CASE NO.: SA 5/95

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

REHOBOTH BASTERGEMEENTE	APPELLANT
and	
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	FIRST RESPONDENT
THE REGISTRAR OF DEEDS, REHOBOTH	SECOND RESPONDENT
CORNELIUS MICHAEL BRANDT	THIRD RESPONDENT
THE KHOMAS REGIONAL COUNCIL	FOURTH RESPONDENT
THE HARDAP REGIONAL COUNCIL	FIFTH RESPONDENT
THE REGIONAL COMMISSIONER FOR THE CENTRAL REGION	SIXTH RESPONDENT

Coram: Mahomed, C.J., Dumbutshena, A.J.A., et Frank, A.J.A.

Heard on: 1995/10/11

Delivered on: 1996/05/14

APPEAL JUDGMENT

MAHOMED, C.J., DUMBUTSHENA, A.J.A. et FRANK, A.J.A.: This is an appeal against a judgment of the Full Bench of the High Court in which an application was dismissed with costs. The appellant sought an order which would prevent certain immovable property and money from becoming the property of the Government of Namibia. Before dealing with the legal questions involved it is apposite to briefly sketch the history pertaining to the appellant and the property insofar as it appears from the papers and have relevance to the issues to be decided so that the matter can be viewed in its proper prospective.

Toward the end of the eighteenth and the beginning of the nineteenth century a number of Baster communities emerged in what was then known as the Cape Colony. One of these communities inhabiting the area known as de Tuin decided to emigrate north. It is this community that settled in Rehoboth and the vicinity around 1871. En route to Rehoboth they settled their own constitution which was eventually promulgated at Rehoboth during January 1872 and which constitution came to be known as the Paternal Laws. The Basters acquired land at and around Rehoboth pursuant to negations with the then existing Tribal Governments laying claim to this area principally the Nama tribe known as the Swartboois.

The Paternal Laws, although dealing also with matters one would not find in a modern day constitution such as civil and criminal matters, provided a framework of rules defining the organs of government of the Baster people and their rights and duties. Thus as Hannah, J. pointed out in his judgment where certain in limine objections were dealt with by the Full Bench:

> "They provided for the appointment of an elected supreme ruler known as the Kaptein who was to hold such office for life. Also for a Raad (Council) consisting of two citizens to assist the Kaptein and a Volksraad (Parliament) consisting of a further two citizens. They provided that every Baster, or anyone married to a Baster, should be a citizen and that all tax-paying citizens should have the right to vote in the election of the Kaptein and member of Parliament. Provision was also made for non-Basters to become citizens. … The Paternal Lwas also provided for the appointment of judges by the

> Kaptein to hear criminal and civil matters and for the appointment of field-cornets, the equivalent of modern-day deputy-sheriffs. A number of offences were specified together with the penalties to be imposed. A system of taxation was created 'in order to defray the necessary government expenditure'. There were laws pertaining to marriage and restrictions were imposed on the sale of land. There was a call-up system in the event of attack by enemies."

After German annexation of the whole area presently known as Namibia (excluding the Walvis Bay enclave) a "Treaty of Protection and Friendship" was concluded between the German Imperial Government and the Basters. This Treaty recognised "the rights and freedom which have been acquired by the Basters at Rehoboth for themselves ..." Despite this Treaty the German Imperial Government in true colonial tradition ignored it when it suited their purpose and made several laws which were applicable in Rehoboth, opened several police stations in the area and even appointed a District Officer for the area. However it is clear that the Kaptein and his council continued to function throughout this period up to the time of the German defeat by South Africa in 1915.

After the defeat of the Germans the Basters continued basically to govern themselves according to the provisions of the Paternal Laws. The South Africans and the Kaptein and Council of the Basters came to an agreement which formed the basis of Proclamation 28 of 1923 wherein, inter alia, the right and title of the Rehoboth Community to the land then occupied by it was acknowledged as well as their right to local self-government in accordance with the Paternal Laws. The boundaries of the Rehoboth Territory was also defined in

this proclamation comprising an area of approximately 14 200 square kilometres. Political dissension in the Baster Community however followed upon the agreement which formed the basis of this proclamation and a further proclamation, No. 31 of 1924, was enacted. In terms of this proclamation the powers of the Kaptein and certain other officials were transferred to the Magistrate and his Court. The magistrate
was an appointee of the South Africans.

From this point onward there was a gradual restoration of the powers back to the community who also all along insisted on self-government. This process was completed with the enactment of the Rehoboth Self-Government Act, No. 56 of 1976 the long title whereof reads as follows:

> "To grant self-government in accordance with the Paternal Law of 1872 to the citizens of the 'Rehoboth Gebiet' within the territory of South West Africa; for that purpose to provide for the establishment of a Kaptein's Council and a Legislative Council for the said 'Gebiet'; to determine the powers and functions of the said councils; and to provide for matters connected therewith."

