

EX PARTE PETER SINTHUMULE

O P I N I O N

1.

Consultants are leading members of the Bavenda tribe living in various districts of Louis Trichardt and Zoutpansberg in the Northern Transvaal, and include members of the family of one, Peter Sinthumule, eldest son of the late Chief.

2.

After the death of the late Chief in October 1939 his brothers and sisters held a meeting to appoint a new Chief and this was attended by the Paramount Chief of the tribe in accordance with native custom. The Native Commissioner of the area was notified in advance of the meeting's intention and he intimated his consent thereto. The ranks of chiefs and indunas, as well as that of the paramount chief, constituted the capacities of those who attended, and in the event the eldest son of the deceased (to whom we shall herein refer as "Peter") was chosen to succeed<sup>to</sup> the Chieftainship held, in his lifetime, by the deceased.

3.

This election as a result of the meeting was timeously intimated to the Native Commissioner for the area who stated his pleasure at the choice and called for a list of those who were parties to the appointment for the purpose of forwarding such list to the Native Affairs Department, Pretoria. The choice was unanimous.

4.

Thereafter, the Commissioner informed the leading representative of the tribe that the Government Department of Native ....

Native Affairs was maintaining that the choice had been made too soon and was premature and in conflict with an alleged custom to allow a delay of a few months or even a year to elapse before an appointment of a successor. Consultants challenged this to the Commissioner, alleging the proper custom to be for an immediate appointment and explaining delays on prior occasions as due to the native habit of withholding announcement of the death of the deceased to the members of the tribe for some time. The Commissioner's attitude was that the Department in Pretoria insisted on a delay of at least six months.

5.

It appears that in the interim of the ensuing period the Native Commissioner visited the particular branch of the tribe to make investigations (as he stated) and another individual, of whose official capacity nothing is known, also made some investigations. Some eight months elapsed during which period Peter and his uncle, brother of the late Chief, performed the necessary functions of chieftainship.

6.

We do not propose to deal with the details of the investigations, official and private, and the transactions which on the face of the statement of Peter's uncle would appear to have been somewhat devious, circuitous and certainly lacking in that candour which one would assume to be the necessary prerequisite of any dealings between the Government officials, exercising the trusteeship of natives, and the natives concerned. We are prepared to assume that the investigations were not properly conducted, that fallacious, false and scandalous inferences and conclusions were drawn therefrom by the parties who made them.

7.

The next step, in so far as Consultants are concerned ....

concerned, was that in November 1940, some leading representatives of the tribe were summoned to see the Native Commissioner in Louis Trichardt, the incumbent thereof having been changed in the interim, and the Chief Native Commissioner was also present. These representatives were then informed that although Peter had been elected unanimously, the Commissioner had made a grave mistake and that Peter could not succeed because of alleged scandalous conduct by him during his father's lifetime. No answer or explanation of this alleged reason was called for or given or permitted but the announcement was peremptorily made that one, George, was appointed Chief from that day on and that this was in accordance with a certain wish expressed by the deceased. In addition the leading representatives there summoned were informed that they were required to leave the location of the late Chief where they were still staying and were to live on a piece of land in Chirolwe in another vicinity (where they still are). They were cautioned not to leave this vicinity at all or to go anywhere else. They were given 30 days in which to carry out the order and would be arrested thereafter if found elsewhere.

8.

We are further prepared to accept that the alleged reason disqualifying Peter was and is wholly untrue and in any event, by native custom, would not disqualify him.

9.

In pursuance of the announcement, referred to above, some few days later other representatives of the tribe were summoned to the Native Commissioner's office, informed of George's appointment and were informed that they would not be permitted to speak or deal with the matter and were thus dismissed. The members of the tribe, we are instructed, do not regard the newly appointed George as their Chief and still, in accordance with their

own custom, look upon Peter as their Chief.

10.

Early in January of this year, on instructions from Consultants, the matter was taken up by their attorneys who shortly summarised the history of the matter as it had been given to them, in a letter addressed to the Native Commissioner at Louis Trichardt. They notified him that it had been assumed that whatever he had done or what had been done by his office had been done under the authority of the Minister for Native Affairs, asked for confirmation of this and for advices as to the statutory provisions under which the steps were taken. His attention was drawn to the hardships under which the expelled persons were then subsisting and suggested relief, thereof at least in the interim. The urgency of the whole matter was pressed upon him.

