REPORTABLE

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case Number : 317 / 97

In the matter between :

DARRYL GARTH STOPFORTH **Appellant**

and

THE MINISTER OF JUSTICE **First Respondent**
THE TRUTH AND RECONCILIATION COMMISSION (AMNESTY COMMITTEE) **Second Respondent**
THE GOVERNMENT OF NAMIBIA **Third Respondent**
THE MINISTER OF SAFETY AND SECURITY **Fourth Respondent**

Case Number : 316 / 97

And in the matter between :

LENNERD MICHAEL VEENENDAAL **Appellant**

and

THE MINISTER OF JUSTICE **First Respondent**
THE COMMISSION FOR TRUTH AND RECONCILIATION (AMNESTY COMMITTEE) **Second Respondent**
THE GOVERNMENT OF NAMIBIA **Third Respondent**
THE MINISTER OF SAFETY AND SECURITY **Fourth Respondent**

COMPOSITION OF THE COURT : **Mahomed CJ; Olivier JA; Melunsky, Farlam and Madlanga AJJA**

DATE OF HEARING : **7 September 1999**

DATE OF JUDGMENT : **27 September 1999**

Jurisdiction of Amnesty Committee to grant amnesty for offences committed by South African citizens outside the Republic; extradition.

JUDGMENT

OLIVIER JA

[1] In these appeals, similar questions of law have been raised. It is convenient to deal with the appeals at one and the same time.

[2] It is common cause that Messrs Stopforth and Veenendaal (citizens of the Republic of South Africa) were, during the incidents described herein, members of what is generally referred to as right-wing Afrikaner organisations, *inter alia* the AWB (Afrikaner Weerstandsbeweging) and the Orde Boerevolk. During or about 1989 they, as well as one Klentz, were approached in the RSA by one Brown to participate in underground terrorist activities in the territory then known as South West Africa ("SWA"). The three of them, as well as others, gathered in SWA, where they were issued with weapons of war: rifle grenades, anti-personnel and anti-tank missiles, phosphorous grenades, explosive devices and rifles. The Appellants and their henchmen were in fact participating in the activities of a militant organisation based in SWA known as Kontra 435 (a reference to the United Nations Resolution 435, the basis of the independence process). Attacks were planned against the offices of UNTAG (the United Nations Task Force overseeing the transition to independence in Namibia) at Outjo, the destruction of United Nations aircraft at the Windhoek Airport and other attacks on United Nations sites. The aim was to derail the impending general election in SWA, being a precursor to independence.

[3] The attack on the Untag offices at Outjo was launched on 10 August 1989.

Stopforth and Veenendaal participated, both heavily armed. A UN security guard and a South West African policeman were killed and the Untag offices were damaged.

[4] They were arrested in SWA during September 1989. On 4 December 1989 they escaped from custody and fled to the Republic of South Africa. Namibia gained its independence on 21 March 1990 and on that date achieved the status of a Republic. During June 1990 the Government of Namibia (the Third Respondent) applied to the SA Government for the extradition of Stopforth and Veenendal, who were then arrested and detained in South Africa until bail was granted pending the hearing of the extradition application.

[5] The application was heard by Magistrate Roux in Johannesburg in terms of sec 10 read with sec 3 (2) of the South African Extradition Act, no 67 of 1962 ("the Extradition Act") there being no extradition agreement between the RSA and Namibia. The matter was fully canvassed, both in fact and in law. On 30 April 1992 Magistrate Roux held in terms of sec 10 of the Extradition Act that the appellants were extraditable.

[6] Stopforth and Veenendaal failed to appeal against the magistrate's order, and their right to appeal lapsed. In May 1992 they filed an application for condonation of the late filing of notice to appeal, but abandoned their application. As a consequence of the magistrate's order and the absence of an appeal the South African Minister of Justice could, by virtue of sec 11 of the Extradition Act, either order or refuse the surrender of Stopforth and Veenendaal to the Republic of Namibia, subject to the jurisdictional requirements described in that section.

