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EDITORIAL

The third volume of the *African Human Rights Law Reports* covers the period up to the end of 2002. The series covers cases decided by UN treaty bodies, the African Commission on Human and Peoples' Rights and domestic judgments from different African countries. We include three short domestic judgments from Francophone African countries that were translated into English.

Editorial changes have been kept to a minimum, and are confined to changes that are required to ensure consistency in style (with regard to abbreviations, capitalisation, punctuation and quotes) and to avoid obvious errors. Where possible quotes and references have been checked against the original. Corrections which may affect the meaning are indicated by square brackets.

We wish to thank the following persons who helped us obtain cases published in this volume of the *Reports*: Chacha Bhoke, Sarai Chisala, Thulani Maseko, Michel Ndayikengurukiye, Mwiza Nkhata, Oninye Obiokoye, Opeoluwa Ogundokun, EK Quansah and Gabriel Shumba.

These *Reports*, as well as other material of relevance to human rights law in Africa, may be found on the website of the Centre for Human Rights, University of Pretoria, at www.chr.up.ac.za.

A French version of these Reports is published by the Pretoria University Law Press (PULP) and may be accessed on the same site in electronic form, or may be obtained from the Centre for Human Rights in hard copy.

Domestic cases that would be of interest to include in future issues of the *Reports* may be brought to the attention of the editors at:

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USER GUIDE

The cases and findings in the *Reports* are grouped together according to the jurisdiction concerned, namely the United Nations, the African Commission on Human and Peoples' Rights and domestic courts.

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The headnotes at the top of each case provide the full original title of the case and keywords dealing with the main issues in the case. These are linked to the keywords in the *Subject index*. The keywords are followed by the paragraph numbers of the case dealing with a specific issue.

The date at the end of a case reference refers to the date when the case was decided. The abbreviation before the date indicates the jurisdiction.

ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
AHRLR	African Human Rights Law Reports
BnCC	Constitutional Court, Benin
BwHC	High Court, Botswana
BuCA	Court of Appeal, Botswana
CCPR	International Covenant on Civil and Political Rights
GaSC	Supreme Court, The Gambia
HRC	United Nations Human Rights Committee
LeCA	Court of Appeal, Lesotho
MwHC	High Court, Malawi
NaLC	Labour Court, Namibia
NaSC	Supreme Court, Namibia
NgCA	Court of Appeal, Nigeria
NgSC	Supreme Court, Nigeria
SACC	Constitutional Court, South Africa
SeCC	Court of Cassation, Senegal
SwCA	Court of Appeal, Swaziland
TzCA	Court of Appeal, Tanzania
ZaHC	High Court, Zambia
ZwSC	Supreme Court, Zimbabwe

CASE LAW ON THE INTERNET

Case law concerning human rights in African may be found on the following sites:

United Nations High Commissioner for Human Rights
www.ohchr.org

African Commission on Human and Peoples' Rights
www.achpr.org

Interights (summaries of case law from Commonwealth countries and international monitoring bodies)
www.interights.org

Centre for Human Rights, University of Pretoria
www.chr.up.ac.za

Constitutional Court of South Africa
www.constitutionalcourt.org.za

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DEMOCRATIC REPUBLIC OF THE CONGO

Gedumbe v Democratic Republic of the Congo

(2002) AHRLR 3 (HRC 2000)

Communication 641/1995, *Nyekuma Kopita Toro Gedumbe v Democratic Republic of the Congo*
Decided at the 75th session, 26 July 2002, CCPR/C/75/D/641/1995

Admissibility (lack of substantiation, 4.3)
Evidence (failure of state party to respond to allegations, 5.1)
Equal protection of the law (5.2, 5.3)
Work (reinstatement, 5.2, 6.2)

1. The author of the communication is Mr Nyekuma Kopita Toro Gedumbe, a citizen of the Democratic Republic of the Congo (ex-Zaire) residing in Bujumbura, Burundi. He claims to be a victim of a violation by the Democratic Republic of the Congo of article 2(1), 2(3), 7, 14, 17, 23(1), 25(a), 25(c) and 26 of the International Covenant on Civil and Political Rights. He is not represented by counsel.

The facts as presented by the author

2.1. In 1985 the author was appointed director of a Zairian consular school in Bujumbura, Burundi. In 1988 he was suspended from his duties by Mboloko Ikolo, the then Zairian ambassador to Burundi. This suspension allegedly was attributable to a complaint addressed by the author and by other staff members of the school to several administrative authorities of Zaire, including the President and the Minister of Foreign Affairs, concerning the embezzlement by Mr Ikolo of the salaries for the personnel of the consular school.[1] More particularly, the ambassador allegedly embezzled the author's salary in order to force him to yield his wife.

2.2. In March 1988 a fact-finding mission was sent from Zaire to Bujumbura, which, purportedly, issued an overwhelmingly negative report against the ambassador and confirmed all the allegations made against him. In August 1988 the Minister of Foreign Affairs of Zaire enjoined Mr Ikolo to pay all the salary arrears to the author, who, in the meantime, had

[1] This complaint was also signed by Odia Amisi; communication 497/1992 (*Odia Amisi v Zaire*), declared inadmissible on 27 July 1994.

been transferred as director of the Zairian consular school to Kigali, Rwanda. The ambassador, who allegedly refused to obey this order, was suspended from his duties and recalled to Zaire on 20 June 1989.

2.3. In September 1989 the Ministry of Primary and Secondary Education issued an order to reinstate the author to his post in Bujumbura. Accordingly, the author moved back to Burundi in order to fill his post. Subsequently, Mr Ikolo, who despite his suspension remained in Bujumbura until 20 December 1989, informed the authorities in Zaire that the author was a member of a network of political opponents of the Zairian government, and that he therefore had requested the authorities of Burundi to expel him. For this reason, the author maintains, Mr Ikolo and his successor at the embassy, Vizi Topi, refused to reinstate him in his post, even after confirmation by the Minister of Primary and Secondary Education, or to pay his salary arrears.

2.4. The author appealed to the Public Prosecutor of the County Court (*Tribunal de Grande Instance*) of Uvira, who passed on the file to the Public Prosecutor of the Court of Appeal (*Cour d'Appel*) of Bukavu on 25 July 1990. Both offices described the facts as being an abuse of rights and called into question the former ambassador's conduct. On 14 September 1990 the case was further transmitted for advice to the Office of the Public Prosecutor in Kinshasa, where the case was registered in February 1991. Since then, despite numerous reminders sent by the author, no further action has been taken. Consequently, the author appealed to the Minister of Justice and to the Chairman of the National Assembly. The latter interceded with the Minister of Foreign Affairs and the Minister of Education, who, allegedly, intervened on the author's behalf with Mr Vizi Topi, all to no avail.

2.5. On 7 October 1990 the author served a summons on Mr Ikolo for adultery, slanderous denunciation and prejudicial charges, abuse of power and embezzlement of private monies. By a letter dated 24 October 1990, the President of the Kinshasa Court of Appeal (*Cour d'Appel*) informed the author that Mr Ikolo, as an ambassador, benefited from functional immunity and could only be brought to trial upon summons of the Public Prosecutor. All the author's requests to the latter to start legal proceedings against Mr Ikolo have to date remained unanswered. According to the author, this is due to the fact that special authorisation by the President is required to start legal proceedings against members of the security police and that therefore the Public Prosecutor could not take the risk of serving a summons on Mr Ikolo, who is also a senior official in the National Intelligence and Protection Service. Accordingly, the author's case cannot be the subject of a judicial determination. Therefore, it is submitted, all available and effective domestic remedies have been exhausted.

The complaint

3.1. The author argues that the arbitrary deprivation of his employment, the embezzlement of his salary and the destabilisation of his family

amounts to torture and to cruel and inhuman treatment. The author further contends that the Government, represented by the Public Prosecutor, denies him the right to a fair and public hearing by a competent, independent and impartial tribunal established by law.

3.2. The author further argues that his family has been destabilised by the immoral behaviour of the ambassador, who allegedly had adulterous relations with the author's wife, in violation of article 17. It is further alleged that, due to the difficult life the author and his family have led since he was suspended from his duties, the author's family does not enjoy the protection to which it is entitled, in breach of article 23(1).

3.3. The author claims that, as a director of a public school who is prevented from exercising his duties, his rights under article 25(a) and (c) have been violated. The author finally contends that he is the victim of a violation of article 26, since he was suspended from public service without disciplinary sanctions having been imposed on him, and thus in breach of the law. In this connection, the author claims that the failure of the government to compel the ambassador to allow him to exercise his duties, even after official reinstatement in his post, constitutes a violation of article 2(2) and (3).

3.4. The author indicates that the matter has not been submitted to any other procedure of international investigation or settlement.

Issues and proceedings before the Committee

4.1. Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its Rules of Procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

4.2. At its 60th session in July–August 1997, the Committee considered the admissibility of the communication.

4.3. The Committee considered that the author's claim that the facts as described by him constituted a violation of articles 7, 17, 23 and 25(a) was unsubstantiated for purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

4.4. The Committee also considered that, in the absence of any information provided by the state party, the author's claims that he has been denied access to public service, as well as to equality before the law and the courts because the state party failed to enforce its decisions to pay back the author's salary and to reinstate him and because he was being prevented from bringing his complaint before the courts may raise issues under articles 14(1), 25(c) and 26 of the Covenant, which need to be examined on the merits. On 1 August 1997 the Committee declared this part of the communication admissible.

On the merits

5.1. The Committee has examined the communication in the light of all the information made available to it by the parties, as required by article 5(1), of the Optional Protocol. The Committee notes that, while it has received sufficient information from the author, the state party, despite reminders addressed to it, has not responded in respect of admissibility or the merits of the communication. The Committee recalls that under article 4(2) of the Optional Protocol, a state party is bound to cooperate by submitting to it written explanations in clarification and by indicating, where appropriate, the measures taken to remedy the situation. In the light of the failure of the state party to cooperate with the Committee on the matter before it, due weight must be given to the author's allegations, to the extent that they have been substantiated.

5.2. With regard to the alleged violation of article 25(c) of the Covenant, the Committee notes that the author has made specific allegations relating, on the one hand, to his suspension in complete disregard of legal procedure and, in particular, in violation of the Zairian regulations governing state employees, and, on the other hand, to the failure to reinstate him in his post, in contravention of decisions by the Ministry of Primary and Secondary Education. In this connection the Committee notes also that the non-payment of the author's salary arrears, notwithstanding the instructions by the Minister for Foreign Affairs, is the direct consequence of the failure to implement the above-mentioned decisions by the authorities. In the absence of a response by the state party, the Committee finds that the facts in the case show that the decisions by the authorities in the author's favour have not been acted upon and cannot be regarded as an effective remedy for violation of article 25(c) read in conjunction with article 2 of the Covenant.

5.3. To the extent that the Committee has found that there was no effective legal procedure allowing the author to invoke his rights before a tribunal (article 25(c) in conjunction with article 2), no separate issue arises concerning the conformity of proceedings before such a tribunal with article 14 of the Covenant. With regard to article 26, the Committee sustains the author's reasoning by finding a violation of article 25(c).

6.1. The Human Rights Committee, acting under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose violations by the Democratic Republic of the Congo of articles 25(c) in conjunction with article 2 of the Covenant.

6.2 Pursuant to article 2(3)(a) of the Covenant, the Committee is of the view that the author is entitled to an appropriate remedy, namely: (a) effective reinstatement to public service and to his post, with all the consequences that that implies, or, if necessary, to a similar post;[2] (b) compensation comprising a sum equivalent to the payment of the arrears of

[2] Communication 630/1995, *Abdoulaye Mazou v Cameroon.*

salary and remuneration that he would have received from the time at which he was not reinstated to his post, beginning in September 1989.[3]

6.3. The Committee recalls that, by becoming a party to the Optional Protocol, the Democratic Republic of the Congo has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the state party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established. Thus, the Committee wishes to receive from the state party, within 90 days of the transmission of these views, information about the measures taken to give effect hereto. The state party is also requested to give publicity to the Committee's views.

[3] Communications 422/1990, 423/1990 and 424/1990, *Adimayo M Aduayom, Sofianou T Diasso and Yawo S Dobou v Togo*.

NAMIBIA

Müller and Another v Namibia

(2002) AHRLR 8 (HRC 2002)

Communication 919/2000, *Michael Andreas Müller and Another v Namibia*
Decided at the 74th session, 28 June 2002, CCPR/C/74/D/919/2000

Admissibility (exhaustion of local remedies — remedies must be effective, 6.3)
Equality, non-discrimination (discrimination on the grounds of sex, 6.7, 6.8, 7; differentiation must be based on reasonable and objective criteria, 6.7)

1. The authors of the communication, dated 8 November 1999, are Mr Michael Andreas Müller (hereinafter called Mr Müller), a German citizen, born on 7 July 1962, and Imke Engelhard (hereinafter called Ms Engelhard), a Namibian citizen, born on 16 March 1965, who claim to be victims of a violation by Namibia of articles 26, 23(4) and 17(1) of the International Covenant on Civil and Political Rights (the Covenant). [1] They are represented by counsel.

The facts as submitted by the author

2.1. Mr Müller, a jewellery maker, came to Namibia in July 1995 as a visitor, but was so taken with the country that he decided to settle in the city of Swakopmund. He started to work for Engelhard Design, a jewellery manufacturer since 1993, owned by Ms Engelhard. The authors married on 25 October 1996. Before getting married, they sought legal advice concerning the possibility of adopting Ms Engelhard's surname. A legal practitioner informed them that this was possible. After the marriage, they returned to the same legal practitioner to complete the formalities to change the surname. They were then informed that whereas a wife could assume her husband's surname without any formalities, a husband would have to apply to change his surname.

2.2. The Aliens Act 1 of 1937 (hereinafter named the Aliens Act) section 9(1) as amended by Proclamation AG 15 of 1989, states that it is an offence to assume [a surname different from the one a person has assumed and used to describe himself after 1937], without authorisation

[1] The Optional Protocol entered into force for Namibia on 28 November 1994 by accession.

by the Administrator General or an officer in the government service, and such authority has been published in the Official Gazette, or unless one of the listed exceptions applies. The listed exception in the Aliens Act section 9(1)(a) is when a woman, upon her marriage, assumes the surname of her husband. Mr Müller submits that the said section infringes his rights under the Namibian Constitution to equality before the law and freedom from discrimination on the grounds of sex (article 10), his and his family's right to privacy (article 13(1)), his right to equality as to marriage and during the marriage (article 14(1)), and his right to have adequate protection of his family life by the state party (article 14(3)).

2.3. Mr Müller further submits that there are numerous reasons for his wife's and his own desire that he assumes the surname of Ms Engelhard. He contends that his surname, Müller, is extremely common in Germany, and exemplifies this by explaining that the phonebook in Munich, were he comes from, contained several pages of the surname Müller, and that there were 11 Michael Müllers alone in that phonebook. He contends that Engelhard is a far more unusual surname, and that the name is important to his wife and him because their business has established a reputation under the name Engelhard Design. It would be unwise to change the name to Müller Design because the surname is not distinctive. It is likewise important that jewellery manufacturers trade under a surname because the use of one's surname implies that one takes pride in one's work, and customers believe that it ensures a higher quality of workmanship. Mr Müller submits that if he were to continue to use his surname, and his wife were to continue to use hers, customers and suppliers would assume that he was an employee. Mr Müller and his wife also have a daughter who has been registered under the surname of Engelhard, and Mr Müller would like to have the same surname as his daughter to avoid exposing her to unkind remarks about his not being the father.

2.4. Mr Müller filed a complaint to the High Court of Namibia on 10 July 1997, alleging that section 9(1) of the Aliens Act was invalid because it conflicted with the Constitution with regard to the right to equality before the law and freedom from discrimination, the right to privacy, the right to equality as to marriage and during the marriage, and with regard to the right to family life.

2.5. Ms Engelhard filed an affidavit with her husband's complaint, in which she stated that she supported the complaint and that she also wanted the joint family surname to be Engelhard rather than Müller, for the reasons given by her husband. The case was dismissed with costs on 15 May 1998.

2.6. Mr Müller's appeal to the Supreme Court of Namibia was dismissed with costs on 21 May 1999. The Supreme Court being the highest court of appeal in Namibia, the authors submit that they have exhausted domestic remedies.

The complaint

3.1. Mr Müller claims that he is the victim of a violation of article 26 of the Covenant, as the Aliens Act section 9(1)(a) prevents Mr Müller from assuming his wife's surname without following a prescribed procedure of application to a government service, whereas women wanting to assume their husbands' surname may do so without following this procedure. Likewise, Ms Engelhard claims that her surname may not be used as the family surname without complying with these same procedures, in violation of article 26. They submit that this section of the law clearly differentiates in a discriminatory way between men and women, in that women automatically may assume the surnames of their husbands upon marriage, whereas men have to go through specified procedures of application. The procedure for a man wanting to assume his wife's surname requires that:

(i) he must publish, in two consecutive editions of the Official Gazette and two daily newspapers in a prescribed form, an advertisement of his intention and reasons to change his surname, and he must pay for these advertisements;
(ii) he must submit a statement to the Administrator-General or an officer in the government service authorised thereto by him;
(iii) the Commissioner of Police and the magistrate of the district must furnish reports about the author;
(iv) any objection to the person assuming another surname must be attached to the magistrate's report;
(v) the Administrator-General or an officer in the government service authorised thereto by him must on the basis of these statement and reports be satisfied that the author is of good character and that there is sufficient reason for his assumption of another surname;
(vi) the applicant must pay prescribed fees and comply with such further requirements as may be prescribed by regulation.

3.2. The authors refer to a similar case of discrimination of the European Court of Human Rights, *Burghartz v Switzerland.*[2] In that case, the European Court held that the objective of a joint surname reflecting the family unity could be reached just as effectively by adopting the surname of the wife as the family surname, and allowing the husband to add his surname, as by the converse arrangement. The Court, before finding a violation of articles 14 and 8 of the European Convention on Human Rights, also stated that there was no genuine tradition at issue, but that in any event the Convention must always be interpreted in the light of present day conditions, particularly regarding the importance of the principle of non-discrimination. The authors further refer to the Committee's General Comment 18, where the Committee explicitly states that any distinction based on sex is within the meaning of discrimination in article 26 of the Covenant, and that the prohibited discrimination includes that the con-

[2] See European Court of Human Rights, judgment A280-B of 22 February 1994.

tent of a law should not be discriminatory.[3] The authors submit that by applying the Committee's interpretation of article 26 of the Covenant, as stated in General Comment 18, Aliens Act section 9(1)(a) discriminates against both men and women.

3.3. The authors claim that they are victims of a violation of article 23(4) of the Covenant, as section 9(1) of the Aliens Act infringes their right to equality as to marriage and during their marriage, by allowing a wife's surname to be used as the common family name only if specified formalities are applied, whereas a husband's surname may be used without applying these formalities. The authors refer to the Committee's General Comment 19,[4] where the Committee notes in respect of article 23(4) of the Covenant that the right of each spouse to retain the use of his or her original family name or to participate on an equal basis in the choice of the family name should be safeguarded.

3.4. The authors refer to the jurisprudence of the Committee in the case *Coeriel et al v the Netherlands*[5] and allege a violation of article 17(1), in that a person's surname constitutes an important component of her identity and that the protection against arbitrary and unlawful interference with one's privacy includes the protection of the right to choose and change one's surname.

3.5. With regard to a remedy, the authors seek the following:

(a) a statement that the authors' rights under the Covenant have been violated;
(b) that Aliens Act section 9(1)(a) is in violation of, in particular, articles 26, 23(4) and 17(1) of the Covenant;
(c) that Namibia should immediately allow Mr Müller to assume Ms Engelhard's surname without complying with the provisions of the Aliens Act;
(d) that the respondents in the High Court of Namibia and in the Supreme Court of Namibia should not recover costs awarded in their favour in these courts;
(e) and that Namibia should amend the Aliens Act section 9(1) to comply with its obligations under the Covenant.

The state party's observations

4.1. By submission of 5 June 2000, the state party made its observations on the admissibility of the communication and by submission of 17 October 2000, it made its observations on the admissibility and the merits.

4.2 With regard to Mr Müller, the state party confirms that he has exhausted domestic remedies in that his claim was brought to the High

[3] See General Comment no 18 of 10 November 1989, para 7 and 12.
[4] See General Comment no 19 of 27 July 1990, para 7.
[5] See views in case no 453/1991 of 31 October 1994.

Court of Namibia and appealed to the Supreme Court of Namibia. However, the state party points out that the author brought his claim directly to the courts, without complying with the terms of the Aliens Act. The state party further contends that the Committee has neither the power nor the authority to consider the author's claim of a specific remedy as in paragraph 3(5)(d) above, since the author in the national proceedings did not claim that the Supreme Court was incompetent to award costs, nor did he contend that Namibian laws on the awarding of costs by the national courts violated the Namibian Constitution or Namibia's obligations under the Covenant.

4.3. With regard to Ms Engelhard, the state party submits that she has not exhausted domestic remedies and has not provided any explanation for not doing so. It is therefore contended that Ms Engelhard's communication is not admissible under article 5(2)(b) of the Optional Protocol, and the state party's response to the merits does not relate to her claims.

4.4. With regard to the author's claim of a violation of article 26 of the Covenant, the state party submits that it does not dispute that Aliens Act section 9(1) differentiates between men and women. However, it is submitted that the differentiation is reasonably justified by its object to fulfil important social, economic and legal functions. Surnames are used to ascertain an individual's identity for such purposes as social security, insurance, licenses, marriage, inheritance, voting, and being voted for, passports, tax, and public records, and therefore constitutes an important component of one's identity see *Coeriel et al v The Netherlands*. The Aliens Act section 9 gives effect to a long-standing tradition in the Namibian community that the wife normally assumes the surname of her husband, and no other husband has expressed a wish to assume his wife's surname since the Aliens Act entered into force in 1937. The purpose of differentiation created by the Aliens Act was to achieve legal security and certainty of identity, and is thereby based upon reasonable and objective criteria.

4.5. It is further submitted that section 9(1) of the Aliens Act does not restrict Mr Müller from assuming his wife's name, but provides a simple and uncomplicated procedure, which would enable the author to fulfil his wish. The present case distinguishes from *Burghartz v Switzerland* in that the author in that case had no remedy to assume his surname in a hyphenated form to his wife's surname.

4.6. The state party contends that article 26 of the Covenant is characterised by an element of unjust, unfair and unreasonable treatment, which is not applicable to the author's case. Nor has it been contended that the purpose of Aliens Act section 9(1) was to impair males in Namibia individually or as a group.

4.7. In response to the author's claim under article 23(4) of the Covenant, the state party contends that in accordance with this article, and the Committee's interpretation in General Comment 19, Namibian law per-

mits the author to participate on equal basis with his spouse in choosing a new name, although he must proceed in accordance with laid down procedures.

4.8. Regarding Mr Müller's claim under article 17(1) of the Covenant, the state party contends that this right only protects the author from arbitrary, meaning unreasonable and purposelessly irrational, or unlawful interference with his privacy. Viewing the purpose of the Aliens Act section 9(1) as described above, inasmuch the author may change his surname if he so wishes, the law is not unreasonable, and does not violate the state party's obligations under article 17(1).

4.9. The state party contests the remedies sought by the author.

Comments by the author

5.1. By submission of 5 March 2001, the authors responded to the state party's observations.

5.2. Mr Müller does not dispute that he could have made an application to change his surname in the terms of the Aliens Act. However, he contends that it is the procedure required for men who wish to change their surnames which is discriminatory. It would therefore have been contradictory to comply with the prescribed procedure.

5.3. With regard to the state party's allegation that Ms Engelhard has not exhausted domestic remedies, the authors submit that it would have been futile for her to bring a claim to court separate from her husband's case, since her claim would not have been different from the first claim, which the Supreme Court of Namibia dismissed. The authors refer to the Committee's jurisprudence, *Barzhig v France*, where the Committee stated that domestic remedies need not be exhausted if it is inevitable that the claim will be dismissed or if a positive result is precluded by established jurisprudence of the highest domestic court.[6] It is further submitted that throughout the national legal proceedings, Ms Engelhard had supported her husband's application, and that, as such, her legal and factual situation was known to the domestic courts.

5.4. In relation to article 26, it is submitted that once there is a differentiation based on sex alone, there would have to be an extremely weighty and valid reason for this. It should be considered whether the objectives enunciated by the state party are of sufficient importance to justify this differentiation based on sex. It is not disputed that a person's surname constitutes an important component of her identity, but it is submitted that, as a consequence thereof, the equal right of partners in a marriage to choose either surname as the family name is worthy of the highest protection.

5.5. Furthermore, the state party's notions of a 'long-standing tradition'

[6] See views in case no 327/1988 of 11 April 1991.

does not justify the differentiation, since it only occurred in the mid-nineteenth century, and, with reference to the European Court decision *Burghartz v Switzerland*, the interpretation must be made in the light of present day conditions, especially the importance of the principle of non-discrimination. To exemplify that tradition should not support discriminatory laws and practices, the authors refer to *Apartheid* as South Africa's former traditional approach to promulgate laws to perpetuate a racially discriminatory process.

5.6. It is submitted that the state party's allegations that keeping the differentiation in the Aliens Act section 9(1) in the interest of public administration and the public at large is not a rational objective, since this interest would not be lesser served should a couple contracting in a marriage have the choice of which of their surnames is to be used as their family name.

5.7. The authors contend that the procedure set out for a man who would like to assume his wife's surname is not as simple as contended by the state party, and refers to the procedure as described above (paragraph 3(1)).

5.8. The authors also refer to the European Court of Human Rights' decision, *Stjerna v Finland*, where the Court stated that 'For the purposes of article 14 [of the European Convention on Human Rights], a difference of treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim . . .', and they submit that there is no reasonable justification for the differentiation complained of. [7] They contend that the Aliens Act section 9(1) perpetuates the 'long-standing tradition' of relegating a woman to a subservient status within marriage.

5.9. In relation to the state party's allegations regarding General Comment 19 on article 23 of the Covenant, it is submitted that it should be interpreted to include not only the choice of a family surname, but also the method in which such choice is effected. In this connection, the authors submit that a husband's application to change his surname may or may not be approved by the Minister of Home Affairs, for example where the costs of advertising or prescribed fees are out of reach for the applicant.

Issues and proceedings before the Committee

6.1. Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its Rules of Procedure, decide whether or not the complaint is admissible under the Optional Protocol to the Covenant.

6.2. In relation to all the alleged violations of the Covenant by Mr Müller, the Committee notes that the issues have been fully raised under domestic procedures, and the state party has confirmed that Mr Müller has ex-

[7] See European Court of Human Rights, judgment A299B of 25 November 1994, para 48.

hausted domestic remedies. There are therefore no obstacles for finding the communication admissible under the Optional Protocol article 5(2) with regard to Mr Müller.

6.3. In relation to the claims by Ms Engelhard, the state party has contested that domestic remedies have been exhausted. Even if Ms Engelhard could have pursued her claim through the Namibian court system, together with her husband or separately, her claim, being quite similar to Mr Müller's, would inevitably have been dismissed, as Mr Müller's claim was dismissed by the highest court in Namibia. The Committee has established jurisprudence, (*Barzhig v France)*, that an author need not pursue remedies that are indisputably ineffective, and concludes therefore that Ms Engelhard's claims are not inadmissible under the Optional Protocol article 5(2). Although the state party has abstained from commenting on the merits of Ms Engelhard's claims, the Committee takes the view that it is not precluded from examining the substance of the case also with regard to her claims, as completely identical legal issues concerning both authors are involved.

6.4. The Committee has also ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

6.5. The Committee therefore decides that the communication is admissible as far as it may raise issues under articles 26, 23(4) and 17(1) of the Covenant.

6.6. The Committee has examined the substance of the authors' claims in the light of all the information made available to it by the parties, as required by article 5(1) of the Optional Protocol.

6.7. With regard to the authors' claim under article 26 of the Covenant, the Committee notes the fact, undisputed by the parties to the case, that section 9(1) of the Aliens Act differentiates on the basis of sex in relation to the right of male or female persons to assume the surname of the other spouse on marriage. The Committee reiterates its constant jurisprudence that the right to equality before the law and to the equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.[8] A different treatment based on one of the specific grounds enumerated in article 26(2) of the Covenant, however, places a heavy burden on the state party to explain the reason for the differentiation. The Committee, therefore, has to consider whether the reasons underlying the differentiation on the basis of gender, as embodied in section 9(1), remove this provision from the verdict of being discriminatory.

6.8. The Committee notes the state party's argument that the purpose of the Aliens Act section 9(1) is to fulfil legitimate social and legal aims, in particular

[8] See views *Danning v The Netherlands*, case no 180/1984.

to create legal security. The Committee further notes the state party's submission that the distinction made in section 9 of the Aliens Act is based on a long-standing tradition for women in Namibia to assume their husbands' surnames, while in practice men so far never have wished to assume their wives' surnames; thus the law, dealing with the normal state of affairs, is merely reflecting a generally accepted situation in Namibian society. The unusual wish of a couple to assume as family name the surname of the wife could easily be taken into account by applying for a change of surname in accordance with the procedures set out in the Aliens Act. The Committee, however, fails to see why the sex-based approach taken by section 9(1) of the Aliens Act may serve the purpose of creating legal security, since the choice of the wife's surname can be registered as well as the choice of the husband's surname. In view of the importance of the principle of equality between men and women, the argument of a long-standing tradition cannot be maintained as a general justification for different treatment of men and women, which is contrary to the Covenant. To subject the possibility of choosing the wife's surname as family name to stricter and much more cumbersome conditions than the alternative (choice of husband's surname) cannot be judged to be reasonable; at any rate the reason for the distinction has no sufficient importance in order to outweigh the generally excluded gender-based approach. Accordingly, the Committee finds that the authors have been the victims of discrimination and violation of article 26 of the Covenant.

6.9. In the light of the Committee's finding that there has been a violation of article 26 of the Covenant, the Committee considers that it is not necessary to pronounce itself on a possible violation of articles 17 and 23 of the Covenant.

7. The Human Rights Committee, acting under article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 26 of the Covenant.

8. In accordance with article 2(3)(a) of the Covenant, the state party is under an obligation to provide the authors with an effective remedy, avoiding any discrimination in the choice of their common surname. The state party should further abstain from enforcing the cost order of the Supreme Court or, in case it is already enforced, to refund the respective amount of money.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the state party has recognised the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the state party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognised in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the state party, within 90 days, information about the measures taken to give effect to the Committee's views. The state party is also requested to publish the Committee's views.

AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

DEMOCRATIC REPUBLIC OF THE CONGO

Institute for Human Rights and Development (on behalf of Mboyo) v Democratic Republic of the Congo

(2002) AHRLR 19 (ACHPR 2002)

Communication 238/2001, *Institute for Human Rights and Development (on behalf of Sedar Tumba Mboyo) v Democratic Republic of Congo*
Decided at the 31st ordinary session, May 2002, 15th Annual Activity Report
Rapporteur: 29th session: Nguema; 30th–31st sessions: Sawadogo

Admissibility (withdrawal of communication 15, 16)

Summary of facts

1. The Institute for Human Rights and Development submitted the complaint on behalf of Mr Sedar Tumba Mboyo. (The Institute for Human Rights and Development is a human rights NGO located in Banjul, The Gambia and since October 1999 has been granted observer status with the African Commission.)

2. The communication was sent by post and was received at the Secretariat of the Commission on 21 November 2000.

3. The applicant, who has full powers to act on behalf of Mr Tumba Sedar Mboyo, maintains that AFDL (the Alliance of Democratic Forces for Liberation) soldiers forced entry into Mr Sedar's residence, and, after having brutalised and intimidated his neighbourhood, forcefully took him without warrant or explanation.

4. He was bound hand and foot, kept in conditions where he could not satisfy his natural needs and subjected to 'heavy handed' interrogation for three days, after which he was accused of inciting a popular uprising.

5. He was then transferred and detained together with ten or so other anti-Kabila protesters in the former Mobutu military camp. Mr Mboyo affirms that he was beaten and his rights infringed upon for two days by the three soldiers guarding him.

6. Mr Mboyo was detained *incommunicado* for a total period of 23 days.

7. The complainant alleges that Mr Mboyo's human rights activities within the NGO may have caused the government to make these unfounded accusations.

The complaint

8. The complainant is alleging that articles 5, 6, 7, 9, 10, 11, 13, 18 and 26 of the African Charter on Human and Peoples' Rights have been violated.

Procedure

9. At the 29th ordinary session held in Tripoli, the rapporteur introduced the complaint. The Commission examined the communication and decided to be seized of the matter and recommended that the parties be informed accordingly.

10. On 19 June 2001, the Secretariat of the African Commission informed the parties of the above decision and requested the respondent state to forward its written submissions within two months from the date of notification of this decision

11. On 20 June the Secretariat of the African Commission requested the Institute for Human Rights and Development to furnish clarification on the measures taken by the complainant to exhaust local remedies or any documents in his possession proving the allegations.

12. During the 30th ordinary session, the rapporteur reviewed the facts of the communication and recommended that the case be deferred to the next session. Parties were requested to forward relevant information to the Commission on exhaustion of local remedies and on the alleged violence against the complainant before the next session to enable it to decide on admissibility.

13. On 19 November 2001, the Secretariat of the African Commission informed the parties of the decision of the Commission and requested the complainant and the respondent state to forward their written submissions within two months from the date of notification of this decision.

14. On 19 February 2002, a reminder was sent to the respondent state and the complainant to forward their submissions within the prescribed time to enable the Secretariat to proceed with the communication.

15. By letter dated 6 March 2002, counsel for the complainant informed the Commission that Mr Mboyo had requested that this communication be withdrawn.

For the abovementioned reason:

16. The Commission takes note of the withdrawal of the communication by the complainant and decides to close the file.

NAMIBIA

Interights (on behalf of Sikunda) v Namibia

(2002) AHRLR 21 (ACHPR 2002)

Communication 239/2001, *Interights (on behalf of José Domingos Sikunda) v Namibia*
Decided at the 31st ordinary session, May 2002, 15th Annual Activity Report
Rapporteur: Chigovera

Interim measures (deportation, 8, 10, 11, 32)
Mission (promotional visit, 16)
Admissibility (exhaustion of local remedies — failure to exhaust local remedies — case pending before local court 28, 30; loss of contact with complainant, 29)

Summary of facts

1. The communication is submitted by Interights, a human rights NGO based in the United Kingdom, on behalf of José Domingos Sikunda.

