IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

VICTORIA MWEUHANGA — Appellant

and

THE ADMINISTRATOR-GENERAL OF SOUTH WEST AFRICA — First Respondent

THE STATE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA — Second Respondent

THE ATTORNEY-GENERAL FOR SOUTH WEST AFRICA — Third Respondent

THE MINISTER OF DEFENCE — Fourth Respondent

CORAM: CORBETT, CJ, HOEXTER, E M GROSSKOPF, SMALBERGER JJA et NICHOLAS, AJA

HEARD: 19 February 1990

DELIVERED: 20 March 1990

J U D G M E N T

E M GROSSKOPF JA

This is an appeal against the refusal by the Supreme Court of South West Africa (MOUTON J) of an application to compel

the production of a document for the appellant's inspection in terms of Rule 35(12) read with Rule 30(5) of the Uniform Rules of Court. To understand the issues it is necessary to set out the background in some detail. It is as follows.

On 28 November 1985 the appellant's husband was killed by members of the South African Defence Force in Ovambo, South West Africa. The Attorney-General of South West Africa indicted four members of the South African Defence Force on a charge of the murder of the deceased. Thereafter the State President of the Republic of South Africa, purporting to act under section 103 ter of the Defence Act, no. 44 of 1957, authorized the Cabinet of the Interim Government for South West Africa, ("the Cabinet") to issue a certificate directing that the proceedings should not be continued.

This section, in so far as it is relevant for present purposes, reads as follows:

> "(4) If any proceedings have at any time been instituted in a court of law against the State, the State President, the Minister, a member of the South

African Defence Force or any other person in the service of the State and the State President is of the opinion -

(a) That the proceedings were instituted by reason of an act advised, commanded, ordered, directed or done in good faith by the State President, the Minister or a member of the South African Defence Force for the purposes of or in connection with the prevention or suppression of terrorism in an operational area; and

(b) that it is in the national interest that the proceedings shall not be continued,

he shall authorize the Minister of Justice to issue a certificate directing that the proceedings shall not be continued.

(5) The State President shall not authorize the Minister of Justice as contemplated in subsection (4) except after having considered a report by the Minister (scil., of Defence) setting forth the circumstances under which the act in question took place as well as the factors indicating that that act was advised, commanded, ordered, directed or done in good faith and for the purposes of or in connection with the prevention or suppression of terrorism in an operational area."

It is common cause that the function assigned to the Minister of Justice in this section was, at the time, exercisable in South West Africa by the Cabinet pursuant to the provisions of sec. 29 of Proclamation R 101 of 1985. The Cabinet, having

been advised that it had no alternative in law, issued the certificate on 27 June 1986 and the prosecution then terminated.

The appellant instituted proceedings on notice of motion in the Supreme Court of South West Africa for the setting aside of the certificate so as to enable the prosecution to proceed. She cited as respondents, inter alios, the Cabinet, the State President, and the Minister of Defence. For convenience I shall refer to these proceedings as "the main application". An issue in the main application was whether the State President had been furnished with a proper report by the Minister of Defence as required by section 103 ter (5) of the Defence Act. On behalf of the Minister of Defence an affidavit was filed by Col. P J de Klerk of the South African Defence Force. Col. de Klerk stated inter alia that he had been instructed to investigate whether the circumstances of the deceased's death fell within the terms of section 103 ter of the Defence Act. He came to the conclusion that action in terms of section 103 ter (4) of the Act was justified and, indeed, necessary. He

therefore prepared a report as contemplated by section 103 ter (5) for the consideration of the Minister of Defence. In his affidavit Col. de Klerk set out a summary of the report, but added that he did not consider it advisable in the public interest to attach the report itself to his affidavit. His draft report was signed by the Minister of Defence and submitted to the State President.

The then State President, Mr. P W Botha, filed an affidavit confirming the facts, in so far as they related to him, set out in Col. de Klerk's affidavit.

On receipt of Col. de Klerk's affidavit, the appellant gave notice in terms of Rule 35(12) of the Uniform Rules of Court requiring the Minister of Defence to produce for her inspection certain documents to which reference was made in Col. de Klerk's affidavit. Among these documents was "the 'report' purportedly in terms of Section 103 ter (5) ...". The Minister refused to produce this document "op grond daarvan dat gemelde verslag die veiligheid van die Staat raak en dat blootstelling daarvan die

veiligheid van die Staat nadelig sal raak". Thereafter, on 28 June 1988, the appellant applied on notice of motion for an order directing the Minister of Defence to comply forthwith with her above-mentioned notice, and to produce for her inspection certain documents, of which the only one still in issue is the report in terms of section 103 ter (5). I shall refer to this application as "the interlocutory application". In opposition to the interlocutory application Col. de Klerk filed an affidavit attaching an affidavit by the Minister of Defence said to have been made in terms of section 66 of the Internal Security Act, no. 74 of 1982 and section 29 of the General Law Amendment Act, no. 101 of 1969. The Minister's affidavit reads as follows:

