

POWERS OF THE SUPREME CHIEF.

We asked the Law Advisers to express an opinion as to

- (A) whether the Governor-General as supreme Chief of all Natives in Natal, Transvaal and Orange Free State, has the power under section one of the Native Administration Act, 1927 :
- (1) To order Natives, particularly squatters, in urban centres and peri-urban areas, to remove from towns;
 - (2) to order Natives to live in such localities as the Supreme Chief may direct;
 - (3) to force Natives to observe such rules and regulations as he may prescribe for the health and well-being of the community in those localities;
 - (4) to force Natives to undertake such work as he may indicate to them; and
 - (5) in the case of Natives in regard to whom the provisions of section twenty-nine of Act No. 2 of 1945 have proved inadequate by reason of the restricted interpretation placed on this section by the Supreme Court and the consequent reluctance of judicial officers to make orders thereunder, as to whether such Natives could be ordered to undertake specified work, either in urban or rural areas, and to live in specified areas.
- (B) If, in the opinion of the Law Advisers, such action would be legal, we asked them to state -
- (i) what procedure should be followed;
 - (ii) whether orders would have to be issued to named individuals or whether such orders could be made applicable to classes of persons;
 - (iii) what sanctions there are to enforce any orders which the Supreme Chief may make or rules he may prescribe, and whether they consider such sanctions as adequate.

The gist of the Law Advisers opinion is the following :-

That while full administrative power over all Natives in the three provinces concerned has been vested in the Governor-General, and while in terms of section ten (1) of the Natal Code, neither the Supreme Court nor any other court of law shall have jurisdiction to question or pronounce upon the validity or legality of any act done, direction or order given or punishment inflicted by the Supreme Chief in the exercise of his powers, authorities, functions, rights, immunities and privileges, nevertheless these powers are not absolute but qualified (Siziba's Guardian versus Meseni (1894) 15 N.L.R. 237) in that while the Supreme Chief was not subject to the control of the Court for anything done within the scope of his office or by virtue of the various powers entrusted him the Supreme Court could nevertheless enquire into any act of the Supreme Chief brought before it on review, in order to ascertain whether such act was within the scope of his authority or the sphere of his duty.

If/...

If such act is within the powers, etc., of the Supreme Chief, it cannot be disturbed by the Court unless a clear case of injustice and illegality has been made out in a particular instance.

The question is, therefore, what the absolute powers of the Governor-General are.

This depends upon the powers exercised and enforced by any Supreme or Paramount Native Chief (except in so far as the powers and authorities of the Supreme Chief have been specifically defined in Act No. 38 of 1927 or in the Code, which powers and authorities are subject to the qualification explained above.

Now the powers of a Paramount Native Chief are not defined by statutory law and the only means there are of ascertaining what those powers are is by evidence, i.e. by means of the evidence, inter alia, of persons who are experienced in questions of Native law and custom (Mathibe versus Lieutenant-Governor (1907 T.S. 557)).

If, therefore, it can be established that according to Native law and custom the Paramount Native Chief has the power to act along the lines proposed, then effect may be given to that power, subject again to the rights of the Supreme Court as defined above.

DECIDED CASES.

Mokhatle and Others versus Union Government
(1926 A.D.)

A Paramount Native Chief and, therefore, the Supreme Chief, has the power, by virtue of Native law, to direct an individual to move his place of residence from one part of the country to another.

The case: Appellants, being members of a Native tribe in the Transvaal, were directed by an order issued by the Governor-General as Supreme Chief forthwith to leave a certain location or any land in the tribal ownership of the tribe, and not to return without permission of the Supreme Chief. The grounds of the order were stated to be that the appellants had consistently defied the authority of their Chief and had promoted dissension in the tribe, particularly in setting up and maintaining an unauthorised court or council, persisting in an attitude of insult and abuse towards the Chief, and in organising and encouraging opposition to the recognised tribal control.

In an action by appellants for a declaration that the order issued against them was null and void, and for damages :-

Held, on appeal, affirming the decision of the T.P.D. in favour of the defendant -

- (1) that a paramount chief can, according to Native law and custom, remove a recalcitrant or rebellious Native from his tribe or the tribal property;
- (2) that this power can be exercised without an investigation or trial of the Native or Natives removed;
- (3) that the Supreme Chief in making the order against appellants had not exercised criminal jurisdiction over them contrary to the provisions of section five of Act No. 4 of 1885, Transvaal;
- (4) that the expulsion of appellants, if without investigation or trial, was not in conflict with the general principles of civilisation recognised by the civilised world within the meaning of section two of Act No. 4 of 1885.

Confirmed.

Kotze, J.A. (P. 79) "... It is not necessary, in dealing with this question, to enquire into the precise extent and scope of the authority possessed by the Governor-General as Supreme Chief, in every instance.