2. Mr Sikunda is of Angolan descent but has been living in Namibia for 25 years.

3. The complainant alleges that, sometime in 2000, Mr Sikunda was arrested and detained by Namibian authorities. No reasons were given for his arrest and detention.

4. It is alleged that on 24 October 2000 the High Court of Namibia ordered the release of Mr Sikunda from detention but that the government of Namibia declined to comply with the order.

5. It is also alleged that Mr Sikunda's lawyers then sought to enforce the High Court order and on 31 October the judge issued a *rule nisi,* directing the Minister to show cause why he should not be cited for contempt of the court order. The case was adjourned twice and on 12 January 2001 Judge Teek delivered his ruling, recusing himself from the case without either party having applied for it.

6. The complainant states that there is a pending court order restraining the deportation of Mr Sikunda which will lapse on 1 February 2001; and that the Namibian authorities have indicated their preparedness to deport Mr Sikunda to Angola whose government accuses Mr Sikunda of being a

UNITA rebel. The complainant alleges that such an act will put Mr Sikunda at real risk of torture and extra judicial death.

The complaint

7. The complainant alleges a violation of articles 4, 5 and 12(4) of the African Charter on Human and Peoples' Rights.

Procedure

8. The communication was received at the Secretariat of the Commission on 31 January 2001 by fax, a copy of which was forwarded to the Chairman of the African Commission requesting him to appeal (under rule 111 of the Commission's Rules of Procedure) to the Namibian government to refrain from taking any measures that may put the life of Mr Sikunda at risk.

9. The Secretariat acknowledged receipt of the communication on 2 February 2001 and requested the complainant to furnish it with further information.

10. On 19 February 2001, the Chairman of the African Commission wrote to the Minister of Foreign Affairs of the Republic of Namibia expressing concern over the alleged deportation of Mr Sikunda.

11. On 22 February 2001, the government of Namibia responded to the Chairman's appeal. It declined the appeal and stated that the actions of the Namibian government were legal and aimed at protecting the security of the country and its citizens.

12. On 12 March 2001 a copy of the above-mentioned written response was forwarded to the complainant and they were reminded to furnish the Commission with further information.

13. On 21 March 2001 the complainant responded to the request for further information stating that it will revert back to the Commission with additional submissions and evidentiary material.

14. At its 29th ordinary session, the Commission decided to be seized of the complaint.

15. On 23 May 2001, the Secretariat conveyed the above decision to the parties and requested parties to furnish it with additional information on admissibility in accordance with article 56 of the African Charter and forwarded a copy of the text of the complaint to the respondent state. The parties were requested to present their written submissions to the Secretariat within three months of notification of the decision.

16. During his promotional visit to Namibia from 2 to 7 July 2001, Commissioner Chigovera raised the matter of this complaint with officials from the Ministries of Justice and Foreign Affairs and urged them to submit their written submissions to the Secretariat as soon as possible.

17. On 17 August 2001, the parties were reminded to forward their written submissions to the Secretariat on or before 23 August 2001.

18. On 18 and 21 September 2001, the Secretariat wrote to the respondent state and the complainant respectively, reminding them to forward their submissions on admissibility.

19. On 24 September 2001, the Secretariat received a letter from Interights, stating that they would not be able to forward their submissions for consideration at the forthcoming 30th session as there were elements missing from their submissions that have not been transmitted by the lawyers of the victims.

20. At its 30th ordinary session held in Banjul, The Gambia, the Commission considered the communication and decided to defer the matter to the 31st ordinary session to allow the complainants time to forward their submissions on admissibility.

21. On 9 November 2001, the parties were informed of the Commission's decision.

22. On 2 January 2002, the complainants were reminded to submit their written submissions on admissibility.

23. By e-mail on 7 January 2002, the complainants informed the Secretariat that they had sent a request for supplementary information to their colleagues in Namibia, but that they had not yet heard from them, and that, in the event that they do not hear from them, they would consider sending a notification for discontinuance of the case.

24. On 19 March 2002, the Secretariat wrote enquiring as to whether the complainants still wished to proceed with the communication, and, if that were the case, to forward their written submissions on admissibility.

25. On 20 March 2002, the complainant wrote informing the Secretariat that, despite repeated attempts, they had failed to secure a response from their colleagues at the National Society for Human Rights. The complainants assured the Secretariat that if this situation does not change before the next session, then they would request the Commission to authorise them to withdraw the communication.

Law

Admissibility

26. Article 56 of the African Charter governs admissibility. The most relevant provisions of that article provide:

> Communications . . . received by the Commission shall be considered if they: (5) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.

27. The respondent state argues that, following refusal by the Minister of Home Affairs to honour the High Court decision on 24 October 2000

ordering Sikunda's release from detention, Sikunda's lawyers sought to enforce the court order by an application to commit the Minister of Home Affairs for contempt of court.

28. The respondent state submits that Interights submitted the present communication to the African Commission on 31 January 2001, while the matter of hearing the application of a *rule nisi* showing cause why the Home Affairs Minister should not be held in contempt of court was still pending before the High Court. Indeed, the High Court heard the matter on 1 February 2001 and delivered judgment on 9 February 2001, finding the Minister of Home Affairs in contempt of court. Therefore, the respondent state argues that Interights, by submitting a complaint on 31 January 2001, had failed to meet the requirements of article 56(5) of the African Charter.

29. The complainants, on the other hand, have been repeatedly requested by the Commission to furnish their submissions on admissibility, especially on the question of exhaustion of domestic remedies. There has not been any response from them.

30. Thus, from the information available to the Commission and principally from the copy of the judgment of the High Court of Namibia, delivered on 9 February 2001, the Commission observes that the complainant brought the matter before it prior to exhausting domestic remedies, indeed while the matter was still pending before the High Court of Namibia.

31. For these reasons, the Commission, in conformity with article 56(5) of the African Charter, declares this Communication inadmissible for non-exhaustion of domestic remedies.

Note

32. When the Chair of the Commission wrote to the government of Namibia expressing concern over the alleged deportation of Mr Sikunda, the government responded stating that its actions were legal and aimed at protecting the security of the country and its citizens. Following the decision that the Commission has come to, the Commission would like to state that, in circumstances where an alleged violation is brought to the attention of the Commission and where it is alleged that irreparable damage may be caused to the victim, the Commission will act expeditiously, appealing to the state to desist from taking any action that may cause irreparable damage until after the Commission has had the opportunity to examine the matter fully. In such cases the Commission acts on the facts as presented and it was therefore in this vein that the Commission wrote to the Minister of Foreign Affairs of the Republic of Namibia, expressing concern over the alleged deportation of Mr Sikunda.

SUDAN

Law Offices of Ghazi Suleiman v Sudan

(2002) AHRLR 25 (ACHPR 2002)

Communication 220/98, *The Law Offices of Ghazi Suleiman v Sudan*
Decided at the 31st ordinary session, May 2002, 15th Annual Activity Report
Rapporteur: Rezag Bara

Admissibility (exhaustion of local remedies — failure to exhaust local remedies, 41–43)
Interim measures (request for, 6)

Summary of facts

1. Complainant is a human rights law office in Sudan and is submitting the communication on behalf of all university students and teachers in Sudan.

2. The complaint was sent by post and received at the Secretariat on 14 October 1998.

3. Complainant alleges that, on 26 September, the Minister of Education in Sudan announced that all the universities in Sudan would be closed for one month. It is alleged that the closure of universities is aimed at assisting the military to mobilise for the civil war in Southern Sudan.

4. The complainant has included with the complaint a sworn affidavit by a university lecturer at the Khartoum University to attest to these allegations.

5. The complainant notifies the Commission that, though an administrative appeal has been filed against the decision of the Minister of Education, he does not believe this will yield any realistic chance of success.

6. The complainant urges the Commission to adopt provisional measures under rule 111 of its Rules of Procedure, requesting the government of Sudan to re-open the universities immediately and prevent further interference with university teaching.

The complaint

7. The complainant alleges a violation of the following provisions of the African Charter on Human and Peoples' Rights: articles 6, 7(c) and 17(1).

Procedure

8. At the 24th ordinary session held in Banjul, The Gambia, from 22 to 31 October 1998, the Commission decided to be seized of the communication.

9. On 26 November 1990, the Secretariat informed the two parties of the Commission's decision.

10. On 3 May 1999, during the 25th ordinary session of the Commission in Bujumbura, Burundi, a representative of the government of Sudan submitted a written response to the Commission concerning the communication.

11. At its 25th ordinary session held in Bujumbura, Burundi, the Commission postponed consideration of the communication to the next session.

12. On 13 May 1999, the Secretariat of the Commission wrote letters to all the parties, notifying them of this decision.

13. On 21 September 1999, the complainant notified the Secretariat of the Commission of a new address for all correspondences relating to the communication.

14. During the 26th ordinary session, the Commission received a written response, together with a three-paged document in Arabic from Dr Ahmed El Mufti, rapporteur of the Advisory Council for Human Rights, Ministry of Justice, Sudan, concerning the communication. The attached document is said to be the decision of the Constitutional Division of the High Court.

15. The Commission considered the communication at its 26th ordinary session held in Kigali, Rwanda, and requested the complainant to submit written observations on the outcome of the administrative appeal filed against the decision of the Minister of Education, and generally, on the administrative appeal processes in the Republic of Sudan.

16. On 21 January 2000, the Secretariat of the Commission wrote to the parties informing them of the decision of the Commission. It specifically requested the government of Sudan to furnish it with the translation of the decision of the Constitutional Division of the High Court in English or French.

17. On 23 February 2000, following an e-mail from Dr Curtis Doebbler of the complainant firm, requesting the Secretariat to furnish him with information on the progress of all communications filed, the Secretariat forwarded to him by e-mail the letter of 21 January 2000. It also requested that he indicate a fax number to enable it to send observations received from the government of Sudan for his response.

18. On 1 March 2000, the Secretariat received an e-mail from Dr Curtis Doebbler, indicating a fax number for the above documents to be sent to.

The Secretariat acknowledged receipt of the same and intimated to him the necessity of submitting the requested written responses on time.

19. On 8 March 2000, the observation of the government of Sudan was faxed to the complainant in the US, as requested.

20. The complainant repeated its request for information on the progress of all communications pending before the Commission on 9 and 16 March 2000.

21. At last, the Secretariat received an e-mail from Dr Curtis Doebbler on 17 March 2000, acknowledging receipt of the e-mail, indicating the facts of all the pending communications filed by the complainant, and also promising to furnish it with their responses no later than 24 March 2000.

22. At the 27th ordinary session held in Algeria, the Commission heard oral submissions from parties and decided to consolidate the cases. It requested to furnish it with written submissions on the issue of exhaustion of local remedies.

23. On 30 June 2000, the above decisions were communicated to parties.

24. On 4 September 2000, Dr Curtis Doebbler wrote from Cairo to the Secretariat of the Commission, requesting information on the decision taken by the Commission at the 27th ordinary session in Algiers.

25. The Secretariat responded on 7 September 2000, informing him that same had earlier been faxed to him and observing that there were at least three e-mail addresses given by him to the Secretariat for communication purposes, and proposing that he should indicate the most suitable e-mail address for future correspondence in order to avoid delays and missing mails. The mails were dispatched to him at all the e-mail addresses indicated by him and also through fax.

26. On 14 September 2000, Dr Curtis Doebbler acknowledged receipt of the mails but pleaded for an adjournment to enable him submit in advance a full brief on the issue of exhaustion of local remedies and to arrange for his witnesses.

27. On 13 March 2001, the Secretariat received the complainant's submission. At the 29th ordinary session, the Commission will hear evidence on exhaustion of local remedies and decide on admissibility.

28. At the 29th ordinary session held in Tripoli, the rapporteur introduced the communications and reviewed the facts and the status of the case. The Commission thereafter heard the parties to the case. Following detailed discussions, the Commission noted that the complainant had submitted a detailed brief on the case. It was therefore recommended that consideration of this communication be deferred to the 30th session, pending submission of detailed replies by the respondent state.

29. On 19 June 2001, the Secretariat of the African Commission informed

the parties of the above decision and requested the respondent state to forward its written submissions within two months from the date of notification of the decision.

30. On 14 August 2001, a reminder was sent to the respondent state to forward its submissions within the prescribed time to enable the Secretariat to proceed with the communication.

31. During the 30th session, the rapporteurs introduced the communications and reviewed the facts and the status of each case. The Commission thereafter heard the oral submission of the respondent state to the case. Following detailed discussions, the Commission noted that the respondent state did not respond to the questions raised by the complainant. The Commission also heard oral submissions by Dr Curtis Doebbler and recommended that consideration of these communications be deferred to the 31st session, pending detailed a written submission by the respondent state to the submissions of the complainant.

32. On 15 November 2001, the Secretariat of the African Commission informed the parties of the decision of the Commission and requested the respondent state to forward its written submissions within two months of the date of notification of this decision.

33. On 7 March 2002, a reminder was sent to the respondent state to forward its submissions within the prescribed time to enable the Secretariat to proceed with the communication.

Law

Admissibility

34. Article 56(5) of the African Charter provides:

> Communications relating to human and peoples' rights referred to in article 55 received by the Commission, shall be considered if they: (5) Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.

35. Concerning the question of exhausting local avenues of recourse, the complainant informed the Commission that no effective recourse was available and that, even if used, the Constitutional Court is not qualified due to the state of emergency and political limitations, making it impossible to legitimately complain to the Court.

36. He maintains that the grounds for a local remedy that could apply are rendered ineffective by the fact that the legal system in Sudan is neither free nor independent, since the Sudanese courts have been controlled by the executive since 1998 and that, given this situation, the executive could not rule on proceedings brought against the Sudanese government, based on international humanitarian law, or even apply this law when it is clearly relevant.

37. The complainant alleges that, in practice, the procedures which allow for compensation for human rights violations committed by the government of Sudan are often inaccessible to those individuals whose rights have been violated. This is due to the fact that current administrative and legal solutions are serious obstacles to their use. Consequently, complainants who ask that their rights be protected before Sudanese courts come up against obstacles which make these avenues of redress ineffective.

38. The Sudanese government alleges that the complainants did not use the remedies available to them in the local courts before applying to the Commission. It insists that neither the lawyer lodging the complaint, nor the complainants, filed an appeal against the decision; this is proved from the registers of the administrative courts.

39. The government maintains that the complainants, despite their insistence in previous correspondence, did not transmit to them the reference number of the appeal that had been filed, proving that no appeal was filed, contrary to the assertions of the complainants who therefore did not exhaust all the local remedies as provided in article 56 of the African Charter on Human and Peoples' Rights.

40. It argues that the right of the complainants to file an appeal against a decision of the Court is provided for in article 20(1) of the Administrative and Constitutional Code of Justice of 1996, as amended in 2000. Documentation on decisions handed down in similar cases was submitted.

41. Article 56(5) of the African Charter requires that 'communications . . . [a]re sent after exhausting local remedies, if any, unless it is obvious that this process is unduly prolonged'. The complaint before the Commission was received by the Secretariat on 14 October 1998 and the decision to close the universities was taken on 26 September 1998 — an interval of one month between closure of the universities and receipt of the complaint.

42. The Commission is of the view that an interval of one month is adequate time within which the complainant could have accessed and exhausted all local remedies. Furthermore, the complainant gives no indication of instituting proceedings before the domestic courts.

43. For these reasons, and in accordance with article 56(5) of the African Charter, the Commission declares this communication inadmissible due to non-exhaustion of local remedies.

DOMESTIC DECISIONS

BENIN

Okpeitcha v Okpeitcha

(2002) AHRLR 33 (BnCC 2001)

Le collectif des enfants Okpeitcha Mathieu associés à leur mère Aline Okpeitcha v Okpeitcha Mathieu
Constitutional Court, decision DCC 01–082, 17 August 2001
Translated from French. Judgment available at www.accpuf.org

Locus standi (6–7)
Family (duty towards family, 8, 10)

The Constitutional Court:

[**1.**] With whom an appeal was lodged on 15 February 2000, registered at its secretariat on 17 February 2000 under no 0274/001/REC, according to which 'the group of children Mathieu Okpeitcha in association with their mother, Aline Okpeitcha', complain about their father's non-respect of his duties towards his family and, in particular, with regard to his children;

[**2.**] In view of the Constitution of 11 December 1990;

[**3.**] In view of Law 91-009 of 4 March 1991, Organic Law on the Constitutional Court, modified by the Law of 17 June 1997;

[**4.**] In view of the Internal Ruling of the Constitutional Court; together with the documents of the case; heard counsellor Clothilde Medegan-Nougbode in her report; after having deliberated on it;

[**5.**] Considering that the applicants explain that their father and spouse Mr Mathieu Okpeitcha, an officer in the People's Armed Forces, 'originally . . . a good father', decided one day quite unexpectedly to no longer pay the school fees of his six children, three of whom are minors, nor to fulfil his obligations to feed his family; that they maintain that this situation has forced the two eldest, in the final year and third last year of school respectively, to leave school and has reduced all of them to begging in order to survive, their mother Aline Odode wife Okpeitcha, housewife, not having sufficient resources to support them; that they consequently request the Court to 'apply the texts in force so that their little family can once more recover their previous full vitality';

[**6.**] Considering that the group of children of Mathieu Okpeitcha are not legally entitled to go to court; that consequently their appeal is inadmissible;

[**7.**] Considering, however, that the facts the applicants are pleading relate to the violation of the rights of the human person; that it falls to the Court, by virtue of article 121(2) of the Constitution, to convene as a matter of course and to give a ruling;

[**8.**] Considering that article 29(1) of the African Charter of Human and Peoples' Rights decrees:

> The individual shall also have the duty: To preserve the harmonious development of the family and to work for the cohesion and respect of this family; to respect his parents at all times, to maintain them in case of need . . .;

[**9.**] Considering that the court orders were diligently delivered both to Mr Mathieu Okpeitcha and to other members of the family at the same address; that only Mr Mathieu Okpeitcha has not felt obliged to respond to them; that he also did not come to court following a summons sent to him through the intermediary of the Chief of Staff of the Beninese Armies; that there is cause to give a ruling on the status;

[**10.**] Considering that it emerges from the information in the file, and particularly from the response made by Mrs Aline Odode wife Okpeitcha to the court orders, that Mr Mathieu Okpeitcha has ceased without grounds to ensure the upkeep and education of his children and thus of his family; that in behaving in this way, Mr Mathieu Okpeitcha violates article 29(1) of the African Charter of Human and Peoples' Rights;

Decides:

[**11.**] Article 1. — The behaviour of Mr Mathieu Okpeitcha, Officer of the People's Armed Forces, 1st battalion, constitutes a violation of article 29(1) of the African Charter on Human and Peoples' Rights;

[**12.**] Article 2. — This decision will be communicated to the group of children of Mathieu Okpeitcha in association with their mother, Aline Okpeitcha, to Mr Mathieu Okpeitcha and published in the *Government Gazette*.

BOTSWANA

Kamanakao and Others v Attorney-General and Another

(2002) AHRLR 35 (BwHC 2001)

Shikati Calvin Keene Kamanakao I, Kamanakao Association, Motsamai Key-ecwe Mpho v Attorney-General of Botswana and Kgosi Tawana Moremi II
High Court, Lobatse, Misca no 377/99, 23 November 2001
Judges: Nganunu CJ, Dibotelo J and Dow J

Locus standi (4–6)
Limitations of rights (narrow interpretation, 21, 32, 33)
Constitutional supremacy (one constitutional provision cannot strike out another, 28, 40)
Equality, non-discrimination (discrimination on the grounds of tribe, 37–39, 42–52, 62)
Evidence (not sufficient information, 55–58)

Nnganunu CJ

[**1.**] The first applicant describes himself in his founding affidavit as the Paramount Chief of the Wayeyi tribe, who was enthroned on 24 April 1999. The second applicant is a society registered in terms of the Societies Act (Cap 18:01) whose objective, it is said, is the promotion and maintenance of the Shiyeyi culture and language. Third applicant is a senior Wayeyi tribesman and politician, whom it is said, has throughout his life been engaged in a struggle for the freedom of the Wayeyi. The applicants jointly seek, in the main, the nullification of certain provisions of the Constitution and specified acts which they believe discriminate against their tribe and deny it and members thereof their rights as contained in sections 3 and 15 of the Constitution. In addition, applicants seek certain declarations against, and/or orders for the performance of certain activities by the government of Botswana. The first respondent is the Attorney-General of Botswana who represents the government whenever it is sued under the State Proceedings (Civil Actions by or against the Government or Public Officers) Act (Cap 10:01). The second respondent is the Chief of the Batawana tribe of the Batawana Tribal Territory.

***Locus standi* of the applicants**

[**2.**] This application was brought to this Court under the provisions of section 18(1) and (2) which read as follows:

1. Subject to the provisions of subsection (5) of this section, if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.
2. The High Court shall have original jurisdiction — (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; or (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section, and may make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 16 (inclusive) of this Constitution.

[**3.**] This section therefore enables any person, who alleges that any of the provisions of sections 3 to 16 inclusive of the Constitution are being, were or will be contravened in relation to him, to bring an application to the High Court concerning such breach. The right of such person to sue for redress of any contravention of his constitutional rights under subsection 1 goes together with the grant of extra jurisdiction to the High Court under subsection 2 to hear the application of such person. In this connection the court is given by section 18(2) powers to consider a wide range of reliefs it may grant to an applicant in an appropriate case. We shall in due course have occasion to refer in detail to the provisions of this section.

[**4.**] The provisions of section 18 are intended, as is provided in section 3 of the Constitution, to afford protection to the fundamental rights and freedoms granted to the individual. For this reason it is desirable that all persons, individuals and organisations should have access to the High Court to seek redress for any perceived contraventions of their rights. The provisions of section 18 of the Constitution as to who can approach the court must therefore be interpreted liberally to give as wide an access to the court as possible. We think that when section 18(1) provided that '. . . if any person alleges that . . .' it used the word 'person' in its widest sense, including as defined in section 49 of the Interpretation Act (Cap 01:O4) where its meaning 'includes a body corporate and an unincorporated body as well as an individual'. This definition of the word 'person' under the Interpretation Act is not exhaustive as made plain by the word 'includes', which suggests that the definition it makes of the word 'person' is part only of its meaning. Groups of individuals formally organised or informally organised would also qualify, in our view, as persons under the definition of that word.

[**5.**] In the present case what is necessary therefore for the three applicants to establish their *locus standi* is to show that they have substantial interest in the case. Although the respondents raised the issue of the *locus standi* of the applicants, we did not understand Mr Motswagole to press this issue, especially when he was reminded that preliminary objections had been given their time earlier on and those raised had been disposed of by the Court in a comprehensive ruling of 20 July 2001. We are of the view that an applicant who alleges a breach of his right, or a right which he shares

with or in a group, is entitled to bring an application to vindicate that right for himself and the group, even if in ordinary parlance the right may be referred to as that of a group, provided however that the applicant also shares in that right or has a substantial and not an insignificant interest in connection with the right. Take for instance the right to worship which, the individual, the congregation or church enjoys. Each of these should, in our view, be able to sue to protect that fundamental right for himself and/or for the group. The existence of such a fundamental right must dictate that those who would suffer by its loss must have access to the High Court for its protection. In the present case the first applicant says that he is the chief of the tribe whose rights he alleges run the risk of being trampled. That capacity alone gives him *locus standi* in the application. Furthermore the first applicant alleges breaches of rights in relation to himself. That too squarely entitles him to bring an action under section 3.

[**6.**] The second applicant is a society for the promotion of the rights of the Wayeyi. It has made the struggle of the Wayeyi for their culture and language its very objective. It should in our mind therefore be rightly concerned with the enforcement of the Wayeyi rights under the Constitution. It too has *locus standi* to sue for the enforcement of the Wayeyi rights. The third applicant is alleged to be not only a Wayeyi tribesman, but a lifelong struggler for the rights of the Wayeyi. He struggles to see that the Wayeyi, of which he is a member, should get their rights. He is included in the group and he has made the group's struggle his personal crusade. He has a sufficient interest, in our view, to sue.

Background of the case

[**7.**] It is useful to give a short background to this dispute. The Wayeyi people live mainly in the Batawana Tribal Territory in the North-West of the Republic of Botswana. It is agreed that they form a separate tribal group with their own ethnic language and culture. As the area in which they live forms part of the Batawana Tribal Territory, they are ruled from Maun by the Chief of the Batawana. The applicants' papers claim that the Wayeyi are numerically strong, and that for decades now they have sought recognition for their tribe and their own traditional leaders and structures, including *dikgotla* manned by their own headmen. They say that up to now they have not been accorded their requests. In fact they say that they have been ignored and fobbed off so that they eventually agitated to have a paramount chief of their own. Since no authority would listen to their plea, they eventually nominated, recognised and installed the first applicant as their paramount chief. Indeed one of the prayers originally sought but which has now been abandoned, was for the Court to declare some part of the Batawana Tribal Territory a tribal area of the Wayeyi where they could, as it were, rule themselves. We have given this background to show the seriousness of the situation, as well as to form a background to the understanding of the reliefs the applicants seek. The applicants emphasise in their papers that they have pursued their demands in a peaceful man-

ner. The reliefs they seek, nevertheless have far-reaching consequences for the parties, and indeed for the country as a whole. They have to be stated in detail.

Reliefs

[**8.**] The applicants apply for the following remedies; and we narrate them as they appear in the application. An order declaring that;

> 1(a) Sections 77, 78 and 79 of the Constitution of Botswana are inconsistent with the fundamental rights provisions of sections 3 and 15 of the Constitution and hence are null and void. Alternatively: (b) Sections 77,78 and 79 are discriminatory on the basis of tribe contrary to sections 3 and 15 of the Constitution of Botswana. Further alternatively: (c) Sections 77 and 78 of the Constitution of Botswana are unjustifiably discriminatory on the basis of tribe either expressly or in effect in so far as they afford preferential treatment to ex officio members of the House of Chiefs to the exclusion of chiefs of other tribes in Botswana.
>
> 2. That section 2 of the Chieftainship Act Cap 41:01 is unconstitutional in that it is discriminatory on the basis of tribe and therefore *ultra vires* sections 3 and 15 of the Constitution of Botswana particularly in that it is under inclusive, in that it expressly interprets 'tribe' to mean only the eight tribes mentioned therein to the exclusion of other tribes in Botswana.
>
> 3(a) That the Tribal Territories Act Cap 32:03 is unconstitutional and *ultra vires* sections 3 and 15 of the Constitution of Botswana and discriminates against other tribes in so far as it is under inclusive and thus defines Tribal Territories to be Tribal Land held by eight Tswana-speaking tribes only. Alternatively: (b) The Tribal Territories Act Cap 32:03 and Chieftainship Act are discriminatory either expressly or in effect in so far as they discriminate on the basis of tribes.
>
> 4. The second respondent's decision and/or conduct of not recognising the first applicant as Paramount Chief of the Wayeyi is expressly or in effect discriminatory on the basis of tribe and therefore *ultra vires* sections 3 and 15 of the Constitution of Botswana.
>
> 5(a) That the 1948 Wayeyi Courts be re-established with the main *kgotla* at Gumare. Alternatively (b) That second respondent to (sic) initiate or put in place a constitutional structure for the appointment and recognition of chiefs, headmen and other Wayeyi traditional authorities that is not discriminatory on the basis of tribe.
>
> 6. That the territorial boundaries between Wayeyi and Batawana be created, respected and treated as termination lines between Batawana and Wayeyi territories.
>
> 7. That the second respondent in conjunction with the Ministry of Education introduce the Shiyeyi language as a national medium of instruction in pre-primary, primary and secondary schools and the culture of Wayeyi be part of the school curriculum.
>
> 8. That the first respondent pay costs of this application.
>
> 9. Further and/or alternative relief.

We point out that prayers 3(a), 5(a) and 6 have been expressly abandoned, whereas the applicants offered no submissions with respect to reliefs 4 and 5(b).

Themes

[**9.**] The reliefs sought by the applicants resolve themselves into three issues. The first is a complaint against the provisions of sections 77 to 79 of the Constitution. The overriding complaint in the main prayer and its two alternatives is that the sections are in breach of the rights of the applicants as granted by section 3 of the Constitution and that they discriminate against the applicants contrary to the prohibition against discrimination contained in the Constitution, especially section 15.

[**10.**] The next complaint of the applicants relates to the Chieftainship and the Tribal Territories Acts. To understand the complaints of the applicants in relation to these two Acts of Parliament it is necessary to explain that the Tribal Territories and the Chieftainship Acts form a scheme together with sections 77 and 78 of the Constitution, whereby the greater part of the land mass of the territory of the Republic of Botswana is divided by the Tribal Territories Act into seven tribal areas designated to be those of the Bakgatla, Bakwena, Bamalete, Bamangwato, Bangwaketse, Batawana and Batlokwa tribes. By sections 77 and 78 of the Constitution a House of Chiefs is established as one of the houses of the Parliament of Botswana. The House of Chiefs so established has three categories of membership. The first category consists of automatic members who by section 78 are the chiefs of the seven tribal territories under the Tribal Territories Act plus the chief of the Barolong tribe. Only these eight communities qualify for the designation of 'tribe' and these tribes alone qualify to have traditional leaders who are recognised as 'chiefs' under the Chieftainship Act. No other communities in Botswana are recognised as tribes even if they are ethnically separate and they are organised along tribal lines; nor can their traditional leaders be known as chiefs under the Chieftainship Act. Where the traditional leaders of other communities are recognised at all in the Act, they are referred to by lesser titles such as sub-chief and not all their leaders are or can be members of the House of Chiefs. As the Wayeyi are not mentioned as a tribe in any of the laws of Botswana, they therefore cannot have a recognised chief and they do not have any representation in the House of Chiefs. That is really the basis of their complaint.

[**11.**] The complaint of the applicants in essence, in regard to these two Acts, is that they discriminate against their people and their tribe by not including them in the provisions of the Chieftainship Act, especially in the definitions in that Act of the words 'chief' and 'tribe', which in effect omit to mention the Wayeyi. In the case of the Tribal Territories Act, the complaint is that its provisions are expressly discriminatory or they have a discriminatory effect.

[**12.**] The last matter in the case of the applicants requires that this Court should issue orders to compel the government to undertake a series of actions to accommodate the grievances of the Wayeyi people as a separate tribe that, according to the applicants, ought to have its own traditional tribal structure with a language and culture recognised for

development in this country. As can be seen, the applicants also ask for the costs of their application. The grouping of the application into the above issues is for convenience of treatment only, but each substantive request for a relief shall be dealt with separately, if need be.

Sections 77, 78 and 79 — as null and void

[**13.**] The applicants allege that sections 77 to 79 of the Constitution are 'inconsistent with the fundamental rights provisions of sections 3 and 15 of the Constitution and hence they are null and void' and it should be so declared. In the alternative the applicants argue that those sections are discriminatory on the basis of tribe contrary to sections 3 and 15. Further alternatively, it is said that the sections are unjustifiably discriminatory on the basis of tribe either expressly or in their effect because they afford preferential treatment to the eight tribes, by making their chiefs *ex officio* members of the House of Chiefs to the exclusion of chiefs of other tribes in Botswana. We understand this last ground to be that the sections are discriminatory because they accord to each of the eight tribes previously mentioned the right to *ex officio* membership of their chiefs to the House of Chiefs , without giving the same treatment to other tribes of Botswana, especially the Wayeyi and its leadership.

[**14.**] In support of the main relief Mr Kanjabanga, for the applicants, argued with conviction that whilst the provisions of section 3 of the Constitution grant fundamental rights and freedoms to all persons in Botswana, especially the right of equality and equal treatment before or under the law, sections 77 to 79 of the Constitution do not treat the Wayeyi tribe and applicants as equal with the eight mentioned tribes who have chiefs that have automatic membership to the House of Chiefs as *ex officio* members. The Batawana and the Bangwaketse, to mention only two of the eight tribes, are specifically mentioned in section 78 of the Constitution as tribes whose chiefs qualify under section 77 for *ex officio* membership of the House.

[**15.**] Section 3 of the Constitution provides that:

> Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely — (a) life, liberty, security of the person and the protection of the law; (b) freedom of conscience, of expression and of assembly and association; and (c) protection for the privacy of his home and other property and from deprivation of property without compensation; the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

This Court points out that the rights declared in section 3 of the Constitu-

tion inhere in every person in Botswana without exception or discrimination.

[**16.**] The applicants point out that paragraph (a) quoted above specifies 'the protection of the law' as a fundamental right and entitlement of each individual. They contend that the right to protection under the law requires that protection to be equal to that rendered to others, resulting in practice to an equality of treatment under any law. They therefore contend that any provision of the Constitution or other law that affords inequality in treatment is in breach of that right They further argue that to the extent that sections 77 to 79 deal only with certain tribes and omit altogether to mention others, then such sections do not give equal treatment to all the tribes of Botswana and therefore they should be deemed null and void. In particular it was pointed out that in according *ex officio* membership of the House of Chiefs to eight tribes only, the sections were discriminatory of other tribes; and also to that extent the sections failed to afford equal treatment under the law to other tribes and their members. The Wayeyi, the applicants say, suffer from that unequal treatment meted by the provisions of the Constitution.

[**17.**] Mr Kanjabanga also anchored his contention on the existence of a natural law, which he contends invests every individual with fundamental rights, including the right to equal protection of the law, to which there is no exception. He contends that any differential treatment would be repugnant to the provision for equality before the law and for equal protection of the law. He quoted extensively from the judgment of Justice Tanaka in the *South West Africa* case, which was heard by the International Court of Justice in The Hague. *South West Africa* second phase ICJ Reports 1966 at 304–315.

[**18.**] While sections 3 to 15, which deal with fundamental rights and freedoms, are contained in chapter II of the Constitution and thus appear at the apex of the constitutional document itself, sections 77 to 79 are part of chapter V, which deals with Parliament in its wider meaning, including the House of Chiefs. These sections are contained in part III of that chapter and they deal with the House of Chiefs. The sections read as follows:

> 77(1) There shall be a House of Chiefs for Botswana. (2) The House of Chiefs shall consist of (a) eight *ex-officio* members; (b) four elected members; and (c) three specially elected members.
>
> 78. The *ex-officio* members of the House of Chiefs shall be such persons as are for the time being performing the functions of the office of Chief in respect of the Bakgatla, Bakwena, Bamatele, Bamangwato, Bangwaketse, Barolong, Batawana and Batlokwa tribes, respectively.
>
> 79(1) The elected members of the House of Chiefs shall be elected from among their own number by persons for the time being performing the functions of the office of Sub-Chief in the Chobe, Francistown, Ghanzi and Kgalagadi districts respectively. (2) The specially elected members of the House of Chiefs shall be elected by the *ex officio* and elected members of the House of Chiefs in accor-

> dance with the provisions of this Constitution from among persons who are not and have not been within the preceding five years engaged in politics.

