THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NUMBER: 96/96

In the matter between:

GOVERNMENT OF THE PROVINCE OF THE

EASTERN CAPE

Appellant

and

FRONTIER SAFARIS (PTY) LIMITED Respondent

CORAM: SMALBERGER, F H GROSSKOPF, HARMS, PLEWMAN JJA and STREICHER AJA HEARD ON: 11 SEPTEMBER 1997

DELIVERED ON: 29 SEPTEMBER 1997

J U D G M E N T

PLEWMAN IA

This is an appeal brought with the leave of this Court against an order of the General Division of the Supreme Court of the Ciskei dismissing a Special Plea. The appellant is the successor to the former Government of the Republic of the Ciskei. (I will for convenience refer to the appellant as "the government".)

In 1987 the government enacted the Nature Conservation Act 10 of 1987 ("the Act") to consolidate the laws relating to conservation and the management and protection of fauna and flora within its domain. In terms of the Act it established certain national reserves. Three reserves are relevant to the appeal namely Tsolwana Game Reserve, Double Drift (formerly Lennox Sebe) Game Reserve and Mpofu Game Reserve (though the latter had not been proclaimed at the time of the events giving rise to the litigation under consideration). These reserves were established over a large number of farms in certain areas of the Ciskei and also covered portions of land known as the Hinana Tribal Resource area. In November 1989 the government, in its wisdom, entered into a

written contract with one Frederick Barry Burchell, acting as the nominee for a company to be formed, in terms whereof it purported to lease the reserves to the company for a period of 40 years. The respondent is the company which was incorporated to assume the rights and duties under the contract which it duly adopted and ratified:

It seems clear that the reserves were not at the time fully developed. The government negotiated a loan from the Development Bank of Southern Africa in order to develop them. The terms of the loan agreement (an annexure to the contract in issue) are specific as to how the funds are to be spent and a "Project Description", part of the agreement, allocates funds to the provision of basic infrastructure (that is fencing and roads) for each reserve. It is also apparent that the government did not have trained personnel immediately capable of managing the reserves. The government's long-term object was the development of the reserves with a view largely to the promotion of

tourism and it intended that the management of the reserves ultimately

be undertaken by Ciskei citizens. There are terms in the contract which reflect these aims. The contract, which will be considered in more detail presently, gave rise to an intricate inter-relationship between the parties in which provision was made for the development of the reserves to be financed by the development loan and by the allocation to the company of responsibility for the administration of the reserves.

On 26 March 1993 the Minister of Finance, representing the government, wrote to the respondent asserting that the contract was void (on grounds not now in issue) and further claiming, in any event, the right to cancel the contract. Obviously the government had re-thought matters. The letter was viewed by respondent as a repudiation of the contract and it, for its part, seemed content to accept the repudiation. It then cancelled the contract on the ground that it had been repudiated by

the government. In due course it served a summons on the government and claimed damages. The claim for damages has been framed under a number of heads covering expenditure of various sorts and includes a

substantial claim for future loss of profits. In the main claim some R62 million is sought and in the alternative claim R9 million. Happily little of this has any bearing on the appeal. What is in issue is a special plea (one of nine special pleas initially raised by the defendant). By an order in terms of Rule 33(4), the plea was adjudicated on by the court a quo as an issue to be decided separately from and before the other issues arising on the pleadings were considered.

The relevant portion of the plea reads:

> "In the alternative to paragraph 2.2 to 2.12 above the Defendant pleads as follows:
>
> 2.13 Sub-section 25 (1) of the Ciskei Nature Conservation Act, No 10 of 1987, as amended, provides as follows:
>
> > The control, maintenance, development and management of a national nature reserve shall vest in the Department (of Agriculture, Forestry and Rural Development) which shall be competent to exercise all or any of the powers mentioned in sub-section (2) of this section or which are otherwise necessary for the

attainment of the objects described in section 24.

2.14 The written agreement, Annexure 'A' to the Plaintiffs Particulars of Claim, purports to divest the said Department of the control, maintenance, development and management of the three national nature reserves mentioned therein.

2.15 The Defendant avers that the Government of the Republic of Ciskei was in law not competent to conclude a contract in such terms and that the aforesaid agreement is accordingly void, ab initio, and unenforceable in law.

2.16 In the premises, the Defendant is in law not liable for damages flowing from any alleged breach of the said agreement.

Wherefore Defendant prays that Plaintiffs claim be dismissed and that judgment be entered in the Defendant's favour with costs."

(There are additional paragraphs to the plea but these form the basis for a yet further special defence which is not presently relevant.)

