

A 18/93

WILLEM ANDRIES ALBERTS VS THE GOVERNMENT OF NAMIBIA
AND ONE OTHER

1993/02/05

FRANK J.

ADMINISTRATIVE LAW - Review - Distinction public authority
and voluntary association - different criteria set out
rugby player asked to withdraw from national team
as member of police force of foreign state - cannot
proceed against government where Voluntary Association
(Rugby Union) acted pursuant to "government policy"
This so even where "government policy" unlawful
must proceed against voluntary association who acted
against him - without constitution of voluntary association
impossible to determine whether voluntary association
acted within it's powers or not - Application dismissed.

IN THE HIGH COURT OF NAMIBIA

In the matter between

WILLEM ANDRIES ALBERTS

APPLICANT

and

THE GOVERNMENT OF NAMIBIA

FIRST RESPONDENT

THE NAMIBIA RUGBY UNION

SECOND RESPONDENT

CORAM: FRANK, J.

Delivered on: 1993.02.05

JUDGMENT

FRANK, J.: The Applicant resides in Walvis Bay where he is employed as a member of the South African Police. He is a Namibian citizen by birth and partake in the game of rugby for a club in Walvis Bay.

He was selected by the Second Respondent during 1991 to play for the National Rugby Team of Namibia. He was, however, informed by the President of the Second Respondent that unless he resigned from the South African Police he would have to withdraw from the team. The reason for this was "that the Second Respondent has been informed by the First Respondent that no member of the South African Police, whether or not a particular member is a Namibian citizen of the Republic of Namibia and whether or not resident in Namibia, may be elected to represent Namibia on a national level as member of any national and officially elected sports team."

As a result the Applicant resigned from the South African Police. During 1992 the Applicant was again selected to the National Team but when it was established that he had rejoined the South African Police he was informed "that on instructions of the First Respondent, I would have to withdraw from the team". He was also informed by the President of Second Respondent not to make himself available for selection to the National Rugby Team while he remained in the employ of the South African Police. Applicant then withdrew from the team and later once again resigned from the South African Police after which he was elected for the national team for certain matches. Unbeknown to Second Respondent the Applicant rejoined the South African Police for the third time. He was selected for the National Team to partake in a tournament in Malaysia and the team will leave on 8th February 1993. He was informed of his selection on 25th January 1993. Applicant knowing that he would be asked to withdraw once it became known that he was a member of the South African Police contacted a lawyer.

Applicant's lawyer contacted the Minister of Youth and Sport who informed him that First Respondent would not be prepared to consent to Applicant representing Namibia because of his employment with the South African Police and also stated that this was contrary to the provisions of the Namibian Constitution. The Minister also confirmed her attitude in writing. She states that the National Team is to be comprised of citizens selected on merit and continues that Applicant is ineligible because of the provisions of Article

4(8)(b) which she quotes. She states that "on the basis of this article, legislation and policies have been formulated, and in accordance with such policies the Namibian Rugby Union has been disqualifying your client from serving on our National Team." She also attached a letter to the Ministry from the Namibian Rugby Union dealing with the matter. The said Union states that they were unaware of the fact that the Applicant had rejoined the South African Police and had they known of this "the policy of the Government would have been followed." It is clear that he would not have been considered for selection had the Union known that he was a member of the South African Police as they state "while he was a policeman, Mr Alberts was not elected for the National Rugby Team because of the Government's policy."

The Second Respondent was also contacted in this regard and through its vice-president informed Applicant that the Second Respondent was committed to the policy mentioned by the First Respondent and will implement it and that Applicant would be asked to withdraw from the team failing which a decision in this regard would have to be taken by Second Respondent.

