1972, sections 3 to 5. The executive government of a self-governing territory vests in a cabinet consisting of ministers drawn from members of the legislative assembly (section 29(1)). The State President may constitute a High Court for a self-governing territory (section 34). It has its own flag, to be flown side by side with the National Flag of the Republic (section 27) and may have a national anthem (section 28). All in all, the intention clearly was

to .....

to bestow upon a self-governing territory a large degree of status and autonomy, and if this feature is considered in conjunction with the extent of legislative powers granted, there can, in my view, be no doubt that its legislature was intended to have original powers of legislation. This is also the view of the editors of Steyn, Uitleg van Wette, 5th ed., p. 293, and Du Plessis, The Interpretation of Statutes, p. 12. See also Dixon, ubi sup. at p. 34, Ellison Kahn op. cit., p. 476, and Baxter, op. cit., pp. 190 to 193.

It is in the light of the above principles that the First Schedule to the National States Constitution Act must be interpreted to ascertain whether the Lebowa Indemnity Act falls within the powers there enumerated. The relevant features of the Lebowa Indemnity Act to which regard must

be .....

be had for this purpose, would appear to be the following:

1. An indemnity is provided to the following persons, namely, the government of Lebowa, any member of the cabinet of Lebowa, any officer or member of the Lebowa Police Force, any person employed in the public service of Lebowa, and any person acting under the authority or by the direction or with the approval of any of the aforegoing persons.

2. These person are indemnified against civil and criminal liability arising out of any act, announcement, statement or information advised, commanded, ordered, directed, done, made, or published subject to certain conditions.

3. These conditions are

(a) that the person acted in good faith;

(b) that the act, etc., was performed with the intent to prevent or suppress internal disorder in any part of Lebowa, or to maintain or restore good order or public safety or essential services therein or to preserve life or property therein.

4. The indemnity is given in respect of acts, etc., performed during the period 1 June 1985 to 11 June 1986. The Act was promulgated only on 13 February 1987 and thus provided an indemnity in respect of liability, criminal and civil, which had already accrued.

It was common cause that the first schedule to the

Act .....

Act contained no express power authorizing legislation such as the Lebowa Indemnity Act. The question then is, as expressed by SCHREINER JA in the above-quoted passage from the Joyce & Mc Gregor case (supra), whether such power may be regarded as "properly" or "reasonably" "required" or "necessary" or "incidental" or "ancillary" to any of the powers expressly granted.

Mr. Van der Byl, who appeared for the respondent, suggested that the relevant express powers were to be found in items 21 B, 21, 1 and 18 of the Schedule read in combination. These items set out the following matters in respect of which a legislative assembly has power to legislate:

21.B "... the establishment, control, organization and administration of a police force."

21. "The protection of life, persons and property and the prevention of cruelty to animals."

1. "The administration and control of depart-

ments established in terms of section 5(2)".

(Section 5(2) provides for the establishment

of departments with the approval of the State

President, to administer matters on which

the legislative council has the power to

legislate.)

18. "The appointment, conditions of service, dis-

cipline, retirement, discharge, and pension-

ing of ... officers and employees employed in

connection with the departments referred to

in section 5(2)".

If one takes items 21 B, 1 and 18 together, one

finds .....

finds that a legislative council has authority to legislate in respect of the departments of state, and the officials comprising them, which administer the matters falling under the government of a self-governing territory. Included among these departments is the police force. It was not suggested that the normal functioning of the state machinery would ever require an indemnity act granting ex post facto indemnity of the kind with which we are dealing here. Indeed, it was common cause in argument that statutes such as the Lebowa Indemnity Act, although not unprecedented in South Africa, are highly exceptional. The Lebowa Act closely follows the terms of the South African Indemnity Acts of 1961 (Act 61 of 1961) and 1977 (Act 13 of 1977), and, like those acts, was

clearly .....

clearly designed to deal ex post facto with liabilities incurred by the government and its servants during a period of public disorder. Such a statute drastically (although, fortunately, only temporarily) alters the fundamental relationship between, on the one hand, the state and its servants, and, on the other hand, the members of society generally. It not only frees the state and its servants from accountability for crimes and delicts committed by them, but does so ex post facto, thereby depriving members of the public of rights which have already accrued. Its nature and effect go,in my view, far beyond what may be regarded as incidental or ancillary to the power of establishing and regulating departments of state, or appointing and controlling ....

ling public servants. I accordingly do not consider that the power to pass the Lebowa Indemnity Act was reasonably ancillary to the matters set out in items 21 B, 18 and 1 of the Schedule.

Does item 21 make any difference to this conclusion? During argument it was suggested that this item, read together with the power to maintain a police force pursuant to item 21 B, was sufficient to empower the passing of the Indemnity Act, at least in relation to acts committed by police officers, which is all that is in issue in the present appeal. The argument in this regard may be formulated as follows: The legislative assembly may legislate in connection with activities performed by members of the police force in

order .....

order to protect lives, person and property. Consequently the legislative assembly may also legislate to indemnify policemen who have committed delicts and crimes in pursuing such activities. Although not without weight, this argument must, I think, be rejected for the reasons which follow.