Elections were held under this Act, the structures were put in place and the Rehoboth area was governed in terms of this act up unto 1989. By Proclamation 32 of 1979 the powers granted by Act 56 of 1976 were transferred to the Administrator-General of Namibia in anticipation and in preparation for the independence of Namibia which followed on 21 March 1990. In terms of Schedule 8 of the Constitution of

the Republic of Namibia Act 56 of 1976 was repealed in toto and the form of self-government which the Basters enjoyed from their arrival at Rehoboth during 1871 - 1872 up to the independence of Namibia during 1990 had come to an end.

As is stated above the Basters initially acquired the land at and surrounding Rehoboth by negotiations mainly with the Swartbooi Tribe. This land was apparently acquired for and on behalf of the community and there was no individual title to the land as such. There however evolved a custom of issuing papers ("papieren") to evidence the granting of land to private owners. In the fullness of time much of the land owned by the Community passed into private ownership. It needs to be stated in passing that none of the land which passed into private ownership in this fashion is the subject-matter of this appeal. In terms of Proclamation No. 52 of 1939 the Community was entitled as "an association of persons" to acquire immovable property and this property had to be registered in the name of the Kaptein "for and on behalf" of the community. In the Registration of Deeds in Rehoboth Act, No. 93 of 1976, provision was made for the establishment of a Deeds Officer and Registry in the Rehoboth area for that area.

Act 56 of 1976 which sought to restore local self-government to the Basters dealt with the question of ownership of movable and immovable property in the Rehoboth area in sections 23 which reads as follows:

"(1) From the date of commencement of this Act the ownership and control of all movable and immovable property in Rehoboth the ownership or control of which is on that date vested in the Government of the Republic or the administration of the territory of South West Africa or the Rehoboth Baster Community and which relates to matters in respect of which the Legislative Authority of Rehoboth is empowered to make laws, shall vest in the Government of Rehoboth.

(2) The said property shall be transferred to the Government of Rehoboth without payment of transfer duty, stamp duty or any other fee or charge, but subject to any existing right, charge, obligation or trust on or over such property and subject also to the provisions of this Act.

(3) The Registrar of Deeds concerned shall upon production to him of the title deed to any immovable property mentioned in subsection (1) endorse such title deed to the effect that the immovable property therein described is vested in the Government of Rehoboth and shall make the necessary entries in his registers, and thereupon the said title deed shall serve and avail for all purposes as proof of the title of the Government of Rehoboth to the said property."

As already mentioned Act 56 of 1976 was repealed by the Constitution. The Constitution does however also have provisions relating to property. Thus Article 129 stipulates that "The assets mentioned in Schedule 5 hereof shall vest in the Government of Namibia on the date of Independence.

Schedule 5 reads as follows:

“(1) All property of which the ownership or control immediately prior to the date of independence vested in the Government of the Territory of South West Africa, or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1980), or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for

the benefit of any such Government or Authority immediately prior to the date of Independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia.

(2) For the purpose of this Schedule, 'property' shall, without detracting from the generality of that term as generally accepted and understood, mean and include movable and immovable property, whether corporeal or incorporeal and wheresoever situate, and shall include any right or interest therein.

(3) All such immovable property shall be transferred to the Government of Namibia without payment of transfer duty, stamp duty or any other fee or charge, but subject to any existing right, charge, obligation or trust on or over such property and subject also to the provisions of this Constitution.

(4) The Registrar of Deeds concerned shall upon production to him or her of the title deed to any immovable property mentioned in paragraph (1) endorse such title deed to the effect that the immovable property therein described is vested in the Government of Namibia and shall make the necessary entries in his or her registers, and thereupon the said title deed shall serve and avail for all purposes as proof of the title of the Government of Namibia to the said property."

The important part of the history narrated above was the passing of the Rehoboth Self-Government Act, No. 56 of 1976, hereinafter referred to as Act 110. 56 of 1976 or the Act. The Baster Community asked for it. Self-Government was granted on the basis of proposals made by the Baster Advisory Council of Rehoboth. In short the Baster Community asked for self-government and they got it. The south African Government in response to their request obliged by enacting Act No. 56 of 1976.

The most important asset of the people of Rehoboth was their land. Before the Passing of Act No. 56 of 1976 the land acquired by the Baster Community was registered in the name of the Kaptein who held the land on behalf of the people, that is, the community.

When Act No. 56 of 1976 was promulgated on 10 December 1976, the ownership or control of the land vested in the Rehoboth Government. It is easy to assume that the arrangement pleased them. The government was theirs. The property was theirs too. Besides they had self-government in accordance with the Paternal Law of 1872. The new Act provided them with a Kaptein's Council and a Legislative council.

