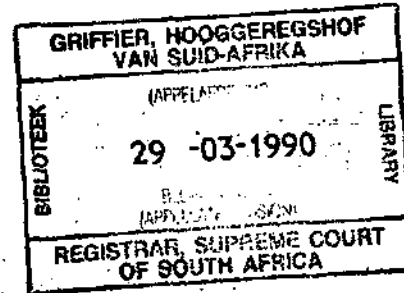


Case No: 522/88
whn



ADMINISTRATOR OF THE PROVINCE OF

THE CAPE OF GOOD HOPE 1st Appellant

CHAIRMAN OF THE DEMARCATION BOARD

FOR LOCAL GOVERNMENT AREAS 2nd Appellant

and

IKAPA TOWN COUNCIL Respondent

JOUBERT JA.

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

ADMINISTRATOR OF THE PROVINCE OF

THE CAPE OF GOOD HOPE 1st Appellant

CHAIRMAN OF THE DEMARCATION BOARD

FOR LOCAL GOVERNMENT AREAS 2nd Appellant

and

IKAPA TOWN COUNCIL Respondent

Coram: JOUBERT, HOEXTER, SMALBERGER, KUMLEBEN JJA

et NIENABER AJA.

Heard: 16 February 1990

Delivered: 29 March 1990

JUDGMENT

JOUBERT JA:

/The

The respondent Ikapa Town Council ("Ikapa"), formerly known as the Cape Town Town Committee, is a local authority established in terms of the Black Local Authorities Act 102 of 1982 ("the 1982 Act"). Its area of jurisdiction comprises the Black residential areas of Langa, Guguletu, Nyanga and Khayelitsha in the Cape Peninsula. Section 2(2)(b) of the 1982 Act empowers the Administrator of the Cape Province ("the Administrator") after consultation with the Minister of Constitutional Development and Planning ("the Minister") inter alia to alter the demarcation of the area of jurisdiction of a local authority, subject to prior consultation with the local authority concerned. In exercising this power the Administrator is obliged to comply with the provisions of sections 7 F and 7 G of the Promotion of Local Government Affairs Act 91 of 1983 ("the 1983 Act"). Moreover, whenever the Administrator exercises this power

he must do so in accordance with the general directives of the Minister (section 17 A(1) of the 1983 Act). In the instant matter the Minister's general directives prescribing the criteria, norms and standards to be considered by the Administrator in exercising his aforementioned power, were published on 24 May 1985 by Government Notice No R 1111 in Gazette No 9751 (Annexure R M N 7, Record vol 2 p 84-85).

The Administrator is the first appellant (the first respondent in the Court a quo).

The Demarcation Board for Local Government Areas is a body established in terms of section 7 A of the 1983 Act. The second appellant (the third respondent in the Court a quo) is the Chairman of the Demarcation Board for Local Government. For the sake of convenience I shall refer to the latter as "the Demarcation Board".

On 27 April 1988 the Administrator in

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terms of section 7 F (1)(a) of the 1983 Act requested the Demarcation Board in writing to advise him regarding the desirability or otherwise of:

- (i) excising from Ikapa's area of jurisdiction that portion of Khayelitsha then falling within such area, and
- (ii) demarcating portion of the excised area, together with other parts of Khayelitsha, as the area of jurisdiction of a proposed new local authority.

The Administrator stated that from time to time he had received requests from leaders in the Khayelitsha area to have a separate local authority for the area.

Moreover, in two annexures to his letter the Administrator furnished certain information in pursuance of the general directives in Government Notice 1111. The first annexure concerned the establishment of the proposed

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new local authority. It was suggested inter alia that the latter would not possess the financial viability to provide even the basic services to its inhabitants. The necessary infrastructure, however, existed and with the necessary financial support from the Central Government certain listed services could be rendered. The second annexure dealt with the proposed area to be excised from Ikapa's area of jurisdiction. A main sewage, water and road network had already been provided for the area. Provision had been made for 44 industrial sites. Attention was directed to the fact that the area was currently overpopulated. The following statistical information was furnished:

| | |
|-------------------------------|---------|
| Residents (estimated) | 155 000 |
| Registered voters (estimated) | 52 000 |
| Residential premises | 20 839 |
| Dwellings | 5 200 |
| Structures and tents | 23 686 |

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It was also stressed that the new local authority would not be financially viable within the foreseeable future. The anticipated income from rental and expenditure was approximately R5,3 m while the estimated expenditure would be R14 m.

