B.b. 112/87

371/86/AV

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE GOVERNMENT OF LEBOWA — Appellant

AND

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA — 1st Respondent

THE GOVERNMENT OF KWA NDEBELE — 2nd Respondent

CORAM: RABIE, ACJ, JOUBERT, HEFER, GROSSKOPF, VIVIER, JJA

HEARD: 7 September 1987

DELIVERED: 29 September 1987

J U D G M E N T

GROSSKOPF, JA

The appellant applied in the Transvaal

Provincial .....

Provincial Division for an order declaring that the district of Moutse as defined in clause 2 of the schedule to Proclamation R 224 of 1972 forms part of the self-governing territory of Lebowa; and an order declaring Proclamations R 227 and R 228 of 1985 to be null and void and of no force and effect. The last-mentioned Proclamations were intended, broadly speaking, to incorporate the district of Moutse into the area of the Kwa Ndebele legislative assembly, and to effect amendments to the constitution of Lebowa which were consequential on the excision of Moutse from its territory. I deal later in greater detail with these Proclamations. The application came before VAN DYK J. He dismissed it with costs, but

granted .....

granted the applicant leave to appeal to this court.

It will be convenient to commence with a short historical survey. For this purpose I shall be referring to laws which have not only been amended from time to time, but which now bear different titles from those under which they were promulgated. Save where otherwise stated, my references will be to the legislation as amended up to the present, and to the titles currently in use.

For present purposes, the starting point is the Black Authorities Act, no 69 of 1951. This Act made provision for the establishment of Black tribal, community, regional and territorial authorities. It is not neces-

sary .....

sary to go into the respective powers and functions of these various authorities save to say that a territorial authority had more extensive powers than any of the others (sec. 7 of the Act), and exercised these powers over an area in which a number of the other authorities had been established (sec. 2 of the Act). By Government Notice R 1274 of 1962 the Lebowa Territorial Authority was established.

The evolution of Black authorities was taken a step further by the promulgation of the National States Constitution Act, no 21 of 1971 ("the 1971 Act"). Sec. 1 of this Act reads as follows:

> "(1) The State President may, after consultation by the Minister with a territorial authority, by proclamation in the Gazette establish a legislative assem-

bly .....

bly for the Black area for which that territorial authority has been established or for such area as modified by the State President by the said proclamation.

(2) The Black area for which a legislative assembly is established may consist of various Black areas, shall be defined in the proclamation referred to in subsection (1) and may, after consultation by the Minister with the executive council of the area concerned, be amended from time to time by the State President by proclamation in the Gazette."

Sections 2 and 5 of the Act authorize the State President to make provision by proclamation for the constitution of a legislative assembly and an executive council for an area defined pursuant to section 1. By Proclamation R 156 of 1971 the State President, acting in

terms .....

terms of sections 1,2 and 5 of the 1971 Act, established a legislative assembly, to be known as the Lebowa Legislative Assembly, for the area described in the schedule to the Proclamation. The Proclamation also laid down the manner in which the legislative assembly and the executive council for the area were to be constituted. According to the schedule, the area of the Lebowa Legislative Assembly was to consist of the areas of ten regional authorities listed in the schedule as items (a) to (j).

By Proclamation R 224 of 1972 the area of the Lebowa Legislative Assembly was amended pursuant to the above-quoted section 1(2) of the 1971 Act by the

substitution .....

substitution of an entirely new schedule. For convenience I shall hereafter, where appropriate, refer to this schedule as "the substituted schedule". In terms of the substituted schedule the territory of Lebowa was to consist of the areas described in five numbered paragraphs. The first paragraph listed a number of districts. The second read:

> "the area of the district of Moutse excluding the following farms: ..."

It is not necessary to set out the descriptions of the farms which were excluded from the district of Moutse, since nothing turns on this exclusion for present purposes. It is the area of Moutse as defined in paragraph 2 of the substituted schedule which forms the subject matter of the present dispute.

Paragraphs 3,4 and 5 define certain other

areas .....

areas which are not relevant for present purposes.

Shortly after the amendment of its area, the Lebowa Legislative Assembly underwent a change of status. To understand this change one has to refer again to certain provisions of the 1971 Act. Section 26(1) reads as follows:

> "The State President may, after consultation by the Minister with a legislative assembly, by proclamation in the Gazette declare that the area, as defined from time to time, for which that legislative assembly has been established, shall under the name mentioned in the proclamation be a self-governing territory within the Republic in accordance with the provisions of this Act."