The court a quo dismissed the special plea. What arises is the validity of the government's central contention namely that the contract purports to divest it (that is the government) of powers and duties entrusted to it for public purposes by the Act and for that reason void.

Appellant's argument in the court a quo was founded on the proposition that in law the state cannot be bound by a contract which would fetter the future exercise by it of statutory powers. This led the parties, and also to some extent the court, into an examination of certain English authority which seems to be the genesis of this concept. Much of this authority is coloured by the existence of royal prerogatives - a subject also touched upon in certain decisions of this country. In this Court, however, appellant's counsel disavowed reliance on any defence other than the contention that the contract was contrary to the Act. Put another way, counsel's submission was that the only enquiry was whether the contract was, within the four corners of the Act, competent.

For this reason it is unnecessary to examine the proposition relied

upon in the court a quo or to consider the decisions, both English and South African, in which principles relevant to the proposition then relied upon are discussed. It is also unnecessary to debate the question of what jurisdictional niche such concept fits in present-day South African law. This notwithstanding, it is perhaps desirable that I refer briefly to what seems to me the logical starting point in a debate relating to the effect of a contract made by the State. In addition certain of the English cases nicely illustrate the essential considerations which distinguish the enforceable contracts from the unenforceable.

The starting point, in my view, is s 1 of the State Liabilities Act 20 of 1957. This Act, in so far as the relevant provision is concerned, is a re-enactment of s 1 of the Crown Liabilities Act 1 of 1910. The 1957 Act was in force in the Ciskei by reason of the Status of the Ciskei Act 110 of 1981. Section 1 (of the State Liabilities Act) provides:

> "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."

The Crown Liabilities Act, which was in the same terms, abolished at least to the stated extent, any prerogative which may have existed and which could have barred liability by the State in contract. South African Railways and Harbours v Smith's Coasters (Pty) Limited 1931 AD 113 and Sachs v Donges NO 1950 (2) SA 265 (A) at 279 and 288.

The State Liabilities Act seems to have had a somewhat chequered history in the Ciskei. Counsel's research (undertaken after the hearing at the court's request) shows that it was one of a multitude of acts repealed by the Repeal of Laws Act 22 of 1985 (Ciskei). It was later re-enacted in the form of the State Liability Decree 21 of 1990 which was brought into force on 31 August 1990. It seems thus that there was legislation in those terms well before 1993 when the government repudiated the contract. What the position was in the inter-regnum is not clear but it is

to be doubted that the relevant royal prerogatives could have been revived. But clearly for the purposes of this appeal because of the terms of the special plea the government's position in relation to contractual liability had been equated to that of the ordinary citizen. This question need not be further pursued.

What must now be examined is the Act (that is the Nature Conservation Act) and the nature and purport of the contract. First the Act. The object of the establishment of national reserves is defined in s 24 and can for present purpose be summarised as being the protection, preservation, reproduction or propagation in their natural state of wild animals and indigenous plants and the preservation and enhancement of the natural beauty of areas concerned.

The provisions relating to administration of the Act are in s 2. What this provides is that the Department of Agriculture, Forestry and Rural Development ("the department") is responsible for the

administration of the Act and that any authorization enabling any person

to do anything for which authorization is required under the Act must be performed under the "licence, permit or other authorization" of a competent authority in the department. The consequence is, of course, that it is the department which both represented the government in concluding the contract and which is designated to exercise the powers conferred by the Act. It will, however, be convenient to continue simply to refer to the government. The provisions relating to the control and maintenance of reserves are -

> "25. Control, maintenance, development and management of national nature reserve. -
>
> (1) The control, maintenance, development and management of a national nature reserve shall vest in the Department which shall be competent to exercise all or any of the powers mentioned in subsection (2) of this section or which are otherwise necessary for the attainment of the objects described in section 24.
>
> (2) The Department may, out of moneys appropriated for the purpose by the National Assembly -
>
> (a) do all such things as may be required for the restoration, preservation and improvement of the land comprising a national nature reserve;

(b) take all such steps as will ensure the recovery and continued existence of the animal and plant life which is peculiar, or was at any time indigenous, to the area in which such reserve is situated;

(c) do everything which it may consider necessary to ensure the security of the animal life and vegetation in a national nature reserve and their retention in a natural state;

(d) protect, develop and improve all water sources and supplies and construct or erect fences, roads, dams, bridges and buildings and such other works as it may consider necessary for the maintenance, development, management and control of any national nature reserve including, where appropriate, weirs, breakwaters, seawalls, boathouses, landing stages, mooring places and swimming pools;

(e) reserve areas as breeding places for wild animals or as nurseries for indigenous trees, plants, shrubs and other flora;