[7] On 20 August 1992 a comprehensive memorandum was submitted by the Appellants' legal representative to the First Respondent's predecessor, arguing that the crimes committed by the Appellants were of a political nature and that Namibia did not at the time of the commission of the offence constitute a foreign country. The submission also alleged that a fair trial would not be granted to the Appellants in Namibia and it was furthermore contended that the available evidence would never justify a conviction. The First Respondent's predecessor was advised by the legal advisers of the Department of Justice that the Appellants should be extradited, but no order was made by him.

[8] During September 1994 the First Respondent, after being appointed as the new Minister of Justice, became aware of the issue which was still pending and requested a comprehensive memorandum, which was presented to him. The matter then was allowed to simmer until 1996, when the Namibian authorities directed a further enquiry to the First Respondent. The issue of the long delay which had occurred since August 1989 was specifically addressed. The First Respondent then decided to surrender the Appellants, and an order to this effect was issued by him on 10 October 1996.

[9] The Appellants made no application in terms of sec 14 (e) of the Extradition Act to the High court for their discharge.

[10] On 21 November 1996 the Appellants applied to the Truth and Reconciliation Commission for amnesty for the incident at Outjo. The applications were based on sec

18 of the Promotion of National Unity and Reconciliation Act, 34 of 1995 ("the TRC Act"). In the applications they admitted *inter alia* to committing murder and damaging property. They averred that two persons died in the attack, *viz* Daniel Haasep, a UN security guard, and Ricardo van Wyke, a member of the South West African police force.

[11] The amnesty applications have not yet been heard by the Commission, but indemnity has been granted to both the Appellants for other crimes committed by them in the Republic of South Africa. As far as the extradition to Namibia is concerned, the sword of Damocles hangs over the heads of the Appellants.

[12] In November 1996 the Appellants launched motion proceedings in the then Transvaal Provincial Division of the Supreme Court of South Africa. Apart from other, consequential relief, two main prayers were advanced, *viz*

(a) That the decision of the Minister of Justice of 10 October 1996 (ordering their surrender for extradition to Namibia) be suspended pending the adjudication by the Amnesty Committee of the Truth and Reconciliation Commission of the amnesty applications; and

(b) In the alternative, that the application made by the Government of Namibia for the extradition (heard and decided by Magistrate Roux on 30 April 1992) be referred back (presumably to the said magistrate) in order to establish whether a *prima facie* case had been made out.

[13] Only the First Respondent (the Minister of Justice) opposed the applications,

which were heard by Daniels J. The learned judge dismissed both applications with costs on 18 February 1997. The court *a quo* came to the conclusion that the Second Respondent, the Commission for Truth and Reconciliation (acting through the Amnesty Committee), could not grant amnesty for deeds committed in Namibia, because it does not have jurisdiction over crimes committed in SWA on 10 August 1989 as those crimes could not be tried in South African courts. The court *a quo* also held that section 20 of the Promotion of National Unity and Reconciliation Act, Act 34 of 1995 ("the TRC Act") was not applicable in the Appellants' case, as Namibia could not be classified as a "former state" of South Africa, unlike the TBVC states.

[14] The learned judge subsequently refused both Appellants leave to appeal to this Court, but such leave was granted by this Court on 27 May 1997.

[15] It must be emphasized that the relief claimed by the Appellants is not a review of the First Respondent's decision to issue the order for the Appellants' extradition. No

such case was made out, and no such relief was claimed. Nor are the Appellants seeking to revive their lapsed right of appeal against the decision of the magistrate given on 30 April 1992 that they are liable to extradition. They apply neither for a right to appeal, nor for their lapsed application for condonation of late noting of appeal to be re-instated. The Appellants' case is simply that they have a right to apply for amnesty in terms of the TRC Act; that the relevant committee is competent to consider their applications; that at least *prima facie* there exists the possibility that amnesty will be given for the offences committed at Outjo; that if such amnesty is granted, they, the

Appellants, would either by operation of law or by virtue of a proper exercise of his discretion by the Minister, not be extraditable or extradited to Namibia. For the purposes of this judgment I will assume, without deciding, the validity of the last-mentioned submission.