It is sufficient, for the purpose of the present case, to observe that, by section thirteen of the Transvaal Act, the Governor-General or Supreme Chief is vested with the same powers as a paramount Native chief possessed under Native law and custom, and that he can exercise any of these powers provided they are not contrary to principles of European or western civilisation...."

P. 82. ".... It is no injustice or hardship to the Natives to be permitted to live under their own tribal government according to Native usages; and unless a clear case of injustice and illegality has been made out in a particular instance, the decision of the Supreme Chief according to Native law and custom, cannot be disturbed by the Court..."

2. Rex versus Molepo (1945 A.D.)

An order having been issued by the Governor-General under section four of Act 9 of 1929 directing a Native to remove himself from a magisterial district in the Transvaal to any district in that Province outside such district and four other named magisterial districts and not to enter such districts without the permission of the Secretary for Native Affairs, the Native was convicted of contravening the section by failing to comply with the order.

He appealed on the ground that the order was ultra vires.

Held - that though the order was too wide in specifying a whole magisterial district as the place from which the removal was directed, this did not invalidate the order, inasmuch as the section authorised a restriction on the movements of the person concerned to the place, province or district to which removal was ordered; that even if the place from which removal was directed had been limited to a location or other restricted area, the result would have been the same and that, therefore, the irregularity as to the place from which he was to remove himself was immaterial.

The question whether the jurisdiction of the T.P.D. to pronounce on the validity of such an order was ousted by section ten of the Natal Code of Native Law, was raised, but not decided.

The decision of the T.P.D. was confirmed.

Greenberg J.A. : "... It is unnecessary to give a decision on the contention advanced by the Crown that, by reason of section ten of the Natal Code of Native Law, no court of law is entitled to pronounce on the validity of the order; I shall do no more than associate myself with the remarks of the learned Judge a quo when he said : 'Bearing in mind the very serious consequences to the individual concerned that will ordinarily flow from an order of this type, it would, I imagine, only be with considerable reluctance that the Court would accept a view leading to these results'." (pp. 504-5)

3. Rex versus Mpanza (1946 A.D. 763)

A Native who is the holder of a registered letter of exemption from the operation of Native law issued to him under the provisions of Law 28 of 1865 (Natal) and by virtue of section thirty-one (3) of Act No. 38 of 1927 deemed to have been issued under Act No. 38 of 1927, is not subject to the provisions of section five (1)(b) of Act No. 38 of 1927 which, inter alia, confers upon the Governor-General a power to order the removal of a Native from any place to any other place.

The decision of the T.P.D. was reversed.

Watermeyer C.J. said: "... Now these powers (powers of the Supreme Chief) at any rate, so far as they consist of rights vested in the Supreme Chief to interfere, at his discretion, with the personal liberty of an individual Native to live where he chooses, are powers connected with Native tribal organisation and control and would appear to be provisions of Native customary law and not of the general law of South Africa applicable to the other inhabitants of the Union..... Consequently it would seem from these general considerations alone that the provisions of section five(1)(b) of Act No. 38 of 1927, though they appear in a Union Statute, are merely a re-enactment of a principle of Native Law" (P771).

And also ..."Again in section five (1)(b) itself, the power given to the Governor-General to remove a Native is coupled with the power to remove a tribe or portion of a tribe, and this collocation also indicates that the subject which is being dealt with in that section is Native law and that the persons amenable to it are Natives subject to Native law and not Natives who are exempt from the operation of Native law...."

(N.B. It seems, by implication, that the powers of the Supreme Chief will only operate in regard to Natives who are still, by virtue of their belonging to a specific tribe and therefore subject to the customary law of such tribe, subject to Native law. It seems extremely doubtful, therefore, if the Supreme Court, should it be called upon to make known its decision in this connection, would be prepared to regard Natives who are born and bred in the cities and towns, as being subject to Native tribal law and customs.)

4. Siziba's Guardian versus Meseni (1894) (15 N.L.R. 237).

One of the issues was :

"Section forty of the Code, of 1891, enacted that the Supreme Chief was not subject to any Court of Law in the Colony, 'for, or by reason of, any order or proclamation, or of any other act or matter whatsoever, committed, ordered, permitted or done, either personally or in Council'."

Held : That the irresponsibility conferred by this section was a qualified, not an absolute one, and that the true construction was that while the Supreme Chief was not subject to the control of the Court for anything done, even mistakenly, within the scope of his office or by virtue of the various powers entrusted to him, the

Supreme Court could nevertheless enquire into any act of the Supreme Chief brought before it on review, in order to ascertain whether such act was within the scope of his authority or the sphere of his duty.