(f) provide accommodation and recreational facilities for visitors to a national nature reserve but without prejudice to the natural environment;

(g) provide meals and refreshments for visitors to a national nature reserve;

(h) carry on any business in a national nature reserve;

(i) supply any other service for the convenience of visitors to a national nature reserve;

(j) erect or establish or equip and maintain any building, structure, depot or premises required or intended to be used in connection with any matter referred to in paragraph (f), (g), (h) or (i) or, with the concurrence of the Minister of Internal Affairs and Land Tenure and the Treasury, let any site required for such a purpose or any such building, structure for such a purpose or any such building, structure or premises as aforesaid;

(k) with the concurrence of the Treasury, make such charges as it may determine in respect of any matter referred to in paragraph (f), (g), (h) or (i) or which are to be paid in respect of permission to enter or to sojourn within a national nature reserve;

(I) subject to such conditions and the payment of such charges (if any) as the Minister may prescribe with the concurrence of the Treasury authorize any person or any body, board or corporation established by or under any law to carry on any activity which may, in terms of this subsection be carried on by the Department."

In terms of s 26 certain activities are prohibited in reserves, for example, no person other than an officer of the government may introduce any wild animal into a reserve.

Counsel for the appellant conceded that within the framework of

the quoted provisions the government was entitled to conclude contracts affecting the control, maintenance, development and management (which concepts I will refer to compendiously as "management"). Any such contract, however, (so it was argued) would have to relate to a specific project, undertaking or activity. The distinction which counsel sought to convey was, for example, that under s 25(2)(f) a contract for the construction of a specific lodge would be competent but permitting the construction of an indeterminate number of lodges would not. The latter it was argued would amount to an abdication of a duty placed on the government.

For the purposes of this case 1 will assume that the "vesting" of management of the reserves by s 25(1) imposed a duty on the government to manage them. But it seems to me that on a proper construction of ss (2), the powers there mentioned are of a permissive and not directory nature. The word "may", in its context, allows of no other construction. It is this that counsel in argument termed the

government's "discretion". Discretion is however not a suitable word if it is understood to connote anything more than the exercise of the government's permissive powers. In my view ss (2) must be read as an enumeration of permitted activities. Section 25(2)(1) in express terms authorizes the government to carry out any of the activities mentioned by engaging outside bodies or corporations to do so.

I turn now to the contract. In what follows, I will refer only to the clauses which seem relevant or which were the subject of special mention by counsel in argument. The preamble thereto makes it clear that the object of the contract was that the "services" which the company is to perform are to be performed "for and on behalf of the government". Clauses 1 and 2 define the subject matter of the lease, namely the reserves, and the term of the lease, namely 40 years. Clause 3 provides for the rental which is to be paid - a direct

payment of R10 000 per annum for a specified period, which sum was to be supplemented thereafter in terms of a stated formula. Clause 4 governs the

commencement date of the contract in respect of each reserve. It also allows the company to introduce and settle animals in the reserves before the commencement date but then (only) in accordance with "the Game and Resource Management Plan" which was to be agreed between the parties. This clause was singled out by counsel for comment and I will return to it.

Clause 5 falls under the heading "Infrastructure". It provides that the basic requirements such as fencing and roads are to be provided by government in accordance with the arrangements agreed upon in the loan agreement to which reference has been made. In terms of clause 6 the company, for its part, became obliged to maintain specified elements of the infrastructure. It is also provided that the company will collect all gate monies on behalf of the government and undertake responsibility for the management and utilization of wild animals (again in accordance with the Game and Resource Management Plan) and it is in addition required to "further the continuation and development of tourism".

Clause 7 was, as I understood it, the cornerstone of appellant's argument. I will deal with it separately. In clause 8 revenue from various sources is allocated to either the government or the company. It provides that a percentage of the company's income from the commercial realisation of wild animals (the so-called "head tax") is to accrue to the government. The company, it is further provided, may derive its income from curio shops, meat processing, handicrafts, safari lodges and hotels and by conducting tours and hunting and photographic safaris. Clause 10 relates to certain transitional arrangements (and need not be discussed). All that need be noted in relation to clause 13 is that the company's right to introduce additional game into the reserves is made subject to the Game Management Plan already referred to and to "any applicable law". I will return to this phrase.

The only other clauses to which it is necessary to refer are clauses 19 and 22. Clause 19 is the clause which confers a right of cancellation on the government. This includes that right in the event of the company

"failing to maintain the Reserves and/or public facilities in accordance with acceptable standards" and also in the event of the company "failing to observe standards of wild game management in accordance with acceptable standards". Finally there is clause 22. Clause 22.1 is in the following terms.