What would self-government do for them? The Preamble to Act 56 of 1976 says it all. The new government would maintain law and order and would ensure justice for all; it would promote the material and spiritual well-being of Rehoboth and its inhabitants; it would protect and develop their own traditions and culture; it would propagate the ideals of Christian civilisation; and it would strive after peace with and goodwill to the other inhabitants of the territory of South West Africa.

They had property both, immovable and movable.

They must, right from the beginning of self-government have appreciated that the ownership and control of their property would vest in the new government. Act 56 of 1976 contained among other sections sections 23 and 25. Section 23 reads:

"23. Transfer of land and other public property to the Government of Rehoboth –

(1) From the date of commencement of this Act the ownership and control of all movable and immovable, property in Rehoboth the ownership or control of which is on that date vested in the Government of the Republic or the administration of the territory of South West Africa or the Rehoboth Baster Community and which relates to matters in respect of which the Legislative Authority of Rehoboth is empowered to make laws, shall vest in the Government of Rehoboth".

Section 25 establishes the Rehoboth Revenue Fund. It is also critically important because it provides the Government of Rehoboth with revenue to use in the administration of Rehoboth. We shall come back to section 25 later in this judgment.

The critical question is whether with the enactment of Act 56 of 1976 the Rehoboth Baster Community continued to own and control the land and moneys in Rehoboth. Mr. De Bruyn, with him Mr. olivier, for the appellant, contends that the Baster Community continued to own the property and that the Rehoboth Government was vested with the ownership and control of the property on behalf of the Rehoboth Baster Community and kept it for them.

Mr. Gauntlett, with him Mr. Maritz, for the respondents, contends that the Rehoboth Baster Community, then a body politic, had its political and constitutional identity subsumed together with those of the Government of the Republic of South Africa and the Administration of the

Territory of South West Africa in as far as scheduled matters relating to self government were concerned. The only affairs that were left out of the responsibility of the Rehoboth Government were under functions such as foreign affairs, defence and telecommunications which were shared between the Government of the Republic of South Africa, the Administration of the territory of South West Africa and the Advisory Council. Otherwise assets held by the South African Government, the Administration and the Rehoboth Baster Community which were related to scheduled matters vested in the Rehoboth Government under the new constitutional dispensation brought about by Act 56 of 1976.

Mr. Gauntlett argued that the appellant was not "driven by an urge to escape the then apartheid government..." but the appellant in voluntarily entering into the new arrangement was cooperating in the implementation of the Odendaal Plan, a cornerstone of apartheid in the then territory of South West Africa. Section 24 of the Act supports this argument. It reads as follows:

> "24 Acquisition of land and interest in land in Rehoboth. - (1) Notwithstanding anything to the contrary contained in any law in force in Rehoboth no person, other than a citizen of Rehoboth of the Rehoboth Investment and Development Corporation, shall, without the prior approval of the minister and the Kaptein's Council, acquire any land or any interest in land in Rehoboth.
>
> (2) The acquisition of any, land or any interest in land contrary to the provisions of subsection (1) shall be invalid.

The contents of section 24 may account for the Rehoboth Baster community wanting back its property in order to preserve what section 24 reserved only for their Community.

The second inquiry according to the respondent is whether if they are correct in contending that ownership and control of the assets vested in the Government of Rehoboth in terms of sections 23 and 25, Article 124, read with schedule 5 to the Constitution had the effect of passing ownership of those assets (like the ownership and control of many other fragmented authorities created in the then Territory pursuant to the Odendaal plan and later, Proclamation. AG 8 of 1980) in the new democratic and unitary state of Namibia.

There is a lingering question in the minds of people listening to arguments in this appeal. That question is: Why does the Rehoboth Baster Community want back its property? Is it because they want to perpetuate the structures set up under the Odendaal Plan? Strydom, J. P., who wrote the judgment for the full bench of the High Court remarked as follows at 876 - 877 of the judgment:

> “... it is in my opinion significant to note that when the Administrator-General suspended the operation of the Act by Proclamation AG 32 of 1989, the control over land and transactions in regard thereto, such as leases, etc. was also taken over by him, also in regard to property which, in terms of the First Applicant, was property owned by it and not by the Government of Rehoboth. Given the allegation by First Applicant that such land was privately owned, by itself, this control by the Administrator-General cannot be explained, and less so the acceptance thereof by the Community."

Be that as it may the critical issue in this appeal is the interpretation of sections 23(1) and 25 of the Act and the provisions of Article 124 as read with Schedule 5 of the Constitution of Namibia. Mr. De Bruyn's approach to the construing of section 23(l) of the Act is tied to the belief that the ownership and control of the property never left the appellant which "has always been an entity in private law". He therefore submitted that the Act as a whole should be interpreted as a constitutional instrument.