> "BEËDIGDE VERKLARING IN TERME VAN ARTIKEL 66 VAN DIE WET OP BINNELANDSE VEILIGHEID, WET NO 74 VAN 1982 EN ARTIKEL 29 VAN DIE ALGEMENE REGSWYSIGINGSWET, WET NO. 101 VAN 1969
>
> Ek, die ondergetekende,
>
> MAGNUS ANDRE DE MERINDOL MALAN
>
> verklaar hiermee onder eed as volg:
>
> 1.
>
> Ek is die Minister van Verdediging van die Republiek van Suid-Afrika en die verantwoordelike Minister vir die doeleindes van Artikel 66 van die Wet op

Binnelandse Veiligheid, Wet No. 74 van 1982, en Artikel 29 van die Algemene Regswysigingswet, Wet No. 101 van 1969.

2.

Ek het in die onderhawige aangeleentheid op 7 Mei 1986 'n verslag ingevolge Artikel 103 ter(5) van die Verdedigingswet 44 van 1957 aan die Tweede Respondent (the State President) voorgelê. Ek het ook ter insae gehad 'n opsomming deur Kolonel PETRUS JACOBUS DE KLERK soos vervat in paragraaf 9 van sy beëdigde verklaring gedateer 27 Januarie 1988 in die aangeleentheid van VICTORIA MWEUHANGA en DIE KABINET VAN DIE TUSSENTYDSE REGERING VIR SUIDWES-AFRIKA EN ANDERE.

3.

Ek het persoonlik die bogemelde verslag en opsomming oorweeg en na my oordeel, raak die verslag, uitgesonderd die opsomming van Kolonel DE KLERK, die veiligheid van die Staat en sal die blootlegging van die volledige verslag, na my oordeel, die veiligheid van die Staat nadelig raak."

The appellant persisted with the interlocutory application. It came before MOUTON J, and was refused with costs.

In due course the main application was heard by a Full Court consisting of MOUTON, LEVY and HENDLER JJ. After hearing argument the Court granted the application and set aside the certificate purportedly issued in terms of section 103 ter of the

Defence Act, with certain ancillary relief. The judgment of the Court is reported as Mweuhanga v. Cabinet of the Interim Government of South West Africa and Others 1989(1) SA 976 (SWA).

The Cabinet and the State President applied for leave to appeal against the order given in the main application. The appellant in turn applied, conditionally on leave being granted in the main application, for leave to appeal against the order in the interlocutory application. All applications for leave to appeal were granted. However, the appeal in the main application was withdrawn on 15 February 1990. The reason for this was that Government Notice AG 16 of 9 February 1990 had declared a general amnesty in respect of persons "who while they were members of ... the South African Defence Force, including the South West African Territory Force, in the performance of their duties and functions in the territory have performed ... any act which amounts to a criminal offence ..." The appellants in the main application considered that this provision applied to the accused persons in respect of whom the State President had

purported to issue the certificate in terms of section 103 ter of the Defence Act, and that the validity of the certificate had consequently become academic.

In the result it is only the appeal in the interlocutory application which is before us. Initially the State President opposed this appeal, but he has withdrawn his opposition and the appeal is now unopposed. Of course, the mere fact that an appeal is unopposed does not release this Court from the duty of examining its merits. Before I do so, however, there are certain preliminary matters with which I should deal. First, the powers, duties, functions, rights and obligations of the Cabinet have now been transferred to the Administrator-General of South West Africa pursuant to section 38(4) read with sections 38(2)(b) and 6(1)(f) of Proclamation R101 of 1985 (see Proclamation R 13 of 1989). This transfer was confirmed by section 2 of Proclamation AG 16 of 1989. In terms of section 4 of the latter Proclamation the Administrator-General replaced the Cabinet as a party in all uncompleted proceedings, and

accordingly the Administrator-General was, at the inception of the hearing on appeal, substituted on the record for the Cabinet. Second, the appellant applied for condonation of the late lodging of the Notice of Appeal and Power of Attorney. The reason for the default, which was not a particularly serious one, was partly the appellant's absence in Angola at the crucial time, and partly an oversight by her attorney for which she is not to blame. No prejudice was caused to the respondents. In these circumstances condonation is granted.