> "Nothing in this agreement shall be construed as exempting [the company] from the provisions of the Nature Conservation Act No 10 of 1987 as amended and as may be amended or from the provisions of any other law or regulations in the Ciskei."

(I have made a small grammatical correction in the clause as it appears in the record.)

Counsel's argument was that by virtue of the contract the government has abdicated its functions in relation to the management of the reserves and purported to transfer this entire function to the company. Abdication must necessarily imply that for the term of the lease the company had been substituted for the government. As an illustration of this general proposition counsel referred to clause 4 and the company's

right to introduce animals into the reserve before commencement of the lease. The clause, so it was argued, if given effect to would override s 2 and s 26. In my view the contrary is true. On a proper construction of the contract the right to introduce game will have to be exercised in co-operation with the government. The phrase "any applicable law" in clause 13 underlines this. But the main contention turned on the provisions of clause 7.1 and I therefore quote it in full:

> "7.1 [The company] further, as part and parcel of this agreement, agrees subject to the provisions of Clause 20.1, 20.2, 20.3, and 20.4 to generally assume responsibility for the management and maintenance of the Reserves in accordance with acceptable standards and more particularly agrees and undertakes to:

7.1.1 Employ and pay all staff necessary to administer and maintain the Reserves (save for the employment of law enforcement officers and staff retained by the Government for the purposes of meeting its obligations in terms of this Agreement.)

7.1.2 To supply those persons resident on and

adjacent to the Reserves, with surplus meat at a privileged rate as and when this may be available.

7.1.3 Permit local residents, under supervision, to obtain certain herbs for their own use where this is feasible and not objectionable to the good management of the Reserves.

7.1.4 Permit local residents under supervision to collect thatching grass where this is feasible and not objectionable to the good management of the Reserves.

7.1.5 Permit local residents to collect firewood under supervision where this is feasible and not objectionable to the good management of the Reserves.

7.1.6 In consideration for hunting on the Hinana Tribal Resource Area, to pay the said Authority a mutually agreed percentage of the daily rates and hunting fees for this activity."

Emphasis was placed on the phrase "generally assume

responsibility for the management and maintenance of the reserves".

However, to suggest that this phrase can be taken from its context and read without regard to the contract as a whole (as seems to me inherent in the argument) is fallacious. In my view more is being read into the clause than is warranted. Firstly it proclaims an "undertaking" by the company and not, I would suggest, the conferment of an enforceable all-embracing right. The generality of the phrase is qualified not only by the preceding clauses but also by the specific additional undertakings which follow in the sub-clauses. Clause 7 is in fact a subsidiary clause of a catch-all nature and one supplementary to (for example) limitations otherwise provided for. The references to clause 20 relate to provisions covering an obligation to co-operate with officials of the Republic of South Africa in so far as the administration of the Double Drift reserve is concerned; an obligation to respect the resolutions of a consultative committee (yet to be formed) and an obligation to respect a commitment made by the government to a body known as the Endangered Wild Life Fund. It was common cause between counsel that the references to

clause 20 were of no assistance in placing limits upon the generality of clause 7. I am not convinced that this is so but even if that be accepted it nonetheless seems to me that appellant's counsel's contention cannot be correct.

The overall effect of the contract is that it imposes a series of reciprocal obligations on the parties all of which are consonant with the objects of the legislation. Indeed this was conceded by appellant's counsel. At first blush the term of 40 years and the seemingly low rental would tend to make one wonder how advantageous the contract was to the government. But this is simply a speculative observation. There is no evidence to show that the contract was in fact disadvantageous to the government and even if it was this would be irrelevant to the question of whether the contract is ultra vires the Act.

The provisions of clauses 4, 5, 6, 13 and 19 all suggest that the government was not intending to wash its hands of the obligation to manage the reserves. Clause 22.1, in my view, puts this beyond doubt.

It can hardly be suggested that statutory control is being lost. Yet that was the essence of the appellant's argument.

The distinction which should, in my view, be drawn is one between a situation where a power is being exercised and one where it is being abandoned. One finds this distinction in academic writings and in case law relevant to the principles upon which the special plea was originally framed. For example in C Turpin Government Contracts the following is said at p 24/25:

> "The rule being one of public policy, if a court should again be required to determine its applicability to a government contract due weight should be given to certain other considerations of policy: that contracts seriously made should be enforced and reasonable expectations realized. The mere fact that a contract is shown to have the effect of limiting the future executive action of the Crown or other public authority falls far short of a demonstration that the public interest is infringed and that the contract should be held invalid. In particular it may appear that the making of the contract, far from being an improper violation of freedom of executive action, is a legitimate exwecise of that freedom."