11.

The reply, which again hardly savours of a benevolent exercise of trusteeship over natives, somewhat curtly informed Consultants' attorneys that the new Chief George "had been installed" by the Governor-General in terms of Section 2(7) of the Native Administration Act No. 38 of 1927, after due and careful consideration of the circumstances involved. Consultants are referred to as "Peter and his co-deportees" and the bland statement is made that they are comfortably domiciled on a good farm with only very limited restrictions and any complaints, if only represented to the Commissioner would be given every consideration.

12.

A gratuitous addition to the terms of the letter was made to the effect that the Native Affairs Department, with its experience and knowledge, knew its own business; that the

matter .....

matter was administrative and involved no legal right.

13.

We are asked to advise whether the passing over of Peter and the appointment of George are valid and particularly whether the Governor-General has power under the Statute to delegate his own powers of removal and appointment of chiefs. Attention is also drawn to the terms of a Proclamation by the Governor General which include a provision excluding any power by the Courts of the land to intervene in such steps as he may take under the Act. We are also asked to advise as to whether the formalities requisite in law for the steps taken have been complied with. Finally we are asked to direct particular attention to the question of deportation to Chirolwe and what measures can be taken thereon.

14.

It is with regret that we have to advise, as our firm conclusion, that there is no way in which the passing over of Peter and the appointment of George can be challenged in law.

15.

The Governor-General is declared by Section 1 of Act 38 of 1927 to be the Supreme Chief of all natives in the Transvaal as well as in two other provinces, and in any part of the Transvaal is vested with all such powers and authorities as are from time to time vested in him in respect of natives in Natal. By Section 2(7) he is given power to recognise or appoint any person as a chief of a tribe or a location and, collaterally thereto, is authorised to make regulations specifying the powers and privileges of such chiefs. He may also depose any chief after the latter may have been so recognised

or appointed.

Our attention has not been drawn to any regulation (and it is highly unlikely that there would be any such), giving power to a chief to nominate in writing his successor or prescribing to anyone so nominated a preference over any other person, and we proceed on the assumption that any regulations made under Section 2(7) are not relevant to the present inquiry.

16.

The first point to be noted is that there is no provision whatsoever in the bald language in the statute vesting the above powers in the Governor-General, prescribing any procedure on his part or any particular formalities. There is no direction as to how he is to determine any appointment and the effect of the statutory provisions referred to is to give him complete and despotic arbitrary power.

The legal conclusion is that this is a purely administrative power and any step thereunder taken by the Governor-General himself is an administrative act of a kind which, even in the absence of express prohibition or exclusion under regulations, does not permit of the interference or intervention of any Court of law in respect of the merits of his decision.

17.

It can well be appreciated that Consultants feel it reasonable and logical to argue that native custom and an appointment of a chief by native custom should prevail or should be given consideration by the Governor-General in his determination of his choice. Unfortunately, however, the law is otherwise and has been determined to be so, even before the present Union Statute, by the highest Court in the land. In the case of Mathibe vs Union Government and Another 1925 A.D. 81 the

Appellate Division decided that in the Transvaal inasmuch as hereditary Native chieftainship had been abolished by Law 3 of 1876 and had not been revived, and inasmuch as by Law 4 of 1885 the power of appointing native chiefs was in the State President, the custom of appointment on the ground of hereditary title was no ground for the only son of a deposed native chief claiming a chieftainship. Under the then existing law it was held that the State President acting by and with the consent of the Executive Council, as provided in the statute, had an absolute discretion and that any native custom purporting or tending to derogate in any way from this power, had become in law obsolete and ineffectual. The abolition of the validity of native custom by the Old Transvaal law has not this day been rescinded. The effect of Section 147 of the South Africa Act was to place the Governor-General in Council in the same position as, under the old law the State President and His Executive Council and after him the Governor-Generals of the old Colonies before Union had been placed. By Act 38 of 1927 even the Governor-General's Council is dispensed with and as the law now stands the Governor-General alone has this absolute discretion.

18.