I now turn to the merits of the appeal. It will be recalled that the affidavit by the Minister of Defence which was filed in the interlocutory application purported to be based on both section 66 of the Internal Security Act of 1982 and section 29 of the General Law Amendment Act of 1969. As appears from the judgment of the Court a quo, the appellant contended in that Court that neither of these Acts applied in South West Africa. The Court held that the Internal Security Act did not apply in South West Africa but that section 29 of the General Law

Amendment Act was in force there, although the latter section had, in so far as the Republic of South Africa was concerned, been repealed by section 73 of the Internal Security Act. The Court held further that the affidavit in terms of section 29 of the General Law Amendment Act was decisive of the interlocutory application, and that production of the report could not be ordered in the face of this affidavit. The Court did not deal expressly with a preliminary argument raised by the respondents before it, viz. that the appellant did not have locus standi to bring the interlocutory application. Inasmuch as the merits of the application were considered, one can perhaps infer that the Court was satisfied as to the appellant's locus standi. Be that as it may, none of the respondents appeared before us to attack the Court's attitude in this regard and I shall assume, without deciding, that the appellant had locus standi.

On appeal before us Mr. Gauntlett, for the appellant, accepted the Court's finding that section 29 of the General Law Amendment Act applied in South West Africa, but that the Internal

Security Act did not. I agree with this. Section 29(3) of the General Law Amendment Act specifically provides that the provisions of section 29 and any amendment thereof apply also in the territory of South West Africa. No corresponding provision is found in the Internal Security Act. And it is noteworthy that sub-sections 66(1) and (2) of the Internal Security Act correspond almost word for word with sub-sections 29(1) and (2) of the General Law Amendment Act (as substituted by section 25 of the General Law Amendment Act, no. 102 of 1972) save that the latter contain a reference to South West Africa whereas the former do not. The meaning and effect of this reference will be considered later, but its absence from section 66 of the Internal Security Act is a further indication that the latter act was not intended to apply in South West Africa.

I turn now to the interpretation and effect of section 29 of the General Law Amendment Act of 1969. Before I consider its terms it will be instructive to sketch briefly the background against which it was introduced. Prior to the decision of this

Court in Van der Linde v. Calitz 1967(2) SA 239 (A) the accepted view was, in the words of CORBETT JA in Minister van Justisie v. Alexander 1975(4) SA 530 (A) at p. 550 C-D:

> "... that evidence, particularly documentary evidence, which was otherwise relevant and liable to production in a court of law, should not be produced if the public interest required that it should be withheld. In the case of an official document in the possession of a State department, objection to its production on this ground, taken in proper form by the political head of the department concerned, was regarded by the Court as conclusive, unless, possibly, the Court was able to hold that the objection to production was frivolous or vexatious ..."

This situation was changed by Van der Linde v. Calitz (supra) and the decision of the House of Lords in Conway v. Rimmer 1968 AC 910. It was held in these cases that the Court retained a residual power to reject an objection that the disclosure or production of a document would be injurious or prejudicial to the public interest. For present purposes I need not consider the exact ambit of this residual power. The point to be made is that it clearly was this change in judicial philosophy which inspired the promulgation of section 29 of the

General Law Amendment Act of 1969. As initially introduced this section, broadly speaking, protected from disclosure in courts of law and similar tribunals information, or books or documents, "if a certificate purporting to have been signed by the Prime Minister or any person authorized thereto by him or purporting to have been signed by any other Minister is produced ... to the effect that the said (information, document etc.) affects the interests of the State or public security and that the disclosure thereof will, in the opinion of the Prime Minister or the said person so authorized or other Minister, as the case may be, be prejudicial to the interests of the State or public security."

Sub-section (2) preserved the common law with respect to disclosure of matters not affecting the interests of the State or public security.

It will be noted that the State privilege or public interest immunity created by this section was extremely wide. In the first place it was available not only to Ministers but also to any persons authorized by the Prime Minister. And,

secondly, it could be invoked in cases in which any of these persons was of the opinion that the disclosure would be prejudicial, not merely to public security, but also to the "interests of the State". The latter expression was undefined and had a wide potential ambit. Cf. Geldenhuys v. Pretorius 1971(2) SA 277 (O) at pp. 278 F to 280 D. In 1972 sub-sections 29(1) and (2) were replaced by the provisions which have at all material times since applied in South West Africa. They read as follows:

> "29. (1)Notwithstanding anything to the contrary in any law or the common law contained, no person shall be compelled and no person shall be permitted or ordered to give evidence or to furnish any information in any proceedings in any court of law or before any body or institution established by or under any law or before any commission as contemplated by the Commissions Act, 1947, as to any fact, matter or thing or as to any communication made to or by such person, and no book or document shall be produced in any such proceedings, if an affidavit purporting to have been signed by the Minister responsible in respect of such fact, matter, thing, communication, book or document, or, in the case of a provincial administration or the territory of South-West Africa, the Administrator concerned, is produced to the court of law, body, institution or commission concerned, to the effect that

> the said Minister or Administrator, as the case may be, has personally considered the said fact, matter, thing, communication, book or document; that in his opinion, it affects the security of the State and that disclosure thereof will, in his opinion, prejudicially affect the security of the State.
> (2) The provisions of subsection (1) shall not derogate from the provisions of any law or of the common law which do not compel or permit any person to give evidence or to furnish any information in any proceedings in any court of law or before any body or institution established by or under any law or before any commission as contemplated by the Commissions Act, 1947, as to any fact, matter or thing or as to any communication made to or by such person, or to produce any book or document, in connection with any matter other than that affecting the security of the State."

It will have been noticed that the provisions were substantially tightened up. The privilege can now be claimed only by "the Minister responsible in respect of such fact, matter, thing, communication, book or document, or, in the case of a provincial administration or the territory of South-West Africa, the Administrator concerned." Delegation is no longer possible, and the functionaries entitled to exercise this power are specified. And the only ground for claiming this privilege is that, in the opinion of the person claiming it, the fact,

matter etc. affects the security of the State, and disclosure thereof will prejudicially affect the security of the State. The amended sub-section (2) also makes it clear that the common law is retained in respect of matters other than those affecting the security of the State.

Mr. Gauntlett accepted that the affidavit in the present case was in a form which complied with section 29. He contended however that in the case of the Territory of South West Africa the affidavit must be signed by the Administrator. The Minister of Defence was not, so the argument proceeded, entitled to make the affidavit and invoke the privilege; only the Administrator could do so. It was unnecessary to decide, he said, who the proper authority was to exercise the powers of the Administrator in the changed constitutional circumstances prevailing at the time when this matter came before the Court since no affidavit was furnished by any person or authority other than the Minister of Defence, and he clearly could not be equated with the Administrator.

The question therefore is who, in relation to South West Africa, is the person entitled to invoke the privilege created by section 29 ? With that question in mind I turn now to the provisions of the section.

The purpose of section 29 (1) is to provide an immunity in respect of production of evidential material before a court or similar tribunal. Two types of evidential material are mentioned, namely, evidence or information as to facts, matters, things or communications, and, secondly, the production of books or documents. As far as the central government is concerned, the privilege may be claimed by "the Minister responsible in respect of such fact, matter, thing, communication, book or document." In its relevant sense the word "responsible" is defined in the Shorter Oxford Dictionary as "answerable, accountable; liable to be called to account." A Minister is responsible in this sense to Parliament and the public for the acts and omissions of his department. The Minister who is entitled to claim the privilege is accordingly, speaking broadly, the Minister who is at the head

of the department whose functions relate to the fact, matter etc. or the book or document which is in issue. I realize that this formulation is very broad, and that problems of demarcation or overlapping could arise, but fortunately there are no such problems in the present case. For present purposes the important point is only that the responsible Minister of whom the section speaks, is the Minister who, through his department, is responsible in a functional sense in respect of the fact, matter, document etc. And as a matter of common sense this must be so. It is the Minister whose department deals with a matter who is able to form the opinion that such a matter affects the security of the State and that its disclosure would prejudicially affect the security of the State.

This then is the position in regard to the central government. The section proceeds with the words "or, in the case of a provincial administration or the territory of South West Africa, the Administrator concerned ..." I deal first with the position of a provincial administration. If one reads the

relevant words in their context they present no difficulty. The section deals, up to that stage, with the central government's executive departments which, represented by their political heads, are responsible for the performance of certain functions. In this context "the case of" the provincial administration indicates a situation where the provincial administration's position is the same as that of the central government departments, i.e., it is the responsible authority in respect of the relevant function. The reason for this provision is obvious. The amended section, as I have noted, lays down how the heads of executive departments of the State can invoke the privilege created by the section. Since the provincial administrations perform important executive functions within their sphere of operations, it is natural that they are included.