The principle originally contended for by counsel (that is in the court a quo) is one which in England also applies to subordinate bodies. A case dealing with this contention in relation to a subordinate body is the case of Dowty Boulton Paul Limited v Wolverhampton Corporation [1971] 2 All ER 277 (Ch). Pennycuick VC after discussing cases which held that it was not competent for the Government to fetter future executive action said as follows at 282 e-h:

> "I have said that the principle laid down in those cases is established beyond doubt. That seems to me, however, a principle wholly inapplicable to the present case. What has happened here is that the corporation has made what is admittedly a valid disposition in respect of its land for a term of years. What is, in effect, contended by counsel for the corporation is that such a disposition - and, indeed, any other possible disposition of property by a corporation for a term of years, for example, an ordinary lease - must be read as subject to an implied condition enabling the corporation to determine it should it see fit to put the property to some other use in the exercise of any of its statutory powers. Nothing in the cases cited supports this startling proposition. The cases are concerned with attempts to fetter in advance the future exercise of statutory powers

> otherwise than by the valid exercise of a statutory power. The cases are not concerned with a position which arises after a statutory power has been validly exercised. Obviously, where a power is exercised in such a manner as to create a right extending over a term of years, the existence of that right pro tanto excludes the exercise of other statutory powers in respect of the same subject-matter, but there is no authority and I can see no principle on which that sort of exercise could be held to be invalid as a fetter on the future exercise of powers."

While the principles under consideration in that case have a different legal status from that for which the appellant has argued here, the practical tests applied to ascertain whether or not the present statute has been contravened are really no different. The short question, in each case is, is the government exercising its (discretionary or statutory) powers or is it seeking to abdicate those powers to others? Here management involves activities of various kinds and the statute provides that those activities may be contracted out. The analysis of the contract which I have given points, in my view, inescapably to the conclusion that the government was exercising its powers. The contract, in my view, is

not contrary to the Act and the appeal must be dismissed.

The order I make is: The appeal is dismissed with costs.

C PLEWMAN JA

CONCUR:

SMALBERGER JA)
F H GROSSKOPF
JA)
HARMS JA)

THE SUPREME COURT OF APPEAL

CASE NO 96\96

In the matter between:

GOVERNMENT OF THE PROVINCE OF
THE EASTERN CAPE APPELLANT

and

FRONTIER SAFARIS (PTY) LIMITED RESPONDENT

CORAM: SMALBERGER, F H GROSSKOPF, HARMS, PLEWMAN JJA and STREICHER AJA

HEARD ON: 11 SEPTEMBER 1997

DELIVERED ON: 29 SEPTEMBER 1997

JUDGMENT

STREICHER, AJA:

I have had the benefit of reading the judgment prepared by Plewman JA. For the reasons that follow I am unable to agree

with with the conclusion reached by him.

The Government of the Ciskei ("the Government") leased national nature reserves of which it was the owner to the respondent. The question to be decided is whether the agreement of lease was a valid agreement.

S 25(1) of the Nature Conservation Act 10 of 1987 (Ciskei) ("the Act") provides as follows:

> "The control, maintenance, development and management of a national nature reserve shall vest in the Department which shall be competent to exercise all or any of the powers mentioned in subsection (2) of this section or which are otherwise necessary for the attainment of the objects described in section 24."

S 25(2) sets out a number of activities that may be carried on by the Department out of moneys appropriated for the purpose by the National Assembly (the subsection is quoted in the

judgment of Plewman JA).

S 25(2)(1) empowers the Department to authorize any person or any body, board or corporation established by or under any law to carry on any activity which may, in terms of this subsection be carried on by the Department, subject to such conditions and payment of such charges (if any) as the Minister may prescribe with the concurrence of the Treasury.

The Department referred to is the Department of Agriculture, Forestry and Rural Development.

In terms of s 25(1) the control, maintenance, development and management of the national nature reserves mentioned in the agreement of lease, vested in the Department. The respondent alleges in its special plea, which was dismissed by the court a quo, that the agreement of lease was void and unenforceable

in that the Government thereby purported to divest the Department of the control, maintenance, development and management of the national nature reserves mentioned in the agreement.

By vesting the control, maintenance, development and management of the reserves in the Department the legislature conferred authority or power on the Department to control, maintain, develop and manage the reserves. Having done so, unless the contrary appears to be the case, one must assume that the legislature intended the Department to exercise the authority or power and not someone else. Baxter, Administrative Law, at 434 states the position thus:

> "In modern democracies original power derives from the political authority of elected legislatures. Because of the practical requirements of government it is recognized that such bodies may delegate their powers. In South Africa, Parliament is recognized to have unlimited powers of delegation.