The Applicant apart from asking that the matter be dealt as one of urgency now seeks the following order:

- "2. Declaring the decision by the First Respondents to order the exclusion of the Applicant and/or the removal of the application from the National Rugby Team of Namibia null and void and without effect in law;

3. Declaring the decision by the Second Respondent to implement the decision/order of the First Respondent to omit the Applicant from the National Rugby Team of Namibia null and void and without effect in law;
4. Reviewing and setting aside the purported order by First Respondent to cause the removal of the Applicant from the National Rugby Team of Namibia, for which he has already been duly elected;
5. Reviewing and setting aside the decision of the Second Respondent to implement the decision and order of the First Respondent which will have the effect of removing the Applicant from the National Rugby Team of Namibia, for which team Applicant has already been duly elected;
6. Directing that the First Respondent should pay the costs of this application, alternatively, should Second Respondent oppose the relief claimed, that the First and Second Respondents pay the costs of this application, jointly and severally, the one paying the other to be absolved."

Neither the Respondents are opposing the application. Mr Geier appeared on behalf of the First Respondent when the matter was called and indicated that First Respondent would abide by the decision of the Court.

The approach to be adopted to the decisions by the two Respondents are different in law. First Respondent is to act, generally speaking, in the public interest whereas Second Respondent as a voluntary association must act pursuant to the provisions of its constitution. In short there is a difference of approach to public authorities and

to private or domestic bodies. "There is an essential difference between the rules that constitute and empower such bodies and those that relate to public authorities. The former are based upon the voluntary, contractual agreement of their subscribing members, whereas the latter are based upon statute. In order to apply the principles of review the Court must deduce what is required, not from a statute but from the terms of the agreement, express and implied. To the extent that the provisions of the agreement are not dictated by law they are, in theory, a matter of voluntary determination." (See Baxter: Administrative Law at p.341); Wade: Administrative Law. 6th ed. at 470 states: "Such cases fall outside administrative law, since they are not concerned with governmental authorities, and the question at issue is not one of ultra vires but one of breach of contract." (See also at 647. The use of the words "ultra vires" may be misleading as they may be used in the "contractual" realm where an association acts outside the powers of it's constitution.)

Schreiner, J.A. postulates the extremes in illustrating the difference between public authority and private decision in Mustapha v Receiver of Revenue, Lichtenburg 1959(3) SA 343 (A) at 347 where the following is stated:

"For no reason or the worst of reasons the private owner can exclude whom he wills from his property or eject anyone to whom he had merely given precarious permission to be there. But the Minister has no such freedoms. He receives his powers from the statute alone and can only act within it's limitations, express and implied. If the exercise of his powers is

challenged the courts must interpret the provision, including its implications and any lawfully made regulations, in order to decide whether the powers have been duly exercised."

The Second Respondent is, of course, not in the same position as the private owner. Its actions must be judged against its constitution. As long as it acts within its constitution, properly interpreted, and not contrary to any law its decisions cannot be attacked. In short. First Respondent's actions must be judged as indicated above by Schreiner, J.A., whereas Second Respondent's actions must be judged against the provisions of its constitution.

First Respondent's attitude is based on Article 4(8)(b) of the Constitution as indicated above. This article reads as follows:

"Nothing in this Constitution shall preclude Parliament from enacting legislation providing for the loss of Namibian citizenship by persons who, after the date of independence:

- (b) have served or volunteered to serve in the armed or security forces of any other country without the permission of the Namibian Government."

What the First Respondent overlooked was the proviso to the article which reads as follows:

"provided that no person who is a citizen of Namibia by birth or descent may be deprived of Namibian's citizenship by such legislation."

In any event, the subsequent legislation, i.e. Act 14 of 1990, does not apply to citizens by birth. This is probably because of the aforesaid proviso which would have rendered any provision in conflict therewith unconstitutional. First Respondent cannot by way of policy decisions, in effect, amend the constitution. This is even more so where they cannot even by legislation give effect to such policy decision because it would be unconstitutional. Where a decision is based on citizenship this must mean citizenship as legally defined and not as defined by whim of a government official. Nor can any policies be formulated on the basis of a definition which has no existence in law.

