LL Case No 188/1992

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

THE ADMINISTRATOR OF TRANSVAAL Appellant

and

M D BRYDON Respondent

CORAM: VAN HEERDEN, VIVIER, KUMLEBEN JJA, NICHOLAS et VAN COLLER AJJA

HEARD: 23 FEBRUARY 1993

DELIVERED: 22 MARCH 1993

JUDGMENT

VAN HEERDEN JA:

On 17 September 1988, and in the district of Randburg, the respondent reversed his Landrover from the shoulder of a public road into an adjacent stormwater ditch. The road was a provincial one which fell under the control of the Transvaal Provincial Administration ("TPA"), and the ditch had been excavated and constructed by employees of the TPA.

Subsequently the respondent instituted action in the Witwatersrand Local Division against the appellant (the Administrator of the Transvaal), who was cited in his capacity as head of the TPA. The respondent claimed payment of the amount of R33 190,83 for the damage caused to the Landrover when it fell into the ditch. In view of the agreement referred to below, no more need be said about the pleadings other than that the appellant disclaimed liability relying on the provisions of s 96 of the Roads Ordinance 22 of 1957 (Transvaal), as

amended ("s 96"), and that in his replication the respondent attacked the validity of that section on two grounds; viz (i) that it was ultra vires the powers conferred upon provincial councils by s 84 of the Republic of South Africa Constitution Act 32 of 1961 ("the 1961 Act"), and (ii) that it was in conflict with s 1 of the State Liability Act 20 of 1957.

Prior to the hearing of the matter the parties agreed that employees of the TPA had negligently failed to take steps to indicate the presence of the ditch; that the respondent had been contributorily negligent in that he had failed to keep a proper look-out, and that should s 96 be held to be invalid the respondent would be entitled to judgment in the amount of R25 000.

The trial court held that s 96 was ultra vires the 1961 Act and consequently awarded the

respondent the said amount with costs. Subsequently it granted the appellant leave to appeal to this court. Hence this appeal.

As originally enacted, s 96 provided that no action would lie against the TPA in respect of damages sustained by reason inter alia of the default or neglect of the TPA in connection with any matter relating to the state of roads or bridges under its charge, unless the claimant complied with certain procedural requirements. The section was repealed by s 9 of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970. The present s 96, which was enacted by s 20 of Ordinance 20 of 1976 (Transvaal), reads as follows:

"96. (1) No action shall lie against the Administrator or an officer or employee ... [appointed by the Administrator for the purpose of carrying out inter alia the provisions of the Ordinance] ... or against any other person who has constructed a ..... public road in respect of any damage sustained by any person in the use of any

> portion of a public road which is not the roadway.
>
> (2) For the purposes of subsection (1), 'roadway' includes that portion of a public road commonly known as the shoulders."

Paras (xxii) to (xxiv) of s 1 of the 1957 Ordinance respectively define "road reserve" as the full width of a public road, including the roadside and roadway; "roadside" as that portion of a public road not forming the roadway, and "roadway" as that part of such a road made and intended or used for traffic or reasonably usable by traffic in general. Hence s 96 purports to exclude liability on the part of inter alia the TPA and its officers or employees for damages sustained by any person in the use of the roadside (excluding the shoulders of a road).

The 1957 Ordinance was enacted by virtue of the powers vested in provincial councils by s 85 of the South Africa Act (1909). The present s 96, if valid, was introduced by virtue of similar powers

bestowed by s 84 of the 1961 Act. That section empowered a Provincial Council to "make ordinances in relation to matters coming within ... [certain] ... classes of subjects", including (in para (h)) "roads, outspans, ponts and bridges, other than bridges connecting two provinces".It is trite law that both the 1909 and 1961 Acts conferred plenary powers of legislation on provincial councils. For present purposes the gist of a number of decisions of this court on the ambit of such powers, notably Middelburg Municipality v Gertzen 1914 AD 544, may be thus summarised:

(1) A provincial council enjoyed all such implied powers as were reasonably necessary or required to give effect to, or were properly ancillary to, powers expressly conferred. Hence, in the words of Innes CJ in Gertzen at p 552:

> "[n]o powers would be implied which were not properly or reasonably ancillary to

those expressly conferred."