Section 29 of the Act provides that the executive government of a self-governing territory is to vest

in .....

in a cabinet consisting of ministers drawn from the members of the legislative assembly of the territory. The powers of the legislative assembly of a self-governing territory are set out in section 30, read with the first schedule to the Act. These powers - which I need not detail - are more extensive than those enjoyed by a legislative assembly under section 3 of the Act.

To revert to the history of Lebowa: by Proclamation R 225 of 1972 the area for which the Lebowa Legislative Assembly had been established (i.e., the area described in the substituted schedule) was declared to be a self-governing territory with a constitution as set out

in .....

in the Proclamation. I shall refer to this Proclamation as the Lebowa Constitution Proclamation. It came into force on 2 October 1972.

After 1972 the area of Lebowa was changed from time to time. These changes were effected by amendments to the subsituted schedule pursuant to section 1(2) of the 1971 Act, which is quoted above. There were, inter alia, amendments in 1977,1978 and 1979. These call for no comment. The next purported amendment - by Proclamation R 210 of 1980 - was however of great importance in the present dispute. This Proclamation read as follows:

"AMENDMENT OF PROCLAMATION R. 156 OF 1971.-
EXCISION OF THE DISTRICT OF MOUTSE FROM

THE .....

THE AREA FOR WHICH THE LEBOWA LEGISLATIVE ASSEMBLY HAS BEEN ESTABLISHED

By virtue of the powers vested in me by section 1(2) of the National States Constitution Act,1971 (Act 21 of 1971), I hereby amend,with effect from 1 November 1980, Proclamation R 156 of 1971, by the deletion of paragraph (2) of the Schedule."

The intended effect of this Proclamation was, as indicated by the heading, to excise the district of Moutse from the area of Lebowa. The members of the government of Lebowa (the present appellant) were dissatisfied with this excision, and made it known that they considered the Proclamation invalid. In particular they contended that there had not been proper consultation as required by section 1(2) of the 1971 Act, and that the Proclamation was in any event invalid on legal grounds

with which I deal later.

The matter was then taken up by the legislature. Section 16 of the Laws on Co-operation and Development Act, no 102 of 1983 ("the 1983 Act") reads as follows:

> (1) The Schedule to Proclamation No. R.156 of 1971 is hereby amended by the deletion of paragraph (2).
> (2) Proclamation No. R.210 of 1980 is hereby repealed.
> (3) Subsections (1) and (2) shall be deemed to have come into operation on 1 November 1980."

1 November 1980, the date on which this provision was deemed to have come into operation was, it will have been noted, the date on which Proclamation R 210 of 1980 purported to take effect. The purpose of

section 16 of the 1983 Act was clearly to replace Proclamation R210 of 1980 with legislation having the same effect as that sought to be achieved by the Proclamation. The legislation obviously did not require prior consultation, as the Proclamation did, and consequently the dispute about whether there had been proper consultation fell away. However, some areas of dispute still remained. The present appellant contended that section 16 of the 1983 Act suffered from the same legal defect as Proclamation R 210 of 1980, viz., that it amended the substituted schedule to Proclamation R 156 of 1971 whereas what should have been amended in order to alter the area of Lebowa, so it was contended, was the Lebowa Constitution Proclamation, R 225 of 1972, by which the self-governing territory of Lebowa had been established.

Once more the legislature stepped in. The

Laws .....

Laws on Co-operation and Development Amendment Act, No 91 of 1985 ("the 1985 Act") was introduced, according to the long title, inter alia "to remove any possible doubt concerning the area of the self-governing territory of Lebowa". Section 9 of this Act contains an interpretation of the Lebowa Constitution Proclamation in order to settle the dispute about the excision (or purported excision) of Moutse. I deal with this section in detail later.

Provision had earlier been made in sections 17 and 18 of the 1983 Act for amendments to the constitution of Lebowa consequential on the excision of Moutse, which was one of the electoral divisions for the election of members of the legislative assembly. These sections of

the 1983 Act were brought into operation by Proclamation R 228 of 1985.