The question, however, remains as to whether Applicant is entitled to the relief sought against First Respondent. This is so because it is not First Respondent who selected Applicant nor is it First Respondent who will ask him to withdraw from the National Team. These actions were taken and will be taken by Second Respondent. Whether Second Respondent acted because they are under the impression that they are obliged to follow the policy of the First Respondent is, in my view, neither here nor there, as vis-a-vis the Applicant it is the decision of Second Respondent that will affect him and it was Second Respondent who informed him that he was not to make himself available for the National Team while employed with the South African Police. While the First Respondent may conceivably have an interest in the matter due to the history relating to Second Respondent's decision to implement "government policy". The decision was, at the end of the day, that of the Second

Respondent and not of First Respondent.

As far as the Second Respondent is concerned its constitution was not placed before Court nor was it referred to in the papers. It is thus impossible to determine whether it was within its powers to set eligibility criteria for selection of members to the National Team based on the criteria of the "government policy". As pointed out above, because of the different legal criteria applicable, it may be possible for Second Respondent to adopt rules governing its members which the First Respondent would not have been able to do. Thus e.g. Second Respondent may conceivably decide that only members who are citizens and who play rugby in Namibia (and not in a foreign country) will be eligible for the National Team, whereas First Respondent will have no authority to implement and impose such a policy without the necessary statutory backing. Thus in this case, although the First Respondent cannot redefine citizenship by way of policy, Second Respondent could conceivably have decided that members serving in the security forces of South Africa will not be eligible for the National Team for any number of reasons, such as suspect loyalty to Namibia, image of the team amongst fellow Namibians, relations with other Rugby Unions on the African Continent and in the world and effect on sponsorship.

Second Respondent could have decided to avoid confrontation with the Government and therefore have implemented the policy which is strongly suggested in the papers. Even this would not make their decision reviewable per se. As this

may also, depending on circumstances, be in the interest of rugby in general, e.g. the access to teachers, schools and infrastructure via Government may be more important to the general development and upliftment of the game of rugby than the selection of one potential player for the National Team in the employ of the South African Police.

In short, without the constitution and without any other legal basis set out in the papers, I am unable to grant an order against the Second Respondent. Should Second Respondent wish to change their selection criteria in view of my findings with regard to the "government policy" and not ask Applicant to withdraw from the team, it will be their prerogative provided they abide by the provisions of their constitution.

IN THE RESULT THE APPLICATION IS DISMISSED WITH COSTS.

A handwritten signature in black ink, consisting of several overlapping loops and a long, sweeping stroke that extends upwards and to the right. The signature is written over a horizontal line.

FRANK, JUDGE

Counsel for the Applicant: Adv.S.Vivier-Turck
Instructed by: Van der Merwe & Oliver,
c/o Fisher, Quarmby &
Pfeiffer.

Counsel for the Respondents: Government Attorney

or whether this happened in the following year but doing the best I can with evidence which was at times quite vague it seems he was referring to a discussion which took place in 1981 when it came to any firm interest being shown.

Before completing the events of 1980 it is necessary to go back to 1979 and to describe the assistance which Zysset gave to the defendant to open a numbered bank account in Switzerland. Zysset was involved in a minor way with a bank in Switzerland and at the defendant's request he made enquiries how the defendant could move money into Switzerland and transfer it out again without the necessity of a signature appearing on the papers. The answer was a bearer savings account and Zysset opened such an account on the defendant's behalf at the Spar- und Leihkasse Bank in Switzerland. A large number of the documents placed before the Court were agreed by the parties and one such document was the defendant's bank statement for his account at this bank. This statement shows that various sums of money were deposited and withdrawn from account No.43.173.07 between 10th July, 1979 and 7th January, 1982. More of that later. In 1980 Zysset opened another account at the same bank again on the defendant's behalf. The agreed statement of *ti* account No.43.761.01 also shows various sums of money deposited and withdrawn between 8th October, 1980 and February, 1981.

The defendant admitted that these two accounts were opened in order to facilitate the transfer of his own funds from Namibia as financial rands. The advantage of doing so was substantial because in 1980 and 1981 the discount