WOOD AND OTHERS v. NDONGWA TRIBAL AUTHORITY AND ANOTHER*

(SOUTH-WEST AFRICA DIVISION.)

1974. *March* 7, 22. BADENHORST, J.P., and STRYDOM, A.J.

Interdict.—Locus standi in judicio *of applicants.—Allegedly illegal punishment imposed by respondents on persons on the ground of their membership of political organisations.—Applicants not personally affected by conduct in respect of which interdict applied for.—No* locus standi *to apply for interdict.—Interdict to be sought by those affected or the political organisation to which they belong.*—Actio popularis.—*Such action having fallen into disuse. —Allegedly illegal punishment already inflicted on one applicant.—Such applicant has no claim to interdict.—Delict.*—Actio popularis. —*Such action having fallen into disuse.*

It is well established that the rights of a private individual are limited to his own interests and that he has no right to institute action in the interest of the general public. A writ *de libero homine exhibendo* also cannot be applied for by any member of the public as the *actio popularis* has long since fallen into disuse.

The three applicants, one a bishop of the Anglican Church, another a bishop of the Ovambo-Kavango Lutheran Church, and the third an adult Ovambo man, applied for an interdict which, *inter alia,* prohibited the respondents from imposing corporal punishment on persons on the ground of their membership of certain political organisations. First and second applicants were not affected personally by the conduct of the respondents against which the interdict had been sought but averred that they had a direct interest in the safety of their congregations, the members of which could at any time have corporal punishment inflicted on them without proper trial. It was alleged that the corporal punishment was for various reasons illegally imposed. The third applicant averred that he had been unlawfully tried and sentenced and that the sentence of corporal punishment had already been executed on him. A rule *nisi* had been granted against the respondents. On the return date,

Held, that the persons whom the first two applicants claimed to represent were still free and that there was nothing to prevent them, and possibly the political organisations to which they belonged, from approaching the Court for relief.

Held, therefore, as such applicants were not personally affected by the conduct against which the interdict was sought, that they had no *locus standi* to apply therefor.

Held, further, if the persons who claimed that they were unlawfully punished were dissatisfied therewith, that they should appeal to the tribal appeal court.

*An application for leave to appeal to the Appellate Division was refused on 1 April.—EDS.

Held, further, as the corporal punishment imposed on third applicant had already been administered at the time when the rule *nisi* had been granted, that third applicant had no claim to the relief granted in that order. Rule *nisi* discharged.

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Return date of a rule *nisi*. Facts of no importance have been omitted.
D. Soggott, for the applicants.
C. J. Mouton, S.C., for the respondents.

Cur. adv. vult.

Postea (March 22).

BADENHORST, J.P.: The first applicant, Richard James Wood, to whom I shall refer for the sake of convenience as Wood, is the bishop of the Anglican Church, while the second applicant Leonard Nongola Auala, to whom I shall refer as Auala, is the bishop of the Ovambo-Kavango Lutheran Church, and also president of that church in South-West Africa. On 19 November 1973, when this application was before the Court for the first time Auala was attending a conference of the Lutheran World Federation in Genèva, but Wood alleged that he had contacted Auala and that the latter had asked him to act also on his behalf in this application. The third applicant, Thomas Ndalikutalah Komati, to whom I shall also refer as Komati, alleges that he is an adult Ovambo man who, at all relevant times was a student at the St. Mary's Mission Station, Okwanyama, Ovambo.

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The respondents are described as the Ndongwa and Kwanyama Tribal Authorities respectively, which act as Tribal Councils in terms of Proc. R.348 of 1967.

The evidence placed before the Court by the applicants, and upon which the rule *nisi*, the confirmation of which is now applied for, was granted, is the following:

[The learned Judge analysed the evidence and proceeded as follows.]