In the first place, the Lebowa Indemnity Act seems to me to be much wider than is contemplated by this argument. I assume for present purposes that the Act may be severable, and therefore valid only in respect of acts committed by policemen. Even then the Act would grant indemnities not only in respect of acts performed with intent to "preserve life or property", but also in respect of those performed "with intent to prevent or suppress internal dis-

order .....

order", or "to maintain or restore good order or public safety or essential services". While some of these matters may have a close relationship with the protection of life, persons and property, this would not be true of all of them. Consider, for example, action taken to restore essential services.

But in my view the matter goes further than that. The effect of the Act, as I have said, is to liberate the state and its officials from the consequences of unlawful acts performed in terminating a period of public disorder. The reason why governments assume extensive powers to combat public disorder is not primarily to protect lives, persons or property, but to protect the safety and stability of the

necessarily

state .....

state. Of course the safety and stability of the state also have a bearing on the persons and property of its inhabitants, but it is an indirect one. That the primary purpose of the Lebowa Indemnity Act was not to protect lives, persons or property appears, inter alia, from the width of the indemnity. Much of the conduct protected by the Act may well have been performed, with one of the requisite forms of intent, by some of the persons mentioned, for purposes which have very little direct relationship with the protection of lives, persons or property. Indeed, in a sense the Act is inimical to the protection of lives, persons and property, in that it deprives persons of redress for unlawful killings, assaults or damage to property. The justification for this deprivation can only be that the Act serves a different purpose, namely the maintenance of order in the general public interest. This

confirms .....

confirms the view that the Act goes beyond what may be regarded as merely incidental to the protection of lives, persons or property. And if this is the essential nature of the Act, it does not avail the respondent to argue that the Act would have been authorized if it had been limited to certain unlawful acts committed by policemen, and no others. This would in effect be substituting an entirely different Act for the one which was promulgated, and would not, in my view, be justified by any theory of severability.

Mr. Van der Byl contended that, if the Lebowa Indemnity Act was ultra vires, the result would be that only the South African parliament could legislate in respect of such a matter, which would be undesirable and anomalous.

I .....

I do not agree. The limitation of the powers of the Lebowa Legislative Assembly necessarily entails that there are certain subjects which are beyond its competence and which must be dealt with by another legislative organ. (I leave aside the question whether it must necessarily be the South African Parliament, and whether the State President might not also be competent - see section 25 of the Black Administration Act, no. 38 of 1927, and section 30(4) of the National States Constitution Act). This inevitable consequence of the division of legislative powers does not seem more anomalous in the present case than in many others.

Then Mr. Van der Byl referred us to a number of indemnity provisions in provincial ordinances in support of

the proposition that provincial councils have commonly been considered to have the power to legislate on this topic. I do not propose analysing these provisions in detail. They all differ substantially from the Lebowa Indemnity Act. Moreover they were passed under different empowering legislation and, in any event, their validity has, to my knowledge, never been tested in any court. Consequently I do not think that they are of any assistance in the present matter.

In conclusion I should state briefly where I differ from the Court a quo. The essence of the judgment of the Court a quo was that the Lebowa police had the duty to concern themselves with internal security in Lebowa, and

that .....

that the power to pass the Lebowa Indemnity Act was incidental to such duty. However, this reasoning, it seems to me, loses sight of the true question to be answered. The question is whether the power to pass the Indemnity Act was incidental to the express powers granted to the Legislative Assembly. The Legislative Assembly had no express powers to legislate generally in respect of internal security, and consequently it serves no purpose to consider whether the passing of an indemnity act would have been ancillary to such power. And, for reasons which I have given, I do not think that the power to legislate in respect of a police force has by itself, as an incident, the power to pass an indemnity act like the present.

The .....

My conclusion is accordingly that a power to pass the Lebowa Indemnity Act was not incidental to any of the matters entrusted to the Lebowa Legislative Council by the First Schedule to the National States Constitution Act. In coming to this conclusion, I applied the ordinary principles laid down in Gertzen's case (supra) and the cases following thereon. I consequently do not find it necessary to express any view on a submission made by Mr. Trengove, who appeared for the appellant, that a more stringent test should be applied in the present case because, he said, the effect of the Lebowa Indemnity Act was to oust the jurisdiction of the Court and the power to achieve such a result should be granted in clear terms. Indeed, I express no

view on whether the Act does have this result, and if it did, whether the Court a quo would have been bound to apply it. Nor is it necessary to deal with his contention that the Act is invalid by reason of its extra-territorial operation or its inconsistency with sections 4 and 23 of the National States Constitution Act. On all these matters I express no opinion.

In the result the following order is made:

1. The appeal succeeds with costs, including the costs of two counsel, and, in so far as applicable, the costs of applying for leave to appeal in the Court a quo.

2. The order of the Court a quo is set aside and replaced by the following:

The defendant is ordered to pay the plaintiff an amount of .....

of R1 200,00 with costs, including the costs of two counsel.

E M GROSSKOPF, JA

RABIE, ACJ
JANSEN, JA
CORBETT, JA
VAN HEERDEN, JA
} Concur