An examination of the Preamble to Act 56 of 1976 reveals the intention of the Legislator and the reasons why the Legislature passed the Act.

In Attorney·General v -Dow 1994 (6) BCLR 1 (Botswana) Amissah JP said at 9 H citing Bennion on Statutory Interpretation on the effect of Preambles:

> "The preamble is an optional feature in public general Acts, though compulsory in private Acts. It … states the reason for passing the Act. It may include a recital of the mischief to which the Act is directed. When present, it is thus a useful guide to the legislative intention".

In Ntenteni v Chairman of Ciskei Council of State and Another

1994(1) BCLR 168 (CK) at 172 H Heath J said:

> "... the very nature of a constitution requires that a broad and generous approach be adopted in the interpretation of its provisions, ... and that where rights and freedoms are conferred on persons by the Constitution, derogations from such rights and freedoms should be narrowly or strictly construed."

However, in this case there is no derogation of the rights and freedoms of the individual. The Court cannot interpret the provisions of s. 23 and s. 25 narrowly and restrictively. We are considering a constitutional instrument which requires a broad, generous and purposive construction. See also S v Mhlungu and Others 1995(7) BCLR 793 (CC) at 800 and the cases cited therein.

Mr. De Bruyn submitted that the intention of Act 56 of 1976 was to protect the appellant and to give self-government as far as was possible and not to take away rights from the appellant. It is not clear how Mr. De Bruyn came to the conclusion that Act 56 of 1976 takes away rights from the appellant. We shall deal with this aspect of the appellant's submissions later in this judgment. Mr. De Bruyn then contended that constitutional instruments ought to be interpreted in a less rigid and more generous way than ordinary statutes in the sense of being more favourable to the subject. We agree. A constitutional instrument must be interpreted "broadly, liberally and purposively so as to avoid 'the austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation' in the articulation of the values bonding its people and in disciplining its government." per Mahomed, C.J. in Government of the Republic of Namibia and Another v Cultura 2000 and Another 1994(1) 5A at 415. See also S v Mhlangu and Others (supra) at 800 C.

Mr. De Bruyn is right when he contends that constitutional instruments ought to be interpreted in a less rigid and more generous way than ordinary statutes in the sense of being more generous to the subject deprived of his rights. See Attorney-General v Dow (supra) cited above. See also the approach of Berker JP, as he then was, in Ex Parte Cabinet for South West Africa: In Re Advisory Opinion 1988(2) SA 832(SWA) at 853 B in a passage in which he expresses the approach to the interpretation of provisions of a statutory instrument such as the Rehoboth Self-Government Act. He remarked as follows:

> "The basic problem that arises in an enquiry of this sort is that, whilst the relevant provisions are statutory instruments in a general sense, they are enactments or documents which, by their nature, ought to be interpreted in a wider and less rigid way than ordinary statures."

Both counsel spent considerable time arguing on the various meanings they ascribed to the phrase "which relates to" appearing in section 23(1). Mr. De Bruyn submitted that the phrase "relates to" was specifically inserted in the section in order to qualify and restrict the type of property that would be affected. He contended that on a proper construction of section 23(1) it was clear it was "the property that must relate. He argued that the use of the word "which" immediately after ownership or control meant the property, and the words "and which" thereafter, also refers to property. We find it difficult to follow that trend of reasoning, however, Mr. De Bruyn agreed that the word

"relate" was not a clear term. It is for that reason that the Court should apply its mind to the purpose and intention revealed in the Preamble to the Act.

Mr. Gauntlett did not urge the Court to construe the phrase narrowly for the reasons advanced by Mr. De Bruyn. He submitted that the phrase "which relates to" the matters in the Schedule was of critical importance to the scheme of things arranged for the Rehoboth Government. He submitted that in its ordinary meaning the phrase "which relates to" has the widest scope as the phrase was intended to be descriptive of the ownership or control, because it links the latter in the widest and most flexible way to the list of objects contained in the Schedule to the Act. See Sekretaris van Binnelandse Inkomste v Raubenheimer, 1969(4) SA 314 (AD) at 320.

In Miele et CIE Gmbtt v Euro Electrical (Pty) Ltd 1988(2) SA 583 (A) at 599 I Corbett, JA as he then was, remarked as follows when construing the phrase "in relation to":

> "'In relation to' is a phrase of a wide meaning (see Shalom Investments (Pty) Ltd and Others v Dan River Mills Incorporated 1971(l) SA 689(A) at 704 H). The addition in s.44(1)(b) of the phrase 'in connection with' (cf s. 44(1)(a) which speaks only of 'in relation to' must be interpreted as further widening the link or connection which, according to s. 44(1)(b), should exist between the use of the mark and the goods."

on close examination of the subjects in the Schedule over which the Legislative Authority is empowered to make laws it

becomes clear that section 23(1) as read with the Schedule does not admit a restrictive interpretation. Here the drafts men were dealing with constitutional matters of the widest amplitude and by implication gave the Legislative Authority unrestricted freedom to legislate without restrictions.