Considerable latitude is also given to such 'original' authorities as provincial councils. But all other administrative authorities are treated as defegees, power having been delegated to them by the original authority. Not being the direct repositories of public trust they are not permitted the same freedom to choose who shall exercise their powers. There is a presumption that they may not further delegate (ie sub-delegate) their powers: delegatus non potest delegare."

(Pty) Ltd 1965(4) SA 628 (A) at 639 C-D Botha JA said:

"The maxim delegatus delegare non pofest is based upon the assumption that, where the legislature has delegated powers and functions to a subordinate authority, it intended that authority itself to exercise those powers and to perform those functions, and not to delegate them to someone else, and that the power delegated does not therefore include the power to delegate. It is not every delegation of delegated powers that is hit by the maxim, but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers."

Wade, Administrative Law, 6th ed. at 363 says:

"There is no general principle that administrative functions are

> delegable. The principle is rather that, where any sort of decision has to be made, it must be made by the authority designated by Parliament and no one else."

It does not follow that every act performed in the execution of a power conferred on an administrative body has to be performed by that body.

Wade, op cit states at 362:

> "A public authority is naturally at liberty to employ agents in the execution of its powers, as for example by employing solicitors in litigation, surveyors in land transactions, and contractors in road-building. The essential thing is that it should take its decisions of policy itself, and observe any statutory requirements scrupulously."

Whether or not the Department could delegate its authority to control, maintain, develop and manage the reserves therefore turns upon a construction of the empowering statute.

No express authority to delegate the Department's

authority to manage the reserves is to be found in the statute. In order to effectively exercise the authority to control, maintain, develop and manage, the Department obviously required ancillary powers and for this reason s 25(1) specifically provides that the Department shall be competent to exercise all or any of the powers mentioned in s 25(2) or which are otherwise necessary for the attainment of the objects described in s 24. Whether or not a particular activity should be carried on and how it should be done requires a policy decision. Furthermore, the various activities need to be co-ordinated. An express authority to authorize another person to carry on any of those activities can therefore not be considered to be an express authority to authorise another person to control, maintain, develop and manage the reserves.

No implied authority to delegate the Department's

authority to manage the reserves is to be found in the statute either. The contrary is the case. The fact that the legislature specifically provided that the Department could authorise a third party to carry on any or all of the activities mentioned in s 25(2) and not that the Department could authorize a third party to control, maintain, develop and manage the reserves is a clear indication that the legislature did not intend the Department to have such power.

The national nature reserves are national assets which have to be protected for the benefit of present and future generations. In accordance with this requirement the object of the Act is in s 24 expressly stated to be the protection, preservation, reproduction or propagation in their natural state of wild animals and indigenous plants and the preservation and enhancement of the natural beauty of the area concerned. In managing the reserves numerous policy

decisions affecting nature conservation and related matters obviously have to be made. The legislature considered the Department to be the appropriate authority to make these decisions. In the circumstances it is highly unlikely that the legislature intended the Department to have the authority to delegate its authority to manage the reserves. If the Department was unable to manage the reserves effectively the Government should have requested the legislature to reconsider the matter.

I therefore conclude that the Department did not have authority to delegate its authority to manage the reserves. The legislature and not the Department was the appropriate body to decide by whom the national nature reserves should be managed.

It remains to consider whether the Department, by entering into the agreement' of lease with the respondent contrary to

the provisions of the Act abdicated its authority to manage the reserves. To do so it is necessary to refer in some detail to the contents of the lease. I shall do so under three heads viz. the respondent's main rights and obligations, the Government's main obligations and the rental and other sources of income. 1. The respondent's main rights and obligations in terms of the agreement of lease (excluding its obligations in respect of rental). 1.1 The respondent as lessee could occupy the reserves for a period of 40 years. During the term of the lease the respondent could at its own expense and for its own account derive income from the conduct of curio shops, game meat processing factories, safari lodges, restaurants, hotels, guided tours, hunting and photographic safaris and from the development of handicraft industries and the sale of surplus

1 game, dead or alive. The agreement does not contain any stipulations in regard to the number of shops, factories, restaurants and hotels that could be established, the nature and number of buildings that could be erected to house them and their situation within the reserves. Upon termination of the lease the respondent was entitled to be compensated for fixed improvements effected by it.