[**19.**] The provision for 'the protection of the law' which is expressed in section 3(a) of the Constitution to be an entitlement of every individual has received extensive consideration by the Court of Appeal in *A-G v Dow* 1992 BLR 119 where Amissah JP said at p 135:

> In Botswana, when the Constitution, in section 3, provides that 'every person . . . is entitled to the fundamental rights and freedoms of the individual', and counts among these rights and freedoms 'the protection of the law', that fact must mean that, with all enjoying the rights and freedoms, the protection of the law given by the Constitution must be equal protection. Indeed, the appellant generously agreed that the provision in section 3 should be taken as conferring equal protection of the law on individuals.

[**20.**] We endorse the position that the right to the protection of the law contained in section 3 of the Constitution leads to the principle that all laws must treat all people equally save as may legitimately be excepted by the Constitution. An enactment or even a provision of the common law that is inconsistent with the Constitution is liable to be struck down by the High Court. The position in regard to a constitutional provision alleged to be inconsistent with another constitutional provision brings into play considerations different from those taken into account where a statute is alleged to be in contravention of the Constitution. That is the issue for determination in this case because the applicants say that the provisions of section 77, 78 and 79, which are in the Constitution, offend against section 3, which is also in the Constitution.

[**21.**] The first alternative argument of the applicants is based on the contention that sections 77 to 79 are contrary to sections 3 and 15 of the Constitution in that they are discriminatory on the basis of tribe. We have already summarised the contentions of the applicants as to how they see sections 77 to 79 contravening their rights to non-discrimination under section 3. With regard to section 15 of the Constitution, it is argued, cogently in our view, that section 15(1) forbids all discrimination except as allowed under the provisions of the further subsections of that section which derogate from the prohibition against discrimination. Applicants contend that any provision of the further subsections which derogates from the prohibition against discrimination should be interpreted *narrowly* in accordance with certain canons of the interpretation of statutes that were urged on us because they derogate from rights granted by the Constitution. It is indeed a canon of interpretation often used by our courts that those provisions of the Constitution that derogate from rights given by the Constitution must be interpreted narrowly consistent with their language, whereas the provisions giving rights should be interpreted broadly.

[**22.**] The second alternative argument deals only with sections 77 and 78 as they confer *ex officio* membership of the House of Chiefs to the eight

tribes already mentioned, to the exclusion of the Wayeyi tribe and other tribes of Botswana. The applicants argue that the effect made by these sections is unduly discriminatory and this Court must so pronounce. To all the above arguments the respondents have replied by stating that the sections referred to are part of the Constitution of Botswana, and as such they cannot be declared null and void by the High Court or any other court which itself is a creature of the Constitution. The argument is complex but it can be better summarised in the following way: That the Constitution is the foundation of the state of Botswana. It is a comprehensive law providing for all the important pillars and institutions of the state, and reposing powers in such institutions as seen fit by the founders. The Constitution, argue the respondents, is a package arrived at after negotiations, and all that it contains was approved by the founders as part of the state. To declare any part of that package as unconstitutional, contend the respondents, would be to rewrite the package. The judiciary, they argue, is also part of that package and it cannot supervise *post facto* what was done and sealed then, and brought down as part of the new state. The respondents contend that no court of the land can declare any part of that Constitution as null and void. This argument is powerful and Mr Motswagole for the respondents says it derives support from certain observations made by the Court of Appeal in *A-G v Dow* (*supra*).

The Constitution

[**23.**] It will be clear from the short analysis of the remedies sought by the applicants that they touch on the body politic of this state. The case very much brings to the fore the question of what is truly justiciable in a court of law and what ought not to be so justiciable, and be left to the political and legislative arenas to deal with. A short survey of the meaning of making and having a constitution will be helpful in resolving the issue of the ability of the High Court to give redress in the situation presented by the applicants. The Republic of Botswana was born on 30 September 1966 by virtue of the Botswana Independence Order, an instrument of the Sovereign Monarch, who had legislative powers in respect of the then Bechuanaland Protectorate. The new state was to be a living creature with a Constitution containing all that was necessary for the new republic to take its place among the nations of the world.

[**24.**] Under the Constitution the people of the new republic were invested with fundamental rights and freedoms, a new citizenship of the new state by the provisions of chapter III of that Constitution (now repealed and re-enacted in a separate statute). The state was given institutions, including the legislature to make new laws to make whatever changes (even to the Constitution) as were deemed necessary. The state was also endowed with the executive to govern and the judicature to adjudge cases. Further provision was made in connection with the finances of the state and how they should be utilised for public good. The Constitution, by section 3, declared

certain rights and freedoms as fundamental entitlements of the citizens and residents of Botswana. This Court cannot overemphasise the importance of these rights as they make up the entitlement of our citizens; and the citizens are to enjoy them everyday of their lives, except to the extent that such rights may be curtailed in terms authorised by the Constitution or other valid laws deriving their authority from the Constitution.

[**25.**] But the Constitution did not rank any of its provisions in order of precedence or supremacy. The question that arises from the grounds advanced by Mr Kanjabanga for the applicants, in support of the first relief sought, and from the riposte of the respondents, is whether this Court is entitled to rank the various provisions of the Constitution in order of precedence *and* then to hold that some of those provisions should be subordinated to others; especially to hold that the provisions of Chapter II, which deal with fundamental rights, are superior to all other provisions in the same Constitution.

[**26.**] The first inquiry at this stage does not deal so much with the detailed meanings and effect of those sections. The inquiry should deal with the principle of whether the High Court has the power to strike down any part of the Constitution on any ground that may be advanced by any litigant. To us it is fundamental to note that the Constitution was enacted as the ground norm of the new state of Botswana — that is, it is the basic and founding law of the republic. It both ended the colonial era and founded the new state. It is not difficult to see that in the negotiations that preceded the adoption of the Constitution both the negotiators and some of the people in the country may at the time have been dissatisfied with some of the provisions contained in the Constitution, or indeed the omissions from it. Some of those dissatisfactions may represent unfinished business that arises from time to time to haunt new generations. However, it should be remembered that the Constitution contains what was achieved and was finally promulgated by the powers that be as the new order.

[**27.**] It seems to us that the Constitution was to be received and was indeed received warts and all with all its weaknesses and strengths. The new Constitution, once negotiated and promulgated, became the new law. It seems to us that every institution in the land, especially those created by that Constitution, had to recognise and accept the Constitution as it is. Referring to the nature of the Constitution and the existence of institutions in it and their relation to it, Amissah JP in the case of *Attorney-General v Dow* BLR 119 at 129 said:

> A written constitution is the legislation or compact which establishes the state itself. It paints in broad strokes on a large canvass the institutions of that state, allocating powers, defining relationships between such institutions and between the institutions and the people themselves. A constitution often provides for the protection of the rights and freedoms of the people, which rights and freedoms have thus to be respected in all further state action. The existence and powers of

the institution of state, therefore, depend on its terms. The rights and freedoms where given by it, also depend on it. No institution can claim to be above the Constitution, no person can make any such claim.

[**28.**] Now we come to the question whether the High Court can strike out part of that Constitution as inconsistent with or even contrary to another part of it. The question is not only important in relation to this case, but it also raises important considerations of what was intended in making a Constitution at all. One of the new institutions of state created under the Constitution was the High Court of Botswana. It has extensive jurisdiction and powers under section 95 of the Constitution and also the extended jurisdiction under section 18, which we cited earlier. Powerful as the High Court is, was it intended to second guess the founders and makers of the Constitution, with powers to reorganise the Constitution in the way it deems fit? To us to strike out one provision of the Constitution as offending another is to rewrite the Constitution, which, as we said before, was a package. To do so is equal to ranking the different provisions of the Constitution in order of precedence and importance — a thing which the framers of the Constitution did not do. It would result in the establishment of a new balance for the balance established by the political representatives of the people. In our view to be able to do so the High Court would need to have express powers from the body of the Constitution itself, enabling it to be the revisionary instrument for the alteration of the Constitution. Only with such powers and capability could the High Court act in a proper case to decide that the provision alleged to be offending can be subordinated to the one it is to be tested against. That is not normally the function of a court. That function is usually left, as has been done in the Botswana Constitution, to representatives of the electorate who can, through discussions and consultations among themselves and with their constituents, agree on new provisions to right what is seen as wrong or lacking. The founders of the Constitution did not make that ranking, nor did they expressly confer such powers on the High Court. We do not think that such awesome powers as to rewrite the Constitution can be assumed to exist unless they are clearly and expressly granted by unambiguous language. It would require a clear provision to that effect before the High Court would assume powers of remaking the Constitution to its values. We believe that the Constitution was made with the values that the makers could conceive, find prudent and possible to include in the Constitution, bearing in mind the circumstances then existing. If new values and any unfinished business require a place in the scheme of the Constitution, in our view, Parliament is the proper institution to adopt such values and to legislate them into the Constitution. The representatives of the electorate, in our view, are better placed to judge what the country as a whole would require from time to time, and when it would be opportune to act. It is not for the court to do so. We therefore firmly refuse the invitation by the applicants so often repeated in Mr Kanjabanga's submission that an activist court can and should engineer new social

values into the laws of this country. Whether that can be the situation in some cases, we are convinced that this is not the sort of case or situation for the High Court to be adventurous. It is also important to note that a mere invalidation of sections 77 to 79 of the Constitution as the applicants urge the Court to impose, would not produce he results that the applicants require, nor that this country can live with. Clearly it would be necessary, if the sections were deleted, that something else be put in their stead.

[**29.**] We should perhaps point out that we have noted and agree with the submission of Mr Motswagole, for the Attorney-General, that the effect of what the applicants urge the Court to do in respect of sections 77 to 79 of the Constitution would be to abolish the House of Chiefs, which, in terms of the Constitution, is one of the Houses of Parliament. That, as pointed out on behalf of the respondents, would leave a gap in the legislative arrangements for the country. We are supported in the view we take by the approach taken by the Court of Appeal in the *Dow* case (*supra*). Discussing the issue of whether the High Court or any other court of the land could declare a Constitutional provision invalid, members of the Court of Appeal seemed to doubt the existence of such a power.

[**30.**] In the *Dow* case (*supra*) at p 150 Amissah JP said:

> We cannot declare a provision in the Constitution unconstitutional. It would otherwise be a contradiction in terms. The Constitution had always had the power to place limitations on its own grants. If it did so, what it enacted was as valid as any other limitation which the Constitution placed on rights and freedoms granted.

[**31.**] Mr Kanjabanga also invited the Court to examine the legality of sections 77 to 79 of the Constitution on the basis of natural law. His argument is that the fundamental rights and freedoms of every person in Botswana are natural rights inherent in a human being by the very nature of his being. He contends that as such no Constitution or law can take such rights away from the human being. His point in the context of the facts of this case is that the rights of the applicants granted them by natural law are as reflected in section 3 of the Constitution and that such rights cannot be whittled down by any other provision of the Constitution, including the provisions of sections 77 to 79, which discriminate against the applicants. But if that were so then one would expect the Constitutions of the many states where fundamental rights and freedoms are contained to state them in the same measure if not in the same language. But that is not the case. For instance, the much newer constitutions in the states of Southern Africa contain much more extensive constitutional rights than the older constitutions of the remaining Southern African states. For example, the new constitutions of South Africa, Namibia and Lesotho contain many more rights than the constitutions of Botswana, Zambia and Zimbabwe. Even in the newer constitutions the extent and formulations of those rights differ markedly.

[**32.**] The conclusion therefore must be that there is no one natural law to which state constitutions must conform in the foundation of fundamental rights and freedoms for their citizens. Nor, in our view, is there in fact a natural law which demands that such rights must or do exist as part of human nature. We are of the view that fundamental rights and freedoms exist only as contained in the Constitution and only to the extent mentioned in that Constitution. If those rights exist by virtue of the Constitution, they exist to the extent they are provided for in the Constitution and no further; and logically they will exist subject to any limitations placed on them. Such rights do not exist on their own as part of the human being. Thus fundamental rights and freedoms in Botswana exist because they are contained in section 3 of the Constitution. More relevant to the present argument is that these rights exist together with the exceptions and limitations that are stipulated in that chapter, for instance, in section 3 it is made clear that these rights are subject to two exceptions, that is, subject to respect for 'the rights and freedoms of others or the public interest'.

[**33.**] These rights are therefore subject to the limitations placed on them in the Constitution. Furthermore, in our view these rights also exist alongside any other provision in the Constitution, even if the terms of that provision place a limit to the application of those rights. Both such provisions being in the Constitution must be constitutional and must be taken by our courts as valid. This argument is also rejected.

The alternative arguments and relief — re sections 77 to 79

[**34.**] The alternative arguments advanced by applicants against sections 77 to 79 of the Constitution amount to saying:

(a) That the sections are inconsistent with the fundamental rights provisions of section 3.
(b) That the sections breach the prohibitions against discrimination contained in section 15.

[**35.**] As the two alternative prayers sought are based on similar grounds we deal with them together. We have already recited the provisions of sections 77 to 79 and here it suffices to note that under section 77 a House of Chiefs is created as part of the legislative system of the state of Botswana. It is composed of three categories of members:

(a) The eight chiefs of the Bakgatla, Bakwena, Bamalete, Bamangwato, Bangwaketse, Barolong, Batawana and Batlokwa tribes are made *ex officio* members of the House of Chiefs.
(b) The next category of membership is that of sub-chiefs. That category consists of four members of the House of Chiefs who are elected each by the sub-chiefs in the Chobe, North East, Ghanzi and Kgalagadi districts respectively.
(c) The third category consists of three specially elected members. These three members are elected by both the *ex officio* members and the four

elected members of the House from among persons eligible to vote who have not been engaged in active politics in the last five years.

[**36.**] It will be seen that apart from the possibility of having a Moyeyi become a member of the House by special election, a Moyeyi traditional authority or tribesman cannot become a member of the House of Chiefs as an *ex officio* member or as an elected member chosen by the sub-chiefs. This is simply because the Wayeyi as a tribe are not mentioned among the eight tribes that have *ex officio* membership of the House, nor do they fit anywhere among the sub-chiefs that elect the four elected members. A Wayeyi chief or tribesman can only hope to become a member of the House of Chiefs if he was specially elected. But only three people from all the registered voters of Botswana can become members of the House by that method. The possibility of a Moyeyi being elected is rather remote. At any rate that possibility does not give the same treatment as is afforded to the eight tribes whose chiefs are automatically members of the House by law. Nor does it give a Wayeyi the same chance as the sub-chiefs who are members of a small group, four of whom will be elected to the House. The sub-chiefs enjoy only a qualified right to membership of the House and many of them will not be elected to it. This is in sharp contrast with the status of the chiefs of the eight tribes specified in section 77 of the Constitution.

[**37.**] The complaint of the applicants is that this distinction in affording membership of the House of Chiefs and giving better rights to eight mentioned tribes is discriminatory and contrary to section 3 and section 15 of the Constitution. We have already stated that section 3 of the Constitution contemplates that every person, and for that matter every tribe, should have equal protection of the law. The applicants, having demonstrated the preferential treatment given to the eight tribes as opposed to their tribe in regard to eligibility for the House of Chiefs, ask this Court to declare that sections 77, 78 and 79 are inconsistent with their right to equal treatment before and by any law. But we must remember that these sections are part of the Constitution.

[**38.**] We next deal with the argument that these sections are inconsistent with section 15 of the Constitution as they are discriminatory of the applicants and their tribe. In order to examine that argument, it is necessary first to look at the provisions of section 15. They read as follows:

> (1) Subject to the provisions of subsections 4, 5 and 7 of this section, no law shall make any provision that is discriminatory either of itself or in its effect.
> (2) Subject to the provision of subsections 6, 7 and 8 of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the function of any public office or any public authority.
> (3) In this section, the expression 'discriminatory' means affording different treatment to different persons, attributable wholly or mainly to their respective description by race, tribe, place of origin, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restric-

tions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

[**39.**] There are derogations from this absolute prohibition against discrimination which are contained in subsection 4 and we shall refer to them later. There is no doubt that under the wide definition of the expression 'discriminatory', the treatment given to the Wayeyi and other tribes by omitting their tribe from having an *ex officio* member in the House of Chiefs under the provisions of section 77(2)(a) amounts to unfairness and discrimination, which, if not justified, is intolerable. They are subjected to a disability which the named eight tribes do not suffer; or put in another way these eight tribes have a privilege or advantage which is not accorded to the Wayeyi. Having said that, however, we must enquire whether these distinctions enacted and written into the Constitution at the time of its adoption can be said to amount to prohibited discrimination under any part of the Constitution especially under either section 3 or subsections 1 and 2 of section 15.

[**40.**] Notwithstanding the difference in the relief sought in the main case and in the alternatives, the difficulty facing the applicants is the same — that in each case the relief sought involves the competence of the High Court to determine whether one part of the Constitution is valid or not. We have already held with regard to the main relief sought that the High Court cannot in any way impugn the validity of a provision of the Constitution. We make the same decision with respect to the alternatives. We are further of the view that the founding fathers of the Constitution realised the disparity in specifying only eight tribes whose chiefs would have an automatic right to membership of the House while other tribes were not so entitled. The founders nevertheless enacted that disparity into the Constitution. Much as the Wayeyi and other tribes do not receive equal protection of the law under the provisions of section 77 to 79, yet it should be recognised that these distinctions were authorised by the Constitution itself. As shown earlier, anything that is authorised by the Constitution cannot subsequently be declared to be illegal even though it may appear inconsistent with another valid provision of the Constitution. This conclusion covers both alternatives (b) and (c) of the relief sought in paragraph 1 of the applicants notice of motion.

[**41.**] We should, however, state that we have noted the submission of Mr Motswagole that the composition of the House of Chiefs is undemocratic because its members are not elected by the electorate. The point Mr Motswagole was making was that the applicants are seeking equality and fairness by inclusion into an institution, the membership of which is hardly justifiable in a modern democratic state. It is common cause that eligibility to chieftainship is based not on merit but on parentage. While we note Mr Motswagole's point, that particular issue is not squarely before this Court.

The Chieftainship Act

[**42.**] The next complaint covers section 2 of the Chieftainship Act. It is contended by the applicants that this section is discriminatory on the basis of tribe because it defines 'tribe' as referring only to the eight tribes mentioned in the section. Applicants contend that such disparity is discriminatory and therefore *ultra vires* sections 3 and 15 of the Constitution. The Chieftainship Act is contained in Cap 41:01 of the Laws of Botswana. It is an act to regulate the appointment of chiefs, sub-chiefs and other persons acting as tribal leaders in lesser capacities. A chief is defined in section 2 of that Act as 'a chief of one of the tribes and includes any regent thereof'. A 'tribe' is defined in the same Act as meaning the Bakgatla, Bakwena, Bamalete, Bamangwato, Bangwaketse, Batawana, Barolong and the Batlokwa tribes. According to these definitions therefore no other communities are recognised as tribes in Botswana. And since those other communities are not 'tribes' they cannot have 'chiefs' as understood under the Chieftainship Act. The applicants' point is that the Wayeyi tribe is not mentioned as a tribe when it exists as such in the state of Botswana. The Court notes that without being designated a tribe under the Chieftainship Act the Wayeyi and any other tribe cannot have a chief under the Act. The applicants therefore complain of this obvious disparity. The disparity between the eight designated tribes and other tribal communities arises from designating the former as tribes, and also in the rights and privileges they obtain as a result of such designation. We agree that the Chieftainship Act does not afford applicants equal treatment and that therefore they do not enjoy equal protection under that law as required by section 3(a) of the Constitution.

[**43.**] It is also contended that the omission of the Wayeyi tribe from being mentioned in the Chieftainship Act is discriminatory and *ultra vires* the Constitution because it contravenes the provisions of section 15 of the Constitution. We have already detailed the provisions of subsections (1) to (3) of section 15 of the Constitution. We noted that they prohibit discrimination absolutely except as may be authorised under the derogation clauses of subsection (4) or elsewhere under the remaining clauses of section 15. To these contentions the respondents have argued that the Chieftainship Act is saved from being regarded as inconsistent with the provisions of sections 3 and 15 of the Constitution by the provisions of subsection 9 of section 15.

[**44.**] Before we deal with subsection 9 of this section, we ought to mention that some discriminatory practices may also be saved by the derogations contained in subsections 4 to 8 of section 15 made to the right to non-discrimination granted in section 15(1) and (2). None will assist the respondents except perhaps subsections 4. Of the numerous derogations from the right to non-discrimination appearing in subsection 4, the only one that deserves any consideration is that contained in subsection 4(e). In that subsection it is provided that:

> (4) Subsection (1) of this section shall not apply to any law so far as that law makes provision — (e) whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.

In other words any provision in a law that does what is described in subsection (4)(e) shall not be regarded as offending the prohibition against discriminatory laws contained in section 15(1). That is clear and causes no doubt.

[**45.**] The only dispute that might arise is what is the meaning of the provisions in paragraph (e) of subsection 4. To answer that question we must first have regard to subsection 3 of the section which defines the expression 'discriminatory' as meaning, in essence, giving different treatment to different people mainly or wholly because of factors like race, tribe, place of origin, political opinion and like factors, with the result that persons of one such description receive privileges and advantages or are subjected to disabilities and disadvantages which persons of another such description do not receive or suffer. Doing so is discriminatory. What subsection 4(e) now says is that a law will not offend section 15(1) (non-discrimination) if it subjects persons of the description referred to above to disabilities or disadvantages, or ,on the other hand, grants them privileges which persons of the same description do not suffer or enjoy if, bearing in mind the nature of the disability or the privilege and special circumstances pertaining to those people or to the people left out, the treatment is reasonably justifiable in a democratic society. However, it is for those who justify such a law to prove that it is exempted by subsection 4(e) once the applicant has put forth facts that *prima facie* show discrimination.

[**46.**] In the present case, the respondents did not attempt to justify the disadvantages suffered by the Wayeyi, nor the advantages enjoyed by the eight tribes on the basis that the provisions that embody these can be justified in terms of the provisions of subsection (4)(e) of section 15 of the Act. There are no special circumstances that were placed before this Court that could justify the differentiation between tribe and tribe in Botswana. It follows that this subsection 4(e) is not available to justify any discrimination that may exist in the Chieftainship Act.

[47.] We now revert to subsection 9 of section 15 of the Constitution. It reads as follows:

> (9) Nothing contained in or done under the authority of any law shall be held to be inconsistent with the provisions of this section: (a) If that law was in force immediately before the coming into operation of this Constitution and has continued in force at all times since the coming into operation of this Constitution; or (b) To the extent that the law repeals and re-enacts any provision which has been contained in any written law at all times since immediately before the coming into operation of this Constitution.

[**48.**] The Chieftainship Act is headed as follows: 'An Act to re-enact with amendments the provisions relating to Chiefs, Deputy Chiefs, Sub-Chiefs and Headmen and matters incidental thereto or connected therewith.' In short, the Chieftainship Act, though commencing on the 9 October 1987, was re-enacting with amendments the provisions of an old law previously existing under the same title as the re-enacted Act. The respondents have therefore argued that subsection 9(b) applies to exempt the present Chieftainship Act from falling foul of sections 3(a) and 15(1) and (2) because it is an act that repeals and re-enacts provisions which had existed since immediately before the coming into operation of the Constitution and has since continued. There can be no doubt that the old Chieftainship Act existed before the becoming into operation of the Botswana Constitution on 30 September 1966. Cap 41:01 largely re-enacts the provisions of the old law and repeals some of it.

[**49.**] Even if the present Chieftainship Act contains substantially the same provisions of the old Chieftainship Act, it would be necessary to show that the terms of subsection 9 are met before it could apply to exempt that law from the proscription against discrimination. It is provided by subsection 9 of section 15 of the Constitution that nothing contained in any law which falls either under (a) or (b) of the subsection shall be held to be inconsistent with the provisions of section 15. In other words, if there is a law that is covered by paragraph (a) or (b) of subsection 9, the provisions of such a law must not be held to be inconsistent with the provisions of section 15 even if they are in fact discriminatory. To the extent therefore that the provisions of the Chieftainship Act, especially section 2, could be held as discriminatory and therefore contrary to section 15(1) and (2), that discrimination is deemed not to be inconsistent with those subsections and any other provision of section 15. The discrimination is rendered immaterial for the purposes of section 15 only. That was the argument put forcefully by Mr Motswagole for the respondents. We agree with that argument because it must be the intended effect of subsection 9 that any existing act whose provisions are contrary to the anti-discriminatory provisions of section 15 would be saved and rendered not offensive to the provisions as long as the law in which they are contained was in force immediately before the coming into operation of the Constitution and has continued at all times thereafter up to the time of the complaint; or alternatively the offending provisions are contained in a law which re-enacts a law that existed before the coming into operation of the Constitution. We are therefore of the view that the omission and the apparent discrimination in the Chieftainship Act cannot be regarded as inconsistent with section 15 only because the Constitution itself has legitimised such discriminatory laws for the purposes only of section 15 of the Constitution.

[**50.**] That subsection specifically states that 'nothing contained in or done under the authority of any law shall be held to be inconsistent with the provisions of this section'. 'The provision of this section' referred to in subsection 9 is a reference to the whole of section 15 but to no other

provision of the Constitution, so that if section 2 of the Chieftainship Act offends against another section of the Constitution, it is in our view not immune from examination by the Court to see if it breaches anybody's rights.

[**51.**] With regard to the Chieftainship Act the Court is dealing only with a statute and not a provision of the Constitution and therefore such an act can be examined for consistency with the provisions of the Constitution. It is well known that except as otherwise provided by the Constitution to the contrary, all laws enacted in Botswana and all rules of the common law can be tested against the provisions of the Constitution to see if they comply therewith. In our view the Chieftainship Act is no exception — except only in regard to the immunity regarding a conflict with section 15.

[**52.**] But the Act was also attacked for being discriminatory contrary to section 3(a) of the Constitution in that it did not afford equal treatment and equal protection to the applicants when compared with the treatment it affords the eight tribes. The question then should be whether any provision of the Chieftainship Act is inconsistent with the rights of the Wayeyi and the applicants to equal protection of the law as required by section 3(a) of the Constitution. We have already stated earlier that the right to the protection of the law means more than simple assistance by law enforcement agencies. It connotes equality before the law as well as equal treatment under the provisions of the law. Any inequality which is entrenched by law is not equal protection under the law for those disadvantaged by that law. Discriminatory treatment can only be tolerated under the Botswana Constitution if it is permitted under laws authorised by the Constitution under the derogation clauses of the Constitution. If that discriminatory treatment is not so permitted, then it ought to be struck down by the High Court. We are therefore of the view that in defining 'chief' and 'tribe' under section 2 of the Chieftainship Act to refer only to the eight tribes of the Bamangwato, the Batawana, the Bakgatla, the Bakwena, the Bangwaketse, the Bamalete, Barolong and Batlokwa, the Act to that extent does not afford equal treatment to the Wayeyi and the applicants. To that extent the Act is contrary to section 3(a) of the Constitution and contravenes the rights of the applicants and their tribe to equal protection of the law. The discriminatory effect of the definitions we have referred to in section 2 of the Chieftainship Act leads to serious consequences when it is remembered that this Act is one of three laws that define which tribal community can be regarded as a tribe, with the result that such a community can have a chief; who can get to the House of Chiefs and that only a tribe can have land referred to as a 'tribal territory'.

The Tribal Territories Act

[**53.**] We next consider the argument that the Tribal Territories Act (Cap 32:03) and also the Chieftainship Act are discriminatory either expressly or

in their effect as far as they discriminate on the basis of tribe. We have already discussed the provisions of the Chieftainship Act and it is not necessary to repeat what we said concerning it. The Tribal Territories Act was first enacted as Proclamation 1899 and was continually amended and re-enacted, the last replacement law being Proclamation 45 of 1933. This last proclamation has also been amended from time to time but essentially it is the 1933 Act which presently exists in our statutes. The Act sets out tribal territories in Botswana and delineates and specifies the boundaries thereof. These areas are those of the Bamangwato, Bakgatla, Bakwena, Bangwaketse, Bamalete, Barolong, Batawana and Batlokwa tribes. The law omits in this or subsequent amendments any mention of any area for the Wayeyi tribe. Furthermore other pieces of land in Botswana are not designated tribal territories even though tribal communities reside therein.

[**54.**] The same defence as that relating to section 2 of the Chieftainship Act was offered by the respondents in answer to the complaint by the applicants against the Tribal Territories Act. That defence is that the Act is saved from being inconsistent with the anti-discrimination provisions of section 15 by subsection 9(a) as the Tribal Territories Act is a law which was in existence before the coming into operation of the Constitution and has since continued to exist thereafter. It is contended therefore that under subsection 9(a) what is done by virtue of that law or what is contained in that law cannot be held to be inconsistent with the provisions of section 15. We agree and for the reasons previously mentioned. It was not contended by the applicants that the Tribal Territories Act was in conflict with section 3 of the Constitution, nor was any ground laid in the papers for that contention to be properly sustained. The attempt to strike down this law as unconstitutional is therefore rejected. No sufficient grounds were advanced in that respect.

[**55.**] We have now come to the point where we can deal with the requirements of the applicants for orders designed to compel the government of Botswana to take positive steps to appoint and recognise Wayeyi chiefs, their headmen and other traditional leaders under relief 5(b); and in accordance with relief no 7, to compel the government to introduce Shiyeyi [Shiyeyi earlier] language as a national medium of instruction in schools in the country, as well as to have the Wayeyei culture declared part of the school curriculum. As a matter of judicial policy the courts are reluctant to issue orders for the carrying out of works and other activities which require their supervision. It is obvious that for a court to issue orders requiring positive action on the part of the government on a continuing basis is a mammoth task.

[**56.**] The performance by government of required activities to fulfil the orders sought by the applicants must involve, *inter alia*, careful planning, budgeting and funding, manpower and other inputs on the part of the state. This Court was not given any information by the applicants to show

that all such inputs are or could be made available, nor was any timescale indicated, nor the feasibility of some of the matters sought by the applicants. Consequently this Court is not put in a realistic position to determine whether such activities can and should be carried out. The Court, in our view, would be incapable of supervising the required activities and would thus be unable to judge whether any performance is adequate, or to know whether the person ordered has wilfully disobeyed the order in the event of a complaint of lack of execution. Now it is a well known rule of our law that courts should not issue orders for doing things which they would not be capable of supervising. The applicants ask that the government be ordered as follows:-

> 1(a) That the 1948 Wayeyi Courts be re-established with the main *kgotla* at Gumare. Alternatively (b) That 2nd respondent [1st respondent] initiate or put in place a constitutional structure for the appointment and recognition of chiefs, headmen and other Wayeyi traditional authorities that is not discriminatory on the basis of tribe.
> 2. That the 2nd respondent [1st respondent] in conjunction with the Ministry of Education introduce Shiyeyi language as a national medium of instruction in preliminary, primary and secondary schools and the culture of Wayeyi be part of school curriculum.

[**57.**] With regard to prayer 1(a) above, it suffices to state that this Court was not provided with any or adequate information concerning what the applicants refer to as 'the 1948 Wayeyi Courts' with the result that the Court is not remotely able to appreciate what is involved. In that event this Court is not in a position to judge the desirability of making such an order. For that reason alone the prayer sought cannot be granted. The prayer for government 'to initiate and put in place a constitutional structure for the appointment and recognition of chiefs, headmen and other Wayeyi traditional authorities' which is not discriminatory according to tribe is an alternative to prayer (a) which this Court has rejected. The applicants have again not given any or adequate information with regard to their requirement. Questions such as those relating to the distribution of other ethnic groups, precisely over which areas and over whom such authorities would hold sway, the feasibility of the establishment of such courts and the implications for the existing local and governmental authorities would arise and need to be taken into account by this Court. No discussion of the impact of such measures was made in applicants' papers. Without a minimum of the relevant information this Court cannot know the implication of such an order for the government and the district. Apart from the issue of the ability of the Court to supervise such an order, the Court cannot decide the wisdom and definability of the granting of such an order without knowing who, if any, would be prejudiced thereby.

[**58.**] For the same reasons advanced by this Court for refusing prayers (a) and the alternative (b), the prayer to order the government to introduce Shiyeyi language as a national language in schools, as well as the Shiyeyi culture in the education curriculum must be rejected. There is hardly any

information on the subject to show this Court in what direction it would be leading the government and the country . There is no discussion at all about the resources such an exercise might possibly require, nor is the scale of the undertaking revealed. These remedies cannot be granted for the reasons stated above.

[**59.**] As regards prayer 4, we note that although it was not abandoned, it was not argued. This prayer, in which the applicants seek the recognition of the first applicant as chief of the Wayeyi, must fail for three main reasons. The first reason is that there is a dispute of fact, which dispute cannot be resolved on affidavits, as to whether or not the first applicant can legitimately claim the chieftainship of the Wayeyi. The respondents have filed an affidavit by one Moeti Moeti, who claims that some other lineage, and not that of the first applicant, has legitimate claim to the Wayeyi chieftainship. The second reason is that the applicants have failed to put forward sufficient factual averments to satisfy the requirements of the Chieftainship Act. Particularly, the applicants have failed to allege that the first applicant has been designated as chief in terms of the Wayeyi customary law. In fact the applicants' papers are silent on the customary law of the Wayeyi on this point. The third reason is that to grant to the applicants the order they seek, that is to recognise the first applicant as chief, would be tantamount to second guessing the legislature as regards its response to this Court's decision. This is because, the applicants succeed in having section 2 of the Chieftainship Act declared *ultra vires* the Constitution it does not necessarily mean that the Wayeyi will be included as the ninth tribe. It may well be that the legislature, in its wisdom, will create equality between the tribes by removing the special status of the eight tribes in the definition section of the Chieftainship Act and undertake such consequential amendments as shall be necessary.

[**60.**] We mention, however, that the refusal by this Court to order as applied for is not an expression that the issues involved in this case must be ignored. On the contrary we wish to emphasise the urgent requirement on the part of the government of Botswana to attend to them lest they bedevil the spirit of goodwill existing between the different tribes and communities of this country.