For some reason not clear to this Court, Mr. De Bruyn persisted in his contention that the phrase "in relation to" should be interpreted narrowly and restrictively because such and interpretation protects the subject against deprivation of his or her property. He found support in what was said by Scott J in Mak Mediterranee SARL v Fund, From Judicial Sale of M.C. Thunder 1994(3) SA 599 (CPD) at 606B. The learned judge there said:

> "The same expression has also been construed narrowly to mean 'having some direct or casual relationship with' (see Commissioner for Inland Revenue v Crown Mines Ltd 1923 AD 121 at 125; De Villiers v Commissioner for inland Revenue 1929 AD 227 at 229; McNeil v Commissioner for Inland Revenue 1958(3) SA 375 (D) at 377; see also Commissioner for Inland Revenue v Butcher Bros_ Pty Ltd 1945 AD 3,01 at 320)."

A full appreciation of what Scott, J. said can be gleaned from reading the passage immediately above the one Mr. De Bruyn relies upon. At 605G - 606A the learned Judge remarked:

> The expressions 'arising out of and 'relating to', like the expression 'in respect of', which is used repeatedly in s 11(4)(c), and the various other expressions used in s 1(1) in its original form, such as 'in the nature of' and 'in regard to', are all expressions not having a very definite meaning and in each case the meaning to be attributed to them, I think, must depend largely on the context in

which they are used. In White and others v Natal Provincial Administration 1955 (3) SA 82 (N) Broome JP construed, for instance, the expression 'in respect of' in the context in which it was there used as indicating 'a loose or indirect relationship', which he thought was also what was indicated by the expressions 'in relation to' or 'relating to'. The expression 'in respect of was described by Beyers JA in Montesse Township and Investment Corporation (Pty) Ltd and Another v Gouws NO and Another 1965 (4) SA 373 (A) at 384B-C, citing with approval Selke J in McDermott and Others v Durban Transport Management Board and_ others 1955 (2) SA 191 (N) at 196, as

> 'an expression of very wide, and not very definite, meaning',

and one which

> 'was potentially the equivalent of such expressions as "in connection with", "arising out of", "with reference to", "in relation to" and "touching and concerning"'.

What is important in the MAK Mediterranee SARL case is what Scott J said at 606 F - G.

> "It seems to me that expressions of the kind referred to above are not readily capable of precise definitions, and have meanings which by their very nature are less than definite. When it becomes necessary, therefore, to determine the limits of the relationships which they may be employed to describe, particularly in what may be considered as borderline cases, it is inevitable, I think, that particular regard will have to be had to the context in which they are used in the statutory provision in question as well as any other indications, whether in the statutes or otherwise, which may present themselves."

The context in which the phrase is used may restrict the meaning or widen it. In the instant case the subject matter of section 23(1) is broad and wide. The section dispenses constitutional powers of great magnitude. In deciding whether the phrase "in relation to" should be construed widely or narrowly the context in which it is

used in section 23(1) and other sections in Act 56 of 1976 must be examined carefully. Because of the nature of the statute in which the phrase is used, in construing the phrase a wide and broad meaning is called for. In our view the context in which "in relation to" is used and the indications in other sections call for a wider meaning than that advocated by Mr. De Bruyn.

We agree with Mr. Gauntlett that any limitation or qualification to the "relation" between ownership or control on the one hand and the scheduled matters on the other hand is not found in section 23 itself but is found in the way the individual items in the Schedule are defined. The law giver did not seek to restrict or qualify the extent of the nature of the required "relation" in section 23 itself by the use of phrases such as "necessarily relates".

To appreciate the wide interpretation required of section 23(1) one has to examine the extent of the powers of the Kaptein in section 14(2) of the Act. It states:

> "(2) The Kaptein shall allocate the powers, duties and functions to be exercised or performed in respect of the various matters set out in the Schedule among different departments, and may in his discretion assign and allocate the administration of the different departments to the several members of the Kaptein's Council and may, if necessary, after consultation with the members of the Kaptein's Council concerned, reorganise such departments with a view to better administration."

In terms of section 16 the Kaptein's Council and the Legislative Council had power to make laws in respect of all matters which were set out in the Schedule. They could amend or repeal any law, "including any act of Parliament and any Ordinance of the Legislative Assembly of the territory of South West Africa" as long as the law affected a scheduled matter applicable to Rehoboth.