This then brings me to South West Africa. In the section South West Africa is grouped together with the provincial administrations, and this is hardly surprising. Whatever the constitutional differences may have been between the provinces

and South West Africa, they had, at all relevant times, one feature in common which is of decisive importance for present purposes. This feature is that their administrations were divided ones. Certain governmental functions were performed in the provinces and South West Africa by the central government in the course of governing the country as a whole (including South West Africa) whereas others were performed by the local administrations (see e.g. the South-West Africa Constitution Act, no. 39 of 1968, and in particular, sections 22 and 38). There was therefore a need for the head of the administration of South West Africa (at that stage the Administrator) to be granted the same rights in respect of his administration as were granted to the heads of the provincial administrations and the government departments. The fact that, in section 29, South West Africa is included without comment with the provincial administrations suggests that this indeed was what was intended. However, Mr. Gauntlett points out that there is a difference in the wording. Whereas the act speaks of "a provincial administration" it refers

to the "territory of South-West Africa". A territory, he contends, cannot be responsible for governmental actions, and therefore the section must mean something different in reference to South West Africa from what it does in reference to the provincial administrations.

Now, of course, a possible explanation for this wording is simply that the draftsman did not repeat the word "administration" with respect to South West Africa: in other words, that he meant "in the case of a provincial administration or the administration of the territory of South West Africa". Elliptical expressions of this sort are, as we know, quite common. This possibility gains added force if one considers possible alternative meanings of the reference to South West Africa. In his written heads of argument Mr. Gauntlett contended that "where as a matter of territorial jurisdiction South West Africa is 'concerned', its administrator is the relevant authority". This contention raises the question: when is South West Africa concerned as a matter of territorial jurisdiction?

It can hardly be suggested, and was not in fact suggested, that this happens whenever the performance of a governmental action affects the territory or its inhabitants, since this would cover a large part of the central government's activities. At one stage Mr. Gauntlett suggested that the test was whether the proceedings in which privilege was claimed were conducted in South West Africa. This would, however, mean that governmental actions of the administration of South West Africa could not be protected from disclosure before a tribunal in any other part of the country, and Mr. Gauntlett later accepted that the place where the privilege is claimed, could not be decisive. In the result the appellant's argument did not attribute any clear meaning to the expression "in the case of ... the territory of South West Africa", and a great deal of extensive interpretation would be required to ascribe a sensible meaning to it which would afford the Administrator of South West Africa greater powers than his counterparts in the provinces. I conclude, therefore, that there was no intention to distinguish between the various

provinces on the one hand, and South West Africa on the other, and that the power of an Administrator of any of these territories to invoke the privilege was limited to matters falling under the authority of his administration. As I have indicated, this result is achieved by simply reading the word "administration" as also being implied in respect of South West Africa. In the present matter the affidavit signed by the Minister of Defence clearly related to a matter falling under the Department of Defence and not under the administration of South West Africa. The Minister of Defence was, accordingly, the proper person to make this affidavit.

In an alternative argument appellant's counsel contended that the Minister's affidavit did not establish a privilege in respect of the whole report, but only in respect of parts, and that the rest of the report should be ordered to be produced. This contention is based on the following facts.

It will be recalled that Col. de Klerk filed an affidavit in the main application in which he summarised the

Minister's report, but declined to attach the report itself because, he said, he did not consider it advisable in the public interest to do so. In paragraph 2 of his affidavit in terms of section 29 of the General Law Amendment Act the Minister states that he submitted a report to the State President, and that he has had sight of the summary of the report contained in Col. de Klerk's above mentioned affidavit. In paragraph 3 he then expresses the opinion that the summary could safely be disclosed, but that disclosure of "die volledige verslag" would prejudicially affect the security of the State. Now by the complete report ("die volledige verslag") is clearly meant the report itself, as distinct from Col. de Klerk's summary. There is no warrant for reading the affidavit as suggesting that there are parts of the report which, in the Minister's opinion, could be disclosed without prejudice to the security of the State.

In the appellant's heads of argument the contention is advanced that the State President and Minister of Defence have, by providing Col. de Klerk's summary of the report, waived any

right they may have had to invoke State privilege in respect of the report as a whole. However, in argument before us Mr. Gauntlett made it clear that this contention was intended only as an answer to a possible claim by the respondents to an immunity or privilege under the common law,as distinct from the privilege allowed by section 29 of the General Law Amendment Act. Since my view is that section 29 applies, it is consequently not necessary to deal with this argument.

In the result I consider that the affidavit by the Minister of Defence complies with the requirements of section 29 of the General Laws Amendment Act, no. 101 of 1969, and that the production of the report for inspection by the appellant was therefore prohibited.

The following orders are made

1. Condonation is granted of the late lodging of the Notice of Appeal and Power of Attorney.

2. The appeal is dismissed with costs.

E M GROSSKOPF, JA

CORBETT, CJ
HOEXTER, JA Concur
SMALBERGER, JA
NICHOLAS, AJA