Powers of the Court

[**61.**] Having reached the conclusions set out above we should now consider what this Court should do. The fundamental rights and freedoms granted under sections 3 to 15 of the Constitution are afforded protection by the High Court under the provisions of section 18. Where a person has successfully shown in an application to the High Court that any of his rights so granted have been, are being or are likely to be contravened, the High Court may make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or

securing the enforcement of any of the provisions of sections 3 to 16 (inclusive) of this Constitution.

[**62.**] It can readily be seen that the remedies available to the Court are wide and varied. Such remedies are not spelt out in any precise language, but they are couched in broad terms indicating by what processes the Court may require the provisions contravened to be enforced, that is the breach to be corrected. Thus the Court is empowered to consider issuing orders or writs or giving directions, all for the purpose of enforcing or securing the enforcement of the relevant provisions of the Constitution. We consider that by the use of the phrase 'for the purpose of *enforcing* or securing the enforcement of any of the provisions . . .' the Constitution intended to give the High Court power to order the immediate enforcement of the provisions contravened, or where appropriate to give such directions as recognise that other things will have to be done leading ultimately to the enforcement of the provision breached. The diversity of the methods of enforcement given to the Court indicates the flexibility which the Constitution has granted to the Court in order to deal with the circumstances of each case. Where, for instance (as in this case), the complaint is about a law being inconsistent with the provisions of the Constitution, the appropriate direction or order, as the case be, of the Court must take into account the legislative process that may be required in order to remedy the breach.

[**63.**] In regard to the present case the breach which the applicants have successfully demonstrated is that brought about by the provisions of section 2 of the Chieftainship Act in defining 'tribe' and 'chief' in terms that exclude the Wayeyi and other tribes and ethnic groups. They have proved in our opinion that these definitions omit them and as such they are not treated equally under this law and therefore there is a contravention of their right to equal treatment and protection of the law as ordained by section 3(a) of the Constitution. It is, however, clear that to secure the observance of their right under section 3(a) of the Constitution, legislative changes are necessary. We therefore order that section 2 of the Chieftainship Act (Cap 41:01) be amended in such a way as will remove the discrimination complained of and give equal protection and treatment to all tribes under that Act. If other laws have also to be amended to accord the applicants this right, then necessary action must follow. On the question of costs, the applicants have succeeded in the main in challenging the unconstitutionality of section 2 of the Chieftainship Act, while the respondents have successfully resisted in the main the attempt to declare sections 77 to 79 of the Constitution unconstitutional. The general rule is that costs follow the event, but in this case we take the view that the extent to which either of the opposing parties has succeeded is not insignificant. In all cases the Court always has a discretion when it comes to the awarding of costs, and in doing so it takes the circumstances of each particular case into account. In this case we take the view that the circumstances are such that the Court cannot weigh with mathematical precision the extent of the

success and/or loss of the respective parties. Our Order on costs reflects that.

[**64.**] The order we issue is this:

(1) We direct that section 2 of the Chieftainship Act (Cap 41:01) be amended to afford equal treatment and equal protection by that law to the applicants.
(2) Save as mentioned in paragraph 1 hereof the application of the applicants fails in all other respects and it is dismissed.
(3) Each party to pay its own costs.

* * *

State v Marapo

(2002) AHRLR 58 (BwCA 2002)

The State v Moatlhodi Marapo
Court of Appeal, criminal appeal no 15/2002, 19 July 2002
Judges: Tebbutt AJP, Korsah JA, Lord Sutherland JA, Grosskopf JA and Akiwumi JA

Interpretation (generous and purposive construction of Constitution, 9–11, 13, 14)
HIV/AIDS (mandatory denial of bail in rape cases, 17–19)
Personal liberty (mandatory denial of bail in rape cases, 19, 21–23, 25)

Tebbutt AJP

[**1.**] The issue for decision by the Court in this matter is whether section 142(1)(i) of the Penal Code, as introduced by Act 5 of 1998, which provides that any person who is charged with the offence of rape shall not be entitled to be admitted to bail, is unconstitutional or not.

[**2.**] The respondent, Moatlhodi Marapo, was arrested on 27 September 2000 and charged with rape. In terms of section 142(1)(i)of the Penal Code, he was not entitled to bail pending his trial. On 9 February 2001 he brought an application in the High Court in Francistown in terms of section 18 of the Constitution of Botswana for an order declaring section 142(1)(i) *ultra vires* section 5(3)(b) of the Constitution and also as offending against section 10(2)(a) of the Constitution. The application came before Mosojane J, who, in a written judgment delivered on 21 November 2001, held that paragraph (i) of sub-section 1 of section 142 of the Penal Code is *ultra vires* the Constitution and struck it down. The Attorney-General has now invoked the provlsions of section 336(1) of the Criminal Procedure and Evidence Act (Cap 08:02), which enables him to have

the correctness of that decision argued before this Court. Although he has, in doing so, posed four questions of law for consideration by this Court, in essence they boil down to the same thing, namely: Does section 142(1)(i) as amended by section 3 of Act 5 of 1998 offend against sections 5(3)(b) and 10(2)(a) of the Botswana Constitution?

[**3.**] Section 18 of the Constitution, under which the respondent brought his application before the High Court, provides as follows:

> (1) . . .if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.

[**4.**] Section 142(1)(i) of the Penal Code, as amended, provides thus: '(1) any person who is charged with the offence of rape shall . . . (i) not be entitled to be granted bail.' Section 5(3)(b) of the Constitution, which is alleged to be contravened by section 142(1)(i) reads as follows:

> Any person who is arrested or detained . . . (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Botswana, and who is not released, shall be brought as soon as is reasonably practicable before a court; and if any person arrested or detained as mentioned in paragraph (b) of this subsection is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

[**5.**] And subsection (2)(a) of section 10 of the Constitution, which is also alleged to be contravened by section 142 (1)(i), reads thus: 'Every person who is charged with a criminal offence (a) shall be presumed to be innocent until he is proved or has pleaded guilty.'

[**6.**] It would seem that there are two convenient starting points in the determination of the issue raised before this Court. The first is to emphasise that section 142(1)(i) unequivocally imposes a total prohibition on the granting of bail to persons charged with rape. There is no saving provision that such a person may be admitted to bail if he is not brought to trial within a reasonable time after he has been arrested and detained, as envisaged in section 5(3)(b) of the Constitution. Mrs Dambe, who appeared for the Attorney-General, submitted that section 142(1)(i) should be read together with section 5(3)(b) of the Constitution and that a person charged with rape could, despite the provisions of section 142(1)(i), if deemed fit, be admitted to bail if he was not brought to trial within a reasonable time. I do not agree. She submitted that a legislative enactment passed by Parliament could not override a term of the Constitution. Section 142(1)(i) is couched in clear and unambiguous language. Its provisions are peremptory. A person charged with rape, it says, '*shall not be*

entitled to be granted bail'. I emphasise the word 'shall' which, it is well-established, denotes that the statutory provision in question is peremptory. I also emphasise the words 'not be entitled'. These denote in the clearest possible terms that the denial of bail is total and absolute, inflexible and unmitigated. And, by so enacting, Parliament has, contrary to Mrs Dambe's submission, sought to override the provisions of section 5(3)b of the Constitution entitling persons to bail in the circumstances therein set out.

[**7.**] The second point of departure is a consideration of the constitutional rights which are, or may be, affected by the provisions of section 142(1)(i). This is necessary because of the further argument advanced by Mrs Dambe to which I shall presently turn.

[**8.**] The Constitution of Botswana in chapter 2 thereof provides for the protection of the rights and freedoms of the people of the country, which rights and freedoms have to be respected in all state actions. This is abundantly clear from (a) the heading of the chapter, namely 'Protection of Fundamental Rights and Freedom of the Individual'; (b) from the provisions of sections 3 to 16 inclusive of the Constitution; and (c) from the provisions of section 18 cited earlier herein, that if any person alleges that the provisions of section 3 to 16 have been, or are likely to be contravened in relation to him, he can apply to the High Court for redress. It is, I think, well that one be reminded of the memorable words of Lord Wilberforce in the House of Lords in *Minister of Home Affairs and Another v Fisher and Another* 1980 AC 319 at 328-9 where the Lords dealt with the Constitution of Bermuda. It, too, contained a chapter (chapter 1) headed like chapter 2 of the Botswana Constitution, 'Protection of Fundamental Rights and Freedoms of the Individual'. Remarking that this chapter was influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms which, in turn, was influenced by the United Nations Declaration of Human Rights of 1948, the learned and noble Law Lord said this:

> These antecedents, and the form of chapter 1 itself, call for a generous interpretation, avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to. Section 11 of the Constitution forms part of chapter 1. It is thus to 'have effect for the purpose of affording protection to the aforesaid rights and freedoms' subject only to such limitations contained in it 'being limitations designed to ensure that the enjoyment of the said rights and freedoms by an individual does not prejudice. . .the public interest.'

[**9.**] Lord Wilberforce went on to say the following:

> A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of

> the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.

[**10.**] One would wish to add to these words the important voice of Lord Diplock in *Attorney-General of the Gambia v Jobe* 1984 AC 689 at 700 who said:

> A constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms, to which all persons in the state are to be entitled, is to be given a generous and purposive construction.

[**11.**] Citing these remarks, Aguda JA who delivered one of the majority judgments in the watershed case in this Court of *Attorney-General v Dow* 1992 BLR 119, said the following at 165H:

> Generous construction means in my own understanding that you must interpret the provisions of the Constitution in such a way as not to whittle down any of the rights and freedoms unless by very clear and unambiguous words such interpretation is compelling. The construction can only be purposive when it reflects the deeper inspiration of the basic concept which the Constitution must for ever ensure, in our case the fundamental rights and freedoms entrenched in section 3.

[**12.**] This then is an appropriate juncture at which to set out section 3 of the Constitution. It reads as follows:

> 3. Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely — (a) life, liberty, security of the person and the protection of the law; (b) freedom of conscience, of expression and of assembly and association; and (c) protection for the privacy of his home and other property and from deprivation of property without compensation, the provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

[**13.**] That a Constitution and particularly one like that of Botswana should receive a 'purposive construction' has been emphasised in recent years by the House of Lords (see eg *Attorney-General of the Gambia v Jobe supra*; *Attorney-General of Hong Kong v Lee Wong Kui* 1993 AC 951 at 966 E) and has also been stressed in Botswana by this Court in *Attorney-General v Dow supra*. Such purposive interpretation has been said to embrace the following concept: 'Rights should be interpreted in accordance with the general purposes of having rights, namely the protection of individuals and minorities against an overbearing collectivity' (per Madame Justice Bertha Wilson of Canada in a paper in 1988 on 'Constitutional Protection of Human Rights' cited by Puckrin JA in *Attorney-General v Dow* at 194 H).

[**14.**] Adopting such a purposive construction to section 3 of the Consti-

tution, it is manifest that its purpose is the protection of those rights and freedoms *of the individual* set out in the section including the right to personal liberty (my emphasis). The only limitations to the latter right are

(i) that its enjoyment should not prejudice the rights and freedoms of others or the public interest and (ii) those limitations expressly contained in section 5 of the Constitution.

[**15.**] Section 5 sets out in subsections (a) to (k) those circumstances in which a person may be deprived of his or her personal liberty. Only sub-section (e) is germane to the present inquiry. It permits such deprivation — '(e) upon reasonable suspicion of his having committed or being about to commit, a criminal offence under the law in force in Botswana'.

[**16.**] It is in respect of that sub-section that section 5(3)(b) becomes operative granting, as it does, entitlement to be released either unconditionally or on conditions, which would include bail. That entitlement has now been removed by section 142(1)(i). Section 142(1)(i) accordingly offends against section 5 (3)(b) unless its enactment can be said to be in the public interest.

[**17.**] It is the contention of the Attorney-General that Parliament obviously considered the enactment of section 142(1)(i) to be in the public interest. In elaboration of this Mrs Dambe made the following submissions:

(a) She submitted that a Constitution — and this would apply to the Botswana one — is not a static document but is a living and organic instrument. It is not a 'lifeless museum piece' to use the words of Aguda JA in *Attorney-General v Dow supra* but must reflect the mores and norms of the time. With this submission I am in complete agreement. The provisions of a Constitution are 'not time worn adages or hollow shibboleths. They are vital, living principles that authorise and limit government powers in our nation' (per Chief Justice Earl Warren of the United States in *Trop v Dulles* 356 US 86 [1958] at 103). In addition, when construing the Botswana Constitution, the national ethos must be taken into account.
(b) Having regard to the mores and norms of the present time and weighing the national ethos, she submitted in considering section 142(1)(i) that the public interest formed the basis for its enactment that public interest was the concern about the escalation in the incidence of crimes of rape and, associated therewith, the HIV/AIDS epidemic that currently afflicts the nation. There had, she said, been a consistent increase, borne out by statistics, in the crime rate and, in particular, the number of rapes. Again with this submission I have no quarrel. The increase in rapes cannot be gainsaid and that the nation is beset by an epidemic of HIV/AIDS is notorious.

[**18.**] It was with this in mind, said Mrs Dambe, that Parliament passed the amendment to section 142 of the Penal Code to reflect societal concerns about the high crime rate and the incidence of HIV/AIDS. It was designed to promote public safety and public health and was thus in the public

interest. The non-bailability of persons charged with rape was one of the measures in that design.

[**19.**] It is with this last-mentioned submission that I have considerable difficulty. It is beyond my comprehension how depriving a person of his liberty merely because he is alleged to have committed rape – not, it must be stressed, because he is found guilty of it – can in any way reduce the crime rate, including rape or serve to contain or restrict the incidence of HIV/AIDS. After all, not all persons who commit rape are infected with HIV/AIDS. It may be thought that knowing that no bail will be granted if a person is charged with rape, will have a deterrent effect, persuading those who may be so minded to desist from pursuing their intentions. That, however, it would seem, was the ostensible purpose in the enactment of the sections 142(1)(ii) (2)(3)(4)(5) by section 3 of Act 5 of 1998 containing, as they do, harsh and severe mandatory punishments for rape, particularly for those persons who are HIV positive and especially if they are aware of it. I cannot conceive that making the fact that a person who may be alleged to have committed rape not entitled to bail can operate in any manner as a deterrent.

[**20.**] Faced with the difficulties that I have just set out, Mrs Dambe submitted that, in any event, the enactment of section 142(1)(i) by the legislature was an expression of public concern about the crime situation in the country.

[**21.**] If I am wrong in my views and that the public interest may in some way be served by section 142(1)(i) or if it may represent an expression of concern about the crime situation, sight must not be lost of the fundamental right enshrined in section 3 of the Constitution of personal liberty. It is one of the most basic of human rights in a democratic society and its deprivation or curtailment must occur only within the most narrow of confines (see *Attorney-General v Dow supra* at 131 - 132, per Amissah P). As stated by Kentridge JA in *Attorney General v Moagi* 1982 (2) BLR at 184: 'Constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them, so as to bring them into line with the common law.'

[**22.**] Such rights are jealously guarded and the development, extension and preservation of them are cornerstones of the intellectual processes of democracies throughout the world and are embodied in the laws and judicial pronouncements of such countries as the United States, the United Kingdom, the many members of the European Community and neighbours of Botswana such as South Africa. This trend has been particularly marked in the sphere of those rights personal to the individual and especially the right to personal liberty. This Court as far back as 1992, has recognised that Botswana is one of the countries in Africa where liberal democracy has taken root (see the *Dow* case *supra* at 168 B–C) and international human rights norms should receive expression in the constitutional guarantees of this country. The court is accordingly required to

balance the concept of the public interest against the right of personal freedom and to determine the precedence of the one in relation to the other by reference to the mores of the community and by using an assessment based on proportionality. It necessitates a value judgment by the court (cf *Ex parte Attorney-General, Namibia*: In *re Corporal Punishment* 1991 (3) SA 76 (NmSC) at 96).

[**23.**] It is notorious, as mentioned by Mr Kgalemang for the respondent, that the trend nowadays — and it has been so for a considerable time — is that basic human rights are nurtured, promoted and protected in all liberal democracies. Having stated that, the denial of entitlement to bail of a person who is only alleged to have committed rape to satisfy the public interest that serious crime should be confined, does not, in my view, weigh up against the infringement of that person's right of personal freedom and his deprivation of it on the mere allegation of his having committed the offence. It must be remembered that even where a person is charged with the grave offences of murder and treason, he may be admitted to bail (see section 114 of the Criminal Procedure and Evidence Act). It is therefore incongruous, to say the least, that a person accused of rape may not be so admitted. Accusations of rape are easily made and male persons are vulnerable to unscrupulous, vindictive or malicious complainants who may make false or unsubstantiated allegations of rape. An innocent person may thus be detained for considerable periods and would not even be entitled to bail, as I have shown, where his trial is, for whatever reason, unreasonably delayed. And even a person who is not innocent of the allegation may be unnecessarily detained for unreasonable periods, especially if he is not tried in a reasonable time, where there is no prospect of his absconding or of not standing trial or of breaking any of the usual conditions of bail. The remarks of the late Chief Justice Mokama in *Daniel Baikakedi v State* — Miscra 4 of 1992 are particularly apposite to the situation. In dealing with an appeal against a refusal of bail by a magistrate where the investigations were taking an unreasonably long time he said this:

> The courts do not like to deprive a man of his freedom while awaiting trial as he may be proved innocent. Even where he is subsequently proved guilty, the courts try not to deprive him of his liberty until he has been convicted (see *S v Budlender and Another* 1973 (1) SA 264).

[**24.**] The learned Chief Justice went on to say the following:

> I cannot accept that once a charge appears to be a serious one then 'the sky is the limit'. After all the charge has not been proved and if we allow the seriousness of the charge to be a determining factor for how long the accused can be remanded in custody, then there is a real danger that those who are accused of serious crime, could almost be detained without trial for an indefinite period. In my view, that would be tantamount to introducing preventative detention in our legal system.

[**25.**] Adopting a purposive construction to the Constitution therefore and applying a value judgment to the proportional assessment of the public

interest on the one hand and the right of personal liberty on the other, I find that section 142(1)(i) of the Penal Code offends against the provisions of section 5(3)(b) of the Botswana Constitution and that the denial of bail where a person is alleged to have committed the offence of rape is not in the public interest. This finding makes it unnecessary to consider whether it also offends against section 10(2)(a)of the Constitution. It follows that I agree with Mosojane J that section 142(1)(i) of the Penal Code is *ultra vires* the Constitution of Botswana and is to be struck down.

[**26.**] One aspect remains. It is the question of costs. Mr Kgalemang submitted that in striking down section 142(1)(i) the learned judge in the Court *a quo* should have ordered the state to pay the respondent's costs and he applied for an order that this Court now award him those costs in that Court. He did not ask for the costs of the proceedings in this Court as he was appointed by the registrar of the Court to act *amicus curiae*. The Court *a quo* did not advert in its judgment to the question of costs. Mrs Dambe contested the application. Mr Kgalemang submitted that the usual rule in relation to costs applied and that as the respondent was the successful party in the Court *a quo* he should have his costs in that Court. Mrs Dambe submitted that an order for costs against the Attorney-General would not be appropriate on three bases: (a) what was involved in the Court *a quo* was an application by the present respondent under section 18 of the Constitution for a declarator that a provision in a statute infringed his constitutional rights in which the Attorney-General was entitled to be heard without attracting any liability for costs; (b) that the application was a criminal matter in which costs against the Attorney-General were not usually awarded; (c) that the issue raised in the application was a constitutional issue of public interest and the Attorney-General's intervention in the matter was one for the benefit of the public as the Court's decision defined the citizen's rights on the issue raised. I shall deal with (b) first. It is true that costs are not generally awarded in criminal matters. However, the High Court has an inherent jurisdiction to do so but will only do so in exceptional cases to mark its disapproval of high handed conduct amounting to bad faith (see *Re: Attorney-General Reference: State v Malan* (1990) BLR 32 (CA). No such consideration arises here. This case however, while having a criminal element to it as a background, was not a criminal matter in its strict sense. It was an application for a declaration of a citizen's rights. I turn, therefore, to Mrs Dambe's points (a) and (c). In respect of both of these it seems to me that the true position is the following. The respondent considered that a law passed by the government contravened his constitutional rights. He applied to the High Court for redress. The Attorney-General represents the government in such matters but it was in effect the government, in its capacity as the maker of the law in question, which was the party being challenged and which sought, via the Attorney-General, to defend its law. It lost. I can see no reason why therefore the individual respondent, as the successful party in his application, should be deprived of his costs. The matter is clearly one of public

interest but the respondent's attack upon the law is as much for the public benefit as the government's defence of it, through its representative, the Attorney-General. The Attorney-General should therefore pay the costs of the respondent in the Court *a quo*. Because the legal representative of the respondent in the proceedings in the Court of Appeal did so *amicus curiae* it is not necessary for me to decide in this case which party, if any, should bear the costs in a reference by the Attorney-General in terms of section 336(1) of the Criminal Procedure and Evidence Act and I leave the question open.

[**27**.] The following order is therefore made:

(1) Section 142(1)(i) of the Penal Code as introduced by section 3 of Act 5 of 1998 is declared *ultra vires* the Constitution of Botswana and is struck down.
(2) The Attorney-General is ordered to pay the costs of the respondent, then applicant in High Court — Miscellaneous Criminal Application F14 of 2001, in the High Court in Francistown.
(3) The costs of the legal representatives of the respondent in the reference in terms of section 336(1) of the Criminal Procedure and Evidence Act (Cap 08:02) brought by the Attorney-General in this Court are the responsibility of the Registrar of the Court, such representative having acted *amicus curiae*.

BURUNDI

Public Prosecutor v Minani

(2002) AHRLR 67 (BuCA 1998)

Le Ministère Public v Minani Jean alias Bugume
Court of Appeal, Bujumbura, 28 October 1998
Judges: Gacuko, Nzeyimana Shungu, Ndoreraho, Bahandwa and Mwamarakiza
Translated from French. Judgment available at www.chr.up.ac.za
Previously reported: Recueil de jurisprudence Burundaise: Matière pénale, Octobre 2002

Evidence (torture confirmed by NGO, 21–23)
Torture (confession obtained through torture can not be used as evidence, 24, 41, 42)

[**1.**] In view of letter no 552/11/423/96 that the public prosecutor of the Appeal Court sent to the presiding judge of the aforesaid Appeal Court of Bujumbura, asking him to finalise case RMPG 1153/YP, in which Jean Minani is being prosecuted;

[**2.**] Seeing that the Court filed the case under no RPCC 636;

[**3.**] Seeing that the defendant received a summons calling him to a public hearing on 22 January 1998 and acknowledged receipt of this on 12 December 1997;

[**4.**] In view of the finalisation of the case at the public hearing of 22 January 1998 at which the defendant appeared, assisted by his counsel, Me Segatwa, and seeing that the case was postponed to the hearing of 13 March 1998 to allow the counsel for the defendant to consult and study the case, as well as to ensure that the witnesses appeared;

[**5.**] Seeing that, at the hearing of 18 March 1998, the case was not heard because counsel for the defendant did not appear;

[**6.**] In view of the deferments of the case at public hearings of 27 April 1998, 23 June 1998, 15 September 1998, 30 September 1998 and 28 October 1998;

[**7.**] Considering the public hearing of 28 October 1998 at which the defendant and his counsel appeared and the parties of the case were duly heard;

[**8.**] Seeing that the Public Prosecutor's Office demanded a sentence of life

imprisonment, that the defendant had the opportunity to speak to the Court and asked for an acquittal;

[**9.**] After having listened to arguments, the Court deliberated on the matter and gave the following ruling:

[**10.**] Whereas the Public Prosecutor's Office accuses the defendant before the Criminal Chamber of the Appeal Court of Bujumbura on the following charges:

> 1. On 13 March 1996, at Kinama, in the district 'Bukirasazi', of having murdered Lieutenant Colonel Lucien Sakubu, acts provided for and punished by article 144 of the Criminal Code, Book II;
> 2. On 13 March 1996, in the same circumstances of time and place, of having associated with criminals to destroy and endanger human lives;

[**11.**] Whereas the defendant, Jean Minani, was heard by the police, by the Public Prosecutor's Office and before the Criminal Chamber;

[**12.**] Whereas the Prosecutor summed up the facts; That, according to the Public Prosecutor's Office, on the day of the event 13 March 1995, [sic] at about 10:00, on the Muzinda road, the victim was returning from his fields when he collided with a cyclist; That, after having knocked him down, the late Sakuba stopped as the law demands and it was at that moment that he was captured by those who were lying in wait for him, and that they took him to a hidden place where he was killed after having been tortured;

[**13.**] Whereas Jean Minani was interrogated about these facts that he was accused of and ended by confessing before the Officer of the Criminal Investigation Department, but after having first denied the facts (c 10, 11, 12, 15);

[**14.**] Whereas before the Public Prosecutor's Office he this time categorically denied the facts;

[**15.**] Whereas to explain the confession made to the police, he claimed to have been tortured; saying he was forced to confess to save his life;

[**16.**] Whereas the Public Prosecutor's Office bases its accusations mainly on what Jean Minani supposedly said and acknowledged before the police officer and also on the statements of the witnesses Birondonoke (c 30) and Saïdi Mugeni (c 11);

[**17.**] Whereas the Public Prosecutor's Office has retained Saïdi Mugeni as the principal witness and whereas the latter has appeared before the Criminal Chamber;

[**18.**] Whereas Jean Minani was heard before the Court and whereas he presented his defence;

[**19.**] Whereas, before the Court, Jean Minani denied the facts as he had done before the Public Prosecutor's Office;

[**20.**] Whereas, before the Court, he reiterated that all that he had previously acknowledged can be explained by the torture he underwent, and whereas he furnished proof of these practices;

[**21.**] Whereas the acts of torture were confirmed by delegates of 'Amnesty International', who visited the cells of the Special Investigation Brigade (BSR), in a document authenticated by a lawyer and addressed to the Criminal Chamber; whereas they confirmed this torture and agreed to send photos proving the acts of torture suffered by Jean Minani;

[**22.**] Whereas one delegate also confirmed that an authority of the BSR, Commandant NT, admitted to him that he used strong methods to extort confessions from accused persons;

[**23.**] Whereas, even if the Court were not to base its judgment on these writings, they give an idea of the manner in which preliminary inquiries are conducted;

[**24.**] Whereas consequently it clearly appears that Jean Minani was tortured during the inquiries; whereas doubt therefore surrounds the confessions obtained from him in this manner;

[**25.**] Whereas the Court listened to the witnesses Saïdi Mugeni, the Head of the zone of Nziragucumura and the Head of the district of Bukirasazi (Kinama), Jean Baptiste Congera;

[**26.**] Whereas Mugeni is a witness called by the Public Prosecutor's Office and whereas he is the only witness to have been heard before the Public Prosecutor's Office;

[**27.**] Whereas the Public Prosecutor's Office did not hear the witnesses called by Jean Minani, this being the reason why Nziragucumura and Congera who are witnesses for the defence were never heard;

[**28.**] Whereas the Court did not summon Birondonoke because he was said to be dead, and moreover, the Prosecutor did not insist on his appearance;

[**29.**] Whereas, interrogated on the facts of the murder of Lieutenant Colonel Lucien Sakubu, with which Jean Minani is charged, Mugeni answered that he knew nothing about the matter;

[**30.**] Whereas, interrogated on his testimony for the prosecution obtained by the police, Mugeni explained that he had been frightened by the state in which he had seen Minani and had rambled;

[**31.**] Whereas, moreover, he only recounted what his children, aged respectively nine and eight years (c 13), had supposedly told him;

[**32.**] Whereas, when the Court invited the officer of the Public Prosecutor's Office to comment on Mugeni's testimony, he replied: 'there are many irregularities in this case . . . Minani says that he never saw Saïdi Mugeni, how then can Mugeni have seen the after-effects caused by the torture?'

[**33.**] Whereas the Court notes that, on the one hand, it is claimed that Mugeni was confronted with Minani and, on the other hand, that there could not have been a confrontation;

[**34.**] Whereas both the defendant and the witness Mugeni affirm that they were not confronted with each other, but that each was heard alone; whereas this version is plausible since the report of the confrontation was not signed by Mugeni; whereas this incomprehensible detail proves the existence of gaps;

[**35.**] Whereas Mugeni declared that Minani did nothing;

[**36.**] Whereas the witnesses Nziragucumura (Head of the zone) and Congera (Head of the district) were heard, and whereas they both said that Minani was not mentioned in the reports they received concerning the death of Sakubu;

[**37.**] Whereas, according to Congera, certain persons whose names appear in these reports are dead, whereas others have to be arrested;

[**38.**] Whereas, according to Nziragucumura, the inquiry that was made never mentioned Jean Minani, whereas he was arrested during a police raid at the time of the inquiry;

[**39.**] Whereas the witness explained that they arrested more than 250 persons, subsequently released, with the exception of Minani when they knew that he had done nothing;

[**40.**] Whereas a case has already been heard before the Provincial Court of Bujumbura relating to the murder of Sakubu (breach of public solidarity), but that nobody among those charged mentioned the name of Jean Minani;

[**41.**] Whereas the advocate of Jean Minani pleaded that Jean Minani acknowledged the offence before the Officer of the Criminal Investigation Department because he was being tortured and whereas he declares that confessions extorted under torture are considered invalid;

[**42.**] Whereas the Court has also accepted this argument;

[**43.**] Whereas he re-examined the testimonies of Mugeni while denouncing the fact that Mugeni was forced to make false statement;

[**44.**] Which Mugeni himself admitted;

[**45.**] Whereas he ended by saying that the witnesses Congera and Nziragucumura testified with full knowledge of the facts and that the Court should base itself on these testimonies to acquit Jean Minani;

[**46.**] Whereas the Court considers that the witnesses Congera and Nziragucumura gave sufficient explanations of this matter;

[**47.**] Whereas, apart from the confessions of Minani under constraint, all the witnesses have exonerated him;

[**48.**] Whereas in this case the Court has to acquit the defendant, especially since the prosecutor himself admitted that the case contained unclear circumstances;

[**49.**] Whereas the second offence of association with criminals relates closely to the first, especially since the prosecutor speaks of momentary association;

[**50.**] Whereas what was said for the first offence is equally valid for the second;

[**51.**] Whereas Minani will therefore also be acquitted on the charge of the second offence;

On all these grounds

[**52.**] The Criminal Chamber;

In view of the Constitutional Act of Transition;
In view of the Law of 29 June 1962 on the maintenance of certain legislative acts and regulations enacted under the tutelary authority;
In view of Law 1/004 14 January 1987 on the reform of the Code of Judicial Organisation and Competence;
In view of the statutory order on the creation of Criminal Chambers;
In view of the Code of Criminal Procedure;
In view of Books I and II of the Criminal Code;

[**53.**] After having deliberated in accordance with the law;

Decides:

[**54.**] Receives the action of the Public Prosecutor's Office and declares it unfounded;

[**55.**] Considers that there does not exist any proof showing that it was Jean Minani who might have killed Lucien Sakubu;

[**56.**] Acquits consequently the defendant who must be freed;

[**57.**] Declares the costs of justice chargeable to the Public Treasury;

[**58.**] Instructs the Public Prosecutor's Office to carry out this ruling.

THE GAMBIA

Jammeh v Attorney-General

(2002) AHRLR 72 (GaSC 2001)

Jammeh v Attorney-General
Supreme Court, 29 November 2001
Judges: Lartey CJ, Jallow JSC, Wali JSC, Ogwuegbu JSC and Amua-Sekyi JSC
Previously reported: [1997-2001] GR 839

Locus standi (8–11, 51, 53, 54)
Constitutional supremacy (21–28, 32)
Political participation (amendment of Constitution, 25–28, 31)
Severability (36–40, 62, 63, 65, 66)

Jallow JSC

[**1.**] The plaintiff filed in and caused to be issued out of this Court in the exercise of its original jurisdiction pursuant to sections 5 and 127 respectively of the 1997 Constitution a writ of summons against the Attorney-General as the defendant. The reliefs sought in the writ are firstly, a declaration that the Constitution of the Republic of The Gambia, 1997 (Amendment) Act, 2001 (6 of 2001), passed by the National Assembly on 15 May 2001 and assented to by the President on 25 May 2001, was made in excess of the powers conferred on the National Assembly and the President; and secondly, a declaration that the said Amendment Act, ie 6 of 2001, is by reason thereof null and void and of no effect.

[**2.**] At the hearing of the suit, counsel for the Attorney-General raised a preliminary objection to the suit, to wit, that the 'honourable court lacks jurisdiction to entertain this matter as the action is incompetent'. The grounds of the objection were threefold: that the writ of summons allegedly not having been signed by counsel as required by rule 45(1) of the Rules of the Supreme Court 1999, there was no writ proper commencing the action in the Court; that the plaintiff 'is not competent to challenge the validity of a legislation which he, as a member of the National Assembly, participated in making'; and that the plaintiff has no *locus standi* to seek the reliefs.

[**3.**] After hearing argument of counsel on the preliminary objection, the Court invited the parties to proceed to address it on the merits, having reserved its ruling on the objection to be incorporated in the judgment.

[**4.**] Rule 45(1) of the Rules of the Supreme Court, 1999 provides as follows:

> Except as otherwise provided in these Rules, an action brought to invoke the original jurisdiction of the Court shall be commenced by writ in form 27 set out in Part III of the Schedule to these Rules which shall be signed by the plaintiff or his counsel.

[**5.**] While the rule imposes a requirement of signature by counsel or the plaintiff on the writ, form 27 in the Schedule to the Rules itself makes no provision for the signature of either. Instead, it requires the writ of summons to be signed by a justice of the Supreme Court. Neither the rule nor form 27 indicates precisely where on the writ the signature of counsel or the plaintiff should be affixed. As a matter of fact, the writ has been backed in the normal way with the signature of counsel for the plaintiff thereto. It is also signed by a justice of the Supreme Court. In my view, the requirements of rule 45(1) have thus been substantially complied with in respect of signature. No miscarriage of justice has been occasioned to the defendant nor has the object of the rule, which is to provide authentication of the document, been defeated. Accordingly any lapses in this respect would be curable by the application of rule 73 of the Rules of the Supreme Court, 1999.