The powers of the Kaptein's Council and the Legislative Council were wide and ample. This is clear from the words used in sections 14 and 16. The essence of the words is that they mean what they say. The same applies to words used in section 23. The words are clear and unambiguous. Because of this there is no need to imply words outside these sections. See Rennie NO v Gordon and Another NNO 1988(1) 5A 1 (A) at 22 E - G where Corbett JA, as he then was, stated:

> "Over the years our Courts have consistently adopted the view that words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands (see eg Garmiston Municipality- v Rand Cold storage Co Ltd 1913 TPD 530 at 539; Tai Properties (Pty) Ltd v Bobat 1952(1) SA 723 (N) at 729E-H; S v Van Rensburg 1967(2) SA 291 (C) at 294C-D; The Firs Investments (Pty) Ltd v Johannesburg City Council 1967(3) SA 549 (W) at 557B-C; D E P Investments (Pty) Ltd v City Council, Pietermaritzburg 1975(2) SA 261 (N) at 265G-H; Hamman en 'n Ander v A1gemene'Kommitee, Johannesburgse Effektebeurs, en 'n Ander 1984(2) SA 383 (W) at 391H). In the Firs Investments case supra Trollip J (as he then was stated (at 557E-G).
>
> > 'Moreover, a strong factor militating against the implication of any such imitation is the difficulty of formulating it. In contract a term will not be implied where considerable uncertainty exists about its nature and scope, for it must be precise and obvious. .. I think that the same must apply to implying a term in a statute, for the process is the same. ...'."

Self -Government would have been meaningless without granting the people of Rehoboth power to govern themselves effectively. The Rehoboth Self-Government Act gave the people that power. This is expressly stated in the long title and the preamble to the Act. The long title says:

> "To grant self-government in accordance with Paternal Law of 1892 to the citizens of the 'Rehoboth Gebiet' with the territory of South West Africa; for that purpose to provide for the establishment of a Kaptein's Council and a Legislative Council for the said 'Gebiet', to determine the powers and functions of the said councils; and to provide for matters connected therewith."

As seen above the Preamble enumerates the responsibilities and duties of the government. These signify the wide powers given to the Government of Rehoboth and its unrestricted mandates.

These in our view are indications outside section 23 which assist in construing the meaning of the phrase "in relation to" and in giving it a wide and purposeful meaning.

The respondents contended that "which relation to" did not appear only in section 23. The phrase was used in other sections of the Act because of this the legislature intended the widest possible interpretation to be given. We agree.

In deed the phrase appears in section 15, section 16(1)(b) and in section 16(3). The phrase also appears in different variations in other sections and this was intended, argued Mr. Gauntlet, to convey the fact that the Legislature intended to

give it the widest possible interpretation in order to achieve the legislative purpose. Section 13 has the phrase "in relation to all"; section 14, "in respect of all matters set out in the Schedule"; section 25(2)(b) "of those matters in respect of which the Legislative Assembly of Rehoboth"; and section 34 "in connection with matters in respect of which the Legislative Authority of Rehoboth".

It was the contention of the respondent that all these variations of "which relates to" have a wide scope and meaning in connecting the particular legislative purpose in the individual sections with the scheduled matters.

Mr. De Bruyn had an alternative argument. He contended that if the ownership or control did relate to scheduled matters then the Rehoboth Government and after it the Government of Namibia, held it for and on behalf of the appellant, i.e. the ownership of the property was of a fiduciary nature.

In our view the ownership or control of the property did not vest in the Government of Namibia in order to hold the property on behalf of the appellant. It held the property because it was the Government of Namibia entrusted with the duty to administer the country for the good of its citizens. The ownership or control of the property like the ownership and control of properties from the rest of Namibia enables the Government of Namibia to perform its duties in the administration of the country.

In terms of 25(1) a Rehoboth Revenue Fund was established. All moneys raised by or accruing to the Government of Rehoboth were ***to be paid into*** *the* ***Rehoboth*** Revenue Fund from a date determined by the Minister. This included all moneys that were payable to the Rehoboth Baster Community and all moneys held to its credit. These moneys were to be used by the Rehoboth Government for the better administration of Rehoboth.

It was, however, contended by the appellant that section 25 envisaged that the moneys would remain payable to the appellant. This contention is not supported by the words and language in section 25. All the moneys paid into the Revenue Fund were to be appropriated by the Legislative Authority of Rehoboth for the administration of Rehoboth generally unless the money was paid by the Government of South Africa for a particular purpose. The money so paid had to be used for that purpose.