In summary the position is the following according to the applicants' application:

(1) Membership of political organisations such as SWAPO and DEMKOP is not prohibited by Native law and custom.
(2) The respondents tried, sentenced and imposed corporal punishment on a large number of persons, including the third respondent, Komati, for the sole reason that they were members of SWAPO or DEMKOP or favoured those organisations.
(3) The trials were illegal in that they did not take place in accordance with Native law and customs.
(4) The imposition of corporal punishment was contrary to Native law and custom, in that:

(*a*) corporal punishment may not be inflicted on women;
(*b*) a person may not be sentenced to more than 10 strokes;
(*c*) corporal punishment may not be inflicted on the naked body; and
(*d*) cuts may not be inflicted in public.

On 19 November 1973 a rule *nisi* was issued in the following terms: "....."

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The first respondent did not place any statements before the Court, but senior chief Gabriel Katamba of the Kwanyama tribe filed an affidavit on behalf of second respondent, in which he replies to third applicant's (Komati's) statement. Therein he states that Komati is not a recognised member of the Kwanyama tribe of Ovambo, but that he is a member of that part of the Kwanyama tribe which lives in Angola, and that he has no knowledge of the tribal laws and customs of the Kwanyama tribe of Ovambo. Katamba says that second respondent was acting as a tribal court when the persons to whom applicants refer, were tried. (I assume he means a Tribal Council of Chiefs in terms of sec. 4 (1) of Proc. R.348 of 1967). He denies that any action was ever taken against any person because of his membership of eg. SWAPO. Only people who contravened tribal laws or customs were charged. Because, generally speaking, members of SWAPO were more inclined to abuse and ignore tribal authority, the impression may be created of action against SWAPO members. The allegation of such action is however rejected. The number of cuts which may be imposed is in the discretion of the Court and there is nothing in Native law or custom which limits the maximum number of cuts to ten. He denies that any person who received cuts was seriously injured thereby. Katamba also denies applicants' allegations that there is a campaign of violence and suppression in Ovambo. In passing he refers to annexures B, E, D and F to first applicant's affidavit and states that those four persons (women) were charged with having ceased hospital services for patients, and refusing to do their work. As such they prejudiced tribal interests and undermined tribal authority. It is the tribal authority that can decide whether such services should cease, and not individuals. By their actions they entered male terrain and were therefore treated as males. Katamba also denies that women were present when corporal punishment was inflicted. It is tribal tradition that when corporal punishment is ordered, it is inflicted with a palm branch at the seat of the court in public on the naked part of the body. According to tribal traditions women may also receive corporal punishment but women and children may not be present when an accused is flogged.

Katamba also says that according to tribal law there is a right of appeal from the area court to the district court, thence to the tribal court and then to the tribal appeal court. If a convicted person is dissatisfied with a sentence he must indicate his dissatisfaction at once and state that he wishes to appeal. The infliction of the sentence is then

suspended. At the tribal appeal court evidence is led again. Gabriel Katamba rejects the allegations of any illegal actions and of actions against people in Ovambo because of their membership of SWAPO or DEMKOP.

Komati did not reply to Katamba's statement. An affidavit was however filed from which it appears that he is at present being held under sec. 6 of the Terrorism Act and that it was impossible to contact him. No application was however made for a postponement so that a statement could be obtained from him.

Further statements have now been placed before the Court in reply to Katamba's statement, but in the light of the conclusions at which the Court has arrived, it is unnecessary to refer to them.

In limine it was argued on behalf of respondents that applicants lacked *locus standi* to bring the application and that respondents have been incorrectly cited.

It is well established that the rights of a private individual are limited to his own interests and that he has no right to institute action in the interests of the general public. Authority for this proposition is found in *Director of Education, Transvaal* v. *McCagie and Others,* 1918 A.D. 616 at p. 621: "....."