(2) In applying the above criteria one has to determine whether there is a sufficiently close connection between the main purpose of the express power and the impugned provision, and if there is, a court has no jurisdiction to examine the wisdom or policy of the exercise of the power: Joyce and McGregor Ltd v Cape Provincial Administration 1946 AD 658, 672.

(3) The tendency in interpretation of the powers of provincial councils is towards liberality. A court will therefore not lightly find that a council has exceeded its powers: R v Dickson 1934 AD 231, 233, and Makhasa v Minister of Law and Order, Lebowa Government 1988 (3) SA 701 (A) 720.

It is convenient at this stage to advert to the reliance placed by counsel for the appellant on passages in the judgment of Wessels AJA in Gertzen.

According to the report of that case Innes CJ delivered a judgment concurred in by Solomon JA; Maasdorp AJA prepared a dissenting judgment, and Wessels AAJA wrote a separate judgment in which he arrived at the same result as Innes CJ. The report does not reflect, however, in whose judgment the fifth member of the court, De Villiers AJA, concurred. Nor does the original record of the proceedings. But since the order endorsed on the cover of the record is to be found in the judgment of Innes CJ the only inference is that De Villiers AJA must have concurred with the judgment of the Chief Justice. (Cf Ellison Kahn 1971 SALJ 116-7 and 362-3.) That being so, the rationes decidendi of Gertzen are to be found in that judgment and not in that of Wessels AJA.

The court a quo found that a provincial legislature would have been able to legislate fully

and effectively on the topic of roads without "introducing exclusions in respect of the liability of the province for negligent acts or omissions perpetrated by its officers or employees in areas adjacent to the surfaces and shoulders of roads and falling under its control". Hence, in the court's view, it could not be said that the power to enact provisions such as those contained in s 96 was reasonably required to legislate effectively on roads.

In this court counsel for the appellant did not contend that the provisions of s 96 were reasonably necessary to give effect to the power expressly conferred, viz the power to legislate on roads. He did submit, however, that the power exercised by the Transvaal Provincial Council when enacting s 96 was reasonably ancillary to the express power; or, put differently, that there is a sufficiently close

0 connection between that power and the provisions of s 96. This was contested by counsel for the respondent and the debate before us focussed mainly on the validity of that submission.

It may be that s 96 is invalid on a ground not canvassed in counsel's heads of argument. As a rule a provincial council may not enact a provision which is in conflict with an Act of Parliament. It is apparently for this reason that in a number of cases the courts have held that provincial legislation was invalid if it purported to interfere with the jurisdiction conferred on courts of law by parliamentary legislation; whether by enlarging, detracting from or ousting that jurisdiction. See, e g, Germiston Municipality v Angehrn and Piel 1913 TPD 135, 138; Oranjezicht Estate Ltd v Registrar of Deeds: Mellish's Executor v Registrar of Deeds 1924 CPD 237, 239; Bignaar v Municipal Council of

Rustenburg 1927 TPD 615, 620; Moola v Potchefstroom Municipality 1927 TPD 522; Chesterfield House (Pty) Ltd v Administrator of the Transvaal and Others 1951 (4) SA 421 (T) 424, and In re Pennington Health Committee 1980 (4) SA 243 (N) 245. (And cf Lenz Township Co (Pty) Ltd v Lorentz, NO 1961 (2) SA 450 (A) 455.) Thus, in Bignaar it was held that if a provision in an ordinance, on its true construction, provided that a decision of a local authority could not be taken on review to a court of law, it would be invalid. Of course, Parliament may expressly or by necessary implication empower a provincial council to interfere with the jurisdiction of a court of law. Such an implied power would be inferred if the invalidity of a provision in an ordinance would frustrate the effective exercise of a power expressly conferred upon a provincial council (cf Lekhari v Johannesburg City Council 1956 (1) SA 552 (A) 566).