There is nothing in the language used in subsections (1) and (2) of section 25 which remotely suggests that the Government of Rehoboth acted as agent of the appellant in the collecting and administering the moneys as was contended for by Mr. De Bruyn. On a proper reading of section 25(1) and (2) it is clear that the Government of Rehoboth was the owner of all moneys or revenue paid into the Fund. And, as correctly submitted by Mr. Gauntlett, the Government of Rehoboth in terms of section 26 had the statutory right to appropriate *the* moneys for purposes clearly expressed in section 26 which reads:

> “26. Appropriation of Rehoboth Revenue Fund by Legislative Authority of Rehoboth - The Rehoboth Revenue Fund shall be appropriated by the Legislative Authority of Rehoboth for the administration of Rehoboth generally, or, in the case of moneys paid over by the Government of the Republic for a particular purpose, then for such purpose, in the manner prescribed by this Act."

There are no indications in the Act which support appellants assertions that the money or some of the money belongs to the appellant or that those moneys were held by the Government of Rehoboth in a fiduciary capacity.

Prior to the independence of Namibia all moneys in the Fund were owned or controlled by the Government of Rehoboth or the Administrator-General. At independence those moneys became the property of the Government of Namibia by operation of paragraphs (1) and (2) of Schedule 5 of the Constitution of Namibia and the ownership or control thereof vested in the Government of Namibia in accordance with the provisions of Article 124 of the Constitution of Namibia. It stands to reason that the moneys accruing from sections 48 and 49 of the Deeds Act which prior to independence stood to the credit of the Government of Rehoboth became at independence moneys of the Government of Namibia in terms of Schedule 5 and Article 124 of the Constitution.

It was contended on behalf of the appellant that first respondent received moneys which became due to it, moneys which accrued to the appellant in terms of sections 48 and 49 of the Deeds Act. These moneys arose from repayments made by

purchasers of property sold to them by appellant, rentals from property leased from the appellant and repayment of loans made by appellant to third parties. If the moneys did indeed belong to appellant it was because appellant, at the time the moneys were paid, was still the Government of Rehoboth. That role ended when self-government was installed as a consequence of Act 56 of 1976.

The Court a quo was right in rejecting appellant's claim that the ownership or control of movable and immovable property previously under the ownership and control of the Rehoboth Baster Community never passed into the hands of the Government of Rehoboth and that if it did the Rehoboth Government held the property on behalf of the appellant. Looked at in which ever way, reaching either of the two conclusions submitted by appellant would result in an erroneous interpretation of sections 23 and 25 of the Act. It has not been shown by the appellant that the Court a quo was wrong in its interpretation of sections 23 and 25. once it is accepted that the ownership or control of movable and immovable property vested in the Government of Rehoboth and that subsequent vesting of ownership or control at the date of independence in the Government of Namibia becomes incontestable.

Mr. Gauntlett rightly submitted that the Government of Rehoboth subdivided the disputed properties consolidated them, sold portions of them, leased the whole or portions of them for livestock grazing and farming and for other purposes, collected

rented, developed townships on Rehoboth Townlands No. 302 and Groot-Aub, managed and controlled such townships, provided agricultural services to farmers, improved the properties and did perform many other functions in relation to these properties. How can the ownership or control be challenged? The Government of Rehoboth was in total control. Subsequently the Administrator-General of the territory of South West Africa, acting in terms of Proclamation AG 32 of 1989, controlled the properties as an incident preparatory to handing over ownership and control to the Government of an independent Namibia.

And once it is accepted that ownership and control of scheduled matters was in the hands of the Government of Rehoboth, a fact accepted by the appellant, the vesting of their ownership or control in terms of Article 124 and Schedule 5 of the Constitution of Namibia in the Government of Namibia cannot be disputed.

Article 124 vested in the Government of Namibia assets mentioned in schedule 5. And paragraph (1) of Schedule 5 states that the assets concerned were those previously held by the Government of Rehoboth. A careful reading of Schedule 5 makes it clear that there can be no other meaning which casts doubt on the vesting of ownership or control in the Government of Namibia. Schedule 5 provides as follows:

> (1) All property of which the ownership or control immediately prior to the date of Independence vested in the Government of the Territory of

South West Africa, or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1980), or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or Authority immediately prior to the date of Independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia.

(2) For the purpose of this Schedule, "property" shall, without detracting from the generality of that term as generally accepted and understood, mean and include movable and immovable property, whether corporeal or incorporeal and wheresoever situate, and shall include any right or interest therein.

(3) All such immovable property shall be transferred to the Government of Namibia without payment of transfer duty, stamp duty or any other fee or charge, but subject to any existing right, charge, obligation or trust on or over such property and subject also to the provisions of this Constitution.

(4) The Registrar of Deeds concerned shall upon production to him or her of the title deed to any immovable property mentioned in paragraph (1) endorse such title deed to the effect that the immovable property therein described is vested in the Government of Namibia and shall make the necessary entries in his or her registers, and thereupon the said title deed shall serve and avail for all purposes as proof of the title of the Government of Namibia to the said property."