1.2 The respondent undertook to maintain and foster the cordial relationship that existed with the adjoining Andries Vosloo Game Reserve administered by the Government of the Republic of South Africa, to observe and respect the resolutions and agreements of a proposed consultative committee consisting of representatives of the Cape Provincial Administration and the Ciskei National Parks Board, and to

2 use its best endeavours to maintain the Government's commitment to the Endangered Wild Life Fund.

1.3 Subject to these undertakings the respondent agreed to assume responsibility for the management and maintenance of the reserves in accordance with acceptable standards and to employ and pay all staff necessary to administer and maintain the reserves (save for the employment of law enforcement officers and staff retained by the Government for the purposes of meeting its obligations in terms of the agreement), to supply those persons resident on and adjacent to the reserves with surplus meat at a privileged rate, to permit local residents to collect herbs, thatching grass and firewood where it was feasible and not objectionable to the good management of the reserves and in consideration for hunting on the Hinana Tribal

Resource Area to pay the Hinana Tribal Authority mutually agreed percentage-of-the daily rates and hunting fees for this activity.

1.4 The respondent undertook the obligation and responsibility of the development and control of fauna and flora according to acceptable standards, of tick and vermin control and of ensuring the continuation and development of game and trophy hunting operations.

The respondent furthermore undertook the responsibility of ensuring the continuation and development of tourism in the form of game viewing and photographic safaris in accordance with the Resource Management Plans which were to be agreed after consultation between the parties (clause 6.2.6 of the agreement).

In addition the respondent agreed to attempt to foster the development of educational and research projects within the reserves whenever reasonably feasible. 1.5 Clauses 4.2.2, 4.2.4, 6.2.2, 6.2.6 and 13.3 contain references to Game and Resource Management Plans. The reference in clauses 4.2.2 and 6.2.6 is a reference to Game and Resource Management Plans to be agreed after consultation between the parties. In terms of clause 4.2.2 the respondent was entitled to introduce and settle animals in the reserves before commencement of the lease. In terms of clause 13.3, and subject to the provisions of the Game and Resource Management Plans, it could do so after commencement of the lease. In terms of clause 4.2.4 the respondent was entitled to maintain in the reserves, the number of cattle determined in

accordance with the Resource and Management Plan. In terms of clause 6.2.2 the respondent had to manage and utilise the wild animals and game in accordance with acceptable standards which were to be recorded in Game and Resource Management Plans. The respondent agreed to maintain stock levels of wild animals conservatively and further agreed that these levels would be determined in consultation by the parties on an annual basis.

The respondent agreed to do what it reasonably could to ensure that the wild and domestic animals in the reserves did not graze on crops or prey on domestic animals on adjoining farms.

1.6 In terms of the lease the respondent could purchase all movable assets required by it and situated within the reserves

at their book value and the Government could do the same upon termination of the lease. By agreement the mechanical pumps, generators and machinery bolted to fixed bases were deemed to be movables.

1.7 The respondent undertook to collect and pay to the Government gate entrance fees (less a commission).

1.8 The respondent undertook to, in accordance with acceptable standards, to maintain certain elements of the infrastructure viz. windmills, boreholes, small dams, hunting access roads, the game farming infrastructure and buildings. The respondent also undertook to be responsible for the normal maintenance and repair of the interior and exterior of all buildings situated in the reserves save for any structural defects or faults which the Government undertook to repair.

1.9 The parties specifically agreed that nothing in the agreement should be construed as exempting the respondent from the provisions of the Nature Conservation Act, 1987 or from the provisions of any other law.

2. The Government's main obligations in terms of the agreement of lease.

2.1 The Government undertook to construct certain elements of a bulk infrastructure for the reserves in accordance with acceptable engineering standards. These elements consisted of main access roads within the reserves as well as roads from the perimeter to adjacent national roadways, fences along the perimeter of the reserves, main storage dams, viewing roads which were to be agreed to, gate houses and entrance gates. The Government obtained a loan of R2 713 000 from the

Development Bank of Southern Africa for this purpose. The Government furthermore undertook to maintain such infrastructure.

2.2 The Government undertook to attend to the maintenance of law and order within the reserves including the administration and observance of the provisions of the Nature Conservation Act, 1987, to re-settle all persons then settled on farms in the areas incorporated by the reserves and to ensure the prevention of poaching and trespassing. 3. The rental and other sources of income.

3.1 The respondent undertook to pay to the Government an amount equal to 5% (called a head tax) of all income received from the commercial realisation of wild animals in the reserves including the sale price of all meat and skins sold, the cost

charged to hunters for animals hunted and game trophies sold as well as all live animals sold.

