

58/56

In the Supreme Court of South Africa  
In die Hooggeregshof van Suid-Afrika

(Appellate) DIVISION).  
AFDELING).

APPEAL IN CRIMINAL CASE.  
APPEL IN KRIMINELE SAAK.

LUCAS MZIMKULU

Appellant.

versus

THE QUEEN

Respondent.

Appellant's Attorney Senyath G. Respondent's Attorney Re Turner book 6 pg 1  
Prokureur van Appellant Senyath G. Prokureur van Respondent

Appellant's Advocate Franks Respondent's Advocate M. J. McKenzie, Q.C.  
Advokaat van Appellant Advokaat van Respondent

(Leave granted)  
Set down for hearing on: Thursday, 7th June, 1956  
Op die rol geplaas vir verhoor op: —

(TPD)  
1, 3, 5, 7, 9

(9.45 - 12.25) - C.A.V

— (Appellant's Advocate)

Constitution, J., Hooten, Steyn,  
Reynolds, & Frank, J.A.

Proceeds  
Regd. 14/6/56.

IN THE SUPREME COURT OF SOUTH AFRICA  
(Transvaal Provincial Division)

Delivered 9th April, 1956.

THE ATTORNEY-GENERAL OF THE TRANSVAAL Appellant

versus

LUCAS MZIMKULU

NESER, J.: Respondent was charged before a magistrate at Benoni with the offence of contravening Regulation No. 17 of Chapter I of Administrator's Notice No. 343 dated 30th April, 1952, at Daveyton Location, Benoni. That notice 10  
under the provisions of Section 38(5) of Act No. 25 of 1945 promulgated regulations being Location Regulations for the municipality of Benoni. The nature of the charge is not relevant.

Before pleading respondent contended that the charge disclosed no offence in that the regulations were ultra vires on the ground that in so far as Daveyton Location was concerned the regulations had not prior to promulgation been referred for consideration to a Native Advisory Board established for Daveyton Location. It was conceded 20  
that the regulations had not been referred for consultation to such Native Advisory Board. The Daveyton Location was established at a date after the 30th April, 1952. Respondent's contention was upheld by the magistrate and respondent was discharged.

The Attorney-General, in terms of Section 103(2) of Act No. 32 of 1944, noted an appeal against the decision of the magistrate on the ground that the magistrate erred in holding that the regulations of the Benoni municipi-

pality published under Administrator's Notice No. 343 dated 30th April, 1952, are invalid in so far as such regulations affect Daveyton Location.

The following are the relevant provisions of Act No. 25 of 1945. Section 21(1) provides:

"For every location or native village under the control of an urban local authority and, should the Minister, after consultation with the urban local authority concerned, so direct, for any portion of an urban area in which natives reside, there shall 10 be established by that urban local authority a native advisory board. The board shall consist of not less than three natives resident within the area of jurisdiction of the urban local authority in addition to a chairman, who may be a European....."

Section 21(2) provides:

"A native advisory board shall consider and report upon -

(i) any regulations which the urban local authority proposes to make or adopt under sub-section (3) 20 or (4) of section thirty-eight."

Section 21(2)(b) provides:

"A native advisory board may also recommend to the urban local authority the making or adoption of any regulations which it considers necessary or desirable in the interest of the natives in the urban area."

Section 21(3) reads:

"Where an urban local authority is required by or under sub-section (1) to establish one or more 30 native advisory boards, no regulation made or adopted by that urban local authority under sub-section

(3) or (4) of section thirty-eight shall be approved by the Administrator or by the Minister unless it has been referred for consideration to such native advisory board or boards and unless a report made in connection therewith by any such board within a reasonable period after the regulation was so referred to it, has been duly considered by the local authority."

Section 38(3) provides:

"An urban local authority may, by resolution...10  
make or adopt regulations not inconsistent with this  
Act, as to all or any of the following matters:

- (a) The terms and conditions of residence in locations, native villages and native hostels;
- (b) the management and control of locations.....
- (c) .....
- (d) The mode of election or selection of members of native advisory boards, ....."

And a number of other matters.

Section 38(5) provides:

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"No regulation made under the authority of subsection (3) or (4) shall be of force or effect until it has been approved by the Administrator and by the Minister and has been promulgated in the manner prescribed for the promulgation of regulations under the law governing such urban local authority."

It was conceded by respondent that in 1952 when the regulations were promulgated there was only one location in the Benoni municipality and that the advisory board of that location had been consulted as provided in Section 21(3). As appears from the wording of the regulations it was intended by the Benoni municipality that they should

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appl. to all locations under its control. The first provision in Chapter I is "The regulations in this Chapter shall apply to any area under the control of the Council which is a location or native village" and throughout the regulations there appear provisions as follows: "The regulations in this Chapter shall apply to any location under the control of the Council."

The simple question which arises is whether an urban local authority acting under the provisions of Section 38(3)(a) can make regulations only in regard to 10 locations which are established at the date of promulgation or whether it can make regulations to apply to locations already established and also to those that are established thereafter.

The magistrate relied strongly on the decision in Benoni Town Council v. Malela, 1930 T.P.D. 761, which dealt with a prior Act - No. 21 of 1923 - in which there were provisions similar to those in Sections 21 and 38 of the present Act. That decision is, however, of no assistance as Section 27 of that Act specifically required 20 that new regulations had to be promulgated within 12 months of the commencement of the Act. Such new regulations were promulgated without any Native Advisory Board having been consulted, and were held to be invalid.

The decision in Makhoane v. Klerksdorp Town Council, 1955(3) S.A. 202, did not deal with the question which has been raised in this appeal. Section 38(3) confers power on the urban local authority to make or adopt regulations as to the terms and conditions of residence in locations. When it does make such regulations it must 30 consult the advisory boards of such locations as are then

established. The Benoni municipality did so consult. Is it obliged whenever it establishes another location to establish an advisory board for that location and to consult with such board in regard to the existing regulations? There would appear to be no reason for such consultation, and there is furthermore nothing in the wording of the Act to indicate that such a procedure has to be followed.

The words "the terms and conditions of residence in locations" are certainly wide enough to cover locations in being and in locations thereafter established. The regulations in question are general and Mr. Weinberg, for respondent, was unable to point to any provision which would or could be applicable only to the existing location. The provisions in Section 21(3) also indicate that Native Advisory Boards need only be consulted if new regulations are being promulgated. The provision is:

"...no regulation made or adopted .... shall be approved by the Administrator .... unless it has been referred for consideration to such native advisory board or boards ....."

The provision that urban local authorities may adopt regulations indicates that a set of regulations will be prescribed which urban local authorities could adopt if they so wish. It can be inferred therefrom that one set of regulations might well apply to all locations. Furthermore, if respondent's contention is sound an urban local authority on establishing a new location would be obliged not only to consult the Native Advisory Board established for the new location but would also be obliged

to consult the existing native advisory boards in regard to regulations in connection with which they had already been consulted.

There is, in my opinion, no reason why an urban local authority should not, when making regulations, fix the terms and conditions of residence for all locations including such locations as are thereafter established. This is what the Benoni municipality did in the present case. There was no obligation in terms of the Act on the municipality to establish a Native Advisory Board 10 for the Daveyton location and to consult such board before the regulations already promulgated could apply to the Daveyton location. In my opinion the magistrate erred in discharging the respondent.

The Attorney-General's appeal is accordingly upheld.

(Sgd) V. H. NESER

JUDGE OF THE SUPREME COURT.

I. agree.

(Sgd) V. G. HIEMSTRA

ACTING JUDGE OF THE SUPREME COURT