[**6.**] Counsel for the Attorney-General has, in canvassing his second ground of objection, urged this Court to follow the judgment of the Supreme Court of Nigeria in the case of *Adesanya* v *President of Nigeria* (1981) NSCC 146. In that case, the plaintiff, who was a member of the Senate of the National Assembly, sought a declaration from the courts to the effect that the appointment of the second defendant by the first defendant as the chairman and member of the Federal Electoral Commission was unconstitutional and null and void in that, the second defendant, at the time Chief Judge, was by reason thereof, disqualified from the membership of such a commission. The appointment had, in accordance with the provisions of the Nigerian Constitution, been the subject of confirmation proceedings in the Senate in which the plaintiff as a senator had participated, even if his own views had not at the end of the day prevailed. The Supreme Court per Fatayi-Williams CJN held (as stated in the headnote at page 147) that the complaints of the plaintiff did not concern his

> . . . civil rights and obligations as person. They pertain to him not as an individual exercising his civil rights and obligations, but as a Senator (a political representative) exercising his rights to vote in the confirmation proceedings in the Senate.

[**7.**] To that extent, therefore, the plaintiff senator having participated in the proceedings and not having had his will, would not be permitted to carry the political debate in the legislature to the court. He was held to be incompetent to bring the action on this ground. That decision, which is of course not binding on this Court, must be viewed against its own peculiar facts and circumstances.

[**8.**] According to the statement of the plaintiff's case (paragraphs (1) and (3)), the plaintiff is a politician and the Minority Leader in the National Assembly. He participated in the debate on the Bill in the National Assembly and actually voted against the measure which the majority eventually adopted. These allegations are admitted by the defendant in paragraphs (1) and (2) of his statement of case. Does the status of the plaintiff as a Member of the National Assembly and his participation in the National Assembly's debate on, but in opposition to the Bill render him incompetent to challenge the constitutional validity of the Constitution of the Republic of The Gambia 1997, (Amendment) Act, 2001, hereafter referred to as the Amendment Act? I do not believe it does. On the contrary, it would appear that his status as a member of the institution in which the legislative authority of the Republic is partially vested by virtue of section 100 of the 1997 Constitution, imposes a greater responsibility in ensuring that such legislative measures do not contravene the Constitution. The cause the plaintiff is pursuing is not a political one internal to the proceedings in the National Assembly and peculiar only to his status as a legislator.

[**9.**] Every citizen of The Gambia is competent, subject only to express restrictions and limitations, to seek redress in the courts against alleged violations of the constitutional order: see *United Democratic Party v Attorney-General,* Supreme Court, 14 February 2001. That competence vested in the general citizenry is not diminished by one's status as a legislator. The situation might have been different if the plaintiff had voted in favour of the measure; for he cannot then be allowed to mount a legal challenge to what he has expressly supported and approved as legislator. The plaintiff has, however, been consistent in his opposition to the measure and before these courts his challenge is based on legal and constitutional, not political, grounds. I find no merit in this ground of objection.

[**10.**] The defendant's third ground of objection is essentially that the plaintiff has no interest peculiar to himself to pursue this case and that he is a stranger who lacks *locus standi* to institute the proceedings. A similar objection had been raised in the case *United Democratic Party* v *Attorney-General* (*supra*). I held in that case that:

> The law cannot regard the ordinary citizen, who wishes to assert his right to challenge in a court of law what he perceives to be a contravention of the Constitution, as an interloper, a stranger to the case, busybody who is meddling with what does not concern him. It does, indeed, legitimately concern him and unless there are express statutory limitations, such as I have already referred to in relation to section 37 of the Constitution concerning the enforcement of fundamental rights and freedoms, a person's interest as a citizen is legally sufficient to vest him with the competence to institute legal proceedings to challenge alleged contraventions of the Constitution with a view to ensuring respect for constitutional order.

[**11.**] Thus a citizen does not need to demonstrate any particular interest peculiar to himself in order to vest him with *locus standi* to institute such proceedings. The plaintiff falls within that category. As a matter of fact, the

judgment of Fatayi-Williams CJN cited by counsel for the Attorney-General provides ample support for such a proposition. Fatayi-Williams CJN in the case of *Adesanya* v *President of Nigeria* posed the question of *locus standi* in relation to allegations of constitutional contravention in these terms at page 156 of the Report:

> If, in a developing country like Nigeria with a written Constitution, a legislative enactment appears to be *ultra vires* the Constitution or an act infringes any of its provisions dealing with Fundamental Rights, who has *locus standi* to challenge its constitutionality? Does (or should) any member of the public have the right to sue? Or should *locus standi* be confined to persons whose vested legal rights are directly interfered with by the measure, or to persons whose interests are liable to be specially affected by its operation, or to an Attorney-General who is a functionary of the Executive Branch?

Having posed the question, the learned Chief Justice of the Federation answered it thus at page 157:

> To deny any member of such a society who is aware or believes, or is led to believe, that there has been an infraction of any of the provisions or our Constitution, or that any law passed by any of our legislative Houses, whether Federal or State is unconstitutional, access to a court of law to air his grievance on the flimsy excuse of lack of sufficient interest is to provide a ready recipe for organised disenchantment with the judicial process.

His Lordship declared further at pages 159–160:

> To my mind, it should be possible for any person who is convinced that there is an infraction of the provisions of sections 1 and 4 of the Constitution which I have enumerated above to be able to go to court and ask for the appropriate declaration and consequential relief if relief is required. In my view, any person, whether he is a citizen of Nigeria or not, who is resident in Nigeria or who is subject to the laws in force in Nigeria, has an *obligation* to see to it that he is governed by a law which is consistent with the provisions of the Nigerian Constitution. Indeed, it is his *civil right* to see this is so. This is because any law that is inconsistent with the provisions of that Constitution is, to the extent of that inconsistency, *null and void* by virtue of the provisions of sections 1 and 4 to which I have referred earlier (The emphasis is mine).

[**12.**] It was for these foregoing reasons that I dismissed the preliminary objections of the learned Attorney-General and proceeded to hear the case on the merits.

[**13.**] I now turn to the merits of the case. The plaintiff in his statement of case filed pursuant to rule 46 of the Rules of the Supreme Court together with the writ claims that the Amendment Act (6 of 2001) purports to amend section 1(1) of the Constitution, which is an entrenched provision, without complying with the procedure set out in section 226(4) of the Constitution in respect of such entrenched clauses, to wit, no referendum had been held to approve the amendment. Secondly, the plaintiff claims that the Amendment Act also purports to amend paragraph 13(1) of Schedule II to the 1997 Constitution when paragraph 17 of that schedule categorically prohibits the amendment or repeal of that paragraph. He

submits that these contraventions render the amendments, indeed the whole Bill, null and void.

[**14.**] The defendant Attorney-General filed a statement of his case on 9 July 2001 in which he averred by way of defence that 'the National Assembly complied with the necessary provisions in amending the above sections of the 1997 Constitution' (paragraph (5) of statement of case). He pointed out in paragraph (4) of his statement that the Amending Act amended several sections other than the ones in question and that the assent of the President to the former is valid (paragraph (4)).

[**15.**] The Amendment Act (6 of 2001), which the plaintiff prays the Court to invalidate, provides in a schedule for a numbered of amendments to the Constitution of the Republic of The Gambia, 1997. The Act declares the amendments as having been made 'in accordance with the provisions of section 226(2) of the Constitution'. I shall be reverting to that issue later.

[**16.**] Although the plaintiff seeks the wholesale invalidation of the Act, his quarrel with it is, essentially, only in relation to the purported amendments to section 1(1) of the Constitution and paragraph (13) of Schedule II to the Constitution.

[**17.**] Learned counsel for the Attorney-General conceded at the hearing that no referendum had been held to seek the approval of the populace for the amendment of section 1(1) of the Constitution. He also conceded that paragraph 17 of Schedule II to the Constitution prohibits the National Assembly from amending or repealing, *inter alia*, paragraph 13 of the said Schedule. The conclusions to be drawn from these admissions are inescapable.

[**18.**] In a country without a written constitution but nonetheless governed by constitutional conventions as in the United Kingdom, the sovereignty and legislative supremacy of Parliament is the norm. By this supremacy is meant that 'there are no legal limitations upon the legislative competence of Parliament'. (See Wade & Philips — *Constitutional and Administrative Law* (9th ed) by AW Bradley at page 57. The editor of this well-established treatise on British constitutional practice cites Dicey as drawing from such supremacy the fact that Parliament has

> under the English 'Constitution' the right to make or unmake any law whatever; and further that no person or body is recognised by the Law of England as having a right to override or set aside the legislation of Parliament.

[**19.**] The treatise describes the doctrine of parliamentary supremacy as consisting

> essentially of a rule which governs the legal relationship between the courts and the legislature namely that the courts are under a duty to apply the legislation made by Parliament and may not hold an Act of Parliament to be invalid or unconstitutional.

[**20.**] Erskine May in his *Parliamentary Practice* (19th ed, Butterworths)

stresses the same point that the British 'Constitution' 'has assigned no limits to the authority of Parliament over all matters and persons within its jurisdiction'. He cites Sir Edward Coke who opined that the power of Parliament 'is so transcendent and absolute, as it cannot be confined either for causes or persons within its bounds'.

[**21.**] In The Gambia, with a written constitution based on the separation of powers, the position is different. Supremacy reposes in the Constitution, whether or not such is expressly declared by that instrument and not with the National Assembly or any other organ of state. Section 4 of the 1997 Constitution provides for the Constitution as the supreme law of the land. It reads as follows:

> This Constitution is the supreme law of The Gambia and any other law found to be inconsistent with any provision of this Constitution shall, to the extent of the inconsistency, be void.

[**22.**] Section 5 empowers a person who alleges that an act of the National Assembly or any action or omission of any other person or authority is in contravention of the Constitution to seek a declaration from a competent court to that effect.

[**23.**] Thus whole section 100(1) of the Constitution vests the legislative authority jointly in the National Assembly and the President, exercised respectively through the passing of Bills and the assent thereto. The exercise of such authority is subject to the restrictions and limitations imposed by the Constitution. Such limitations arise in a number of ways. Firstly, under section 4 of the 1997 Constitution, any enactment which is inconsistent with the provision of the Constitution is void to the extent of that inconsistency. Thus in relation to the 1970 Constitution and in the case of *Attorney-General of The Gambia* v *Jobe* (1985) LRC (Constitutional & Administrative) 556, the Judicial Committee of the Privy Council, in an appeal from The Gambia ruled section 8(5) of the Special Criminal Court Act (10 of 1979) invalid, null and void as it was *ultra vires* and a plain and flagrant violation of the right to a presumption of innocence guaranteed under section 20(2) of the 1970 Constitution. Similarly this Court by a four to one majority decision (Amua-Sekyi JSC dissenting) in the case of *Jeng* v *Gambia Commercial & Development Bank Ltd*, delivered on 7 December 2000, has ruled that section 23 of the AMRC Act 1992 (23 of 1992), by purporting to limit the rights of appeal of aggrieved parties not to extend beyond the Court of Appeal in proceedings involving that corporation, is *ultra vires* section 128(1)(a) of the 1997 Constitution guaranteeing a right of appeal to the Supreme Court and therefore null and void and of no effect. The said section 128(1)(a) of the 1997 Constitution provides for appeals

> to the Supreme Court as of right . . . (a) from any judgment of the Court of Appeal on an appeal in any civil or criminal cause or matter from a judgment of the High Court in the exercise of its original jurisdiction.

[**24.**] Some limitations on the legislative authority are of a procedural nature. A special procedure is provided for effecting amendments, where they are permissible, to the Constitution. The special nature of such a procedure is justified by the fact that the Constitution is not akin to any ordinary law. It is the supreme law and the source of validity of all other laws and the authority for all public actions. Thus section 226(2) of the Constitution requires every Bill for the amendment of the Constitution to be published in two issues of the *Gazette* with an interval of not less than three months between the two publications and an interval of not less than ten days between the last publication and the introduction of the measure into the National Assembly. In order to pass the Assembly for assent, the Bill must be supported by the votes of not less than three quarters of all the members of the National Assembly.

[**25.**] Section 226(4) of the Constitution provides a further condition in relation to what is referred to as 'entrenched' clauses of the Constitution. Section 226(7) lists those clauses. Among them is section 1 of the Constitution which was purported to have been amended by the Amendment Act (6 of 2001). Any alteration of an entrenched clause - whether by way of repeal, addition, amendment, etc — must, in order to be valid, in addition to the requirements of section 226(2), satisfy the following conditions:

(a) the Bill must be referred by the Speaker to the Independent Electoral Commission (IEC);

(b) the IEC must within six months of the reference hold a national referendum on the Bill;

(c) at least fifty per cent of those qualified to vote at the referendum must vote at the referendum; and

(d) at least seventy-five per cent of those voting must have supported the Bill.

[**26.**] The Attorney-General has conceded that no referendum has been held to seek the approval of the electorate for the Bill in accordance with section 226(4) of the Constitution. And the Amendment Act (6 of 2001) complained of, declares that it was enacted by the President and the National Assembly and assented to by the President on 25 May 2001.

[**27.**] All these requirements are conditions precedent to the valid alteration of any provision of the Constitution which has been entrenched by section 226(7) of the Constitution. Failure to comply with these conditions renders such a purported amendment of the Constitution and assent thereto invalid, null and void and of no effect. It is clear, however, from a reading of the chapeau to section 226(4) of the Constitution, that no measure to alter an entrenched provision can be validly passed by the National Assembly or validly assented to by the President unless the aforesaid conditions precedent are satisfied. Section 226(5) further emphasises this point by the requirement that the Independent Electoral Commission must certify compliance with these conditions and ensure that the certifi-

cation(s) 'shall be delivered to the President when the Bill is presented for assent'.

[**28.**] In the instant case, the Bill was passed by the National Assembly, presented to and assented by the President *before* one of the conditions, namely, the holding of a referendum had been complied with. Accordingly, I find and do so hold that the purported amendment to section 1(1) of the 1997 Constitution contained in the Schedule to the Constitution of the Republic of The Gambia, 1997 (Amendment) Act, 2001 (6 of 2001) purporting to substitute for that section a new one declaring that 'The Gambia is a sovereign Secular Republic' is *ultra vires* the Constitution, null and void and of no effect, by reason of non-compliance with the provisions of section 226(4) of the Constitution.

[**29.**] The legislative authority is further limited by the Constitution by way of prohibitions against the exercise of its legislative functions in respect of certain specified matters. Thus, for example, section 100(2)(a) of the Constitution declares that the National Assembly shall have no power to pass a Bill to establish a one-party state. Of immediate concern to this case is that paragraph 17 of the Second Schedule to the Constitution provides as follows: 'The National Assembly shall have no power to pass a bill to amend or repeal this paragraph or paragraphs 11, 12, 13, or 14, of this Schedule.'

[**30.**] Paragraph 13 of Schedule II to the Constitution, provides for immunity from legal proceedings of members of the Armed Forces Provisional Ruling Council or their appointees for acts or omissions in the performance of their official duties.

[**31.**] It is clear that the purported amendment to paragraph 13 of the Constitution contained in Act 6 of 2001 is *ultra vires* paragraph 17 of the Second Schedule to the Constitution which prohibits any such alteration, thus is null and void and of no effect. And I so hold.

[**32.**] It cannot be over-emphasised that, given the supremacy of the Constitution over all other laws and acts or omissions of public authorities, it is important for all those involved in the exercise of the legislative authority of the state to exercise due care and caution to ensure that such legislation is consistent with the provisions of the Constitution and that it is enacted in accordance with the requirements and procedures of the Constitution. Failure to comply with these legal requirements will attract the kind of consequences which have befallen the purported amendments to section 1(1) and paragraph 13 of Schedule II to the Constitution.

[**33.**] Although the plaintiff's real complaint is in relation to these purported amendments, the relief he seeks, and urged upon the Court by counsel, is that the Amendment Act (6 of 2001) should *in toto* be declared null and void as the whole Act is alleged by the plaintiff to have been made in excess of the powers conferred by the Constitution. Counsel argued that the requirement of section 226(4) is that the Bill itself containing the

proposal to amend an entrenched provision should be submitted to a referendum. That not having been done in this case the whole Bill, should, he submits, be set aside. Counsel for the learned Attorney-General, however, argues that the Court should not, so to speak, throw the baby out with the bath water but should salvage the remaining provisions by severing from the bill those provisions which have been held by the Court to be *ultra vires* the Constitution and invalid.

[**34.**] At this stage it is necessary to indicate that the Act is not concerned solely with the two provisions which are specifically challenged by the plaintiff. It contains an extensive range of other amendments relating to unentrenched sections 9, 12, 50–60, 63, 88, 98, 125, 129, 131, 137, 141, 143, 145, 152, 164, 178–182, 184, 192, 195 and 198. These sections deal respectively with citzenship by birth; acquisition of dual citizenship by Gambians, the establishment of a Boundaries Commission charged with the delimitation of constituency boundaries; National Assembly elections; appointments to the offices of Chief and Alkalos; political parties; tenure of the office of President; the composition, meetings and dissolution of the National Assembly; the composition of the Supreme Court; the Court of Appeal and the High Court; the appointment of members of the Special Criminal Court; appeals from decisions of the Cadis courts; qualifications for appointment to the office of Chief Justice; tenure of office of judges; the office of Judicial Secretary; composition of the Judicial Service Commission; the preparation of the annual estimates and the laying of the same before their approval by the National Assembly; the appointment of the Ombudsman; matters relating to the Prisons Service and the Police Force; the establishment by Act of the National Assembly of a Land Commission; and National Youth Service Scheme and the National Council for Civic Education and the extension of the period within which the President may make provision for adjusting any existing law to bring it into conformity with the Constitution.

[**35.**] With respect to learned counsel for the plaintiff, the Amendment Act (6 of 2001) is not an enactment for amending an entrenched provision of the Constitution. The Long Title of the Act describes the measure as 'An Act to amend the Constitution of the Republic of The Gambia, 1997 under *section 226(2)* . . .' (The emphasis is mine). Section 2(2) of the Act as well has stated expressly that: 'The amendments are made in accordance with the provisions of sections 226(2) of the Constitution.' Section 226(2) of the Constitution sets out the procedure and requirements for effecting an amendment to the ordinary, unentrenched provisions of the Constitution. There is no requirement for an amendment falling within this section to be submitted to a referendum. The Amendment Act (6 of 2001) did not require to be submitted to a referendum at least in so far as relates to those amendments which have not been challenged. The case of counsel for the plaintiff might perhaps have been different if the Amendment Act was declared to be an exercise undertaken in accordance with the provisions of section 226(4) of the Constitution. The Amendment Act is thus no

more than an ordinary amendment of the Constitution undertaken in accordance with section 226(2). Its defect lies in erroneously purporting to amend other sections which are entrenched by the Constitution and which therefore ought properly to have been dealt with under section 226(4) of the Constitution.

[**36.**] The real issue, therefore, it seems to me, is whether those provisions of the Amendment Act which have been held to be invalid can be severed from the other provisions whose validity, at least on this score, has not been challenged and the latter allowed to stand on their own.

[**37.**] The question of severability was exhaustively considered by the Supreme Court of India in the case of *Chamarbaugwaklla* v *Union* (1947) SCR 930. The Court was there faced with the question whether the definition of a prize competition in the Prize Competitions Act, 1955, which was wide enough to cover both competitions of skill and gambling competitions could be limited, by a process of statutory construction, to gambling competitions. It was held that on a literal reading of the words of the statute, it could not be so limited and thus applied to both classes of competitions. The extension of the statute to competitions of skill was, however, held to be *ultra vires* the legislative authority of the Union Parliament and therefore invalid. In determining the issues whether such provisions could be servered from the valid provisions of the Act — an issue decided in the affirmative by the Court — the Supreme Court of India formulated the following guiding principles on severability:

> (i) in determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor; the test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid;
> (ii) if the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety; on the other hand, if they are so distinct and separate that after striking out [what] is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable;
> (iii) even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole;
> (iv) likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety;
> (v) the separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections; it is not the form, but the substance of the matter [that] is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provisions therein;
> (vi) if after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the

whole of it must be struck down as void as otherwise it will amount to judicial legislation; and
(vii) in determining the legislative intent on the question of separability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it.

[**38.**] The test of severability has been concisely laid down by the Judicial Committee of the Privy Council in the *Attorney-General for Alberta* v *Attorney-General for Canada* [1947] AC 503. In that case, the Court held that certain provisions of the Alberta Bill of Rights Act, 1946, were 'in pith and substance' legislation relating to 'banking, a subject-matter within the exclusive legislative competence of the Parliament of Canada under head 15 of section 91 of the British North America Act, 1867, and, accordingly, beyond the powers of the Provincial Legislature to enact'. According to the headnote of the case, it was held in relation to the issue of severability that:

> Further, Part 1 of the Act was not severable; the whole Act hung together and Part II being *ultra vires* there was nothing left which would have any effective operation and the whole Act was therefore invalid.

In reaching this conclusion, the Court set down the test for severability in the following terms:

> The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometime[s], been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires* at all.

[**39.**] That test was reiterated with approval and applied by the Board of the Privy Council in the case of *Attorney-General of The Gambia* v *Jobe* [1985] LRC (Constitution and Administrative) 556 at 567 when their Lordships held that section 8(5) of the Special Criminal Court Act (10 of 1979) found to be *ultra vires* the Constitution and therefore invalid, was severable from the rest of that Act.

[**40.**] Applying the test as elaborated by their Lordships of the Judicial Committee and the Indian Supreme Court with which I agree to the case at hand, it is clear that the offending provisions of the Amendment Act (6 of 2001) have no linkage whatsoever with the other extensive provisions which I had referred to earlier. The latter are independent of the former. What remains is not bound up, inextricably or otherwise, with what has been struck down. Indeed, the National Assembly could have, and perhaps should properly have, separately legislated for the amendments to the entrenched provisions on the one hand, and the ordinary provisions of the Constitution on the other hand. What is left of the Amendment Act (6 of 2001) cannot be regarded as part of a single legislative scheme of which the invalid provisions are an inseparable component nor as the truncated and unenforceable remains of a statute. With the invalid provisions struck out, the remaining provisions retain their coher-

ence and can be enforced without any necessity for alterations or modifications thereto.

[**41.**] I find and accordingly hold that the purported amendments to section 1(1) of the Constitution and paragraph 13 of the Schedule II to the Constitution respectively are severable and are hereby severed from the Amendment Act (6 of 2001).

[**42.**] The claim of the plaintiff is accordingly only partially allowed, to the extent that I find and hold that the purported amendments to section 1(1) of the Constitution and paragraph 13 of Schedule II to the 1997 Constitution contained in the Amendment Act (6 of 2001) were made in excess of the legislative powers conferred by the 1997 Constitution and are accordingly null and void and of no effect and are hereby severed from the Act.

Lartey CJ

[**43.**] I have also had the privilege of reading in advance the comprehensive and erudite judgment of my brother Jallow JSC, which sets out the full facts of this matter. I fully concur in the reasoning and conclusions which have just been read. In my respectful opinion, the plaintiff's claim should succeed only in part.

Wali JSC

[**44.**] I have had the privilege of reading in advance, the lead judgment of my learned brother Jallow JSC and I agree with his reasoning and conclusion for partially sustaining the plaintiff's claims.

[**45.**] My learned brother has ably set out the facts involved in this case and I adopt them. I wish to comment on the issue of *locus standi* of the plaintiff who, by a writ of summons filed in this Court seeks the following reliefs against the defendant:

> (a) declaration that the Bill entitled the Constitution of the Republic of The Gambia, 1997 (Amendment) Act, 2001 (6 of 2001), passed by the National Assembly on 15 May 2001 and assented to by the President on 25 May 2001 was made in excess of the powers conferred on the National Assembly and the President; (b) a declaration that the Constitution of the Republic of The Gambia (Amendment) Act, 2001 (6 of 2001), is null and void and of no effect.

[**46.**] The capacity in which the plaintiff brought this action is as follows: The plaintiff is a politician and the minority leader in the National Assembly and as a citizen and member of the National Assembly, he has an interest in ensuring strict adherence to the 1997 Constitution by all persons and institutions irrespective of their position. The defendant is the Chief Legal Officer to the Government of The Gambia and is responsible for all governmental legal matters.

[**47.**] After filing and exchanging pleadings and statements of respective cases by the parties, the defendant, by way of preliminary objection dated

11 July 2001, sought to impeach the jurisdiction of this Court to entertain the action in that:

> (1) there is no writ commencing this matter as required by rule 45(1) of the Rules of the Supreme Court, 1999; (2) Hon Kemesseng Jammeh is not competent to challenge the validity of a legislation which he as a Member of the National Assembly participated in making; and (3) the plaintiff lacks *locus standi* to seek declaration in reliefs (a) and (b) this action.

[**48.**] My learned brother has comprehensively dealt with the competence of the validity of the writ of summons and therefore the issue does not need any further comment by me.

[**49.**] On issue of *locus standi* of the plaintiff to bring the action, learned counsel for the defendant contended that since the plaintiff had participated in the deliberation and passing of the amendment Bill before it was finally signed into law by the President, he is estopped from litigation in court over the same issue and that he also does not fall within the category of persons contemplated under section 5 of the 1997 Constitution of the Republic of The Gambia.

[**50.**] But can that statement be correct? Sub-sections 5(1)(a) and (b) provide as follows:

> A person who alleges that — (a) any Act of the National Assembly or anything done under the authority of an Act of the National Assembly; or (b) any act or omission of any person or authority, is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in a court of competent jurisdiction for a declaration to that effect.

[**51.**] Section 5(1)(a) and (b) is clear and unambiguous and must therefore be given its literal meaning. The two sub-sections, in my view, widen the scope of the *locus standi* of a Gambian citizen to challenge in court with jurisdiction in such matters, a law enacted by the National Assembly which violates a provision of the Constitution or anything done under the authority of such unconstitutional legislation. Likewise a Gambian citizen is conferred with powers and *locus standi* to challenge, before a court with competent jurisdiction, any act or omission of any person or authority when such act or omission contravenes a provision of the Constitution.

[**52.**] The role of the court in interpreting and applying the Constitution is purely judicial and it will only play that role when it is called upon to adjudicate, on the legal rights of litigants in an actual and a justiciable dispute. There must therefore be:

(1) a dispute or controversy between the parties;
(2) that the dispute or controversy must be real and concrete, not academic or hypothetical;
(3) that it must affect the legal relations or rights of the parties; and
(4) that the action must be initiated by due process.

(See *Flast v Comen*, 392 US 94, *Aetna Life Insurance Co v Hapworth* 300 US 299; and *Adesanya v President of Nigeria* [1981] All NLR 1.)

[**53.**] The issue is whether a party needs necessarily to possess the same interest to give him *locus standi* to invoke the jurisdiction of the court in order to adjudicate in a constitutional case. A transgression or violation of the Constitution by the government is wrong committed against the whole country and its citizenry. Even the Supreme Court of the United States is noticed now to be shifting from the strict adherence to the *locus standi* rule to the liberal emphasis of the court's function as a protector of public interest in the enforcement of constitutional limitation and will no longer be deterred by the mere plea of *locus standi* from considering a challenge to violation or transgression of the Constitution: see *Katzanback v Mcchang* [1964] 379 US 294; *Domorawski v Pfister* 380 US 479 and *Barrows v Jackson* (1953) 346 US 349.

[**54.**] It is therefore my conclusion that based on section 5(1)(a) and (b) of the 1997 Constitution of The Gambia, the plaintiff in his capacity as an ordinary citizen of The Gambia, is enclothed with legal right and *locus standi* to institute the present action to challenge the legality and constitutionality of the amendments to section 1(1) and paragraph 13 of Schedule II to the Constitution of The Gambia as contained in the Constitution of the Republic of The Gambia, 1997 (Amendment) Act, 2001 (6 of 2001), which was assented to without complying with section 226(4) and paragraph 17 of Schedule II to the said Constitution. The amendments to that extent are hereby declared unconstitutional and are therefore null and void, with no legal effect whatsoever. The action therefore partially succeeds.

[**55.**] It is for these and the detailed reasoning contained in the lead judgment which I hereby adopt that I also hereby dismiss the remaining reliefs sought by the plaintiff.

Ogwuegbu JSC

[**56.**] I have also had the advantage of reading in draft the judgment earlier delivered by learned brother Jallow JSC and I entirely agree with his reasoning and conclusions.

[**57.**] The facts of the case have been fully set out in the judgment of my learned brother Jallow JSC and it is not necessary for me to set them out here. The plaintiff in paragraph (9) of his statement of case claims the following reliefs:

> (a) a declaration that the Bill entitled the Constitution of the Republic of The Gambia, 1997 (Amendment) Act, 2001 (6 of 2001) passed by the National Assembly on 15 May 2001 and assented to by the President on 25 May 2001 was made in excess of the powers conferred on the National Assembly and the President; (b) a declaration that the Constitution of the Republic of The Gambia (Amendment) Act, 2001 (6 of 2001) is null and void and of no effect.

[**58.**] The plaintiff contended that:

> (i) section 1(1) of the Constitution is an entrenched provision and its amendment must comply with the procedure set out in section 226(4) of the 1997 Constitution; and (ii) paragraph 13(1) of Schedule II to the 1997 Constitution in its paragraph 17 specifically prohibits its amendments or repeal.

[**59.**] It was the plaintiff's further contention that as result of non-compliance with the provisions of the 1997 Constitution, the entire Bill should be declared null and void and of no effect.

[**60.**] The defendant in paragraphs (4) and (5) of his statement of case averred as follows:

> (4) In further answer to paragraphs (5) and (6) of the plaintiff's statement of case, the defendant avers that the Bill amended other sections, ie sections 9, 12, 50, 51 to 57, 58, 59, 60, 88, 98, 125, 129, 131, 137, 139, 141, 143, 145, 152, 164, 178, 184, 192, 195 and 198 of the Constitution; (5) Also in answer to paragraphs (5) and (6) of the plaintiff's statement of case, the defendant avers that the National Assembly complied with the necessary provisions in amending the above sections of the 1997 Constitution.

[**61.**] In his oral submission, Mr Olulana, learned Director of Civil Litigation, who appeared for the defendant, conceded that section 226(4) of the Constitution was not complied with in the amendment of section 1(1) of the Constitution and that paragraph 13(1) of Schedule II to the Constitution is a no go area by virtue of paragraph 17 of the said Schedule II. He urged the Court to sever the provisions which ran foul of the Constitution from those that complied with the constitutional requirements and declare the latter valid.

[**62.**] Section 226(4) of the Constitution provides that a Bill for an Act of the National Assembly containing any of the provisions referred to in section 226(7) thereof shall be subjected to a referendum among other requirements. Section 1(1) of the Constitution is one of such provisions. By paragraph 7 of Schedule II to the 1997 Constitution, the National Assembly shall have no power to pass a Bill to amend or repeal paragraph 13(1) of Schedule II. In the circumstances, the Bill purporting to amend the above two provisions of the Constitution is *ultra vires* the powers of the National Assembly and the President. I therefore declare the said Amendment Act (6 of 2001) null and void to the extent that it purported to amend the said section 1 (1) of the Constitution and paragraph 13(1) of Schedule II.

[**63.**] What becomes of the other provisions of the Amendment Act (6 of 2001) is to be determined. Those other provisions complied with section 226(2) of the Constitution. They are capable of maintaining a complete and independent existence capable of separate enforcement without regard to the provisions which I have also declared null and void; see *Attorney-General for Alberta* v *Attorney-General for Canada* [1894] AC 31. I do not agree with the contention of the learned plaintiff's counsel that the provisions are not separable.

[**64.**] The action, therefore, partially succeeds.

Amua-Sekyi JSC

[**65.**] The Constitution of The Gambia, 1997 (Amendment) Act, 2001 (6 of 2001), was enacted by the President and the National Assembly on 25 May 2001 and published as Supplement C to *The Gambia Gazette* no 6 of 4 June 2001. The Act amended various provisions of the 1997 Constitution, among them section 1(1) and paragraph 13 of Schedule II to the Constitution. Counsel for the Attorney-General concedes that to be valid, the amendment to section 1(1) ought to have been submitted to a referendum for approval under section 226(4) and that paragraph 17 of Schedule II had expressly declared that the National Assembly shall have no power to amend or repeal paragraph 13. It follows that the purported amendments to section 1(1) of the Constitution and paragraph 13 of Schedule II were ineffective. Counsel for the plaintiff is therefore right in asking that these amendments be declared null and void.

[**66.**] With regard to the other amendments, the only criticism made is that they were in the same Bill. I agree that this is no reason for declaring them a nullity.

* * *

Sabally v Inspector General of Police and Others

(2002) AHRLR 87 (GaSC 2001)

Ousman Sabally v Inspector General of Police, Secretary of State for Interior and Religious Affairs and Attorney-General
Supreme Court, civil ref no 2/2001, 5 December 2001
Judges: Jallow JSC, Wali JSC, Ogwuegbu JSC, Amua-Sekyi JSC and Akamba Ag JSC

Fair trial (right to be heard — indemnity of state agents; retroactive legislation, 4, 6, 10, 14)

Judgment

[**1.**] This is a constitutional reference stated by Kabalata J of the High Court on 2 July 2001 for the Supreme Court in the exercise of its original jurisdiction under section 127(1)(b) and (2) of the Constitution. The Court is requested to determine 'whether the Indemnity (Amendment) Act 5 of 2001 was made in excess of the powers conferred by the Constitution or any other law upon the National Assembly or any other person or authority'.

[**2.**] The relevant facts of the case are as follows: On 12 June 2000 the

plaintiff issued a writ of summons in the High Court seeking *inter alia* damages from the defendants for assault and injuries allegedly occasioned to him by state security personnel. The defendants denied the claim. It is however common ground between the parties that the plaintiff's claim arises from the events of 10 April 2000 when there were public disturbances in some parts of The Gambia. The trial commenced before Kabalata J on 1 March 2001 with the plaintiff being subjected to examination in chief as well as to cross-examination by the counsel for the defendants.

[**3.**] Meanwhile, 'an Act to Amend the Indemnity Act and for matters connected therewith' was enacted by the National Assembly and assented to by the President of the Republic on 2 May 2001. Section 1 of the amending Act (Act 5 of 2001) provides that the Act 'shall be deemed to have come into force on 1 January 2000'.

[**4.**] Act 5 of 2001 indemnifies public officers and state agents against all claims in respect of actions undertaken during any period of public emergency, public disturbance or riotous situation. The jurisdiction of the regular courts is ousted in favour of a Claims Commission to be established to receive and hear claims and make recommendations to the President for compensation etc to deserving claimants. Hence the reference to this Court by the High Court following a motion by the defendants to strike out the civil suit on the ground that by virtue of the amending Act, the plaintiff has no cause of action against them.