3.2 The respondent undertook to pay rental to the Government in a sum of R10 000 per annum for a period of 5 years and thereafter either R10 000 (or such other figure that the parties agreed upon) or 2% of any excess of income over expenditure derived from the conduct of curio shops, game meat processing factories, safari lodges, restaurants and hotels, guided tours, hunting and photographic safaris, the development of handicraft industries and the sale of surplus game dead or alive whichever was the greater. For purposes of calculating the aforesaid excess income, the commission earned by the respondent on gate entrance fees collected on behalf of the Government was to be deemed not to be income from the

aforementioned sources and the head tax was to be deemed to be an expense. - - - - - - - -

3.3 The Government could at its own expense and for its own account collect revenue from the issuing of hunting licences and from 10 holiday chalets which it could erect on the Double Drift Game Reserve as a public amenity.

The respondent obtained the right to occupy the reserves and, subject to the terms of the Act to conduct a substantial commercial enterprise thereon. It specifically agreed to assume responsibility for the management and maintenance of the reserves, to exercise control over the reserves and to attend to various aspects of a developmental nature.

In the judgment of Plewman JA he comes to the conclusion that the Government did not abdicate its authority to

manage the reserves. He states that the provisions of clauses 4, 5, 6, 13 and 19 all suggest that the government was not intending to wash its hands of the obligation to manage the reserves and that clause 22.1 puts this beyond doubt. In my judgment an analysis of these clauses do not support this conclusion.

Clause 4.2.2 did place a limitation on the respondent's right to introduce animals into the reserves and clause 4.2.4 placed a limitation on the number of cattle that the respondent could maintain in the reserves.

Clause 5 deals with the Government's obligation in regard to the provision of a bulk infrastructure. It also deals with the Government's undertaking to attend to the maintenance of law and order within the reserves, the observance of the provisions of the Act and the prevention of poaching and trespassing. These matters are

matters that should be attended to by the Government even in respect of private property. In addition Clause 5 contains an undertaking by the Government to re-settle all persons at the time settled on farms in the areas incorporated by the reserves. This was no more than an undertaking to give vacant possession.

Clause 6.2.2 required the respondent to manage and utilise wild animals in accordance with acceptable standards which were to be recorded in Game and Resource Management Plans. No agreement was required in this regard. In terms of 6.2.6 the development of tourism in the form of game viewing and photographic safaris was to be done in accordance with Resource Management Plans which were to be agreed between the parties.

Clause 13.3 placed some restriction on the introduction into the reserve, by the respondent, of further game.

Clause 19 is the cancellation clause. In my view this clause provides confirmation that the respondent and not the Government was, from the commencement of the lease, to manage the reserves. The clause provided that the Government would be entitled to cancel the agreement inter alia where the respondent failed to maintain the reserves and the public facilities in accordance with acceptable standards and where the respondent failed to observe acceptable standards of wild game management. It furthermore provided that the respondent would be entitled to cancel the agreement inter alia where there existed a state of social, civil or political disorder or lawlessness which rendered the continued management of the reserves impossible, where by operation of law or executive Government action, effective management and control of the reserves became impossible and where the Government failed

to provide or maintain essential infrastructural services which rendered the continued management of the reserves impossible or severely prejudiced the respondent in the management of the reserves.

Clause 22.1 is the clause that provides that nothing in the agreement should be construed as exempting the respondent from the provisions of the Act or from the provisions of any other laws. This clause required no more than that, to the extent that the agreement empowered the respodent to control, maintain, manage or develop the reserves, it should exercise that power lawfully.

Subject to the aforesaid limitations the respondent, as lessee, had the right to use and enjoy the property and the Government, as lessor, was under an obligation to refrain from doing anything which would disturb the respondent in its use and

enjoyment. The right to use and enjoy the property included the right to control and manage the property.

The limitations placed on the respondent's power to manage did not alter the fact that it was the respondent, and not the Department, which was, in terms of the agreement, going to manage the reserves. This fact is recognised by the respondent itself in its particulars of claim. It alleges in its main claim for damages that it would initially have made a profit of R2 000 000 per annum and that it would have made a total profit in an amount of R755 010 702 from the running and administration of the reserves in terms of the agreement, had it been allowed to run and administer the reserves for the remaining period of the lease.

The parties purported to vest the Department's authority to manage the reserves in the respondent. The Department had no

authority to do so. Its attempt to do so amounts to an abdication of its authority to manage the reserves. The agreement of lease, is therefore invalid.

I would accordingly have upheld the appeal with costs and have substituted for the order of the court a quo an order dismissing the plaintiffs claim with costs.

P E STREICHER
ACTING JUDGE OF APPEAL