[16] It was not argued by the First Respondent that the Appellants were not entitled to apply for amnesty. What was put in issue is the jurisdiction or competency of the Committee on Amnesty to entertain and adjudicate upon the application. This is the point on which the matter was decided *a quo*, and the one which is decisive of the appeal in the Stopforth matter. I will later also deal with a further complication which arose in the Veenendaal appeal.

[17] The jurisdiction or competency of the Committee on Amnesty to consider applications for amnesty is circumscribed by the TRC Act. The basic principle for granting amnesty as far as the act of an applicant is concerned, is that amnesty is granted only for

> ... an act associated with a political objective...
> (secs 18(1), 19(3)(a) and 20(1)(b) of the TRC Act).

The expression act associated with a political objective is defined in sec 20(2) of the TRC Act as

> ... any act or omission which constitutes an offence or delict which, according to the criteria in subsection (3), is associated with a political objective, and which was advised, planned, directed, commanded,

> ordered or committed within or outside the Republic during the period 1 March 1960 to the cut-off date, by ...

Subsection 20(2)(a) qualifies the broad scope of sec 20 (2). I will deal presently with these qualifications.

[18] For the purposes of this judgment I shall assume, without deciding, that the acts committed by the Appellants in Outjo on 10 August 1989 were acts associated with political objectives within the ordinary meaning of that expression. But this will not avail the Appellants if that expression as used in sec 20 (1) (b) and 20 (2) bears a specific limited meaning which does not apply to the facts of this case.

[19] It is accordingly necessary to consider whether the TRC Act gives any indication of a specific, limited meaning of the term **"*political objective*"** used in secs 20 (1) (b) and 20 (2), and whether there is any corresponding limit put on the actions that are to be seen as achieving these political objectives?

Various provisions of theTRC Act impose such qualifications and limitations. They are :

(1) The act committed in effecting the political objective must be ... an act or omission which constitutes an offence or delict ... (sec 20 (2)).

(2) The act must be ... associated with a political objective ... and must accord with the criteria of subs (3).

(3) The criteria mentioned in subs (3) to determine whether an act has a political objective are :

(a) The motive of the person who committed the act, omission or offence;

(b) the context in which the act, omission or offence took place, and in particular whether the act, omission or offence was committed in the course of or as part of a political uprising, disturbance or event, or in reaction thereto;

(c) the legal and factual nature of the act, omission or offence, including the gravity of the act, omission or offence;

(d) the object or objective of the act, omission or offence, and in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals;

(e) whether the act, omission or offence was committed in the execution of an order of, or on behalf of, or with the approval of, the organisation, institution, liberation movement or body of which the person who committed the act was a member, an agent or a supporter; and

(f) the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the proportionality of the act, omission or offence to the objective pursued, but does not include any act, omission or offence committed by any person referred to in subsection (2) who acted -

(i) for personal gain: Provided that an act, omission or offence by any person who acted and received money or anything of value as an informer of the State or a former state, political organisation or liberation movement, shall not be excluded only on the grounds of that person having received money or anything of value for his or her information; or

(ii) out of personal malice, ill-will or spite, directed against the victim of the acts committed.

(4) The act in question must have been advised, planned, directed, commanded, ordered or committed **within or outside the Republic** (sec 20 (2)), (My emphasis);

(5) The act must have been committed during the period 1 March 1960 to the cut-off date (sec 20 (2));

(6) by

Any member or supporter of a publicly known political organisation or liberation movement on behalf of or in support of such organisation or movement,

(7) *bona fide* in furtherance of a political struggle waged by such organisation or movement;

(8) *against the State or any former State or another publicly known political organisation or liberation movement*.

(Sec 20 (2) (a), my italics)

I have already set out the facts as they appear in the record. On these facts, and applying the legal principles and statutory provisions enumerated above, will the Amnesty Committee have jurisdiction to grant amnesty to the Appellants?