The case was remitted to the Native High Court with a declaration that the award of the Supreme Chief, if invalid in law, does not bar that Court from entering upon a trial of the questions arising out of the summons in the action.

5. Mathibe versus Lieutenant-Governor (1907 T.S. 557)

Native Law and customs - Paramount Chief - Power to depose sub-chief - Governor's authority - Law 4 of 1885, section thirteen.

Section thirteen of Law 4 of 1885 empowered the Governor as paramount chief to exercise over all chiefs the authority which in accordance with Native laws and customs is given to any paramount chief, and to depose any chief found guilty of an act whereby the peace of the colony is endangered.

Held : That apart from the special power given by the second part of the section, the Governor had under the first part a general power to depose a Native chief on any of the grounds on which a paramount chief could do so; that where it was proved that by the law and customs of a Native tribe the paramount chief had power to depose a chief at will, the Governor had the same authority; and that the legality of his action in that respect could not be questioned on the ground that he had deposed such chief for insufficient reasons and without trial.

In this case, in order to decide what was meant by "the law and customs of a Native tribe" several experienced witnesses, both Native and European were called to give evidence.

6. Rex versus Mpafuri (1928 T.P.D. 609).

Native - Governor-General - Order for removal of Native from one place to another - Vagueness - Validity - Act No. 38 of 1927, sections one, five (1)(b), five (2).

Section five (1)(b) of Act No. 38 of 1927 provides that "the Governor-General may whenever he deems it expedient in the general public interest, order the removal of any Native from any place to any other place within the Union upon such conditions as he may determine".

The Governor-General issued on appellant an order stating : "By virtue of the powers conferred upon me by section five (1)(b) of Act No. 38 of 1927, I do hereby order you, the Native Munjedzi Mpafuri presently residing on Mpafuri's location in the district of Louis Trichardt forthwith to leave the location aforesaid and to remove to Crown land in section E in the district of Barberton as may be indicated to you by the Magistrate of Barberton, or alternatively to such place as may be prescribed by the Minister of Native Affairs."

Held/...

Held : That the order did not definitely specify the place to which accused was to remove, and was therefore invalid.

Krause, J (P. 612) : "... The power given to the Governor-General is certainly very drastic because a Native may possibly be removed without any opportunity being given to him to be heard in his defence. It is an order which may be despotically issued by the Governor-General, because the only thing that he has to consider in issuing such order is the fact that he deems it expedient in the general public interest to order such removal. That is the only limitation in so far as a single Native is concerned, which the Act places upon him in the exercise of his powers. It is a matter which is entirely in his own discretion, and he may exercise his discretion on informal evidence which is placed before him and not on such evidence as is adduced in a Court of Law; It seems to me that no Court would be justified in such circumstances in interfering with an order so made subject to certain limitations" (The limitations referred to are that where there is a clear case of injustice and illegality the Court can disturb the orders of the Governor-General.)

7. Rex versus Mabi and Others (1935 T.P.D. 408)

Removal Order - Act No. 38 of 1927 (as amended), sections five (1)(b), five (2) - Grounds for interference by Court - Unreasonableness.

Held : "The discretion conferred on the Governor-General by section five (1)(b) of Act No. 38 of 1927 (as amended) to order the removal of a Native from any place to any other place is an almost unlimited discretion, and the Court is not entitled to interfere with such an order solely on the ground of unreasonableness or of hardship occasioned thereby to the Native concerned, such as would be caused by lack of accommodation and lack of water at the place to which he is sent, or failure to pay him compensation."

The appeal against the above decision was dismissed.

The case. Six Natives were charged with a contravention of section five (2), by failing to comply with an order issued under section five (1)(b) of Act No. 38 of 1927.

An order under the hand of the Governor-General was given on 30th April, 1935, ordering the removal of the accused. Part of the order reads :-

"I do hereby order that within thirty days of the service of this order you, each of you, remove yourself with the members of your family dependant upon you from Chief Mabi's Location, Rustenburg, to the following places set opposite your names, there to reside....."

Mr. Oost: "Before the hon. the Minister sits down I would like to ask him a question, namely whether the Minister will be prepared to say something more about Native administration of justice under this Bill and in how far this Bill affects the administration of justice in Native areas. "

The Minister of Native Affairs: "I have already pointed out that the tribal authority, the chief-in-council, will obtain juridical powers, based on Native law. In that case we therefore again introduce the fundamental principle of the chief or headman's authority in this respect. Naturally there will be an appeal to the courts of law. When a Native chief-in-council should abuse his juridical powers, There will be an opportunity for investigation; there will be no danger of abuse. The administration of justice which there too (in the Native court or High Court) will have to be exercised, either by the Native Commissioner concerned or the higher courts to which such an appeal will go, will, however, have to take into account the Native law or customs on which the original verdict should have been based."

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