[**5.**] Counsel for both parties addressed the Court. Counsel for the plaintiff submits that Act 5 of 2001 retroactively purports to take away a vested right of the plaintiff to pursue his pending civil action in contravention of section 100(2)(c) of the Constitution. Accordingly she contends that the amendment is unconstitutional and in excess of the powers of the legislative authority. Counsel for the defendants submits that the amendment is valid and constitutional and within the competence of the legislative authority. The deprivation of a vested right, he argued, is justified by the public interest pursuant to section 17(2) of the Constitution.

[**6.**] Accordingly in addition to the question posed by the High Court, counsel for the defendants formulated a second one for determination of this Court in the following terms: 'whether any acquired rights under chapter 4 of the Constitution of The Gambia 1997 is subject to public interest?'

[**7.**] Counsel for the plaintiff, quite properly in our view, has objected to the inclusion of this new issue by the defendants. These proceedings are not instituted in the Supreme Court in the context of its original jurisdiction whereby the parties would have been free to formulate either an agreed list of issues or separate lists of issues in the absence of agreement. The current proceedings fall within the referral jurisdiction of the Court pursuant to section 127(2) of the Constitution. In such a case the issue or matter for determination of the Supreme Court is to be formulated by the

referring court in accordance both with the provisions aforesaid as well as in accordance with rule 61(2) of the RSC. Under rule 61(1) a reference to the court is required to be by way of case stated and such statement by the referring court is required by rule 61(2)(c) to contain *inter alia* 'the matter or question for determination by the court'. Once the referral has been made in accordance with the Constitution and the RSC with the question or matter identified, the parties in the court below are not entitled, at the hearing of the reference, to reformulate the issues whether by addition or in any other manner. They are bound by the issue as stated by the High Court. What is required of such parties is to file in accordance with rule 61(3) RSC a statement of their respective cases on the question or matter formulated by the referring court. Accordingly we hold that the additional question or issue raised by the counsel for the defendants is not properly before us and cannot for these reasons be entertained by this Court.

[**8.**] What remains to be determined by the Court is whether in enacting Act 5 of 2001 the legislative authority exceeded the powers conferred upon it by the Constitution by purporting to retroactively deprive the plaintiff of the vested right of continuing to pursue the legal proceedings instituted by him and pending in the High Court at the time the amendment was enacted. Does the amendment take away or impair a vested right of the plaintiff to pursue the legal proceedings instituted by him?

[**9.**] This Court recently had occasion in the case of *Alhaji Sait Boye v Alhaji Falai Baldeh and 3 others* (civil suit 1/2001) to define a vested, accrued or acquired right as a secured or settled right, as a right that is certain, complete, in existence and has matured and as one not subject to a condition precedent. The Court continues to be guided by that decision.

[**10.**] Access to an independent and impartial court for the determination of one's rights and obligations is acknowledged as a fundamental human right which also lies at the heart of enforcing other rights. Where, as in the instant case, a party has exercised the right and instituted legal proceedings, he has a vested right to continue such proceedings. Any retroactive legislative measure purporting to nullify his right to do so would be in contravention of the prohibition against retroactive deprivation of vested rights as provided for by section 100(2)(c) of the Constitution.

[**11.**] The African Commission on Human and Peoples' Rights, in its decision of 15 November 1999 in communication 145/95 brought by the Constitutional Rights Project, the Civil Liberties Organisation and Media Rights Agenda against Nigeria [*Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999)] in respect of measures taken against certain newspapers, had occasion to address the issue of legislative nullification of pending judicial proceedings.

[**12.**] In finding the measures to be in violation of article 7(1)(a) of the Banjul Charter on Human and Peoples' Rights guaranteeing the right of access to the courts, the Commission declared [at para 33] that:

> A civil case in process is itself an asset, one into which the litigants invest resources in the hope of an eventual finding in their favour. The risk of losing the case is one that every litigant accepts, but the risk of having the suit abruptly nullified will seriously discourage litigation, with serious consequences for the protection of individual rights. Citizens who cannot have recourse to the courts of their country are highly vulnerable to violations of their rights. The nullification of the suits in progress thus constitutes a violation of article 7(1)(a).

[**13.**] Although the Commission was there concerned not with the constitutionality of the measures complained of but their compatibility with the legal obligations undertaken by Nigeria under the Charter, an instrument to which The Gambia incidentally is also a state party, the principles laid down are pertinent and relevant to the instant case.

[**14.**] The Court accordingly holds that the application of Act 5 of 2001 to terminate the legal proceedings instituted by the plaintiff and pending at the time of the enactment constitutes a contravention of section 100(2)(c) of the Constitution and exceeds the competence of the legislative authority to the extent that the plaintiff would be deprived retroactively of his vested right to continue such proceedings.

[**15.**] Accordingly the Court hereby directs the High Court to dismiss the motion filed by the defendant on 14 May 2001 and to proceed, notwithstanding the provisions of Act 5 of 2001, with the hearing of the case of *Ousman Sabally v The Inspector General of Police and 3 Others* (civil suit 115/2000).

LESOTHO

Attorney-General v 'Mopa

(2002) AHRLR 91 (LeCA 2002)

Attorney-General v 'Mopa
Court of Appeal, 11 April 2002
Judges: Gauntlett JA, Grosskopf JA, Melunsky Ag JA, Plewman JA and Steyn P
Previously reported: [2003] 1 LRC 224

Interpretation (purposive, not literal, 16, 17)
Fair trial (prohibition of legal representation in civil proceedings, 20, 23, 24, 26–28)
Limitations of rights (must be proportionate and acceptable in a democratic society, 33; onus on state to prove limitations justified, 34)
Costs (constitutional litigation, 40)

Gauntlett JA

[**1.**] The issue in this appeal is whether section 20 of the Central and Local Courts' Proclamation 1938 (the Proclamation), is inconsistent with section 12(8) of the Constitution of Lesotho 1993 and to the extent of the inconsistency accordingly void.

[**2.**] It has arisen in the following way. The respondent (as applicant before the High Court) is the defendant in proceedings instigated against him in the Maseru local Court. The cause of action is defamation and the claim is for damages in an amount of M10 000. At the commencement of the hearing in the local Court on 11 November 1998, the respondent informed the Court that he wished to be legally represented and asked for a postponement of the case in order to engage a legal practitioner. The application was refused on the grounds that section 20 of the Proclamation did not allow litigants in civil cases a right to legal representation. The case proceeded (a few witnesses testifying), but was then postponed for further hearing. During the postponement the respondent instituted an urgent application before the High Court for a declaratory order that section 20 of the Proclamation 'is inconsistent with section 12(8) of the Constitution of Lesotho and therefore invalid to the extent that it does not permit legal representation in civil proceedings', an order that the proceedings before the local Court be stayed pending the finalisation of the application and related relief.

[**3.**] Although the matter was launched on 26 November 1998, and an interim order granted on 30 November 1998, it was only enrolled for hearing in relation to the final relief sought on 22 and 23 November 2001. Judgment was handed down with expedition by the High Court (Ramodibedi J) on 12 December 2001. It is unfortunately again necessary to record that delays of this magnitude by litigants — particularly when the outcome is not only important to them but to others — are unacceptable. If the respondent was dilatory in seeking a speedy determination of the final relief, it was incumbent upon the appellant (particularly by virtue of his office and the importance of the issues raised) to enrol the matter for hearing.

[**4.**] The Proclamation gives the minister — defined as 'the Minister of Motlotlehi's Government for the time being responsible for the administration of this Proclamation' — with the concurrence of the Chief Justice the power by warrant to 'recognise or establish within the Territory such central and local courts as he shall think fit which shall exercise such jurisdiction and within such limits as may be defined by such warrant' (section 2(1)). A court so recognised or constituted is authorised to exercise civil jurisdiction 'to the extent set out in its warrant and subject to the provisions of this Proclamation, over causes and matters in which the defendant is ordinarily resident within the area of the jurisdiction of the court, or in which the cause of action shall have arisen within the said area . . .', with certain exceptions (sections 6 and 8). Such a court is required to administer 'the native law and custom prevailing in the territory' (subject to what is traditionally termed a colonial repugnancy clause), the 'provisions of all rules or orders' made by specified chiefs or headmen, and the provisions of any law which the court is authorised to administer (section 9).

[**5.**] Central and local courts are, it is apparent, thus vested with an extensive jurisdiction and wide powers in both criminal and civil matters.

[**6.**] Section 20 of the Proclamation provides:

> Every person who is charged with a criminal offence in a central or local court shall be permitted to defend himself before the court in person or by a legal representative of his own choice, who shall be a legal practitioner admitted to practice in the courts of Basutoland. In civil proceedings no party may be represented by a legal practitioner, but shall appear himself; provided that the court may permit the husband or wife, or guardian, or any servant, or the master, or any inmate of the household of any plaintiff or defendant, who shall give satisfactory proof that he or she has authority in that behalf, to appear and to act for such plaintiff or defendant.

[**7.**] The respondent's founding affidavit before the Court *a quo* put his case in simple terms:

> that the Basotho courts (as the local and central courts are popularly referred to) are courts of law and not domestic tribunals which can deny parties appearing before them legal representation without offending against the Constitution.

In the matter in question he was, he said, defending a claim for a substantial sum in damages and would not have a fair trial if he was unable to be legally represented.

[**8.**] The application was opposed in the Court *a quo* by three parties: by the plaintiff in the damages action before the Maseru local Court, by the President of that Court and by the Attorney-General. The President of the Maseru local Court filed an affidavit. She contended that 'the term ''fair trial'' does not include the right to legal representation especially in a civil case'; that the courts in question were staffed by personnel who are not legally trained; and that 'they apply simple Basotho Principles. Therefore the fact that they are not on par with legal representatives would jeopardise the functioning of these courts.'

[**9.**] In a reply, the respondent pointed to the value of legal representation not only in advancing the litigant's cause but by virtue of the role of practitioners as officers of the court.

[**10.**] The Court *a quo* upheld the respondent's claim that section 20 of the Proclamation is in conflict with section 12(8) of the Constitution, and is therefore invalid to the extent that it does not permit legal representation in civil proceedings. The Court (citing in this regard the judgment of this Court in *Commander of Lesotho Defence Force v Rantuba* 1999-2000 LLR & B 95 at 102) dismisses the submission on behalf of the appellant that since the Constitution contains no express provision for legal representation in civil cases, no such right exists. Declining to follow pre-constitutional cases in which the prohibition imposed by section 20 of the Proclamation had been enforced, the Court *a quo* held that the lack of explicit reference in the Constitution to such a right was not determinative — a right to legal representation in civil cases was to be inferred from the whole text of sections 4(1)(h) and 12(8), (9), (10) and (11) of the Constitution:

> To deny a person legal representation in civil proceedings in a court of law is no doubt a denial of justice itself. It offends against the age-old principle of natural justice at common law.

[**11.**] Before this Court the appellant again contended that the Constitution entrenches no right to legal representation. Had this been intended (the argument runs) it could so easily have been explicitly stated — as section 12(2)(d) does in relation to criminal proceedings. The result is 'to leave the question of legal representation in civil proceedings to the common law, to be altered by statute as and when circumstances dictate'. Section 20 of the Proclamation has done just that.

[**12.**] In my view, this argument is flawed.

[**13.**] This matter, it will be evident, entails a claim to a constitutional right which, the respondent contends, is infringed by a statutory provision. To the extent of that infringement, the provision in question (the respondent asserts) is inconsistent with the Constitution and void.

[**14.**] This argument gives rise to a series of inquiries. The first relates to the general approach a court is required to adopt in the interpretation and application of the Constitution in a matter where a claim such as that in issue here is made. Following on that the question arises whether the Court *a quo* was correct in holding — as it appears to have done — that Lesotho's Constitution by implication provides for a constitutional right to legal representation in civil proceedings generally. If the Court *a quo* was not correct in that respect, the inquiry is whether the right to a fair trial in civil proceedings — provided expressly in section 12(8) of the Constitution — entitles a civil litigant to legal representation and, if so, whether this is without regard to the nature of the particular proceedings or whether it depends on the circumstances. In either eventuality, the further question arises whether (if such a right exists) section 20 of the Proclamation is inconsistent with it. If the answer to that question is in the affirmative, the inquiry is then whether such an infringement is justified. If there is such a right, and it is infringed, then the final inquiry is as to what order the Court should make.

[**15.**] I proceed to deal with these aspects in that sequence.

Interpreting chapter 2 of the Constitution

[**16.**] This Court has previously addressed the first aspect in its judgments in *Sekoati v President of the Court Martial* [2000] 4 LRC 511 and in *Rantuba*. In *Sekoati* at 518 — the first matter in which this Court was required to apply the Declaration of Rights comprising chapter 2 of the Lesotho Constitution — we approved and applied this passage from the first judgment by South Africa's Constitutional Court:

> A Constitution is no ordinary statute. It is the source of legislative and executive authority. It determines how the country is to be governed and how legislation is to be enacted. It defines the powers of the different organs of state, including Parliament, the executive and the court, as well as the fundamental rights of every person which must be respected in exercising such powers.

(See *State v Makwanyane* 1995 (3) SA 391 (CC).)

[**17.**] We went on (by reference to other jurisdictions) to stress the consequential fact that constitutional instruments are interpreted in a different way from ordinary statutory provisions. The interpretation of rights provisions entails, we said, a broadly purposive approach, involving the recognition and application of constitutional values and not a search to find the literal meaning of statutes. This, however, remains an exercise to be undertaken within limits. We quoted in this regard with approval the judgment of Kentridge Ag J (speaking for a unanimous court) in *State v Zuma* 1995 (2) SA 642 (CC):

> We must heed Lord Wilberforce's reminder that even a Constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination.

A constitutional right to legal representation?

[**18.**] I turn now to the second aspect. Section 4(1)(h) of the Constitution confers upon every person in Lesotho 'the right to a fair trial of criminal charges against him and to a fair determination of his civil rights and obligations'. This right is then expanded upon in section 12. The scheme of that section is clear. Section 12(1) to (7) deals specifically and exclusively with criminal proceedings. Section 12(8), in contrast, deals specifically and exclusively with civil proceedings. Section 12(2)(d) confers an entitlement to legal representation in criminal proceedings, whatever the offence in question. Section 12(8) makes no such explicit provision.

[**19.**] The scheme adopted in this regard in Lesotho's Constitution is not, it may be noted, idiosyncratic. Article 6(3)(c) of the European Convention on Human Rights guarantees the right of a person charged with any criminal offence to legal representation. There is no such provision in relation to civil proceedings. Article 6(1) provides for a right to a fair hearing in the determination of civil rights and obligations. Article 12 of the Constitution of Namibia 1990 also distinguishes between civil and criminal cases, again with the express guarantee of legal representation in criminal cases only (art 12(1)(d). Both the interim (1993) and current (1996) South African Constitutions have been similarly structured (see further in that regard: *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C) and *Hamata v Chairperson, Peninsula Technikon IDC* 2000 (4) SA 621 (C) at 636-637). So too with the right to counsel in section 10(b) of the Canadian Charter (1982) (see Hogg *Constitutional Law of Canada* (4th ed, 1997) p 1438) and art 22 of the Indian Constitution (see Seervai *Constitutional Law of India* (4th ed, 1993) vol 2 pp 1154-1155).

[**20.**] In my respectful view, the Court *a quo* was not correct in concluding (as I understand the judgment) that an implied constitutional right to legal representation in all civil proceedings is to be found in the Constitution. I believe it is apparent from the constitutional scheme in this regard, which I have outlined above, and the clear and deliberate contrast between criminal and civil proceedings, that the Constitution does not intend that. On the contrary, a deliberate distinction is drawn between criminal proceedings (where such a right is entrenched, irrespective of the nature of the offence with which an accused is charged) and civil proceedings, in relation to which the more general provisions of section 12(8) apply. In these circumstances, the implication of such a right in civil proceedings would offend against the ordinary — and very stringent — test for the implication of provisions in a statute, namely consistency of the putative implied provision with the express provisions, and the fact that without the implied provision, the statute would not make sense (see in particular the analysis by Corbett JA in *Rennie NO v Gordon* 1988 (1) SA 1(A) at 22D-F). Even if that standard were to be too exacting (for the reasons indicated above) in the context of the interpretation of a Constitution — a matter I leave open

— it seems to me that the admonition by Kentridge Ag in *Zuma* finds full application. The implication of such a provision would be palpably at odds with both the scheme and clear wording of section 12 of the Constitution.

[**21.**] A comparable problem arose in South Africa relating to detailed provisions entrenching a constitutional right to a fair trial in criminal proceedings, with no similar express provision relating to civil proceedings. The majority of the South African Constitutional Court in *Ferreira v Levin NO* 1996 (1) SA 984 (CC) per Chaskalson P, rejecting the contrary conclusion by Ackermann in his minority judgment, held that:

> In the context of our [interim] Constitution, and having regard to the specific wording of the section itself, and the fact that the right to a fair trial is dealt with specifically and in detail under s 25(3), I cannot read s 11(1) as including a residual fair trial right.

[**22.**] It does not follow, however, that a litigant in civil proceedings in Lesotho has no entitlement to legal representation. As this Court stressed in *Rantuba*, in the first place that is an ancient and cherished common law right. We rejected the contention advanced there that the Constitution had tacitly abrogated that common law right. It was not necessary for us to say more. The question, however, now arises as to whether the Constitution, quite apart from not abrogating the common law right to legal representation in civil proceedings in the way it does in relation to criminal proceedings, none the less itself provides a foundation for claiming an entitlement to legal representation in civil proceedings, either generally or in appropriate circumstances.

[**23.**] In my view it does so, in appropriate circumstances. The protection has not been created by entrenching such a right *per se*. The protection lies in the provision for a right to a fair hearing in civil proceedings. That entitlement will not automatically found a claim under the Constitution to legal representation in all cases. It will, however, do so when the requirements of a fair hearing in turn make legal representation appropriate. It follows that such a claim will not lie in all civil proceedings, in the way it exists (by virtue of the specific stipulation in section 12(2)(d)) in all criminal proceedings.

[**24.**] The distinction may be simply illustrated. A statute may conceivably provide for the determination of a civil dispute of a very simple kind and with minimal consequences. Examples might include labour legislation providing for the determination of minor disciplinary matters and excluding an entitlement to legal representation, or legislation regulating the adjudication of minor disputes between neighbours, or even property claims of very low value. Sound policy considerations, balancing concerns of cost, fairness, expedition and lack of formality, may in appropriate circumstances justify that approach, and not infringe upon the right to a fair trial. Whether or not a particular provision excluding an entitlement to legal representation infringes upon the right to a fair trial would have to be examined in each instance on its own terms. Just such an approach was

adopted by the Supreme Court of Canada in *G v Minister of Health and Community Services* (1999) 7 BHRC 615.

[**25.**] I referred above to a comparable scheme adopted in the European [Convention on] Human Rights. It is significant that the European Commission has adopted just such an approach, considering whether there has been a 'hearing', as contemplated by art 6(1), where legal representation in a civil proceeding is excluded (Harris *et al Law of the European Convention on Human Rights* (1995) 216, citing *Webb v UK* no 9353/81, 33 DR 133 (1983)).

[**26.**] That then, in my view, is the scheme created by section 12. It does not by implication provide, in the manner suggested by the Court *a quo*, for a right to legal representation in all civil proceedings. But it does provide unequivocally for a right to a fair hearing in all civil proceedings. Such is the importance to litigants, the court itself and the functioning of the administration of justice in general of legal representation (for the reasons analysed in *Rantuba*) that a court would be concemed, in applying the general right to a fair trial in civil proceedings, to scrutinise carefully the exclusion of legal representation to ensure that the general right the Constitution does confer to a fair hearing in civil matters is not undermined.

Does section 20 of the Proclamation infringe on the right to a fair hearing?

[**27.**] This gives rise to the next — the third — inquiry: Does section 20 of the Proclamation have the effect of infringing upon the constitutional right to a fair hearing entrenched in section 12(8) of the Constitution?

[**28.**] In my view, it patently does do so. The statutory prohibition on representation by a legal practitioner in civil proceedings in that provision is wholly without qualification: whatever the complexity of the issue or the amount at stake or other measure of its significance, the exclusion is entire. This is despite the fact that the value to the litigant of representation of *some* kind is implicitly acknowledged by the provision for representation by 'any inmate of the household of the litigant' (I revert to this aspect in a further regard below).

[**29.**] For the reasons I have given above, the constitutional entitlement to a fair trial may not require a party to be legally represented where the dispute is not complex, where it is capable of being adequately addressed by the litigants in person and where the potential consequences are confined. That, however, is not the position under section 20 of the Proclamation. Exclusion applies not only without refinement, but it does so in courts of extensive jurisdiction. When Cotran J (as he then was) said — in the passage quoted more fully by the Court *a quo* — that 'the nature of the disputes are simple and can adequately be dealt with by those courts' (*Lepolesa Mahloane v Julius Letele* 1974-75 LLR 255 at 256), he appears

with respect to have overlooked this. The same applies to the suggestion by Mofokeng J in *Macheli v Sesiu* 1976 LLR 212 that the proceedings in central and local courts are simple and uncomplicated by technicalities. In some cases customary law may raise complex issues, particularly in its intersection with the Constitution (see Bennett *Human Rights and African Customary Law* (1995) *passim*; cf *Mthembu v Letsela* 2000 (3) SA 867 (SCA)). The point, moreover, is not whether the dispute 'can adequately be dealt with by those courts'; it is whether it is fair to require a litigant to be without legal representation.

[**30.**] The present case again illustrates the point. It entails a claim of defamation. What amounts to defamation, its publication, and defences are not without complication. This is the more so when the effect of the Constitution on the pre-existing law of defamation is yet to be the subject of an authoritative ruling in Lesotho (*Commander, Lesotho Defence Force v Matela* 1999-2000 LLR & B 13 (LAC); cf Hix Networking Technologies v System Publishers (Pty) Ltd 1997 (1) SA 391 (A) and *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA)).

[**31.**] I accordingly conclude that section 20 of the Proclamation, in excluding representation in all civil proceedings in the central and local courts, is to that extent inconsistent with the rights to a fair trial.

[**32.**] The Court *a quo*, it may be noted, also considered the provision to infringe upon the constitutional right to equality. This is because accused persons in criminal proceedings are always permitted legal representation in terms of the impugned provision, while civil litigants are always deprived of it. I agree that the distinction is — for the reasons outlined below — arbitrary and irrational, but I respectfully disagree with the conclusion that it also offends against the right to equality. The essential notion of equality jurisprudence is that persons similarly circumstanced should be similarly treated. What the South African Constitutional Court has termed 'mere differentiation' (*Prinsloo v van der Linde* 1997 (3) SA 1012 (CC)) may, as I believe to be the case here, be arbitrary and irrational, but it need not necessarily constitute an act of discrimination repugnant to the equality clause. An accused in criminal proceedings is not similarly circumstanced to litigants — plaintiffs, defendants, third parties, interveners and nominal parties — in civil proceedings. He or she stands in jeopardy of liberty or other punishment meted out by the state, social stigma and their consequences in society. Civil litigants cannot generally be equated with an accused on trial.

Is the infringement justified?

[**33.**] Consequential to this conclusion that section 20 of the Proclamation infringes upon the right to a fair trial in civil proceedings is the inquiry as to whether the infringement may nevertheless be justified. The Constitution does not provide as some constitutional instruments expressly do, for the justification of an infringement of a chapter 2 right, but it is apparent from

the scheme of the Constitution that a limitation of a right is authorised where, in accordance with the broad test articulated by Dickson CJ in the Canadian Supreme Court in the well-known matter of *R v Oakes* [1987] LRC (Const) 477 at 499-500, the limitation of the right is reasonably and 'demonstrably justified in a free and democratic society'. The first aspect relates to the objective or purpose of a limitation, and the second to the aspect of proportionality. The objective must be sufficiently substantial and important so as to warrant overriding a constitutionally protected right, while the proportionality test requires that the means chosen to limit the right are appropriate. Dickson CJ said in this latter respect at 500:

> There are, in my view, three important components of a proportionality test. First, the measures adapted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question: *R v Big M Drug Mart Ltd*. Thirdly there must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'.

[**34.**] The onus of proving that a limitation is justified rests upon the person averring it (*State v Makwanyane*), and it must be discharged 'clearly and convincingly' (*State v Mbatha; State v Prinsloo*). In *Lotus River, Ottery, Grassy Park Residencts Association v South Peninsula Municipality* 1999 (2) SA 817 (C) at 831D it was stressed that:

> There must be a reason which is justifiable in an open democratic society based on human dignity, equality and freedom for the infringement of a constitutional right. Further, the limitation must be shown to serve the justifiable purpose.

[**35.**] Section 20 of the Proclamation in my view fails to meet any of these criteria. Neither threshold in *R v Oakes* is surmounted. Not addressing the question of complexity of the dispute, the provision imposes a total prohibition on legal representation in relation to which the judicial officer is given no mediating discretion. Yet simultaneously it permits representation before a court of law by an eclectic array of persons, distinguished by nothing more than the irrational factor that they have some form of relationship with the litigant or generally share a roof. All these factors seem to me to be insufficiently related to a defensible objective and not to justify the wholesale exclusion of the right.

[**36.**] In my view, the attempt on the papers and in argument before us by the appellant to justify the infringement is without merit. I repeat that this is not to say that a statutory provision restricting legal representation in civil proceedings is *per se* unconstitutional; the blunt and encompassing terms of section 20 of the Proclamation, however, have that consequence.

What order?

[**37.**] The last inquiry pertains to the order we should make. For the reasons

I have indicated, I consider that section 20 of the Proclamation is inconsistent with section 12(8) of the Constitution to the extent that it excludes an entitlement to legal representation in any civil proceedings in the central and local courts. The effect of a declaration to that effect is that the provision, to the extent of its inconsistency, is void (section 2 of the Constitution). Section 22(2) in addition gives this Court (in substituting its order for the order of the Court *a quo*) wide powers to:

> make such orders, issue such process and give such directions as it may consider appropriate for the purpose of enforcing or securing enforcement of any of the provisions of sections 4 to 21 (inclusive) of this Constitution. . .

[**38.**] It seems to me, however, that it is not necessary in this instance to fashion any further direction. What is required is a simple declaratory order that section 20 is void to the extent of its inconsistency (in effect the second sentence in the provision is struck down) and an order that in this particular matter (for the reasons given above) the appellant is entitled to legal representation. These are indeed the material prayers in the notice of motion and the order made by the Court *a quo*.

[**39.**] It was not argued before us that the present is an appropriate case for the Court to exercise any powers it may have in terms of section 22(2) to mediate the effect of nullity arising from its declaration (pursuant to the provisions of section 2), or to suspend the operation of its order subject to a referral of the offending statutory provision to Parliament for action by it within a time frame laid clown by the Court. The extent of the powers of the Court in that regard do not require determination in this matter, and it would accordingly be inappropriate to decide 'more than what is absolutely necessary for the decision of [this] case' (Bhagwati J in *MM Pathak v Union* [1978] 3 SCR 334, quoted with approval in *Sekoati*; see further *Greathead v SA Commercial Catering and Allied Workers' Union* 2001 (3) SA 464 (A) at 468A per Grosskopf JA).

[**40.**] The matter of costs remains. The appellant contends that (following the approach by the Court *a quo*) this Court should make no order as to costs. The respondent asks that if the appeal fails, costs should follow the result. The Court *a quo*, in declining to make any order as to costs, refers to the fact that a constitutional issue was at stake. In ordinary litigation the essential principle is that the awarding of costs is at the discretion of the court and that a successful litigant should generally be awarded his or her costs. In constitutional litigation an additional principle applies. This is that litigants should not be deterred by the threat of adverse costs orders from approaching a court to litigate an alleged violation of the Constitution. If the issues raised by such a litigant are advanced in good faith and not vexatiously, and are important and controversial (for instance, involving an alleged violation of chapter 2 rights), the court is concerned not to penalise the applicant (see, for instance, *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC), *African National Congress v Minister of Local Government and*

Housing, KwaZulu-Natal 1998 (3) SA 1 (CC) and *Sanderson v A-G, Eastern Cape* 1998 (2) SA 38 (CC)).

[**41.**] But that is not the case here. The appellant is the government, and is unlikely to be deterred in its decisions to litigate by a costs order (as was noted in *Sanderson v A-G, Eastern Cape*). The respondent was obliged by the ruling of the President of the District Court — which the appellant has sought to defend — to bring urgent proceedings in the High Court. The respondent is a non-state actor who has successfully vindicated his constitutional right (cf *August v Electoral Commission* 1999 (3) SA 1 (CC), *SA National Defence Union v Minister of Defence* 1999 (4) SA 469 (CC), *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* and *Dawood v Minister of Home Affairs*). This has taken him from the Court in which he was defending himself to two others.

[**42.**] The President of the Central Court, in refusing to postpone the proceedings and thus obliging the respondent to institute an urgent application for interim relief as well as the determination of the issue before us, seems (it should be noted) to have been unaware of the duty imposed upon her by section 22(3) of the Constitution. This reads:

> If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of sections 4 to 21 (inclusive) of this Constitution, the person presiding in that court may, *and shall if any party to the proceedings so requests*, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious (My emphasis). (See also s 128).

This oversight resulted in unnecessary costs for the respondent — in particular, he should not have had to seek an urgent interim interdict.

[**43.**] The appellant, moreover, has chosen to institute this appeal which the respondent has been obliged to defend. The issue has arisen, in addition, in the course of proceedings instituted against the respondent in which the respondent is in jeopardy of paying a substantial sum in damages. In all the circumstances, in my view, it would be unfair to the respondent not to award him costs in relation to the appeal.

[**44.**] There was no cross-appeal before us by the respondent regarding the costs order made by the Court *a quo*. In the course of argument, this aspect was canvassed. Counsel for the respondent quite properly accepted that in the light of his concession in the Court *a quo* regarding costs, and in the absence of a cross-appeal on this issue, the costs order made by the Court *a quo* could not be disturbed.

[**45.**] The following order is accordingly made: The appeal is dismissed, with costs.

MALAWI

Munthali v Attorney-General

(2002) AHRLR 102 (MwHC 1993)

Martin Matchipisa Munthali v The Attorney-General
High Court, civil cause no 52 of 1993, 19 May 1993
Judge: Mwaungulu

Personal liberty and security (arbitrary arrest and detention, claim for and calculation of damages, 24, 25 ,27)
Remedies (calculation of damages, 24, 25, 27)

[**1.**] On 11 January 1993 the plaintiff, Martin Matchipisa Munthali, took out this action against the Attorney-General, claiming aggravated damages and exemplary damages for false imprisonment and trespass to land respectively. The writ of summons, accompanied by an acknowledgement of service, was served on the Attorney-General on 20 January 1993. The Attorney-General did not lodge any notice of intention to defend. So, on 11 February 1993, the plaintiff obtained an interlocutory judgment for damages to be assessed by the Master.

[**2.**] A notice of appointment for assessment of damages was taken out on 16 February 1993, setting down the case for 12 March 1993. On 12 March 1993, Namboya, State Advocate, who was at the chambers but not for the particular case, informed the Court that the State Advocate handling the matter was outside the country. The case was adjourned to 18 March 1993. On 18 March 1993, nobody was present for the defendant. I proceeded to hear evidence from the plaintiff.

[**3.**] This action starts on 27 October 1965 when the plaintiff was arrested at Mlare in Karonga. He was found in possession of firearms. He was tried, convicted and sentenced to four years imprisonment with hard labour. There was an appeal to the High Court and the sentence was increased to eleven years. He was to be released on 25 February 1973 and he was.

[**4.**] On 25 February the plaintiff was just leaving the prison when two prison officers asked him to follow them. Fifteen minutes later he was served with a twenty-eight day detention order. The order, I presume, was under the Preservation of Public Security Act in its original form which authorized detention for 28 days pending the decision of the Minister. The 28 days was later removed from the statute book and substituted with the words 'reasonable time'. He was not told why he was detained.

[**5.**] He was taken to Dzeleka Prison in Dowa. He was put in a dark solitary

room. He was ordered not to speak to anyone. He was further told that he was a very influential person and that he would influence them and others because he told them that he wanted multi-party elections in the country. He was at Dzeleka Prison for two months.

[**6.**] After those two months he was sent to Mikuyu Prison. According to him, it was worse there. He was in a solitary cell measuring three feet by six feet. The room was much darker. There was no window and no ventilation. He was alone in Mikuyu up to 1974. His only companion was Chakufwa Chihana who joined him later and was released subsequently. He remained at the Mikuyu Prison till 12 June 1992 when he was released.

[**7.**] Talking about his life in prison, the plaintiff said that he lost sense of time. He could not read, he could not talk to anybody, he was confused. To quote his very words, 'I don't know what was going on because a human being cannot be treated like that, even an animal can be treated better'. This had an effect on his health, he developed high blood pressure and he could not see properly.

[**8.**] The food was not good till some time in 1975 when it improved, following a strike. In 1978 it worsened again. The cells were not cleaned. They were refused permission to clean them themselves or, if allowed to clean them themselves, it was with difficulty. He had, however, adequate blankets although he had no mattresses and pillows. He could not sleep straight or stretch himself because in the same cell was a bucket in which he had to help himself.

[**9.**] He had his first relation visit him in 1979. The visitor informed him that his house was burnt down, so was his five hundred tree coffee bushes. He was told that this was done by Youth Leaguers. His bottle store was also burnt down, together with his fishing nets and carpentry equipment. When he went to his home after he was released on 12 June 1992, he verified most of this damage.

[**10.**] It is on account of these that he is claiming damages from the Attorney-General. As we have seen, liability is not denied. Perhaps I should mention, as I proceed to assessment of damages, that I had problems with the relief sought. It may be important to reproduce paragraph 14 of the statement of claim:

> Therefore the Plaintiff claims
> (i) Aggravated damages for false imprisonment
> (ii) Exemplary damages for trespass to land and goods.

[**11.**] The paragraph I have just quoted from the statement of claim raises the pedantic difference between aggravated damage and exemplary damages. In a footnote to paragraph 211 of *McGregor on Damages*, 14th edition, the learned authors say this:

> Frequently the expression used is aggravation and or mitigation of 'damages' and not of 'damage'. There is justification for both, since both the damage and

> the damages are made more or made less. Nevertheless it is submitted that it is preferable to adhere to the singular word 'damage' for two reasons. First, this is the logical order as the damage must be aggravated or mitigated before the damages can be aggravated or mitigated. Secondly, in relation to aggravation this helps to keep separate damages awarded as compensation to the plaintiff and damages awarded as punishment of the defendant, a distinction which, as explained by Lord Devlin in *Rookes v Barnard* (1964) AC 1129, 1221, has in the past been too frequently blurred . . . 'Aggravated damage' indicates that the loss to the plaintiff is increased and can therefore only have reference, or lead on, to compensatory damages; but 'aggravated damages' is ambiguous in this respect and could refer equally to compensatory damages and to exemplary damages.