On the papers we cannot but assume that it is the Governor-General who has made the appointment. The Additional Native Commissioner's letter dated 7th January, 1942 says so. We can at once say we can find no authority given to the Governor-General to delegate his power of appointment. All subordinates to him, from the Minister of Native Affairs and the Secretary for Native Affairs and all officials of the Department down to the lowest Assistant Commissioner, have only power to carry out the orders and directions of the Governor-General .....

General as specified by him in which event who-ever carries out such orders or directions is regarded as his deputy or representative. This conclusion is derived by us as follows :

Section 1 of Act 38 of 1927, giving the Governor-General the same powers as he would have in respect of natives in Natal, read together with Section 24(1) of the same Act, empowers the Governor-General to amend the provisions of the Natal code of Native Law by proclamation. In respect of Transvaal natives his power under the Natal Native Code Law applies to them. The Natal Code of Native Law was amended and in terms of Section 3 thereof power was given to the subordinate officers of the Crown to carry his orders and directions into effect.

19.

Reverting to the present case, if the Governor-General delegated to anybody at all the power to make the present appointment it would be invalid. It would only be valid if he made the appointment and directed that it be carried into effect, in which case even the Assistant Native Commissioner could act in accordance with these directions. We must assume, in the absence of any evidence to the contrary, that the Governor-General did personally make the appointment and it is irrelevant whether he did so after receiving recommendations, advices, reports or any other form of representation, before he made the appointment, from any official or any private individual.

20.

There is no right vested in any individual native or group of natives giving title or claim to a right of hearing .  
Under  
~~Unless~~ analagous Sections of Act 38 of 1927 empowering the Governor-General to remove a native from one place to another whenever he deems it expedient (a matter to which we shall refer later) it has

been ....



been held that a power such as this empowers the Governor-General to issue an order despotically and in his own discretion without any opportunity being given to parties concerned to be heard in their own defence or to give any explanation. See Rex vs. Mpafuri 1928 T.P.D. 609 at 612. This has been reaffirmed on numerous occasions and in different branches of our statutory law. The only ground on which Consultants could in law raise complaint would be if the Governor-General did not in fact make the appointment himself but delegated to some other personage, however high, the making of the appointment. This follows from the principle laid down in such cases as Rex. vs Mbadala 1932 T.P.D. 161 and Rex vs Mashele 1934 T.P.D. 36, where a power of inquiry given to a Commissioner was held impossible of delegation to an Assistant Native Commissioner particularly having regard to the stringent nature of the power in issue.

21.

Section 10 (1) of Proclamation 168 of 1932 reads as follows :

"Neither the Supreme Court nor any Court of law shall have jurisdiction to question or pronounce upon the validity or of the legality of any act done, direction or order given ..... by the Supreme Chief in the exercise of his powers, authorities, functions, rights, immunities and privileges."

In our opinion, even apart from this, if the Governor-general personally made the appointment the Court could not interfere. On the bare language of this section in the proclamation a fortiori no Court could interfere.

But ...

But if the Governor-General did not make the appointment Section 10 would not apply and Court process would be available. We must except from this proposition that phrase in Section 10 of the Proclamation which means "direction or order given". But even then if the Governor-General delegated the power of appointment he would not be acting "in the exercise of his powers" as provided in the same Section, and the Court would have jurisdiction to interfere. That this is correct appears from the case of Sizaba's Guardian vs Meseni 15 N.L.R. 237 in which it was laid down that the absence of responsibility of the Governor-General to anybody was not so absolute as not to be qualified to this extent, that the Supreme Court could inquire into any act of the Supreme Chief brought before it on review to ascertain whether such act was within the scope of his authority.

22.

The only possible ground therefore on which Consultants could contemplate an attempt at obtaining relief by legal process would be if it could be shown that the Governor-General personally did not make the appointment of George.

23.

It is unfortunate for Consultants that as to the falsity (which we assume) of the reason for the Governor-General's step, its disregard of native custom and the prior election, the absence of any opportunity for representations or defence or explanation—none of them afford grounds for any approach to the Court for relief.

24.

In regard to procedure, the Native Natal Code, as amended by Proclamation 168 of 1932, prescribes various forms of procedure for conveying the Governor-General's decision.

It ....