[20] On behalf of the Appellants it was argued that their applications comply with all the requirements noted above. In particular they placed reliance on the fact that the acts for which amnesty is sought could have been committed **... within or outside the Republic...** (sec 20 (2)). They argued that this phrase, far from qualifying or limiting the jurisdiction of the Committee on Amnesty, extends its competency to cover acts such as those committed by the Appellants in Outjo, SWA. During argument reference was made to what was termed "***comparable political acts***" by various groups and organisations in the apartheid era in London, Paris, Botswana, Mozambique and Lesotho. These comparisons highlight the intricacy of the problem before us - but also contain the key to its solution.

[21] In analysing the jurisdiction of the Amnesty Committee it is clear that a purposive interpretation should be given to the TRC Act. In *Secretary for Inland Revenue v Sturrock Sugar Farm (Pty) Ltd* 1965 (1) SA 877 (A) at 903 Ogilvie Thompson JA made it clear that

> Even where the language is unambiguous, the **purpose** of the Act and other wider contextual considerations may be invoked in aid of a proper construction.

And in *Venter v R* 1907 TS 910, Innes CJ at 914 expressed a similar approach as follows

> ... it appears to me that the principle we should adopt may be expressed somewhat in this way - that when to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it could lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account, the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the legislature.

(See also *R v Detody* 1926 AD 198 at 202-203.)

In giving effect to this approach, one should, at least,

(i) look at the preamble of the Act or at other express indications

in the Act as to the object that has to be achieved;

(ii) study the various sections wherein the purpose may be found;

(ii) look at what led to the enactment (not to show the meaning, but to show the mischief the enactment was intended to deal with);

(iv) draw logical inferences from the context of the enactment.

(EA Kellaway, *Principles of legal interpretation of statutes, contracts and wills*, Butterworths, Durban 1995 at 69; *Jaga v Dönges NO and Another* 1950 (4) SA 653 (A) at 662; *In re Bidie* 1949 Ch 121; *Aetna Insurance Co v Minister of Justice* 1960 (3) SA 273 (A) at 284.) Part and parcel of this approach may well be the *noscitur a sociis* rule *(R v Jones* 1925 AD 117 at 129).

[22] What appears from the preamble to the TRC Act is that amnesty is to be granted in respect of acts, omissions and offences associated with political objectives committed **... in the course of the conflicts of the past.** (My emphasis).

The ... conflicts of the past ..., are, on a proper interpretation of the preamble, conflicts between groups within the South African society. The preamble clearly states that the Constitution Act, 200 of 1993,

> ... provides a historic bridge between the past **of a deeply divided society characterized by strife, conflict,** untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence for all South Africans... (My emphasis).

(See also the definition of ... gross violation of human rights ... in sec 1 (1) of the TRC Act.)

It further records that the Constitution states

> ... that the pursuit of national unity, the well-being of all South African citizens and peace require **reconciliation between people of South Africa and the reconstruction of society.** (My emphasis)

It further states that amnesty shall be granted ... in **order to advance such reconciliation and reconstruction.** (My emphasis)

[23] In my view, the acts of the Appellants in SWA in 1989 were not part of the ... conflicts of the past ... as intended in the TRC Act. These acts were not directed against South African opponents, *e.g.* liberation groups or political organisations opposing the then government. The Appellants went to SWA to lend support to a conflict between political groups in that territory. What is clearly intended by the TRC Act is that the acts committed must have been associated with the conflicts of **our** South African past. They must have sprung from **our** deeply divided society. The envisaged amnesty must be given to reconcile opposing South African people. An internal conflict between groups in the South West African Society falls outside the jurisdiction of the Amnesty Committee. The acts committed by the Appellants did not arise from **our** past - when these acts were committed the South African government itself had accepted Resolution 435 and was co-operating with the UN to organise a free and fair election. Swapo, the liberation movement in SWA at the time, was not a role player on the South African political scene. In any event, the attacks by the Appellants were not committed against Swapo. To grant amnesty for the acts the Appellants committed in Outjo would play no role in bringing about ... reconciliation between people of

South Africa.