12 Had the introductory phrase of s 96(1), viz "[n]o action shall lie" read "[n]o court shall enter judgment" the section might well have interfered with the jurisdiction of the courts. And it is arguable that s 96, as re-enacted, indirectly but effectively ousts the jurisdiction of a court of law to try an action based on an act or omission which under the common law would give rise to delictual liability on the part of the TPA and its officers or employees. In this regard it is to be noted that the above-mentioned introductory phrase of s 96(1), viz "[n]o action shall lie", also occurred in its precursor, and that the original s 96 was clearly directed at the non-enforceability of a pre-existing cause of action if the claimant failed to take certain procedural steps. It is therefore also arguable that s 96(1), in its present form, does not prescribe that no cause of action will arise if damages are suffered

in the use of the roadside, but merely enjoins that such may not be enforced in a court of law (leaving a so-called natural obligation). And if on its true construction s 96 does interfere with the jurisdiction of the courts, it would be difficult to contend that s 84 of the 1961 Act by necessary implication empowered provincial councils to enact provisions such as those contained in the former section. Be all that as it may, since we did not have the benefit of full argument on the postulated effect of s 96, I shall refrain from expressing a definite view on it. In what follows I shall therefore assume, in favour of the appellant, that the section does not curtail the jurisdiction of the courts.

The ambit of s 96 calls for the following observations. Firstly, it excludes liability for damages sustained in any form of use of the roadside (excluding the shoulders of a road). That part of a

public road is rarely used by vehicular traffic, but is quite commonly utilised by pedestrians and the drovers of farming stock. A pedestrian, a drover, and the owner of such stock is therefore deprived of a claim based on common law delictual liability arising from anything done, or omitted to be done, in, on or regarding the roadside. Secondly, s 96 draws no distinction between damages caused by negligent wrongdoing and that arising from intentional conduct. There is, indeed, no mention of, or reference to, fault in the section. On the contrary, the emphasis falls on "any damage sustained" in the use of the roadside and not on an act or omission of an officer or employee of the TPA which may have been the cause of such damage. Hence, on the wording of s 96 no claim may be preferred in regard to either negligent or intentional tortious conduct. It is - debatable whether, despite the clear language of the

5 section, it can be construed as restricting the exemption to negligent conduct. It may be said that the Transvaal Provincial Council could not have intended to indemnify an officer or employee who, whilst engaged in the construction of a public road or part thereof, with direct intent causes damage to a user of the roadside. On the other hand it is not inconceivable that that legislature intended to exclude the liability of the actual perpetrator as well as the vicarious liability of the TPA for damages suffered by such a user where the officer's or employee's intent consisted of dolus eventualis. I shall, however, make a further assumption in favour of the appellant, viz, that on a proper interpretation of s 96 liability for intentional wrongdoing is not excluded.

On this assumption counsel for the appellant submitted that s 96 is unobjectionable because

the connection between its provisions and the power ("the main power") vested in provincial councils in relation to roads is sufficiently close. If this submission were well-founded, a provincial council would also act within its powers if it excluded liability for damages incurred in the use of the roadway or, in a different sphere, for damages suffered as a result of delictual conduct on the part of any hospital employee. And I have little doubt that the enactment of such provisions would be ultra vires the empowering provisions of the 1961 Act.

Counsel also submitted that s 96 is properly ancillary to the main powers because, were it otherwise, the TPA would have a heavy burden cast upon it in relation to the roadway. Thus, it was argued, the TPA would have to remove trees or shrubs, cover drainage ditches, fill in holes, remove stones and (broken) bottles, etc. It seems to me, however,

that counsel has taken far too pessimistic a view of the potential liability of the TPA, and its officers and employees, should s 96 be held to be invalid. The examples put forward by counsel relate mainly to omissions which as a rule would not give rise to delictual liability, especially when regard is had to considerations such as the cost to be incurred in removing, or in one way or another safeguarding against, the risk created by dangerous objects and conditions; the degree of the risk; the gravity of the consequences if the risk is not neutralised, and the degree of the utility of the functions performed by the TPA in relation to roads. See Ngubane v South African Transport Services 1991 (1) SA 756 (A) 776-777. Moreover, most users of the roadside will not expect it to be free from all impediments and pit-falls, whilst the cost of erecting warning signs where such are called for, will probably be relative-

ly low.