[**12.**] This passage points to the proper way in which both exemplary and aggravated damages should be understood. This has significance because, as Lord Devlin observed in *Rookes v Barnard*, award of exemplary damages is 'an anomaly from the law of England'. It should be understood, however, that aggravated damage as opposed to aggravated damages is part of the compensatory policy of damages. What is envisaged in exemplary damages is that circumstances can be proved which would entitle the plaintiff to have an award of damages much higher than he would obtain ordinarily. In that sense aggravated damages endeavour to fully compensate the plaintiff for the damage he has suffered. Exemplary damages, however, are not necessarily compensation to the plaintiff for the damage he has suffered, they are more a punishment on the defendant for waywardness. In *Rookes v Barnard*, Lord Devlin said:

> Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. It may well be thought that this confuses the civil and criminal functions of the law; and indeed, so far as I know, the idea of exemplary damages is peculiar to English law. There is not any decision of this House approving an award of exemplary damages and your lordships therefore have to consider whether it is open to the House to remove an anomaly from the law of England.

Later, he continued as follows:

> Moreover, it is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation. Indeed, when one examines the cases in which large damages have been awarded for conduct of this sort, it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed.

[**13.**] Reading paragraph 14 of the statement of claim in relation to false imprisonment, the plaintiff prays for aggravated damages. As we shall see later, this is a proper case where exemplary damages for false imprisonment ought to be awarded. I would not think, in view of what has happened in this case, that one should be pedantic enough to think that aggravated damages claimed for false imprisonment should not include

the punitive aspect in exemplary damages. I would accept the submissions of the learned authors that when the words 'aggravated damages' are used as opposed to 'aggravated damage' they are wide enough to encompass exemplary damages.

[**14.**] It has been submitted for the plaintiff that he should be awarded exemplary damages. Mr Mhango relied on the statement of Lord Devlin in *Rookes v Barnard*. In that case Lord Devlin, with whom Lord Justices Pearce, Hodson, Evershed and Reid agreed, thought that, although before that decision exemplary damages were awarded widely, exemplary damages should be restricted to the three areas he mentioned. In this particular case, the plaintiff's situation clearly falls in the first category.

> The first category is oppressive, arbitrary or unconstitutional action by the servants of the government. I should not extend this category – I say this with particular reference to the facts of this case – to oppressive action by private corporations or individuals. Where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might perhaps be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service.

[**15.**] The restrictions created by Lord Devlin have not been warmly welcomed by common law jurisdictions. In Australia the limitations there were confirmed by the Privy Council of the House of Lords in *Australian Consolidated Press v Uren* (1969) 1 AC 590, Lord Morris of Borth-y-Gest delivering the judgment of the board upholding the insurgency on the basis that under Australian common law exemplary damages were awarded for libel. He also opined that other common law jurisdictions could develop on the principles in *Rookes v Barnard.* In *Broome v Cassell & Co* (1972) AC 1027, 1067, Lord Hailsham, the Lord Chancellor, was perturbed that uniformity could not be achieved in the common law jurisdictions. Just across, in Zambia, *Rookes v Barnard* has had to be tailored to the development of the law in Zambia. Deputy Chief Justice Baron said, in *Times Newspapers (2) Limited v Kapwepwe* (1973) 2 ZLR 292, 298:

> The limitation of exemplary damages to these categories of cases was clearly a departure from what was previously understood to be the law, and recognised as such by Lord Devlin when he said in *Rookes v Barnard* at page 410:
>
> > I am well aware that what I am about to say will, if accepted, impose limits not hitherto expressed on such awards and that there is powerful, though not compelling, authority for allowing them a wider range.
>
> Although we will naturally give the most serious consideration to decisions of the House of Lords it is the function and duty of this court to develop our law against the background of our own social conditions, and not those of some other country. The differences between the circumstances prevailing in England and Zambia are very material in this case; it is therefore necessary to decide at

> the outset whether the law as laid down in *Rookes v Barnard* is suitable for Zambia.

[**16.**] In Malawi the case of *Rookes v Barnard* has been widely applied. I must point out, however, that reasons such as have caused a departure from the House of Lords decision in *Rookes v Barnard* have not arisen here. For the most part, cases in which *Rookes v Barnard* has been cited on claims for exemplary damages have been, like they are in this case, cases against public officers. In that regard the principles in *Rookes v Barnard* have been applied. I also want to apply them in this case.

[**17.**] This leads us to how these exemplary damages are to be worked out. Again, here, the starting point is what Lord Devlin said at page 411 in *Rookes v Barnard:*

> . . . if, but only if, the sum which they have in mind to award as compensation (which may of course be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then they can award some larger sum.

[**18.**] In my mind, what comes out of this statement is that the Court must come up with a proper award after taking into account all circumstances of aggravation. With that figure in its hands, the Court must ask itself whether it adequately punishes the defendant for his conduct. If it does not, the Court must award a larger sum to show its discomfiture with the defendant's conduct. Where the award adequately punishes the defendant, it is improper to award a larger sum because exemplary damages are by nature included in aggravated damages. This is what Lord Hailsham said in *Cassell v Broome* [1972] 1 All ER 801 at page 828:

> The true explanation of *Rookes v Barnard* is to be found in the fact that, where damages for loss of reputation are concerned, or where a simple outrage to the individual or to property is concerned, aggravated damages in the sense I have explained can, and should in every case lying outside the categories, take care of the exemplary element, and the jury should neither be encouraged nor allowed to look beyond as generous a *solatium* as is required for the *injuria* simply in order to give effect to feelings of indignation. It is not that the exemplary element is excluded in such cases. It is precisely because in the nature of things it is, and should be, included in every such case that the jury should neither be encouraged nor allowed to look for it outside the *solatium* and then to add to the sum awarded another sum by way of penalty additional to the *solatium*. To do so would be to inflict a double penalty for the same offence.

And then Reid said at page 809:

> . . . if they [the jury] think that sum is insufficient as a punishment then they must add to it enough to bring it up to a sum sufficient as punishment. The one thing which they must not do is to fix sums as compensatory and as punitive damages and add them together. They must realise that the compensatory damages are always part of the total punishment.

[**19.**] I will be looking at the actual awards a bit later. Let me now consider

some aspects that have been raised by counsel for the plaintiff to help me assess the damages in this case.

[**20.**] The first point taken by Mr Mhango is that in assessing damages generally, each case must be treated on its own merits, based on its peculiar circumstances. He submitted that this is true even when assessing damages for false imprisonment. He submitted that decided cases only act as guidance for amounts to be allowed. This seems to have been asserted by our courts in Malawi from time to time when awarding damages for false imprisonment. Previous cases have been cited. There is, in fact, support even from our neighbours in East Africa. In *Katende v The Attorney-General* (1971) EALR 260, 261 Phadke, J said:

> Both counsel referred to several decisions of this court relating to quantum for damages awarded in such cases . . . These decisions have furnished a helpful guidance but they cannot furnish material for formulating a comparative basis. Ultimately the damages should be such as the court considers reasonable in all the circumstances of a case.

[**21.**] It must be obvious from this case that ultimately the Court has to look at the particular case and, as I have repeatedly said, because of the nature of the injury that is being compensated in false imprisonment, the assistance which can be had from previous cases is really muted. In Malawi, however, a further problem has arisen and counsel has raised it in his submission.

[**22.**] Mr Mhango has submitted that awards in Malawi have been based on time spent in prison. From there, Mr Mhango thinks there is an hourly or daily rate which is established by the courts and followed profusely. I have stated persistently that this is not the case. First, I have stated that the cases which are related to some degree to time were based on a misconception which emanated from a decision where the award was not actually based on the time of imprisonment, although time was one of the factors that were considered. Secondly, I have been able to demonstrate by looking at the various awards in the High Court and those confirmed by the Supreme Court of Appeal that there is no uniformity. In looking at the cases that have been cited by counsel, this is confirmed. In *ADMARC v Stambuli* MSCA civil appeal 6 of 1984; K4000.00 for three days was approved. This would give a daily rate of K1333.00 or an hourly rate of K55.00; yet in *Malemia v Optichem (Malawi) Ltd* civil case 387 of 1985, K800.00 was awarded for imprisonment of thirty minutes. This would give an hourly rate of K1600.00 or a daily rate of K19200.00. This cannot be reconciled with an award of K40000.00 for false imprisonment of thirty days in *Banda v Southern Bottlers Ltd* civil case 42 of 1987. Surely, the decisions in both the High Court and the Supreme Court are not clear on awarding damages in relation to time. Some decisions seem to confirm the traditional view which is expressed in the East African case *Katende v The Attorney-General* that I referred to earlier. This seems to be the view in

England for the learned authors of *McGregor on Damages*, 14th Edition, state at paragraph 1537:

> The details of how the damages are worked out in false imprisonment are few; generally it is not a pecuniary loss but a loss of dignity and the like and is left to the jury's or judge's discretion. The principal heads of damage would appear to be the injury and liability, ie the loss of time considered primarily from a non-pecuniary view-point and the injury to feelings ie the indignity, mental suffering, distress and humiliation with any attendant loss of social status. This will be included in the general damages which are usually awarded in this case: no breakdown appears in the cases.

[**23.**] After reviewing all these cases, in *Bula v ADMARC*, civil case 1189 of 1991, I concluded as follows:

> In my view, there is more in support of the view point that damages to be awarded for false imprisonment should really be left to the court to determine after taking into account all the circumstances of the case including time. The problems that arise when time becomes the sole basis of the award is that such an approach is likely to ignore circumstances, both of aggravation and mitigation, which may attend a particular case. In certain cases, the circumstances of the case might be more pertinent to the *quantum* of damages than time for, obviously, imprisonment in horrendous and horrible circumstances even for a short time may do more damage to the plaintiff than a protracted or elongated imprisonment in otherwise innocuous and harmless circumstances. This is understandable because damages for false imprisonment are an award not only for loss of liberty, which in some way can be related to time but also for loss of reputation and status which are not related to time. The approach, therefore, should be to leave it to the court to decide *quantum* in the circumstances of the case.

[**24.**] Now coming to the particular case, this is surely a case where exemplary damages should be awarded. The plaintiff was sentenced to four years imprisonment with hard labour for the offence which he had committed for which he was convicted. The state felt that this sentence was wholly inadequate; they appealed. That sentence was enhanced almost three times over to eleven years imprisonment to reflect the seriousness of the offence and to allay fears that might have been there as to the security of the nation. Then thereafter to keep the man for another nineteen years without any court order or conviction shocks every sense of justice or punishment. Even if it may be conceded that some surveillance had to be made to ascertain the security risk, a fact which should have been ascertained in the eleven years he was there, it would appear to every average man that it is irresponsible to detain a man for another nineteen years beyond what is expected of a government which runs its affairs including security in a manner in which it should and not willy-nilly interfere with the basic right of its citizens, to freedom and opportunity for personal achievement and progress. The ignominy in this case lies in the magnanimity in which public officials disregarded the constitutional and legal avenues available to justify the incarceration or release of the plaintiff. The point here is how much would this Court award to a man who was

adequately punished for his wrongs but is kept irresponsibly in circumstances we have described for nineteen years? In my mind, this is a case where not only should he be adequately compensated but a case also where those public officers who are called upon to act within the confines of the law and authority should get the signal that the Court will award such damages as would prevent and deter the repetition of what has happened. For, obviously, this case will go into the annals of history as an example of how a modern government treats its citizens. Even if I was tempted to look at the awards that have been made in these courts in otherwise very innocuous cases, if compared to this one, it is still very difficult to come up with an award that compensates the plaintiff for the loss of liberty and opportunity that he has suffered by his incarceration. Indeed if I were to tow Mr Mhango's submission that there is an hourly or daily rate, I would lock the finances of the whole economy to compensate the plaintiff in this case.

[**25.**] In compensating the plaintiff for what he has suffered, I must take into account all the circumstances of the case. In this particular case the unjustified and protracted detention of the plaintiff is a serious consideration. Mr Munthali has been deprived of his liberty for close to two decades. In that period he has lost opportunity for reform, rehabilitation and absorption in the society. It must always be understood that ultimately the best institution for rehabilitation is not prison or a detention camp. It is the society. For with its benefits and burdens, adversities and advantages, it shapes the destiny of many and mostly for good. Mr Munthali must be compensated for the anguish, agony and debasement of solitary confinement and being cut out from association and contact with society. The awards for false imprisonment are, so to speak, at large. The awards reflect society's discomfiture of the wrongdoer's deprival of a man's liberty and society's sympathy to the plight of the innocent victim. The awards, therefore, whether meted by a jury or judge, are based on impression.

[**26.**] 'In other words the whole process of assessing damages where they are ''at large'' is essentially a matter of impression and not addition'. Per Lord Hailsham, LC in *Cassell v Broome* [1972] 1 All ER 801 at 825. Time is one of the factors to be taken into account. It is not the only consideration.

[**27.**] In this particular case, in awarding damages, both the compensatory and punitive aspects of the award must be borne in mind. From the statement which I quoted earlier from *Rookes v Barnard*, Lord Devlin did not envisage two awards, one reflecting the compensatory aspect and the other punitive one. What was being championed was that the jury or judge must aim at adequate compensation. If the adequate compensation is equally punitive, the judge or jury should award that sum. If the award for compensation was not punitive enough, upon ascertaining the wrongdoer's ability to pay, a larger sum, not an additional sum, should be awarded to reflect the punitive element. The splitting of an award into a compensatory one and a punitive one was deprecated in the House of

Lords in *Cassell v Broome*. In Zambia, in *Times Newspapers Limited v Kapwepwe,* awards were split. I think there is better sense in a single award which reflects both the compensatory and punitive aspect of the award. We employ the same principles in sentencing criminals. We do not create two sentences to reflect deterrent and punitive aspects of the sentence. At the end of the day one has to look at the whole award and see whether in itself it both compensates the victim and adequately punishes the wrongdoer. In this case taking into account the longevity of the imprisonment and the circumstances in which Mr Munthali was treated, bearing in mind that this is not the sort of conduct which a civilised government should be allowed to perpetrate, I award K4 500 000.00 for false imprisonment. This award adequately compensates the plaintiff and punishes the defendant for waywardness in treating the plaintiff.

[**28.**] For trespass to the land and the goods, I would have awarded more to compensate for the losses that have been incurred as a result of the destruction of the crops and the other property mentioned in evidence. The value, however, has not been very easy to ascertain. The evidence has been of little assistance. I think that in that case the approach to take would be the one taken by the Court in *Attorney-General v Msonda and Others* (1974) ZLR page 220. Most of the claims that were not established, in circumstances much like the present, were disallowed for lack of proof. I have said that liability was not denied. I would think, however, that the circumstance in which the plaintiff's property was gotten into would justify an award for exemplary damages. I would award K4000.00 for trespass to land and goods.

[**29.**] The parties can appeal to the Supreme Court.

* * *

Malawi Law Society and Others v President and Others

(2002) AHRLR 110 (MwHC 2002)

The Malawi Law Society, Episcopal Conference of Malawi and Malawi Council of Churches v The State and the President of Malawi, the Minister of Home Affairs, the Inspector General of Police and Army Commander
High Court, Blantyre, misc civil cause no 78 of 2002, 22 October 2002
Judge: Twea

Limitations on rights (previously laid down by law, 10, 24, 30)
Assembly (role in a democracy, 30)
Separation of powers (15–21)

Judgment

[**1.**] On 3 June 2002 the applicants obtained leave to move for judicial review against the respondents. The applicants are the Malawi Law Society, a statutory corporation; the Episcopal Conference of Malawi, a consortium of the dioceses of the Roman Catholic churches in Malawi; the Malawi Council of Churches, a consortium of Protestant churches in Malawi; the Civil Liberties Committee, a human rights non-governmental organisation; and Messrs Humphrey Mundwalo and Msawiya Mwambokera, who are citizens of the Republic of Malawi. The respondents are the President of the Republic of Malawi, the Minister of Home Affairs, the Inspector General of Police and the Army Commander. The orders against which judicial review is sought are two directives that were made by the President, the first respondent, on 28 May 2002 banning all forms of demonstration in relation to the constitutional amendment sought to allow the President of the Republic of Malawi to serve unlimited terms in office, and further that the second, third and fourth respondents must deal with anyone who violated such directives. The applicants seek a like order *certiorari* quashing the directive or decision; prohibiting the second, third and fourth respondents from carrying out the aforesaid order; a declaration that the President's ban is unconstitutional, illegal and unlawful; a like order *mandamus* requiring second, third and fourth respondents to maintain law and order and protect public safety, life and property, and a like order *mandamus* requiring the respondents to abide by the Constitution. Both parties appeared on the substantive review and argued their case with great passion.

[**2.**] The background to the case is that there were rumours that the National Assembly would be presented with a bill seeking to amend section 83(3) of the Constitution. This section reads as follows: 'The President, the First Vice-President and the Second Vice-President may serve in their respective capacities a maximum of two consecutive terms . . .'

[**3.**] Naturally this sparked a debate among the general populace in this country. Some supported the envisaged amendment and others did not. On 28 May 2002, the first respondent conducted a rally directed at there being no demonstrations for or against the envisaged constitutional amendment dealing with presidential term limit, and furthermore instructed the second, third and fourth respondents to deal with anyone violating his directive on the ban. I must mention at the outset that the exact text of the President's directives at the rally was not provided, although it is admitted that the said directives were made at a rally.

[**4.**] The applicants have argued that the directives have the effect of fettering the constitutional rights to freedom of association, assembly and demonstration, expression, conscience and opinion, and the rights to political rights as enshrined in sections 32, 33, 34, 35, 38 and 40 of the Constitution. They argued further that the directives were unconstitutional and unreasonable, and that they warrant the intervention of the Court.

[**5.**] On 4 October 2002, the parties appeared in Chambers and, among other things, this Court directed that they file supplementary arguments on the definition of the word 'demonstration'. Both parties settled for the definition espoused by Mann LJ in the case of *British Airports Authority v Ashton* (1983) All ER 6. In that case, the learned judge adopted the *Shorter Oxford Dictionary* (3rd Ed) definition wherein the seventh variant of the said word means 'a public manifestation of feeling: often taking the form of a procession and mass meetings'. This definition has largely influenced the respondents' interpretation of the presidential directives: that the ban applied only to public processions or mass meetings. It should be noted that the above definition gives examples of the forms that public manifestation of feelings may take: that is, processions or mass meeting. It must be appreciated that the said case concerned the industrial action of picketing at the airport in the face of a regulation that prohibited 'public' assembly or demonstration or procession likely to obstruct or interfere with the proper use of aerodromes. The Court in that case concerned itself much with the word 'public', and I am mindful that this word had much bearing on the definition preferred by the learned judge. In the present case, again I must stress that the exact text of the President's directives was not provided, hence there is no mention whatsoever that the President was referring to public demonstrations. What came out was simply 'demonstrations'. The applicants contended that this referred to all forms of demonstrations.

[**6.**] I have had recourse to *Black's Law Dictionary* (6th ed) and the word 'demonstration' among other things means a 'show or display of attitudes towards a person, cause or issue'. This definition is much wider than the definition in the *Ashton* case (*supra*), and has a bearing on section 38 of our Constitution which provides that 'every person shall have the right to assemble and demonstrate with others peacefully and unarmed'.

[**7.**] It is my view that the element of procession or mass rally is not a necessary ingredient at all. The *Black's* definition is wide enough to cover any manifestation of attitudes or feeling towards a person, cause or issue. This would include shouting slogans and displaying placards to mention a few of the forms alluded to in the arguments by the parties.

[**8.**] Bearing this in mind one can see that the directive is too wide, and, as was admitted, the shouting of slogans and displaying of placards take place at the President's own rallies, and the ban would be impossible to enforce. If enforced at all, it would completely take away the rights enshrined in sections 32, 33, 34, 35, 38 and 40, as anyone who showed or displayed an attitude towards the subject would be dealt with.

[**9.**] This Court also looked at the second limb of the directive: that the other three respondents should 'deal' with anyone violating the directive. The parties proffered no arguments on the meaning of the directive or the word 'deal'. What did the President intend when he directed the Minister, the Inspector General and the Army Commander to 'deal' with anyone

violating the directive? All sorts of things come to mind as to what he may have intended. As I said I did not have the benefit of any arguments on this point; however, all I can say at present is that, in the context of this directive, the word 'deal' is dangerously vague and brings to mind very negative connotations. The President must be explicit in his directives.

[**10.**] I will now look at the constitutional position. The parties agree that the Constitution guarantees the rights under sections 32, 33, 34, 35, 38 and 40. Further, both agree that these rights are not absolute and can be limited. Lastly, both agree that under section 12 of the Constitution, which sets out the fundamental principles on which the Constitution is founded, paragraph (v) provides that:

> As all persons have equal status before the law, the only justifiable limitations to lawful rights are those necessary to ensure peaceful human interaction in an open and democratic society.

Therefore human rights, or such of them that can be lawfully limited, may be limited in order to ensure peaceful human interaction. In my view there is a meeting of minds between the parties as to the essence of this constitutional principle.

[**11.**] This marks the boundary as far as agreement on the constitutional position goes. The point of departure came in considering the limitation on rights under section 44 of the Constitution. Section 44(2) of the Constitution provides as follows:

> Without prejudice to subsection (1), no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this Constitution other than prescribed by law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society.

[**12.**] The state relied on the case of *R v Oakes* (1986) 26 DLR (4th) 200 also in 19 CRR at 308. This case was basically on the constitutionality of section 4(2) of the Canadian Narcotic Control Act, in which, under section 8, it provided that an accused found in possession of narcotics had to establish that he or she did not so possess it for purposes of trafficking. The argument was whether this reverse onus provision limited the right to be presumed innocent under the Canadian Charter of Rights. In my view the position taken by the state, relying on the case of *R v Oakes* (*supra*), is tenable except to the extent of whether there was prescription by law. The state avoided this argument, but the applicants clearly and strongly contented that there was no prescription by law. They further argued that as long as there was no law, then the rest of the tests as to reasonableness, recognition by international human rights standards and necessity in an open and democratic society do not apply.

[**13.**] As I said earlier, the directive, notwithstanding that the exact text is not available, was made at a rally. The status of the rally too is not clear. The parties did not advance any argument on this issue.

[**14.**] To decide the question whether there was law, let me examine the

Presidency. Section 72 of the Constitution provides as follows: 'There shall be a President who shall be Head of State and Government and the Commander-In-Chief of the Defence Forces of Malawi.' The Constitution therefore, clearly separates and recognises the President as 'Head of State' and 'Head of Government'. The Constitution further provides in section 4 that:

> This Constitution shall bind all executive, legislative and judicial organs of the state at all levels of government and all the peoples of Malawi are entitled to the equal protection of this Constitution, and laws made under it.

[**15.**] The organs of the state are clearly separated into executive, legislative and judicial. The functions of these organs of the state are set out in sections 7, 8 and 9 respectively. Section 7 reads:

> The executive shall be responsible for the initiation of policies and legislation and for the implementation of all laws which embody the express wishes of the people of Malawi and which promote the principles of this Constitution.

[**16.**] For completeness this section should be read together with section 88(1) and (2) of the Constitution which provide as follows:

> (1) The President shall be responsible for the observance of the provisions of this Constitution by the executive and shall, as Head of State, defend and uphold the Constitution as the Supreme law of the Republic.
> (2) The President shall provide executive leadership in the interest of national unity in accordance with this Constitution and the laws of the Republic.

[**17.**] The tenets of the Constitution therefore place the President in the executive realm. He heads the executive and, as head of state, must defend and uphold the Constitution.

[**18.**] Be this as it may, section 78 of the Constitution provides that the President is also 'Head of Government'. According to our political dispensation, the party in the majority in Parliament forms the government. The Ministers and Deputy Ministers are appointed by the President under section 94. They are responsible to the President for the day-to-day running of the government: section 93 and section 97 of the Constitution. It is therefore trite to observe that the term government refers to the executive arm or organ of the state whose functions are defined in section 7 of the Constitution. The different capacities of the President as 'Head of State' and 'Head of Government' must, therefore, always be borne in mind.

[**19.**] In considering this issue let me take judicial notice of the fact that the incumbent President is also the President of the party which forms the government of the day. I also take judicial notice of the fact that party presidents, so too the incumbent in this case, go about the country addressing public rallies. In respect of the incumbent, it is not possible to tell whether he is addressing a rally as head of state, head of government or as party president. I have already said that the status of the rally on 28 May 2002 was not disclosed. I therefore cannot tell in what capacity the President was addressing the said rally.

[**20.**] From the evidence before me, however, it would appear that after the directives were issued nothing further was done. If the President issued the directive as head of state, then his decision would subsequently have been tendered in accordance with section 90 of the Constitution, that is, produced in writing, signed and sealed. If he made the directive as head of government, he would subsequently have initiated legislation which would have been passed on to Parliament to become law. In the absence of any evidence to the contrary, at law, it would be that the President made the directives as a politician.

[**21.**] To take this point further, it should be noted that section 48 of the Constitution vests all legislate powers in Parliament, and under section 58(2) Parliament is prohibited from delegating legislative powers that substantially and significantly affect the fundamental rights and freedoms recognised by the Constitution. The President under the Constitution, therefore, does not have power to make laws.

[**22.**] In considering all this, I have taken into account section 25 of the Police Act which provides, among other things, as follows:

> 25(1) Any Officer-in-Charge of Police may issue orders for the purpose of . . . (b) directing the conduct of assemblies, meeting and processions on public roads or streets or places of public resort and the route which and times at which any procession may pass.
>
> (2) Any person who wishes to convene an assembly, meeting or process on a public road or at any public place shall give notice in writing to the Officer-In-Charge of Police of his intention so to do. . . .
>
> (4) Upon receipt of the notice required by subsection (2), the Officer-In-Charge of Police may, if he considers that the assembly, meeting or procession is likely to cause a breach of the peace or disaffection amongst inhabitants of Malawi, or unduly to obstruct or cause inconvenience to the public, by order in writing, prohibit or may impose such conditions in writing relating thereto as he shall deem fit, in order to prevent a breach of peace, disaffection amongst inhabitants of Malawi or obstruction of or inconvenience to the public.

This section cannot and does not limit the rights in issue; it only regulates how such rights, among other things, can be enjoyed. The position of the law therefore is as was espoused in the case of *Mulundika and Others v The People*, (1996) IBHRC 199 (Supreme Court of Zambia). The citizen therefore need only give the police notice of the assembly, *et cetera*. There is no legal requirement that the police should grant them permission. Further there is no legal requirement to give notice about who will be addressing or what will be said at the assembly, meeting or procession. According to section 25 of the Police Act, assemblies, meeting or processions at private places do not require police notice.

[**23.**] Lastly, this Court bears in mind that the Constitution, under section 45, permits derogation from the rights only in accordance with the Constitution, when there has been a declaration of a state of emergency. It cannot be said and it was not argued that we have reached that stage.

[**24.**] After considering the arguments and submissions before me, I find that there is no law prescribed to limit or restrict the right to assembly and demonstration. I find that the directive of the President at a political rally to limit such rights does not amount to law. The argument by and for the respondents in view of the finding in the case of *R v Oakes* (*supra*) are therefore not tenable. In view of this, I find that there is no need to examine the rest of the tests set out in section 44(2) of the Constitution.

[**25.**] I will now look at the second limb of the directive: to the Minister of Home Affairs, the Inspector General and the Army Commander. I will begin by looking at the constitutional provisions that vest powers in the above offices. Section 93 provides that the Minister will be responsible for the running of government departments among other duties, as may be prescribed by the President, subject to the Constitution

[**26.**] Section 153 provides that the Malawi Police Force is an independent organ which is there to provide protection of public safety and the rights of persons in Malawi according to the prescriptions of the Constitution. It also vests the political responsibility of the force in the Minister, which responsibility must be exercised according to the Constitution. Be this as it may, the Constitution under section 154 provides that the Inspector General is the head of the Malawi Police Force and is responsible to the Minister. This notwithstanding, he is required to be independent from control or direction of any other person or authority other than is prescribed under the Constitution. Further, section 158 of the Constitution, provides for the political independence of the Malawi Police Force. This section restricts police officers to professionalism and constitutionalism, failing which they would be subject to disciplinary action.

[**27.**] Under section 160(1), the defence forces of Malawi, are required at all times to operate under the directions of the civil authorities in whom the Constitution vests such powers and to uphold and protect the constitutional order. Although the ultimate responsibility for the defence forces vests in the President under section 161(1) as the Commander-In-Chief, section 160(2) explicitly provides that no person or authority may direct or deploy the defence forces to act in contravention of the Constitution. Be this as it may, the day-to-day command vests in the Army Commander under section 182 of the Army Act. This notwithstanding, the responsibilities conferred on the President and the Army Commander are subject to the recommendation of the Army Council created under section 8 of the Army Act and the Defence and Security Committee of the National Assembly created under section 162 of the Constitution.

[**28.**] From the above discourse it is clear that the Minister of Home Affairs, the Inspector General and the Army Commander are all subject to the Constitution in the exercise of their power and duties. All the persons who are entrusted with these powers are reasonable men who are aware that they are subject to the fundamental principles of our Constitution as provided in section 12(ii) of the Constitution that:

> All persons responsible for the exercise of powers of the state do so on trust and shall only exercise such powers to the extent of their lawful authority and in accordance with their responsibilities to the peoples of Malawi.

[**29.**] It has been submitted in this Court that people have shown or displayed attitudes for or against the presidential term limit, even before the very sight and hearing of the President himself. These people have not been dealt with. This Court can only assume that those directed were aware that these people have the right and freedom to do so. This Court did not receive any evidence nor was it submitted that the second, third and fourth respondents have acted on the directive to the detriment of the people's rights. The constitutional position therefore holds.

[**30.**] After hearing the parties and considering the evidence and the submission made by counsel and reading the authorities that counsel ably researched, it is my judgment that the two directives made by the President were unconstitutional, and furthermore that the banning 'all form of demonstrations' was unreasonable as such a ban is too wide and not capable of enforcement as events have shown even at the President's own rallies. It should be noted that the police have powers to regulate assemblies, meeting and processions under section 25 of the Police Act; the state has numerous other laws that regulate assemblies and prevent rioting, and also laws on defamation that regulate freedom of speech and expression. The police service would be advised to use these powers properly. Again, as Malawians, the organisers of demonstrations on this issue, or indeed any other issue, for or against, must bear in mind public tranquillity. Democracy will always have enemies both within and without the government. Granted that the police have, at times, acted in a biased manner, as numerous cases before this Court will show, but we must take heed that confrontation will only result in chaos and disorder which are, in themselves, enemies of democracy. The rule of law must be preserved by challenging those we think have wronged us before the court. The wrongdoers too must be heard. I wish us to direct our minds to the words of Tambala J, as he was then, in the case of the *National Consultative Council v The Attorney General* Civil Cause 958 of 1994. He held that:

> There is need to strike a balance between the needs of society as a whole and those of individuals. If the needs of society in terms of peace, law and order, and national security are stressed at the expense of the rights and freedoms of the individual, then the Bill of Rights contained in our Constitution will be meaningless and the people of this country will have struggled for freedom and democracy in vain. In a democratic society, the Police must sharpen their skills and competence. They must be able to perform their main function of preserving peace, law and order without violating the rights and freedoms of the individuals. That is the only way they can contribute to the development of a free state. Matters of national security should not be used as an excuse for frustrating the will of the people expressed in their Constitution.

[**31.**] Every Malawian who is mature enough will remember that for 30 years until eight years ago, this country 'enjoyed' peace and quiet, law and

order that was devoid of the rights and freedoms and the social justice now enshrined in our Constitution. Taking judicial notice of the cases brought before this Court and the events in our National Assembly, very few Malawians want that kind of peace and quiet, law and order.

[**32.**] It is therefore my judgment that the applicants are entitled to the relief sought and I grant the said relief as prayed, with costs to the applicants.

NAMIBIA

Nanditume v Minister of Defence

(2002) AHRLR 119 (NaLC 2000)

Nanditume v Minister of Defence
Labour Court, 10 May 2000
Judge: Levy AJ
Previously reported: 2000 NR 103

Equality, non-discrimination (discrimination on the grounds of HIV status, 23, 37, 38)
Work (employment discrimination, 28, 37)
HIV/AIDS (employment discrimination, 10–16, 18–22, 31, 32, 38)

Levy AJ

[**1.**] In this matter the applicant is represented by Mr DF Smuts assisted by Ms MJ Figueira, while respondent is represented by Mr TJ Frank SC.

[**2.**] The issue raised in this application is whether the exclusion on the grounds of HIV status alone of a prospective applicant for enlistment in the Namibian Defence Force (hereafter NDF) constitutes unfair discrimination as contemplated in section 107 of the Labour Act (Act 6, 1992).

[**3.**] On 12 September 1997, by way of notice of motion supported by a solitary affidavit, applicant applied to court for an order:

> (1) Directing that respondent discontinue discriminating against the applicant on the grounds of being HIV positive in respect of his application for enlistment in the Namibian Defence Force (hereafter NDF);
>
> (2) Directing respondent to process applicant's application for enlistment in the NDF, without having regard to the applicant's HIV status;
>
> (3) Granting to the applicant such further and/or alternative relief as this Honourable Court deems fit.

[**4.**] The solitary affidavit referred to above was attested by applicant himself and annexed to his affidavit were certain relevant documents to which I shall at a later stage refer.

[**5.**] The respondent opposed the application and filed an answering affidavit made by Mr Erastus Negonga, the Permanent Secretary in the Ministry of Defence. The defence also filed a solitary affidavit. The applicant replied to this and he annexed an affidavit by Dr Malcolm Steinberg MB

ChB (Wits), MSc Epidemiology (London), and with extensive qualifications in the field of human immunodeficiency (hereafter HIV and Public Health).

[**6.**] When the case was called on 26 October 1998, the Court, appreciating the magnitude of the issues involved, referred the matter for the hearing of oral evidence (such evidence to include the evidence of persons who had not made affidavits), provided written statements of the evidence which they intended to give, were served on the respective litigants. The Court also ordered discovery. It is necessary to refer specifically to paragraphs 1 and 2 of the aforesaid order of court. They are as follows:

> (1) The application is referred for the hearing of oral evidence on a date and time to be arranged with the registrar of this Court, on the question whether the respondent's exclusion of the applicant from enlistment in the NDF on the grounds of his HIV status alone, is a reasonable criterion as contemplated by s 107(2) of the Labour Act 1992.
> (2) The evidence shall be that of any witness that the parties or either of them may elect to call . . .