This concludes my resumé of events concerning Lebowa, and I turn now to Kwa Ndebele. The Kwa Ndebele Legislative Assembly was established, pursuant to sections 1,2 and 5 of the 1971 Act, by Proclamation R 205 of 1979. The area in respect of which the legislative assembly was established was defined in the first schedule to the Proclamation, and did not include the district of Moutse. Kwa Ndebele became a self-governing territory by virtue of Proclamation R 60 of 1981. Its area was defined as "the area described in Schedule 1 to Proclamation R 205 of 1979". By Proclamation R 227 of 1985

this Schedule I was amended by adding a paragraph to include the district of Moutse into the area of Kwa Ndebele.

The effect of these various legislative amendments to the territories of Lebowa and Kwa Ndebele, if valid, thus was to transfer the district of Moutse from Lebowa to Kwa Ndebele. It is the validity of this transfer which is in issue in the present appeal. The declarations which the appellant seeks are, as I indicated at the commencement of this judgment, firstly that the district of Moutse, as defined in clause 2 of the substituted schedule, forms part of the self-governing territory of Lebowa; and secondly that Proclamations R 227 and R 228 of 1985 are null and void. Pro-

clamation R 227, it will be recalled, incorporated Moutse into the area of Kwa Ndbele, and Proclamation R 288 in effect caused the constitution of Lebowa to be amended consequential upon the excision of Moutse from its area. The appellant did not launch an independent attack on the validity of these Proclamations but contended that they would have to be struck down if the appellant succeeded in its first claim, i.e., if this Court were to declare that Moutse still forms part of Lebowa.

It seems remarkable that the dispute about Moutse should still be open for debate where the legislature has twice, in 1983 and 1985, sought to determine it. It seems appropriate therefore to commence my consideration of the merits of this dispute by dealing with the most

recent .....

recent legislative attempt to resolve this issue, viz., section 9 of the 1985 Act.

Section 9 serves to interpret the Lebowa Constitution Proclamation, R 225 of 1972. In section 2 of the Proclamation the area of Lebowa is defined as the "area described in the Schedule to Proclamation R 156 of 1971". What section 9 of the 1985 Act does is to give a statutory meaning to this definition. The section reads as follows:

> "For the purpose of section 2 of the Lebowa Constitution Proclamation, 1972, any reference to the area for which the self-governing territory of Lebowa has been established, shall be interpreted as a reference to the area defined in the Schedule to Proclamation No. R.156 of 1971, as substituted by Proclamation No. R.224 of 1972 and amended by Proclamations Nos. R.126 of 1977, R.217 of 1978, R.247 of 1979, R.210 of 1980 (read with section 16

of the Laws on Co-operation and Development Amendment Act, 1983 (Act No. 102 of 1983)), R.123 of 1981 and R.35 of 1983, and as it may thereafter be amended under section 26 of the National States Constitution Act, 1971 (Act No. 21 of 1971)."

The section thus provides, broadly speaking, that the area of Lebowa should be understood to consist of the area defined in the substituted schedule as it was amended up to the date of the 1985 Act, and as it might be amended in the future. (I return later to future amendments). The amendments specifically mentioned in the section are firstly those of 1977, 1978 and 1979, which, as I have indicated above, have no bearing on the present matter. Then there is the reference to Proclamation R 210 of 1980 (read with section 16 of the 1983 Act). This is the crucial provision of

the section for present purposes. The further amendments mentioned in the section are also not relevant.

Section 9 of the 1985 Act consequently refers to the following provisions which are relevant to the inclusion or excision of Moutse: the substituted schedule, which contained a reference to Moutse in paragraph 2; Proclamation R 210 of 1980, which purported to delete paragraph 2 from the substituted schedule, and section 16 of the 1983 Act, which repealed Proclamation R 210 of 1980 but gave statutory effect to the deletion of paragraph 2 of the schedule. Consequently the net result of these amendments, if they are all given their full effect, was to delete paragraph 2 from the substituted schedule.

And .....

And it is the area defined in the schedule as thus amended which, in terms of section 9 of the 1985 Act, must be taken to be the area for which the self-governing territory of Lebowa was established.