It was essential therefore that the Central Government had to render financial support until additional sources of revenue could be found. (Annexure R M N 3, Record vol 1 p 54-64).

The Secretary of the Demarcation Board thereupon took all formal steps necessary for the holding of an enquiry as prescribed by the provisions of section 7 G of the 1983 Act. Ikapa was given written notice on 28 April 1988 of the enquiry to be held on 1 June 1988 at Bellville for the purpose of hearing further evidence and representations from persons who lodged written objections and representations. (Annexure R M N 4, Record vol 1 p 65-70).

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The enquiry by the Demarcation Board was held on 1 June 1988 and lasted one day. Attorney Van Niekerk appeared for Mali Hoza and his Lingeletu Committee on whose behalf he handed in written submissions, (Record vol 7 p 394 - 402), with a supporting memorandum by Dr Anthea J Jeffery and Professor S B Bekker from the Agency for Social and Legal Research C C (Record vol 7 p 403-412). It was pointed out that Khayelitsha was neither contiguous with nor in close proximity to the other areas (Langa, Guguletu and Nyanga) under the jurisdiction of Ikapa. Hoza and his Committee supported the proposed excision of Khayelitsha and the formation of a new local authority. They claimed to have the support of approximately 80% of the residents of certain areas in Khayelitsha.

At the enquiry Ikapa was represented by its counsel, Mr Dison and Mr Gamble. A very large number

of documents were handed in on behalf of Ikapa viz:

1. written submissions and objections, dated 30 May 1988 (Annexure R M N 6 A, Record vol 1 p 73-83; also Record vol 7 p 413-423);
2. an extract from the Cruywagen Report of 1984 (Record vol 2 p 86-101);
3. portions from the Government's White Paper on Urbanisation of 1986 (Record vol 2 p 102-114);
4. documents relating to an enquiry held on 7 November 1987 by the Demarcation Board at the request of the Administrator in connection with the demarcation of Areas 3 and 4 of Town 1 of Khayelitsha (known as Site B) and the Area known as Site C (Record Vol 2 p 115-140). (I digress here to point out that the decision taken by the Administrator pursuant to this enquiry was taken on review by Ikapa and

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the Administrator agreed to the setting aside of his decision);

5. documents relating to the request of the Administrator, for an enquiry by the Demarcation Board into the excision of an area of jurisdiction for Townships 1 and 2 in Residential Area 1 of Khayelitsha with a view to establishing a local government (Record vol 2 p 141-149). No enquiry took place because the Administrator withdrew his request.

Two academics, Prof I J van der Merwe and T van Rooyen from Stellenbosch University as well as Mrs Damon, Prince Xubingo, Ngwana, Fulani, Gerry Tutu, Nyangeni, Gwilizha, Nyutu and Njoli (the mayor of Ikapa) testified on behalf of Ikapa (Record vol 10 p 685-734, 754-759).

Other witnesses such as Smous, Bivuma, Thelma Jacobs, Magaza and Pelzer also testified at the enquiry

(Record vol 10 -p 735-753). Some of them were in favour of the proposed excision of Khayelitsha and the formation of a new local authority.