In the final analysis the power which the Transvaal Provincial Council purported to exercise when enacting s 96 cannot, in my view, be regarded as reasonably ancillary to the main power or, put differently, as sufficiently closely connected with the latter power. In short, I agree with the court a quo that that council could fully and effectively have legislated on roads without excluding liability of the TPA and its officers or employees for damages incurred in the use of any portion of a public road. Obviously the same holds good for the indemnity conferred upon anybody taking part in the construction of such a road.

Lensing v Kimberley Munisipaliteit 1976 (3) SA 615 (NC) appears to be the only reported case in which an exclusion of liability by a legislative authority was considered. I find it unnecessary.

however, to determine whether that case was correctly decided. For, unlike the present case, Lensing was concerned with regulations excluding liability of a local authority for damages caused by the cutting off of electricity supplied to a consumer in terms of an agreement.

In view of my conclusion that s 96 is ultra vires, it is unnecessary to consider whether it is in conflict with s 1 of the state Liability Act.

The appeal is dismissed with costs.

H J 0 VAN HEERDEN JA

VIVIER JA

KUMLEBEN JA CONCUR

VAN COLLER AJA

J U D G M E N T

NICHOLAS, AJA:

I take a different view of this matter from

that of VAN HEERDEN JA. For the reasons which follow I would uphold the appeal.

It is unnecessary to repeat the facts which are set out in the judgment of my learned colleague.

The question for decision is whether s 96 of the Transvaal Roads Ordinance 22 of 1957 was or was not beyond the powers conferred upon provincial councils by s 84(1) of the Republic of South Africa Constitution Act 32 of 1961, which provided that "a provincial council may make ordinances in relation to matters coming within the following classes of subjects", including -

> "roads, outspans, ponts and bridges other than bridges connecting two provinces."

The legislative powers of provincial councils were considered in Middelburg Municipality vs Gertzen 1914 AD 544, where this Court was concerned with provisions similar to s 84 contained in s 85 of the

South Africa Act. The following principles may be extracted from the majority judgment delivered by INNES CJ:

> The legislative authority conferred by the South Africa Act upon provincial councils is an original and not a delegated authority, so that within the limits imposed they may make laws as freely and effectively as the Parliament of the Union of South Africa.
>
> The authority given to a provincial council to make ordinances in regard to any specified subject includes (in the absence of clear intent to the contrary) such legislative powers as are properly and reasonably ancillary to those expressly conferred or are reasonably required to deal fully and effectively with the subject assigned. The limits of such reasonable requirements fall to be decided by the Court in each

particular case.

Once it is clear that legislative provisions which are challenged fall with the powers conferred upon a provincial council, the court would not be justified in interfering with them merely because it considered them to be unwise or impolitic. Courts of law are concerned with the validity, not with the wisdom or the policy of provincial ordinances.

The present s 96 was inserted in the Roads Ordinance 22 of 1957(T) by s.20 of Ordinance 20 of 1976(T), the original s 96 having been repealed by s 9 of Act 94 of 1970. S 96 now reads:

> "(1) No action shall lie against the Administrator or an officer or employee referred to in section 98 or against any other person who has constructed a public road in respect of any damage sustained by any person in the use of any portion of a public road which is not the roadway.
> (2) For the purposes of subsection (1), 'roadway' includes that portion of a public road commonly known as the shoulders."

(S 98(1) empowers the Administrator to appoint such officers and employees as are in his opinion necessary for the carrying out of the provisions of the Ordinance or any other law relating to roads. Reference may usefully be made to the following definitions in s 1 of the Ordinance -

> "(xxi) 'road' means any road (other than a railroad) intended for vehicular or animal traffic and includes a bridge or drift traversed by a road and intended for use in connection therewith; and all land reserved or designated as a road under the provisions of some law or other;
> (xxii) 'road reserve' means the full width of a public road, and includes the roadside and the roadway;
> (xxiii) 'roadside' means that portion of the public road not forming the roadway;
> (xxiv) 'roadway' means that part of a public road made and intended or used for traffic or reasonable usable by traffic in general.")

In his judgment in the Court a quo, VAN ZYL J

framed the question to be decided as follows:

> "Whether the power to legislate on roads includes the power, by implication, to exclude the Administrator's vicarious liability for negligent conduct or omissions in respect of roads under his jurisdiction."