[24] The above-mentioned conclusion is confirmed if one questions critically whether the acts now under consideration were committed

> ... against the State or any former State or another publicly known political organisation or liberation movement ... (sec 20 (2) (a)).

or

> ... in particular whether the act, omission or offence was primarily directed at a political opponent or State property or personnel or against private property or individuals ... (sec 20 (3) (d)).

[25] "State" is defined in the TRC Act as the Republic of South Africa. It is common cause that the Appellants had no intention of acting against the RSA; on the contrary they thought that they were acting in its favour or interest. They were, similarly, not acting against the personnel of the RSA as meant by sec 20 (3) (d).

[26] "A former State" is defined in the TRC Act so as to include only the former so-called independent States : Transkei, Bophuthatswana, Venda and Ciskei. The Appellants did not act against them.

[27] "Liberation movement" is not defined in the TRC Act. The expression, in its present context, means a political organisation or movement aimed at the liberation of the oppressed masses from colonialism, apartheid and disenfranchisement. Swapo was clearly, at the time, such a movement. But there is no evidence or allegation that the Appellants intended to act or did in fact act against Swapo. Their victim was the

UN, more particularly its peace force, Untag. If Swapo had been the Appellants' target, they had ample opportunity of attacking Swapo's offices, vehicles and personnel. They did not do so. For the same reason, they were not acting against a "political opponent" as meant by sec 20 (3) (d), nor were they acting against private property or individuals, as meant by that section. But even if this conclusion is considered too narrow, and one were to accept that their ultimate target was Swapo, their actions would still not be part of the political past of **our** country.

[28] That leaves us only one last question : were the Appellants, in acting against the Untag offices in Outjo, committing acts against ... another publicly known political organisation ... as meant by sec 20 (2) (a)? Is the UN, represented by UNTAG, such an organisation?

[29] That the UN is a ... publicly known political organisation ... in the **general** sense, *i.e.* an organisation whose functions include that of attempting to influence state policies in any field (*cf* *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 586 D) is clear. The UN was in 1989, as it is today, committed to the furtherance of human rights protection in all countries of the world. Where the laws of a country are inimical to such protection (*e.g.* the then apartheid laws) the UN endeavoured, by means of debates and resolutions, to procure changes in these laws, the government policy and particular decisions of the government of that country. The UN would thus fall squarely within the ordinary meaning of ... publicly known political organisation ...**.**

[30] However, applying the approach outlined above, I am of the view that the UN, then represented by UNTAG, cannot be fairly said to be ...a publicly known political organisation... for the purpose of sec 20 (2) (a) of the TRC Act.

[31] This latter conclusion is borne out if regard is had to sec 20 (2) (a). This requires the act to have been done **against** the State (defined as the Republic of South Africa), a former State, **another** publicly known political organisation or a liberation movement. (My emphasis) Now why is the word **another** used? The answer lies in the first part of sec 20 (2) a : Amnesty can only be granted for acts committed **by**

> ... any member or supporter of a publicly known political organisation or liberation movement.

against another similar group.

Sec 20 (2) (a) therefore envisages conflict between two opposing organisations or groups, such as between the AWB and the ANC, or, in South West Africa, between Kontra 435 and SWAPO. The UN (or UNTAG) can by no stretch of the imagination be reduced to the level of one of the opposing groups or organisations; it is simply not the same kind of organisation as Kontra 435, a terrorist group with which the Appellants associated themselves.

[32] My conclusion is further borne out by sec 20 (3) (d) of the TRC Act. It requires the Amnesty Committee to consider

> ... in particular whether the act, omission or offence was primarily directed at **a political opponent** or State property or personnel or against private property or individuals. (My emphasis).

The UN (or UNTAG), against which the Appellants directed their acts, cannot properly be described as ...**a political opponent** .... Nor were the acts directed at the South African State or its personnel, or against any private property or individuals in the course of opposing an opponent or as part of the South African conflicts of the past.