The attitude adopted by Ikapa at the enquiry was outlined by Mr Dison as follows in his address to the Demarcation Board:

"Now Sir, we feel that - I'd like to make our attitude absolutely clear - we are not against the principle of there being a new municipality in the area, we only feel that it is entirely premature at this stage and we say that the viability of the new black local authority in Khayelitsha depends mainly on two factors. One of them is whether it will have the financial resources to be able to develop the area adequately, and secondly, do the people in the area want it ? As far as financial resources are concerned, the figures produced show it will have

a deficit of at least 8,7 million - that is on the papers submitted. But we are going to show in our evidence that it is really closer to 13 million on their figures - on the C P A's figures, not on our figures. And that is just for the first year - obviously there will be enormous running costs and we are going to lead evidence about that. - - - -

- - - - -
- - - - Now secondly, the wishes of the inhabitants - evidence will be led which shows that the suggestion by the C P A officials and the mere statement in the Memorandum submitted by my friend, my learned friend representing Rosa (Hoza?), that the area of Khayelitsha, wants its own authority is wrong - - -"

(Record vol 10 p 660-661).

Evidence was also adduced to suggest that the residents of Khayelitsha lacked experience in and knowledge of conducting a new local authority. Gilli was the only councillor of

Ikapa who represented Khayelitsha. Compare paragraph 16 of the written submissions and objections on behalf of Ikapa (Record vol 1 p 81). It was also suggested by Mr Dison that the Administrator's request for an enquiry was being hurried for what he regarded as political reasons (Record vol 10 p 662).

The Demarcation Board in its report, dated 24 June 1988, to the Administrator unanimously recommended the proposed excision of the whole of Khayelitsha that fell under the jurisdiction of Ikapa as well as the proposed formation of a new local authority (Record vol 4 p 256-307).

On 19 July 1988 the Administrator (in Executive Committee) decided in terms of section 2(2)(b) of the 1982 Act to excise the proposed area of Khayelitsha from Ikapa's jurisdiction. He also decided in terms of section 2(1)(a) of the 1982 Act to establish the proposed new local

authority under the name of Lingelethu-West (Record vol 4 p 252). On 22 July 1988 by notices PN 643/1988 and PN 648/1988 in the Official Gazette No 4541 he promulgated his decisions (Annexure R M N 5, Record vol 1 p 71 and Annexure R M N 6, Record vol 1 p 72, respectively).

Ikapa brought an application in the Cape of Good Hope Provincial Division for the review and setting aside of the recommendation of the Demarcation Board and the decisions of the Administrator. The Administrator and the Demarcation Board as 1st and 3rd respondents respectively opposed the application. The other respondents who were cited as interested parties did not oppose the application. They are not parties to the appeal.

After the record of the proceedings of the enquiry as well as the Demarcation Board's report to the Administrator had in terms of Rule 53 of the Uniform Rules

of Court been made available to Ikapa the latter was in a position to ascertain from the report that the Demarcation Board had made use of certain after-acquired information which had not been disclosed to Ikapa. Nor had Ikapa been given an opportunity to comment thereon. See the Applicant's Supplementary Affidavit, dated 29 September 1988. (Record vol 2 p 173-175). I shall refer to the nature of the after-acquired information in more detail later.

Ikapa's application was heard on 17 October 1988 in the Court a quo by HOWIE J and HOBERMAN A J. It was upheld with a suitable order as to costs. In his judgment HOWIE J (HOBERMAN A J concurring) held, in brief, that the principles of natural justice (audi alteram partem) applied to the proceedings of the enquiry and that the use by the Demarcation Board of the after-acquired information in its report accordingly constituted a reviewable irregularity

which also vitiated the Administrator's decisions since they were based on the report. It was found to be unnecessary to decide the other grounds of review which were argued by counsel.

Applicability of the principles of natural justice.

The maxim audi alteram partem is a principle of natural justice which is part of our administrative law.

Its basis is fundamental fairness. Winter & Others v

Administrator-in-Executive Committee & Another, 1973(1) SA

873 (A) at p 890 in fine. There is a marked trend in our

case law not to adhere to the old classification of decisions

by a public official or body into administrative or quasi-

judicial in order to determine the applicability of the

principles of natural justice. The accepted ground for

applying the audi alteram partem principle is where a public

official or body is authorised by statute to give a decision

prejudicially affecting an individual in his liberty, property or existing rights unless the statute expressly or by necessary implication indicates the contrary. Recently this Court in Administrator, Transvaal, & Others v Traub & Others, 1989(4) SA 731 (A) at p 761 D-G accepted the concept of legitimate expectation as an integral part of the audi alteram partem principle. In essence there is a clear duty on the public official or body in exercising its statutory functions to act fairly in according the affected individual a fair hearing.