Mr. De Bruyn submitted in the alternative that in so far as ownership did not revert back to the Rehoboth Baster Community but vested in the first respondent in terms of the provisions of schedule 5(1) it was tantamount to an expropriation of the appellants land and it should have been compensated. He cited Blackmore v Moodies G.M. and Exploration Co. Ltd- 1917 AD 402 at 416-7.

Article 16 gives the right to all persons in Namibia to acquire, own and dispose of all forms of property. Sub-article (2) provides that:

> "(2) The state or an competent organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament."

There is no need to repeat what happened before Namibia became independent. Suffice to mention that by the time independence was granted to Namibia the Rehoboth Baster community had no ownership or control of scheduled matters. In terms of section 23 and section 25 of Act 56 of 1976 what once was its property and which it held because it was the Government of Rehoboth passed over to a new government entity, the Government of Rehoboth. What is more the Rehoboth Baster Community ceased to exist as a public association with governmental authority long before the independence of Namibia. How can the Rehoboth Baster Community now claim that which it lost many years before the date of the independence of Namibia?

Mr. De Bruyn also contended that it was inconceivable that Article 124 read with Schedule 5(1) could be interpreted to mean that the Appellant should lose all its land that it had negotiated for over many years, paid for and held for over one hundred years without receiving any payment for it whatsoever. If the appellant lost its land it lost it with its eyes open when it agreed to self-government and surrendered all the

property it had acquired, as the Government of Rehoboth, to the new Government of Rehoboth. The Rehoboth Baster Community asked for self-government. It was granted self-government with all it's attendant consequences. One of those consequences was the surrender of ownership or control of property.

We do not see how under these circumstances Schedule 5(1) could be interpreted in accordance with the provisions of Article 16(2) of the Constitution as contended for by Mr. De Bruyn. The Government of Namibia did not expropriate appellant's property. The property did not belong to appellant. The ownership and control of all movable and immovable property vested in the Government of Rehoboth and paragraph (1) of schedule 5 says, among other things, that "all property of which the ownership or control immediately prior to the date of independence vested ... in the Government of Rehoboth ... shall vest in or be under the control of the Government of Namibia".

It is difficult to understand why the appellant brought this action. It is difficult to understand why appellant changed its mind. Hannah J expressed the doubt on the appellant's apparent change of mind in his concurring judgment in this way:

> "In 1976 the Baster Community, through its leaders, made a decision opting for Self-Government. The Community freely decided to transfer its communal land to the new Government. Clearly it saw advantage in doing so. Then, in 1989, the Community, through the political party to which its leaders were affiliated, subscribed to the constitution of an independent Namibia. No doubt, once again, the Community saw advantage in doing so. It wished to be part of the new unified nation which the Constitution created.

> The constitution, to which the community freely subscribed, transferred, as the Judge-President has, if I may respectfully say so, amply demonstrated in his judgment, the property of the Government of Rehoboth to the newly constituted Government of Namibia. That it did so is perfectly understandable. One aim of the Constitution was to unify a nation previously divided under the system of apartheid. Fragmented self-governments had no place in the new constitutional scheme. The years of divide and rule were over.
>
> Given these circumstances the Baster community can, in my opinion, have no justifiable complaint that the communal lands which it owned over the past generations became vested, after independence, in central Government: That they did so was a result of decisions freely taken by its leaders on its behalf, decisions which, at *the time, were* regarded as advantageous. As is made clear by this application the Community's leaders, or some of them, now see matters in a different light. They regret the decisions which were made. But *it is* not for this Court to attempt to change history even if it wished to do so."

If the appellant had intended *to* keep *the* property permanently because it was an association *of persons at public law, it* should never have agreed to the creation of the Government of Rehoboth.

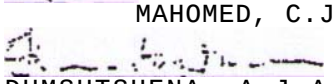
It, however, agreed to its formation because self-government was negotiated with the Government of South Africa on "the *basis of the* proposals by the Baster Advisory Council of Rehoboth and at the *request of the said people and* without prejudicing any further constitutional. development of the territory of South West Africa...". It has not been shown why there has been a change of mind.

And more importantly it has not been shown that the full bench of the court a quo erred in its interpretation of sections 23 and 25 of the Act and its holding that the disputed properties

and the ownership or control of the moneys vested in the Government of Rehoboth was wrong. Further it has not be shown that the Court a quo erred in its interpretation of Article 124 and Schedule 5 of the Constitution.

In the event the appeal is dismissed with costs including the costs of employing two counsel.

MAHOMED, C.J.



DUMSUTSHENA, A.J.A.

FRANK, A'~-J.A.

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