In the present application the first and second applicants allege however that they have sufficient interest in the application to be recognised as parties because of the following facts: They are both bishops of churches with a considerable following in the Ndongwa and Kwanyama areas. They have a direct interest in the safety of members of their congregations, who can, at any time, be subjected to corporal punishment, as happened in the case of third applicant, Komati, Johannes Natanguala and the numerous other persons who placed statements before the Court, without proper trial, and that the persons on whose behalf they acted were in danger of receiving the same treatment. The third applicant states that he is himself a member of SWAPO and that he has received corporal punishment. His many relatives and friends who are members of SWAPO or DEMKOP may also expect to receive corporal punishment in a serious and dangerous way.

Mr. *Soggott,* who appeared for the applicants, argued that, in cases where the freedom of the individual was in issue, the Court would permit a friend or relation to approach the Court for relief. He referred us to the case of *Bozzoli and Another* v. *The Station Commander, John Vorster Square, Johannesburg,* 1972 (3) S.A. 934 (W) and the two cases of *Patz* v. *Greene & Co.,* 1907 T.S. 427, and *In re Cakijana and Others,* (1908) 29 N.L.R. 193 which are quoted therein, as authority for his argument. In the *Bozzoli* case, SNYMAN, J., said, and I agree with him, that the *Patz* decision was no authority for the statement that the *actio popularis* was still part of our law, and it is therefore unnecessary to deal any further with this point. In *Cakijana's* case an application for

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an order *de libero homine exhibendo,* was placed before the Court by a friend. At p. 201 of that report, BALE, C.J., said: "....."

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If Lord *Trayner's* statement is correct then it must necessarily follow that a writ of *de libero exhibendo* may not be requested by any member of the public, since the *actio popularis* has long since fallen into disuse. This was the attitude of SNYMAN, J., in the *Bozzoli* case, and I think correctly so.

In *Bozzoli's* case the position was that a number of students of the University of the Witwatersrand had been arrested and detained at John Vorster Square. *Bozzoli,* the principal of the University applied for a writ *de libero homine exhibendo.* SNYMAN, J., held that he had *locus standi* because of his particular interest in the welfare of the students. The learned Judge said, at p. 935: "....."

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I agree with this statement by the learned Judge. It appears to me that this is as it should be where a person is deprived of his freedom and is unable to approach the Court in person.

But even if it were to be accepted for the sake of argument that the applicants in the present case had a special interest in the persons they represent, then it is immediately apparent that the present case differs from the *Bozzoli* case. In the latter case the student's had been arrested and were being detained. The purpose of that application was to compel the South African Police to bring the students to trial at once. In the present case all the persons that the applicants purport to represent are at liberty. There is nothing to prevent them and possibly the political organisations to which they belong from approaching the Court for relief. *Bozzoli's* case therefore does not assist the applicants. In my opinion the principle laid down in *McCagie's* case, *supra,* applies to the present case. Mr. *Mouton's* submission that the applicants have no *locus standi* must succeed. But even if this view is wrong, there is a further reason why the rule *nisi* should not be confirmed. It is common cause that persons who are tried and convicted have a right of appeal. Katamba says, and his allegations are not disputed, that the sentences are automatically suspended if a person appeals. If any of the persons represented by applicants should be charged and convicted, he can appeal at once. If he is dissatisfied with the number of cuts imposed or thinks

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that cuts should not be inflicted on the naked body, he may raise this before the tribal appeal court.

In the present case it is not alleged that any of the persons who were sentenced to corporal punishment used their rights of appeal. I find it

difficult to understand why they should approach this Court and not the higher authorities in their own territories.

As far as third applicant is concerned, it is furthermore clear that he is not entitled to the relief prayed for since the corporal punishment had already been inflicted when the rule was issued.

In the light of the preceding it is not necessary to deal with Mr. *Mouton's* other submissions.

The rule *nisi* is discharged with costs.

STRYDOM, A.J., concurred.

Applicant's Attorneys: *Fisher, Quarmby & Pfeifer*. Respondent's Attorney: *Deputy State Attorney*, Windhoek.