Mr Gordon, who appeared for the appellant, sought to escape the above interpretation by relying on the brackets which enclose the reference to section 16 of the 1983 Act in section 9 of the 1985 Act. The effect of the brackets is, he said, that regard is to be had to section 16 only in so far as it qualifies Proclamation R 210 of 1980, and for no other purpose. Since the only effect which the 1983 Act had on Proclamation R 210 of 1980 was to repeal it, the result then is, he contended, that

the substituted schedule should be read for purposes of the 1985 Act as if it still contained paragraph 2 (since, according to the argument, section 16 (1) of the 1985 Act, which in effect re-enacted the Proclamation, was to be ignored because it did not qualify the Proclamation). The position would have been different, he said, if the reference to section 16 of the 1983 Act had not been placed in brackets, but if the parenthesis had been indicated in some other way, e.g., by placing the reference between commas or semi-colons. If that had been the punctuation used, section 16 of the 1983 Act would, for the purposes of section 9 of the 1985 Act, have had to be read together with

all the Proclamations mentioned in section 9, and would then have been given its full effect of not only repealing Proclamation R 210 of 1980, but also of replacing it with a legislative provision which removed the reference to Moutse from the substituted schedule.

Mr .....

Mr Gordon quoted no authority for the proposition that words in parenthesis were to be differently interpreted depending on whether the parenthesis was indicated by brackets rather than by commas or semi-colons. The lack of authority for this proposition is not surprising since punctuation is a matter to which little or no regard is had in the interpretation of statutes. In Duke of Devonshire and Others v. O'Connor (1890) 24 QBD 468 (CA) LORD ESHER M R said (at p. 478):

> "To my mind ... it is perfectly clear that in an Act of Parliament there are no such things as brackets any more than there are such things as stops."

This passage has been approved in South Africa. See e.g. Bosman's Trustee v. Land and Agricultural Bank of SA .....

SA and Registrar of Deeds, Vryburg 1916 CPD 47 at p. 54 and Sigcau v. Sigcau 1941 CPD 334 at p. 345. However, Steyn, Uitleg van Wette, 5th ed. at p. 150 disapproves of this view as being unrealistic. I need not come to any firm conclusion on the matter since it is at least clear that no sanctity attaches to punctuation - indeed, an interpretation supported only by the use of a particular punctuation mark must inevitably yield to one based on the intention of the legislature as it appears from the meaning of the words used read in their context. (Cf. S v. Yolelo 1981(1) SA 1002 (A) at p. 1011 A-B - a passage which deals with the related topic of the division of a section into paragraphs).

And .....

And our courts have shown no hesitation in ignoring brackets where the sense of a provision required it. See Swanepoel v. Bloemfontein Town Council 1950(3) SA 536 (O) at p. 541 B-G, De Beer v. Coetzee 1956(3) SA 263 (T) at pp. 267 D - 268 B, R v. Le Roux 1959(4) SA 342 (C) at p. 347 C-F and S v. Le Riche 1965(4) SA 757 (T) at p. 758 D-G. In the present case the use of the brackets would, according to Mr Gordon's argument, have the result that section 16 of the 1983 Act should, for the purpose of section 9 of the 1985 Act, be read as if it did nothing more than to repeal Proclamation R 210 of 1980; whereas if section 16 of the 1983 Act were read on its own it also in effect re-enacted the proclamation. It

seems .....

seems quite inconceivable that the legislature would have set out a list of the amendments to the substituted schedule but would have intended to ordain, merely by using brackets instead of commas or semi-colons, that one of the amendments which appears in the list should be disregarded. Assuming that in linguistic theory brackets can have such an effect on the meaning of words, I can do no better than to quote the following dictum by FRY LJ (Duke of Devonshire v. O'Connor (supra) at p. 483):

> "Now, whether brackets can or cannot be looked at if they appear on the Parliament Roll, I express no opinion; but ... in the present case ... I must read through them and pay no attention to them, for the sense is too strong for me to pause at these miserable brackets."

It .....

It follows, therefore, that section 9 of the 1985 Act legislatively interpreted the Lebowa Constitution Proclamation so as to exclude Moutse from the area of Lebowa. This conclusion would by itself be a complete answer to the appellant's claims. However, for completeness' sake I propose commenting briefly also on section 16 of the 1983 Act. Before doing so, I should, however, mention one last aspect of section 9 of the 1985 Act. As appears from its terms which I have quoted above, this section refers also to possible future amendments to the area of Lebowa, and expresses the contemplation that such amendments would be effected "under section 26" of the 1971 Act (in Afrikaans, "kragtens artikel 26"). It

was .....

was common cause in argument before us that section 26 of the 1971 Act does not grant any such powers of amendment and I express no view on the correct interpretation to be placed on the reference to that section.