In this Court Mr Burger, appearing on behalf of the Administrator and the Demarcation Board, contended that the audi alteram partem principle was inapplicable to the proceedings of the investigatory enquiry held by the Demarcation Board. It was also inapplicable to its report and recommendations to the Administrator which merely concerned

the government and welfare of the general public in Khayelitsha and not the rights or property of Ikapa per se. I cannot

agree. The purpose of the enquiry as well as the ensuing

report was to advise the Administrator on the desirability or otherwise of the proposed excision and demarcation.

Such advice could have prejudicially affected the proprietary rights of Ikapa in regard to a diminished area of jurisdiction with a concomitant loss of income from a reduced number of residents.

In my judgment the Court a quo correctly held that the Demarcation Board was in the circumstances under a duty to observe the audi alteram partem principle by according Ikapa a fair hearing in the exercise of its statutory functions.

It was common cause that the Demarcation Board's report referred to certain independently after-acquired information not available at the enquiry on 1 June 1988, viz.:

1. Financial details for 1987/1988 obtained from the Cape Provincial Administration as set out in paragraphs 168 to 170 of the report (Record vol 4 p 292-293).
2. Demographic details referred to in paragraph 172 of the report (Record vol 4 p 293).
3. References in paragraphs 177, 190 and 191 of the report (Record vol 4 p 295, 298) to the record of the Supreme Court case in 1986 between Fulani and Others and Mali Hoza & Others (Record vol 7 p 437-496).

As regards this after-acquired information, the first question to be answered is whether it was material to the inquiry.

If it was not material then there was no duty to disclose it; and its non-disclosure would not constitute a violation of the audi alteram partem principle.

The gist of Ikapa's case as presented

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at the enquiry to the Demarcation Board comprised the following matters:

1. The prematurity of the proposed excision of Khayelitsha and the establishment of a new local authority.
2. The financial viability of the proposed new local authority.
3. The lack of popular support for the proposed new authority.
4. The lack of experience on the part of the residents to administer the proposed new authority.

How did the after-acquired information affect these matters?

Firstly, the financial details for 1987/1988 as after-acquired information relate to the operating expenditure of Ikapa during that period and include the bridging finance provided by the Government. When these financial figures are compared

with the figures disclosed by Mr Dison for the period 1/6/87 to 31/3/88 at the enquiry (Record vol 10 p 725) then it becomes apparent that Ikapa itself was not financially self-sufficient. All local authorities receive financial subsidies from the Government. The after-acquired information did not influence the position at all. Nor did it affect the conclusion of the Demarcation Board that the proposed new authority would as a matter of course have to rely on Government subsidies as suggested by Ikapa's counsel at the enquiry. Secondly, the demographic figures referred to in paragraph 172 of the report (Record vol 4 p 293) were exactly the same as those used at the enquiry save for the figure of approximately 800 000 for the total population. It was used by the Demarcation Board solely to suggest that some of the figures produced at the enquiry were conservative estimates. The figure of approximately 800 000 people did not influence the

position at all. It must also be considered in the light of the next aspect. Thirdly, from the record of the 1986 case between Fulani & Others and Mali Hoza & Others regard was had to a passage from the replying affidavit of Fulani (who testified in support of Ikapa at the enquiry). At the enquiry the two opposing sides claimed to have large support for their views from the residents but their figures were not supported by any elections or opinion polls. The Demarcation Board by implication found that the after-acquired information in this regard did not really assist and came to the conclusion that it could not determine the support for either side which could at best be put at fifty-fifty (See paragraph 192 of the report, Record vol 4 p 298). In my view the after-acquired information was clearly not of a material nature. Nor did it influence the Demarcation Board in its recommendations to the Administrator. The

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Court a quo was accordingly wrong in holding that the use in the report of the Demarcation Board of the after-acquired information constituted a reviewable irregularity which vitiated both the recommendations of the Demarcation Board and the decisions of the Administrator. It therefore becomes necessary to consider the other grounds of review advanced by Ikapa.