It can be done by any authorised deputy down to a Native Commissioner or any other officer, duly authorised by the Governor-General or the Minister for Native Affairs. His order or direction can even be transmitted by telegram to any person so charged with the carrying out of his direction. Without going into details it is quite clear that in the absence of evidence to the contrary, the officer at Louis Trichardt must be assumed to have simply been the deputy, duly authorised, to carry out the Governor-General's order and direction of appointment of George, and that in conveying it personally as he did at Louis Trichardt all necessary procedure was duly complied with. If it was conveyed by the Assistant Native Commissioner, and not the Native Commissioner, then his authority would have to be derived from special appointment thereto and for the purpose by the Governor-General or the Minister for Native Affairs.

25.

The real difficulty confronting Consultants is that everything will be presumed, in the absence of evidence to the contrary, to have been correctly and properly carried out. There is nothing before us to warrant Consultants taking any steps in Court. It may be possible that opportunity can be found to ascertain what steps were taken and how they were taken, how the position was intimated to the Governor-General and whether he made a direct appointment, or did so by delegation. Apart from the facilities possibly available in Louis Trichardt, the representatives of the natives in the legislature, such as Senator Jones and the others who have been approached on behalf of Consultants, may be able, by interview with the Minister or Secretary for Native Affairs, to obtain enlightenment. It seems to us that the other grievances of Consultants in regard to the

whole .....

transaction such as the method of investigation, the false conclusion arrived at without hearing, the absence of opportunity of making representations, should be conveyed through the Parliamentary representatives. For this purpose we would suggest that in addition to the letter already sent to these representatives, a sworn statement by Ramablane, and sworn confirmation and corroboration by other persons in a position to do so, should be placed in the hands of such representatives with a view to their taking the matter up directly with the Minister for Native Affairs and failing satisfaction to afford them material for raising the matter for debate in Parliament.

26.

Before proceeding to the last issue it occurs to us that we have omitted to answer crisply the question of the Governor-General's power to exclude the jurisdiction of the Court by proclamation. In our opinion he can do so because by Section 24(1) of Act 30 of 1927 he is given unfetter<sup>ed</sup>/power to amend by proclamation the Natal Code. His amendment by Proclamation 168 of 1932 including this exclusion of the Courts is not out of cognisance with the Native Natal Code as it existed even prior thereto, because that included a provision excluding from cognisance of the Courts the actions of the Supreme Chief.

27.

It remains now to deal with the depositions. By Section 5(1)(b) of Act 38 of 1927 as amended by Section 4 of Act 9 of 1929 the Governor-General may whenever he deems it expedient in the general public interest, order the removal of any tribe or portion thereof, or order any native from any place to any other place, or to any province or district within the Union, upon such conditions as he may determine." This power, drastic as

it ...

it is, has been held absolute and unchallengeable and any act thereunder valid, in Mpafuri's case(cited above) and Rex versus Mabi and Others 1935 T.P.D. 408 . In the latter case it was held that the court could not interfere with any order of removal made under the section in issue, however unreasonable or whatever hardship be occasioned, even if the result be lack of accomodation and lack of water at the place to which a native is sent and a failure to provide for any form of compensation.

28.

In Section 5(1)(B) as amended, however, is included a proviso to the effect that in case a tribe objects to any such removal "no such order shall be given" unless the resolution approving of the removal has been adopted by both Houses of Parliament. It would follow, therefore, that the only remedy open to Consultants is to procure the objection of the tribe, in which event the matter will be aired by both Houses of Parliament and a thorough enquiry raised by debate may result in relief. There is no provision as to how the objection of the tribe is to be ascertained, arrived at or conveyed, but either or both the following methods are open, namely, a Petition signed by all or a majority of the tribe directed to the Governor-General and/or a series of meetings of the sections of the tribe, or of the whole tribe, passing resolutions for conveyance to the Governor General. Any such Petition or Resolution should make specific referenc~~e~~ to Section 5(1)(b) of Act 38 of 1927 as amended.

29.

Finally as in the case of the order of appointment of George as Chief, it seems to us that only the Governor-General may make the order and that some attempt should be made to investigate ....

investigate all the circumstances relating to the order for removal on the lines suggested in regard to the order of appointment. If he delegated this power the order would be invalid.

30.

We take the liberty of adding that it seems to us the best results would be obtained by utilising the services of the native representatives in the House and the Senate.

A. Shacksnovis.

Chambers,  
His Majesty's Buildings,  
Johannesburg.

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