I turn now to section 16 of the 1983 Act, and, in particular, the amendment which it effected to the substituted schedule by the deletion of paragraph 2 thereof which related to Moutse. The argument adduced on behalf of the appellant was that the substituted schedule served only to define the area of Lebowa prior to its becoming a self-governing territory. Once Lebowa achieved that status, so it was contended, the substituted schedule, and Proclamation R 156 of 1971 of which it formed a part,

became of historical interest only. Amendments to the schedule could therefore not affect the area of the self-governing territory of Lebowa.

An examination of the 1971 Act demonstrates, in my view, that this argument is fallacious. Moreover this Court has already interpreted the relevant provisions of the Act in a sense contrary to that put forward in the argument, as I shall show. I repeat briefly the effect of the relevant sections of the Act. Section 1, which I have quoted above, makes provision for the establishment of legislative assemblies in Black areas and for the defining of areas in respect of which such legislative assemblies would have legislative power. In sub-section (2)

there .....

there is provision for the amendment of such areas.

The transition to self-governing status is governed by section 26(1) of the 1971 Act. The area in respect of which self-governing powers may be granted is described in that sub-section as "the area, as defined from time to time, for which that legislative assembly has been established". Now the area for which the legislative assembly was established, is that defined in the Proclamation issued pursuant to section 1(1) of the 1971 Act. In terms of section 1(2) this area may "be amended from time to time" after consultation with the "executive

council .....

council" of the area concerned. And, in terms of section 29 of the 1971 Act, the provisions of the Act with regard to an executive council shall mutatis mutandis apply to a Cabinet of a self-governing territory. The effect of these provisions on the amendment of the area of a self-governing territory was expressed by this Court as follows in Government of the Republic of South Africa and Another v. Government of Kwa Zulu and Another 1983(1) SA 164 (A) at p. 199 H in fin:

> "The State President's power to amend an area which has been declared by him to be a self-governing territory is not unlimited, for, since such an area is an area for which a legislative assembly has been established in terms of the provisions of s 1(1), an amendment thereof may be made only after

consultation .....

> Consultation by the Minister with the Cabinet of the territory concerned: see s 1(2) read with s 29 of the 1971 Act."

(See also at p. 201 C-E and 206 D-G).

It is common cause that the above passages formed a part of the Court's ratio decidendi. However, Mr. Gordon suggested in argument before us that this point may possibly not have been pressed vigorously in the argument in the Kwa Zulu case. (It was common cause though that it had been debated in the heads of argument - see at pp. 176 H and 189 D to 190 F of the report). Be that as it may, this Court has given a considered judgment on the point in issue, and we should not depart from it unless, at the very least, we are satisfied that it is

clearly .....

clearly wrong. See the authorities quoted in Tucker's Land and Development Corporation (Pty) Ltd v. Strydom 1984(1) SA 1 (A) at pp. 16 G to 17 D. Far from being so satisfied, I consider the above passages from the Kwa Zulu case to be clearly correct in view of the unambiguous terms of the provisions which I have summarized.

My conclusion accordingly is that the area of Lebowa was, both before and after its transition to self-governing status, defined in the substituted schedule. When the legislature amended the schedule by section 16 of the 1983 Act it thereby altered the area of Lebowa. The nature of the alteration was, of course, to excise the district of Moutse.

To .....

To sum up: Section 16 of the 1983 Act served to excise Moutse from the area of the Lebowa self-governing territory. Section 9 of the 1985 Act thereafter provided a legislative interpretation of the area of the Lebowa self-governing territory which again, in effect, ordained that Moutse was to be regarded as excluded. It follows that the interpretation which the legislature placed on the Lebowa Constitution Proclamation was the one which I consider to be legally correct in any event.

For the reasons which I have given, the appellant is not entitled to the relief claimed by it.

The appeal is dismissed with costs, including the costs of two counsel.

E M GROSSKOPF, JA

RABIE, ACJ
JOUBERT, JA
HEFER, JA
VIVIER, JA
} Concur