The other grounds of review.

I have sedulously considered the other grounds of review advanced in this Court by Mr Dison on behalf of Ikapa under the headings that follow. In view of the conclusions I have arrived at in regard to their merits I do not consider it necessary to deal with his submissions in any great detail.

(a) Popular support for the new local authority.

This matter was fully canvassed at the enquiry on behalf of Ikapa and also Hoza and his Lingeletu Committee as appears from the record of the enquiry's proceedings (See Record, vol 10 p 634-759). The Demarcation Board was under no statutory duty to conduct opinion polls or to hold elections in order to determine with precision the amount of popular support among the residents of Khayelitsha for the proposed excision and the new local authority. It was basically a matter of opinion. The finding of the Demarcation Board that it was impossible to determine the support for or against and that it could at best be put at fifty-fifty was fair and just (See paragraph 191 of the Report, Record vol 4 p 298). There is no merit in this contention of Mr Dison.

(b) Capable Leaders.

The question whether there were leaders experienced in

municipal administration to serve on the proposed new local authority was mooted at the enquiry. The Demarcation Board dealt with this matter in paragraphs 182, 183, 205, 209(a) of its report (See Record, vol 4 p 296-297, 304, 305). This contention of Mr Dison cannot be sustained.

(c) Financial viability of the proposed new local authority.

It was contended by Mr Dison that the Demarcation Board failed to make further investigation regarding the financial viability of the proposed new local authority.

I have already touched on this matter in my analysis of the after-acquired information from which it appeared that the evidence adduced at the enquiry established that Ikapa itself was not financially viable and that all local authorities receive financial subsidies from the Government. The position of the proposed new

local authority would be the same. This contention overlooks the fact that it would be futile for the Demarcation Board to further investigate a matter which was common cause at the enquiry. There is no substance in this contention.

(d) Homogeneity.

Mr Dison contended that there was no evidence to support the finding of the Demarcation Board in paragraph 203

(1)(a) of its report (Record, vol 4 p 301) that the community was reasonably homogeneous. This contention overlooks entirely the evidence adduced at the enquiry.

(See Record, vol 10 p 655, 668, 740, 754). There is no merit in this contention.

(e) Lack of evidence to justify the decision of the Demarcation Board.

A careful scrutiny of the record of the enquiry's

proceedings (Record, vol 10 p 636-759) and the Demarcation Board's report (Record, vol 4 p 256-307) serves to dispel this contention as being entirely unfounded.

(f) Ulterior motive and bias on the part of the Administrator.

These contentions lack a factual basis. They are of a speculative nature and cannot be substantiated. They are accordingly devoid of substance.

(g) Lack of consultation with Ikapa.

Section 2 (2)(b) of the 1982 Act makes it obligatory for the Administrator to consult with Ikapa prior to making his decision regarding the proposed excision of Khayelitsha and the establishment of the new local authority. On 26 April 1988 a member of the Executive Committee of the Cape Provincial Administration wrote

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a letter to Ikapa inviting the comments of the latter on the aforementioned matters (See Annexure E L 4 Record vol 3 p 202). In a letter dated 24 June 1988 Ikapa indicated in reply thereto that it had presented written presentations to the enquiry on 1 June 1988 which constituted its comments (See Annexure R M N R 1, Record vol 3 p 247). In the circumstances the contention that Ikapa had not been consulted by the Administrator in terms of section 2 (2)(b) of the 1982 Act must be dismissed as unfounded.

In the result the appeal must succeed.

The following orders are granted:

1. The appeal is upheld with costs, including the costs of two counsel.
2. The following order is substituted for the order of the Court a quo:

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

C. P. JOUBERT J A.

HOEXTER J A
SMALBERGER J A Concur.
KUMLEBEN J A
NIENABER A J A