After referring to the principles laid down in Gertzen's case, the learned judge said:

> "When these principles are applied to the facts in the present matter there is little doubt that the provincial legislature would indeed be able to legislate fully and effectively on roads without introducing exclusions in respect of the liability of the province for negligent acts or omissions perpetrated by its officers or employees in areas adjacent to the surfaces and shoulders of roads and falling under its control. It cannot be said that the power to enact such a provision is reasonably required for giving effect to its authority or for achieving the objects of the Roads Ordinance. Similarly it cannot be regarded as ancillary or accessory to or naturally associated with the powers expressly granted to it in this regard. It follows that the provincial legislature did not have the power to legislate on the exclusion of liability as provided in sec 96 of the Road Ordinance, No 22 of 1957. Such section is hence ultra vires the empowering provisions of section 84 of Act 32 of 1961."

The statement in the first sentence of the quotation is correct to the extent that a provision such as s 96 is not essential to an effective roads ordinance - indeed, the Ordinance was in operation for 19 years before the new s 96 was enacted, and there was no provision similar to s 96 in the Roads Ordinance 97 of 1933 which preceded it. However, the question is not whether the provision itself is necessary, but whether the power to enact it is a power reasonably required to enable a provincial council to legislate fully and effectively on the subject of roads.

In terms of s 4 of the Roads Ordinance all public roads within the Transvaal Province are under the control and supervision of the Administrator; and under s.20(a), the Administrator has power in respect of the construction, maintenance and control of any public

road. The exercise of powers of construction and maintenance is likely in the ordinary course to result in the incurring of liability at common law to users of roads both by the Administrator, and by officers and employees and other persons who have constructed public roads. Moreover the fact that the Administrator has the control and supervision of public roads carries with it the possibility of liability in respect of dangerous conditions existing on such roads. Since such liability will result in calls being made on the provincial purse, it was in my view reasonably necessary that a provincial council should have the power to enact legislation limiting such demands if it considered it expedient to do so. S 96 embodies a limitation on the liability of the Administrator and others towards users of public roads. The South African statute book is replete with

other examples of limitations of liability. Dealing with the subject in his Law of Delict, Boberg states at 774-775 that it would not be reasonably practicable to supply a comprehensive list. He continues:

> "The following are illustrative: Aviation Act 74 of 1962, s 11(1) (no action for trespass or nuisance by reason of the flight of an aircraft in specified circumstances), s 20 (exemption of State and its employees from liability for harm to persons or goods conveyed in State-owned/operated/chartererd non-commercial aircraft); Merchant Shipping Act 57 of 1951, s 343bis (inserted by s 29 of Act 13 of 1965) (exemption of State and its employees (subject to exceptions) from liability for harm to persons or goods conveyed in State-owned/operated/chartered ships); Police Act 7 of 1958, s 32bis (inserted by s 2 of Act 74 of 1965) (exemption of State and policemen (subject to exceptions) for harm to persons or goods conveyed in police vehicles, aircraft or vessels); Forest Act 72 of 1968, ss 13(l)(f)(ii), 14(2), 15(5), (6) (various exemptions in respect of damage caused by clearing fire-belts and extinguishing fires), s 28 (general exemption for State and certain officials unless proved negligent); Promotion of the Economic Development of National States Act 46 of 1968, s 15 (exemption

of directors of corporations established by Act, and members of advisory boards, from liability for damage caused in performance of their duties, unless done wilfully, dishonestly, grossly negligently, or in breach of the Act or regulations). Anatomical Donations and Post-Mortem Examinations Act 24 of 1970, s 9(1) (exemption of doctors, dentists and magistrates who bona fide remove or authorize removal of tissue by virtue of a consent which is subsequently proved to be invalid); Mental Health Act 18 of 1973, s 68(1); Sea Birds and Seals Protection Act 46 of 1973, s 7; Sea Fisheries Act 58 of 1973, s 21; Companies Act 61 of 1973, s 8 (State and its officers, and auditors, liquidators and judicial managers, protected when performing their duties under the Act provided not mala fide or negligent); Defence Act 44 of 1957, ss 103ter, quat (inserted by s 8 of Act 1 of 1976) (exemption for acts done in suppressing terrorism in operational areas; administrative procedure for compensation); Water Act 54 of 1956, s 33G (inserted by s 7 of Act 42 of 1975); National Parks Act 57 of 1976, s 28 (exemption of board of trustees from liability for damage caused by animals in parks); Prevention and Combating of Pollution of the Sea by Oil Act 6 of 1981, s 10; Natural Scientists' Act 55 of 1982, s 28; Nuclear Energy Act 92 of 1982, s 41.