[33] For the above reasons, the Amnesty Committee is not competent to grant amnesty to the Appellants as sought by them.

[34] There is also an alternative way by which the same conclusion can be reached.

The offences in respect of which the extradition of the Appellants is sought are murder, theft and the unlawful possession of a machine gun, hand and rifle grenades and explosives, committed in SWA. A South African court will only have jurisdiction to try persons accused of committing crimes if the offences were committed within South Africa and in general if they were committed in the court's territorial area of jurisdiction. An exception to this rule is the so-called extra-territorial offences, such as treason for which a person may be prosecuted in South Africa even if the offence was committed abroad. The offences committed by the Appellants in Outjo do not fall into the class of extra-territorial crimes. It follows that no South African court has jurisdiction to try the Appellants for the offences for which their extradition is sought.

[35] In my opinion it is clear that Parliament could never have intended to confer on the Amnesty Committee the power to grant amnesty in respect of offences committed outside South Africa which are not triable in this country but in another country in which any amnesty purportedly conferred by the Amnesty Committee would not be recognised. The power conferred on the Committee to grant amnesty in respect of offences committed outside South Africa can, in my view, only be exercised in respect of so-called extra-territorial offences triable in this country. The crimes committed by the Appellants at Outjo do not belong to the latter category.

[36] In the result, I am of the view that the Amnesty Committee is not competent to grant the Appellants amnesty for the deeds they committed on 10 August 1989 in Outjo, South West Africa. To suspend the extradition order authorised by the Minister of Justice on 10 October 1996 in order to enable them to approach the Amnesty Committee would be futile. The main prayer in the Notice of Motion was correctly refused by the court *a quo*.

[37] The alternative prayer was that the extradition application made by the Government of Namibia be referred back (I presume : to the said magistrate) in order to establish whether a *prima facie* had been made out.

The request has no basis in law or in fact. Magistrate Roux had already conducted the enquiry in terms of the Extradition Act and made an order in terms of sec 10 thereof. A prerequisite for such an order was that the magistrate had to find of an accused

> ... that there would be sufficient reason for putting him on trial for the offence, had it been committed in the Republic.

Implicit in the order made by the magistrate is that he had made such finding. There was no appeal against this order. Counsel for Stopforth could not indicate on what legal basis the matter can now be referred back to the magistrate, who is now *functus officio*.

For these reasons, the second prayer was rightly refused by the court *a quo*.

In the result, the appeal by Stopforth must be refused.

THE VEENENDAAL APPEAL

[38] When the matter was called in this Court, an attorney, Mr Mostert, appeared for Veenendaal. He confirmed newspaper reports that his client had stolen a car and fled the country. Mr Mostert confirmed that his client was not prepared to countenance the present governmental system any longer, that he had left the country, and that Interpol was looking for him. Mr Mostert quite properly conceded that his client was, under the circumstances, a fugitive from justice.

[39] In the result, Veenendaal has no right to be heard in the appeal. Were he to be heard, the court

> ... would be stultifying its own process, and it would, moreover, be conniving at and condoning the conduct of a person who, through his flight from justice, set law and order at defiance.

(*Mulligan v Mulligan* 1925 WLD 164 at 168; see also, in respect of appeals, *S v Nkosi*, 1963 (4) SA 87 (T) and *S v Moshesh and Others*, 1973 (3) SA 962 (A.) No reason was advanced why this general rule even if subject to exceptions, a matter I need not decide, should not be applied in Veenendaal's case. There having been appearance for the appellant, the correct order seems to be that the appeal should be struck off the roll, with costs.

[40] The following orders are made :-

1 The Stopforth appeal is dismissed with costs, such costs to include the costs of two counsel.

2 The Veenendaal appeal is struck off the roll with costs, such costs to include the costs of two counsel.

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PJJ OLIVIER JA

CONCURRING :

MAHOMED CJ

MELUNSKY AJA

FARLAM AJA

MADLANGA AJA