There are many others. They are traced in successive volumes of the Annual Survey."

The number and nature of the statutes containing

limitations of liability is indicative of a felt need for legislative interference in appropriate cases with the common law rights of individuals in order to protect the State, and persons performing functions under the Act concerned, against claims by members of the public.

Directly relevant to the present enquiry is s.25(2) of the National Roads Act 54 of 1971 which provides -

> "No action shall lie against the [National Transport] Commission or any officer of the Commission, or against any other person who has constructed a national road, in respect of damage sustained by any person in the use of any part of such national road other than the roadway."

The Roads Ordinance is kindred legislation to the National Roads Act. They have a similar subject-matter. S.96 of the Roads Ordinance and s 25(2) of the National Roads Act are substantially similar. The fact that Parliament included s 25(2) in legislation relating

to national roads provides strong support for the view that power to enact a smilar provision in provincial legislation on roads was reasonably necessary.

In my opinion therefore the enactment of a limitation of liability to users of roads was within the powers conferred by s 84(1) of Act 32 of 1961.

VAN HEERDEN JA suggests that s 96 may be invalid on the ground that it ousts the jurisdiction of a court of law to try an action in respect of damage sustained by a person in the use of a portion of a public road which is not the roadway. I respectfully disagree.

In my opinion what s 96 does is to deprive such a person of his common law right to recover damages. In its terms s 96 denies him a remedy, ("No action shall lie...") but such denial necessarily

involves a deprivation of his common law right. In Minister of the Interior and Another vs Harris & Others 1952(4) SA 769(A) at 780 in fin to 781C CENTLIVRES CJ said:

> "There can to my mind be no doubt that the authors of the Constitution intended that those rights [that is, the rights entrenched in the Constitution] should be enforceable by the Courts of Law. They could never have intended to confer a right without a remedy. The remedy is, indeed, part and parcel of the right. Ubi jus, ibi remedium.
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> If authority is needed for what I have said, I refer to the following cases. In Ashby v. White, 92 E.R. 126 at p. 136, HOLT, C.J., said:
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> 'If a plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.'
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> In Dixon v. Harrison, 124 E.R. 958 at p.964, it was stated that the greatest absurdity imaginable in law is:
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> 'that a man hath a right to a thing for which the law gives him no remedy; which is in truth as great an absurdity, as to say, the having of right, in law, and having no right,

are in effect the same.'" It follows I think that the converse of ubi jus, ibi remedium is true: in the absence of a remedium there can be no jus.

By depriving a person of his common law right to recover damages, the statute does not trench upon the jurisdiction of the courts. Thus s 96 does not affect the jurisdiction of a provincial or local division of the Supreme Court which is enshrined in s 19(1)(a) of the Supreme Court Act, namely -

> "...jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance..."

When the Administrator uses the shield provided by s 96 as a defence to an action, he does not raise an objection to the jurisdiction of the court to hear the

action; his case is that the plaintiff does not have a right of action.

The court a quo did not find it necessary to deal with an alternative argument on behalf of the plaintiff, namely, that s 96 was repugnant to the provisions of s 1 of the State Liability Act 20 of 1957, which provides:

> 1. Any claim against the State which would, if that claim had arisen against a person, be the ground of an action in any competent court, shall be cognizable by such court, whether the claim arises out of any contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity . and within the scope of his authority as such servant.

In terms of s 4 nothing contained in the Act shall affect any provision of any law which

(a) limits the liability of the State or the Government or any department thereof in

respect of any act or omission of its servants. S 96 of the Roads Ordidnance is such a provision.

In my opinion therefore s 96 of Ordinance 22 of 1957 is intra vires.

NICHOLAS, AJA