[**7.**] It will be observed that paragraph 1 of the order of court of 26 October 1998 is not the same as claims 1 and 2 of the notice of motion. Notwithstanding, the explicit terms of the aforegoing sub-orders, both counsel informed this Court that the mutual intention was not to replace claims 1 and 2 of the original notice of motion. Those claims still remain for decision. The ambit of the inquiry, however, was substantially extended.

[**8.**] Furthermore, notwithstanding the wording of paragraph 2 of that Court's order, this Court was still to take into account not only the oral evidence given in court but also the affidavits already filed, save and except that in respect of the written statement of one Alex van den Heever, who did not testify. Therefore only pages 150–4, and pages 178–9 were to be considered.

[**9.**] In consequence of the aforegoing, this Court had to consider the evidence and affidavits of the following compassionate and learned persons:

On behalf of the applicant:

1. Dr Malcolm Steinberg, MB ChB, MSc Epidemiology (London), Diploma Occupational Health, Managing Director of HIV Management Services (Pty) Ltd, Programme Leader of National AIDS Research Programme, World Bank consultant on AIDS in South Africa, Medical Association of South Africa's HIV Clinical Guidelines Committee.
2. Abduraman Achmat, researcher in the Active AIDS Law Project in South Africa.
3. The applicant's affidavits. He did not testify orally.

On behalf of respondent:

1. Dr Clive Evian, MB ChB, MSc (Community Health), Director and Consultant of HIV/AIDS, Director of Aids Consulting Unit for Alexander Forbes, Director of City of Johannesburg AIDS Programme.

2. Mr Charles Murray Harebottle, BSc Eng (Mech), MSc Eng (Ind), Henly Graduate Management Diploma, Corporate Management Consultant of Business and Practice Development. Involved in strategic response programmes to deal with HIV/AIDS.
3. Major Freddie Maiba, Namibian Defence Force, Operations Division and in charge of Policy and Planning. Formerly Military Engineer Instructor, Intelligence Physical Training Instructor, Intelligence Research Officer, Tactical Training Instructor. Has attended several courses in foreign countries.
4. Colonel Jakobus Johannes Crouse, B Com LLB, SANDF officer specialising in medical legal sphere of SANDF, particularly HIV/AIDS epidemic in South Africa; active in programmes to combat HIV/AIDS epidemic.
5. Mr Erastus Negonga, Permanent Secretary, Ministry of Defence, who made the opposing affidavit, but did not testify orally.

Mr Alex van den Heever, a health economist, manager of Gauteng Health Department, MSc Econ (UCT), and experienced researcher in respect of HIV/AIDS economics, did not give oral evidence but relevant parts of his written and supplementary statements were referred to.

[**10.**] It is common cause between the litigating parties that human immunodeficiency virus (HIV) is a condition found in some human beings which predisposes a person with HIV to, and culminates in, acquired immunodeficiency syndrome, AIDS, within a period, on average of approximately 8 to 12 years. AIDS, however, is not a single disease but a collection of illnesses which affect people infected with HIV. Infection with the HIV virus initiates a process which causes a slow, steady destruction of those cells known as CD4 T-Lymphocytes. These cells, according to the medical evidence, are an important component of the human immune system, which becomes progressively weaker, destroying the body's ability to fight infections and certain cancers. When the CD4 T-Lymphocytes cell count has been severely depleted, the immune system becomes so weak that the body succumbs to certain infections and cancers. Collectively these are called 'opportunistic diseases'. When this occurs the person is said to have AIDS.

[**11.**] If a person tests HIV positive, it does not mean that such person has AIDS, nor does it mean that such person is ill, nor that such person will become ill soon. It may take several years, on average 8 to 12 years, for the HIV to damage the immune system so much that the person can be said to be ill. Furthermore, it may take one and a half to two months after being infected with HIV for there to be signs that an infected person has in fact become HIV positive. This is known as the 'window period'. Therefore a blood test which indicates that a person is HIV positive is not an indication of that person's health on that date, while a person who tests negative may nevertheless be HIV positive. Two other tests are necessary to determine whether an HIV-positive person is ill. The first is to ascertain the infected person's CD4 count. This is measured as the number of cells per cubic millimetre of blood and indicates the degree of damage to the

immune system. The lower the CD4 count, the more damaged the immune system is. CD4 counts below 200 cubic millimetre are associated with more rapid development of AIDS-related diseases. The second test necessary to ascertain the health of the person who is HIV positive is known as the viral load test. It measures the amount of virus multiplying in the blood at a given time.

[**12.**] A high viral load indicates high levels of viral infection and a shorter time to the inevitable development of the 'disease'. Obviously some people with HIV have low viral loads and some have high viral loads. A low viral load means a slower rate of disease progression. The experts agreed that a person with a CD4 count below 200 and a viral load in excess of 100 000 would not be fit for military duty.

[**13.**] There are drugs, that is, medicines and treatment, which help to delay the onset and severity of the 'opportunistic infections', that is, AIDS proper. In the long run, however, it is at present an incurable and fatal condition which for convenience is called the 'AIDS disease'.

[**14.**] In many countries of Africa it has reached epidemic proportions; these include Namibia and the Republic of South Africa, as well as their neighbours. It poses an economic and financial threat to those African states with fragile economies.

[**15.**] It is a disease which, relatively, has only recently been identified. It is transmitted in only a few ways but largely by a mother who is infected with the disease transmitting it at birth to her baby and predominantly through sexual intimacy between two persons one of whom is infected. It is not transferred via toilet seats or swimming pools or the sharing of food utensils or touching infected persons, nor is it transmitted in urine, faeces or sweat from the body nor in saliva.

[**16.**] Because of the origins of the disease, the way it is transmitted, and its rampant magnitude, ignorance and prejudice have shrouded all aspects of the disease including its treatment and control.

[**17.**] Since time immemorial the world has had visitations of plagues and epidemics. But never before has the world been able to face a plague or giant epidemic with the scientific technology which is available today. Never before have commerce and industry rallied to the side of medical research and never before has there been such a concentrated effort in the social and educational fields to control this plague and, if possible, eliminate it. In the same vein, certain states have legislated or issued guidelines for the implementation of policies to combat the disease or to ameliorate the suffering of those who have it. The United Nations has also made pronouncement in respect thereof.

[**18.**] In Namibia, the National Defence Force and the Police Force are not excluded from the operation of the Labour Act 1992, the state being regarded as the employer. On 3 April 1998 and in *Government Gazette*

no 1835, Namibia issued 'Guidelines for the Implementation of a National Code on HIV/AIDS in Employment'.

[**19.**] These guidelines are therefore applicable to the NDF but they are only guidelines, and do not have the force of law.

[**20.**] Clause 6(2)(1) of the 'Guidelines' provides:

> *Job access:*
> There should be neither direct nor indirect pre-employment tests for HIV. Employees should be given the normal medical tests of current fitness for work and these tests should not include testing for HIV.

Clause 6(5) provides:

> *HIV testing or training:*
> In general, there should be no compulsory HIV testing for training. HIV testing for training should be governed by the principle of non-discrimination between individuals with HIV infection and those without and between HIV/AIDS and other comparable health/medical condition.

Clause 6(6)(2) provides:

> Employees with HIV-related illness should have access to medical treatment and should be entitled, without discrimination, to agreed existing sick leave provisions.

Clause 6(6)(3) provides that HIV-infected employees should work under normal conditions so long as they are fit to do so and if they can no longer do so, they should be offered alternative employment 'without prejudice to their benefits'.

[**21.**] While the aforegoing guidelines may well be implemented in certain instances, in others they could be economically impossible. As far as the military is concerned section 65(2) of the Defence Act (Act 44 of 1957) requires recruits to undergo a medical examination.

[**22.**] Mr Negonga lists some of the diseases for which recruits are examined. Any medical examination of a recruit must be fully carried out. In the light of what has been said above, if the test is to ascertain whether a recruit is fit for military service, an HIV test only will not achieve this purpose. In addition to the HIV test, there must be a CD4 count test and a viral load test. If the military does not and will not do these latter two tests then the HIV test should also be abandoned. It will not achieve the purpose for which medical examinations are held.

[**23.**] In the supporting affidavit to his notice of motion the applicant said that he had been a former plan combatant and a member of SWAPO's National Liberation Struggle in exile from 1976 to 1989, and while in exile had undergone military training at Thobias Hainyeko Training Centre. In September 1996, he sought enlistment in the Namibian Defence Force. On 11 September 1996 applicant went to the Oshakati State Hospital, where blood was taken for the purposes of an HIV test. The results of the test were sent to the Okahandja base of the NDF. On 26 September

1996, at the Okahandja base, applicant was informed by Dr Shaenda, a medical officer in the NDF, that he had tested positive, and that because he was HIV positive, he would not be accepted by the NDF.

[**24.**] In his affidavit applicant asserted that, except for being HIV positive, he was in sound health, and in proof thereof he annexed to his affidavit a medical report made and signed by a district surgeon or medical officer of the state. From this it appears that applicant was at that date in good and sound health. It is apparent from this comprehensive medical report that applicant had a thorough clinical examination. At the foot of this medical report, the following question is posed to the doctor:

> Do you consider that the applicant is in good health and free from any physical or mental defect, disease, or infirmity which should be likely to interfere with the proper performance of duty as a 'Government Service Official in any part of South West Africa?' (For South West Africa read Namibia.)

To this question, the medical officer replied in the affirmative and signed and dated the medical report 31 October 1996, that is, approximately one month after the applicant, to the knowledge of respondent, had tested positive for HIV.

[**25.**] It is therefore abundantly clear that the sole and only ground for refusing to enlist applicant as a member of the NDF was because he was HIV positive and that he was, nevertheless, at that time fit and able to perform the usual duties and functions in the NDF.

[**26.**] It is furthermore relevant to observe that it was respondent's doctor, acting in the course and scope of his duties, who certified that applicant was in sound and good health and capable of performing his duties anywhere in Namibia.

[**27.**] Applicant avers in his supporting affidavit that the conduct of the NDF in refusing to enlist him solely on the basis of his HIV status constitutes discrimination in an unfair manner as contemplated by section 107 of the Labour Act, given his ability and capacity to do the duties as an NDF member. In the alternative, applicant says he was discriminated against on the impermissible ground of disability, by the respondent in conflict with section 107 of the Act.

[**28.**] At this stage, it is necessary to consider the provisions of section 107 of the Labour Act, as far as it is relevant hereto. Section 107(1) provides:

> Subject to the provisions of section 106 and subsection (2) of this section, if, upon an application made to the Labour Court in accordance with the provisions of part IV by any person, the Labour Court is satisfied (a) that any person has discriminated or is about to discriminate in an unfair manner or is so discriminating against him on the grounds of his . . . disability, in relation to his employment . . . the Labour Court may — (i) issue an order in terms of which such person is ordered — (aa) in the case of continuing acts of unfair discrimination . . . to discontinue any such acts as may be specified . . . (bb) to perform

or to refrain from performing any act specified . . . (ii) make any such other order as the circumstance may require.

[**29.**] The respondent originally filed only an affidavit made by Mr Erastus Negonga, the Permanent Secretary for the Ministry of Defence.

[**30.**] Mr Negonga admits that the applicant was rejected solely on the grounds that he tested positive for HIV, but denies that this is discrimination in an 'unfair manner'.

[**31.**] It is common cause that there are military personnel in the NDF who are HIV positive. When the NDF was established there was no testing for HIV and personnel who were HIV positive may have been recruited. Furthermore, Mr Negonga says in his affidavit that 'military personnel are a population group notably at risk for developing and transmitting sexually transmitted diseases (STD) including HIV'.

[**32.**] Consequently, certain personnel may well have acquired HIV subsequent to enlistment. Mr Negonga does not state how many HIV-positive persons are in the NDF, but it appears from his own affidavit that the numbers are not small. Mr Negonga sets out in considerable detail the humane way persons who suffer from HIV and AIDS are treated in the military. He says that when a member of the NDF is diagnosed as HIV positive or with AIDS, the NDF accepts responsibility and follows a 'policy of non-discrimination as far as possible'. It disciplines persons who discriminate against HIV/AIDS personnel and where necessary deploys infected personnel to other positions 'where they run less risk of the process accelerating' but, this, he says, means 'rearranging personnel in the NDF. Such people are permitted to attend clinics and they receive ''immune boosters'' and hospitalization if necessary. They and their families receive counselling.' It is apparent therefore from the affidavit of Mr Negonga that the NDF has a large number of personnel who are infected with HIV/AIDS and that the NDF is geared to cope with these. The NDF is therefore complying with the clauses 6(6)(2) and 6(6)(3) of the Guidelines for Implementation of a National Code for HIV/AIDS and is to be commended for doing that.

[**33.**] The applicant annexed to his supporting affidavit a reference from the Secretary General of Swapo which relates and confirms that the applicant was in the party's National Liberation Struggle from 1976 to 1989 and that he underwent military training at Thobias Hainyeko Training Centre. The Secretary recommends him as an 'employee'. If this is read with the medical report of 31 October 1996 that he is fit to do duty anywhere in Namibia, the refusal to enlist him constitutes discrimination particularly as there are in the ranks of the NDF persons who are HIV positive and in some of these persons the disease has progressed to the extent that the persons concerned have been 'deployed to other positions where they run less risk of the process accelerating'.

[**34.**] Furthermore, the cost factor does not arise. The 'Guidelines' enjoin employers to pay for medication and, according to Mr Negonga, if the

necessity for medical treatment arises the machinery for doing so is already in place.

[**35.**] Apparently because of the large numbers of persons in the military who are HIV positive, Dr Clive Evian, who was called by respondent to testify, conceded that an HIV test not followed by a CD4 and viral load test before enlistment cannot be justified on the basis of keeping 'the military an AIDS-free workplace'.

[**36.**] The case for applicant in this regard was considerably strengthened when Major Maiba, testifying for respondent, said that personnel in the military, although it is a high risk environment, are not tested for HIV once they have enlisted. This applies even if they are selected to leave Namibia for peacekeeping operations in other countries in breach of a specific request made by the United Nations.

[**37.**] By reason of the aforegoing, I find that the exclusion of applicant from the military, solely because he was found to be HIV positive, constituted in September 1996, discrimination in an unfair manner, in breach of section 107 of the Labour Act.

[**38.**] The act of unfair discrimination occurred in September 1996, that is approximately four years ago. I repeat what I have said previously. The medical experts who testified agreed that an HIV-positive person can be as fit and as healthy as any other normal person in similar circumstances, but as that person's CD4 count decreases and the viral load increases, such person's well-being progressively deteriorates. Clinically, as soon as the CD4 drops below 200 such person is said to suffer from AIDS. A combination of these two indicators can serve as a prognosis as to the time period that will elapse before a person will suffer from AIDS proper. The two medical experts were in agreement that a person with a CD4 count below 200 and a viral load in excess of 100 000 would probably be incapable of participating in the strenuous and exacting work as required in the fighting units of the military. Common sense tells one that the different departments or divisions or categories or branches of the military have different degrees of stress, physical and mental, and this is confirmed by Mr Negonga in his affidavit where he says HIV-positive personnel are transferred to such departments. Major Maiba says at present no one is allocated to a particular department or activity when such person enlists. This only happens, he says, after everyone has done his or her basic training. The Major says this basic training is strenuous. Both medical experts were of the opinion that a person who contracts HIV is fit and healthy for several years and that the training routine would not be to his or her detriment. Dr Steinberg in fact said that regular exercise would be to such persons' benefit. This, however, depends on the progress of the 'disease' in later years. It is therefore essential that the date when the HIV virus is contracted be established as accurately and as soon as possible. In this regard the cooperation and good faith of the recruit is essential. A comprehensive

and proper test after basic training will enable the military authorities to place an HIV-infected person in a suitable department of the NDF.

[**39.**] In the instant case, the applicant was not frank with the Court. He was diagnosed in September 1996 as being HIV positive, but he did not inform the Court when he thought he may have contracted the condition. If he had contracted it four or five years prior to September 1996, to grant an order that respondent enlist him now could be saddling the respondent with a recruit who could not do the basic training nor any of the duties which may arise in the military. Applicant must therefore be prepared to subject himself to the CD4 test and to the viral load test.

[**40.**] The order of the Court therefore is:

(1) Respondent shall enlist applicant in the NDF should applicant re-apply for enlistment, provided the applicant's CD4 count is not below 200 and his viral load is not above 100 000.

(2) The medical examination to which respondent is obliged to subject applicants shall include an HIV test together with a CD4 count test and a viral load test and no person may be excluded from enlistment into the NDF solely on the basis of such person's HIV status where such person is otherwise fit and healthy unless such person's CD4 count is below 200 and his viral load is above 100 000.

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Government of the Republic of Namibia and Others v Mwilima and Others

(2002) AHRLR 127 (NaSC 2002)

Government of the Republic of Namibia and Others v Mwilima and all other accused in the Caprivi treason trial
Supreme Court, 7 June 2002
Judges: Strydom CJ, O'Linn AJA, Chomba AJA, Mtambanengwe AJA and Manyarara AJA
Extract: Judgment of Strydom CJ in which Mtambanengwe and Manyarara concurred. Full text of judgment on www.chr.up.ac.za
Previously reported: 2002 NR 235 (SC)

Fair trial (legal aid, 44–48, 59–62, 75, 79; resource limitations, 52, 53, 63, 67; access to legal counsel, 90–94, 96)
Justiciability (directive principles, 53, 75, 76)
Interpretation (guided by foreign case law, 69–75)
Jurisdiction (status of international treaties in national law, 80–82)

Strydom CJ

[**1.**] The respondents are all awaiting trial on some 275 counts which include, *inter alia,* charges of high treason, murder, sedition, public violence and attempted murder. It is common cause that the arrests of the respondents followed upon an armed attack which was launched in the Caprivi region of Namibia as a result of which a state of emergency was proclaimed there on 2 August 1999. First respondent, who was the main deponent, stated that most of the respondents were arrested during that stage. The trial of the respondents was postponed from time to time, and was finally set to commence on 4 February 2002. During October 2001 an application was launched by the respondents with the main purpose to obtain legal aid, in some form or other, and which would ensure legal representation to them during their trial. The appellants opposed the matter.

[**2.**] The matter was launched on a semi-urgent basis and was heard in first instance by a bench consisting of three judges of the High Court. The judgment, which was written by Levy AJ and concurred in by Silungwe J and Unengu AJ, was handed clown on 14 December 2001. The order made by the Court *a quo* reads as follows:

> (a) Second respondent (ie second appellant) is directed to provide such legal aid to the applicants (ie the respondents) as assessed by him so as to enable them to have legal representation for the defence of all the charges brought against them in the trial referred to as the Caprivi treason trial due to start on 4 February 2002.
> (b) Respondents (ie appellants) shall pay the costs limited to disbursements and to include the costs of two instructed counsel jointly and severally, the one paying the other to be absolved.

[**3.**] The Government Attorney immediately filed a notice of appeal in which it was stated that the appeal was against the whole judgment and order handed clown by the High Court of Namibia.

[**4.**] Because of the inept and unsatisfactory way in which this notice was formulated, it is necessary to set out in full the relevant part of the notice. This reads as follows:

> To: The Registrar; High Court of Namibia; Windhoek
> Take notice that the appellant hereby appeals to the above Honourable Court against the whole judgment and order in the above-mentioned matter handed down in the High Court of Namibia by his Lordship, the Honourable Mr Acting Justice Levy *et* Mr Justice Silungwe *et* Mr Acting Justice Unengu on 14 December 2001.

[**5.**] In the Court a *quo,* as also in this Court, the first and second appellants were represented by the Government Attorney, Ms Erenstein Ya Toivo, and the respondents by Mr Smuts, assisted by Mr Cohrssen. The third appellant was separately represented by Ms Verhoef of the office of the Prosecutor-General who took two points *in limine* and did not address any argument on the merits of the application. Because of the wording of the

notice of appeal, which clearly refers to an appellant in the singular, and because the notice was filed by the Government Attorney, there was no indication that the Prosecutor-General intended to appeal. The first intimation that the Prosecutor-General intended to appeal came when Ms Verhoef filed heads of argument.

[**6.**] The respondents objected to the appearance of Ms Verhoef on the basis that the Prosecutor-General was not a party to the appeal, as he gave no notice of appeal. Ms Erenstein Ya Toivo informed us that she was indeed given instructions also to appeal on behalf of the Prosecutor-General and that it was at all times her intention to do so. She consequently applied for an amendment of the notice to substitute for the word 'appellant', where it appears in the note, the words 'first, second and third appellants'. The fact that in the heading of the notice of appeal the parties were described as they appeared in the Court *a quo,* and that in terms of the Rules of Court the appellants, being the government or departments thereof, were not required to file powers of attorney made it further impossible to determine who really brought the appeal. The parties were also separately cited and were represented by different counsel. After argument, the Court allowed the appellants to amend the notice by substituting for the word 'appellant', the words 'first and second appellants'. Mr Smuts had no objection to this amendment. As the Court was of the opinion that the points raised by Ms Verhoef were sufficiently important to hear argument in that regard, the Court, again with the acquiescence of all the parties, allowed her to present her argument as part of the legal team of the appellants.

[**7.**] I shall further, for the sake of convenience and in order to avoid confusion, refer to the parties as they appeared in the Court *a quo.* The applicants launched their application to the High Court in which they claimed the following relief:

> (a) Condoning the non-compliance with the Rules of this Honourable Court and hearing the application on a semi-urgent basis as is envisaged in Rule 6(12) of the High Court Rules.
> (b) Declaring ss 4 and 5 of the Legal Aid Amendment Act 17 of 2000 unconstitutional, and/or striking such sections down as being unconstitutional; alternatively declaring that the refusal of legal aid to the applicants in respect of their forthcoming treason trial is unconstitutional.
> (c) Directing the second respondent to provide legal representation to the applicants for the defence of the charges brought against them in the treason trial against them.
> (d) Ordering the stay of criminal proceedings against the applicants until such time as legal representation has been provided.
> (e) Ordering that those respondents, who oppose the application, pay the applicants' costs jointly and severally, the one paying the other to be absolved.

[**8.**] The first applicant, who acted as spokesman for all the others, declared that most of them had been arrested after a state of emergency had been declared in the Caprivi region following an armed attack which had been

launched upon certain government offices. Resulting from this all the applicants are now facing some 275 criminal charges. Since their arrest, shortly after the state of emergency had been declared on 2 August 1999, attempts had been made to be released on bail. These attempts had been unsuccessful. Therefore some 52 of the applicants had jointly contributed N$17 500 to appoint a legal representative to apply for bail on their behalf. However, due to the inordinate delay to bring the matter before court, the funds of all the applicants were then depleted and none of them were able to appoint legal representatives to defend them in the upcoming trial. The applicants wish to appoint legal representatives because of the seriousness of the charges against them, and because they are all lay persons who will not be able to defend themselves effectively.

[**9.**] It was further stated that attempts made to get outside funding, from humanitarian agencies and foreign human rights organisations, had been unsuccessful. Some of the applicants had applied to the Directorate of Legal Aid for assistance but had, to the date the application was launched, not received any response. It was furthermore alleged that the second respondent had confirmed to Ms T Hancox of the Legal Assistance Centre, who is representing the applicants in this application, that his directorate would be unable to provide legal aid to the applicants due to a lack of both financial and human resources.

[**10.**] It seems that in the Court *a quo* the main thrust of the applicants' attack is aimed at sections 4 and 5 of the Legal Aid Amendment Act, Act 17 of 2000, in terms whereof the discretion of the Court to issue, under certain circumstances, a certificate which would oblige the second respondent to grant legal aid to an accused has been removed. The result of the amendments is that the second respondent now has the sole discretion to grant legal aid. Applicants further stated that their right to a fair trial as guaranteed by article 12 of the Constitution would be jeopardised if they were to be denied legal representation because of financial constraints. Applicants alleged that the said amendments were contrary to their constitutional rights as protected by articles 12(1)(d) and (e) and article 10 of the Constitution.

[**11.**] In regard to the urgency of the matter the applicants pointed out that the trial was due to commence on 4 February 2002. If the application was processed in the normal way the matter would not have been ready for hearing before that date, and if the application was successful it follows that time would be needed by the legal representatives appointed to prepare for trial. Applicants further pointed out that the state had disclosed the identities of 34 witnesses and that there were more than 500 undisclosed witnesses which the state also intended to call.

[**12.**] All three respondents opposed the application. On behalf of the first and second respondents the Permanent Secretary of the Ministry of Justice, Ms Lidwina Ndeshimona Shapwa, deposed to an answering affidavit

together with one Arnold Misiya Mtopa, the Acting Director of the Directorate of Legal Aid.

[**13.**] Ms Shapwa stated that as Permanent Secretary she, in terms of the State Finance Act of 1991, exercised control over the financial and personnel functions of the second respondent. She explained that the second respondent endeavoured to effectuate the principle of state policy as contained in article 95(h) of the Constitution, but that the funds available were always inadequate to meet all the requests for legal aid. The second respondent's briefing of private legal practitioners to represent legal aid clients resulted therein that the amount budgeted for was always exceeded. The deponent said the situation was further aggravated by the fact that, in terms of section 8(2) of the Legal Aid Act, judges could in particular instances issue certificates which had to be complied with by the second respondent. To avoid this problem, sections 4 and 5 of the Amendment Act were necessary to impose some control over the spending of the legal aid budget by keeping the decision making in regard to the spending solely within the Ministry.

[**14.**] According to Ms Shapwa she was, during 2000, approached by Dr Mtopa, who informed her of the unprecedented scope of the treason trial insofar as the number of charges were concerned and the number of accused appearing in the case, which would, so it was anticipated, result in a trial of long duration. Dr Mtopa enquired of her whether additional funds would be made available, as both his staff and budget were inadequate to deal with the situation. Ms Shapwa, however, informed him that additional funds were not available. In general the deponent further denied that the applicants would not have a fair trial if legal representation was not provided by the state and contended that, in any event, article 12 of the Constitution had to be interpreted in the light of the Principle of State Policy contained in article 95(h). She further pointed out that the presiding judge bore the responsibility to ensure that the rights of unrepresented accused were protected and that all procedural safeguards for the accused were observed so that justice would prevail in the criminal trial. She further explained that special measures were taken to ensure that the accused were in a position to follow and understand the proceedings as a result of which five interpreters had been assigned to the trial to ensure that all the accused understand the proceedings.

[**15.**] Dr Mtopa, who represented the second respondent, also pointed out that article 95(h) of the Constitution provides that legal aid may be granted by the state but with due regard to the resources of the state. He submitted that if the order requested by the applicants is granted, it would stultify article 95(h) and render it otiose in circumstances where the first respondent does not have the means to comply therewith. Dr Mtopa pointed out that a decision concerning the application for legal aid, applied for by some of the applicants, could only have been taken after the applicants had been screened and subjected to a means test and that this

had not taken place because of inadequate staff and financial constraints. The deponent further confirmed that he had discussed the situation with Ms Shapwa and that she had informed him that additional funds were not available. Dr Mtopa explained the problems he had in regard to the granting of legal aid by the courts and denied that this was a function which should be exercised by judges. Both deponents have also referred to a statement by the Minister of Justice, made on 1 August 2001, in which he stated that no funds were available to assist the applicants with legal aid.

[**16.**] From what is set out above it is clear that the second respondent, who is the repository of the power, never exercised a discretion and there was therefore no proper functioning of the machinery, created specifically for thus purpose, under the Legal Aid Act 29 of 1990. Bearing in mind the long time lapse since the applications, or some of them, were made, the reasons given, namely lack of staff and financial constraints, are also not convincing. For reasons which will hopefully later become clear, it is not necessary for me to dwell on this issue further.

[**17.**] The main findings of the Court *a quo* were that the applicants were entitled to have legal representation in order to ensure a fair trial. The Court further found that the respondents might have shown that the Ministry of Justice and the second respondent lacked the funds to provide applicants with the necessary legal representation. That was, however, not the issue as the duty was that of the government and there was no proof that the government did not dispose of the necessary resources to provide the applicants with legal representation. Because of this finding the Court also concluded that it was not necessary to decide the constitutionality of sections 4 and 5 of the Amendment Act.

[**18.**] As previously stated, the appeal is against the whole of the judgment and order handed down by the Court *a quo.* Counsel argued various points and issues before us. During argument two main points crystallised. The first was that article 95(h), together with other articles of the Constitution, limited the liability of the respondents to grant legal aid to indigent accused persons to the circumstances set out in article 95(h), namely to defined cases and with due regard to the resources of the state, as was submitted by Ms Erenstein Ya Toivo. On the other hand, it was submitted by Mr Smuts that if the circumstances of a particular case were such that an accused person would not have a fair hearing without legal representation, and the accused was not able to afford legal representation, then article 12 of the Constitution placed a duty on the first respondent to step into the breach and, in some way or another, to provide assistance to such an accused.

[**19.**] Before discussing these main points I shall first deal with the points *in limine* raised by Ms Verhoef. These were:

(a) That the court does not have jurisdiction to hear the application as this

application is brought by way of the civil process whilst the criminal trial forming the subject matter of the application is pending against the respondents; and (b) That the application brought by the respondents was not urgent in any form and the urgency upon which the respondents relied was self-created.

[**20.**] In developing her argument Ms Verhoef submitted that the case against the applicants was a criminal case and that they were therefore limited to that forum to obtain the relief they are now seeking by way of a civil process in a civil court. In support of her contention counsel referred the Court *inter alia* to cases such as *Sita and Another v Olivier NO and Another* 1967 (2) SA 442 (A); S *v Absalom* 1989 (3) SA 154 (A); *S v Strowitzki* 1994 NR 265 (HC) 1995 (1) SACR 414 (Nm) and *S v Vermaas;* S *v Du Plessis* 1995 (3) SA 292 (CC).

[**21.**] Mr Smuts, on the other hand, submitted firstly that the above cases were distinguishable from the instant case. Secondly counsel pointed out that the first and second respondents had a direct interest in the outcome of the proceedings and consequently had a right to be heard. This, so it was submitted, would not have been possible if the application had been made in the criminal court where the case was pending. Mr Smuts further referred to various cases where interdictory relief was granted to applicants who brought their applications by way of civil process. See in this regard *Margret Malama-Kean v Magistrate for the District of Oshakati NO and the Prosecutor-General* (judgment of the High Court of Namibia, delivered on 15 October 2001) [2001 NR 268 (HC)]; *Pieter Johan Myburgh v The State and Another (*unreported judgment of the High Court of Namibia, delivered on 9 August 1999) and *Klein v Attorney-General Witwatersrand Local Division and Another* 1995 (2) SACR 210 (W). See also *Sheehama v The* State [2001 NR 281 (HC)] (judgment of the full bench of the High Court of Namibia, delivered on 8 November 2001).

[**22.**] In answer to the submission of Mr Smuts that the process in the criminal court would not have allowed parties who had a direct interest to take part in the proceedings, Ms Verhoef submitted that such parties could be called as witnesses by the judge in the criminal proceedings. This would, in my opinion, not be much more than cold comfort to a party who might in the end be ordered to foot the bill and to provide legal aid. There is a big difference between being a party to proceedings and only being a witness in those same proceedings. First and foremost is the measure of control that a party exercises in presenting his case, for example what evidence to present and what submissions to make to the Court. In this instance Ms Verhoef conceded that in principle it would be better for the prosecution if the applicants were defended. That perhaps explained why the Prosecutor-General did not oppose the application on the merits.

[**23.**] I also agree with Mr Smuts that the cases relied on by Ms Verhoef, with the possible exception of the *Vermaas* and *Du Plessis* cases *supra*, were distinguishable from the present case as they were all cases where the relief

claimed stood in direct relationship to the criminal prosecution. In the *Sita* case *supra* the Attorney-General gave directions, in terms of section *79*(1)(b) of the previous Criminal Procedure Act 56 of 1955, for the trial to come before the Pretoria Regional Division. Upon being arraigned in that Court the accused refused to plead and claimed, on the strength of section 190(1) of that Act, to be tried by a superior court. The regional magistrate dismissed this claim and an application was launched to a full bench of the TPD where the accused persons were equally unsuccessful. They further appealed to the Appeal Court where the second respondent took the point that that Court did not have jurisdiction to hear the matter as no leave to appeal had been granted in terms of section 21(2)(a) of Act 59 of 1959. The appellants argued that the matter was a civil matter, which originated in the TPD and that the provisions of section 21(2)(a) were therefore not applicable. The Court rejected this argument and found that the proceedings before the TPD were no more than an appeal from the decision of the magistrate. Although the proceedings before the TPD were brought on notice of motion, Botha JA who wrote the judgment of the Court, stated that it is 'not the form of the procedure adopted but the subject matter of the proceedings which determines their character as either a civil or criminal matter' (at 449 B–C). Being an appeal against a ruling given in a criminal case, the further process retained that character.

[**24.**] In the *Absalom* case *supra* the accused applied for condonation of the late filing of his notice of appeal after having been convicted in a magistrate's court. The Court stated, on 162A, that the application was so closely related to the accused's conviction, sentence and appeal that it was in the opinion of the Court a criminal matter.

[**25.**] In the *Strowitzki* case *supra* the issue at stake was a permanent stay of criminal proceedings. The Court refused the application, which was brought on the basis that the applicant would not have a fair hearing as a result of an undue delay to commence with the proceedings. On appeal to the full bench of the High Court the respondent pointed out that the applicant's process was irregular as no leave to appeal had been obtained and the applicant had also not yet been convicted.

[**26.**] One argument raised by the appellant was that cases based on the Constitution were *sui generis* and that the provisions of the Criminal Procedure Act should not apply to them. This argument was rejected and the Court found that the proceedings were indeed criminal proceedings.

[**27.**] The *Vermaas* and *Du Plessis* cases *supra* originated from the Transvaal Provincial Division of the Supreme Court where the accused appeared before different judges. The trials, which were both of huge dimensions, had run for some considerable time as a result whereof the accused were no longer able to afford legal representation. Application was made to provide them with legal representation at public expense. The judges presiding at the trials construed the relevant provisions of the South African Constitution to mean that they could seek a ruling from the Constitu-

tional Court on this point, even though they were competent to decide it themselves.

[**28.**] The Constitutional Court found that upon a correct interpretation of the Constitution the referrals were incompetent. The Court went on to say that in any event the trial judges were much better placed than they were to decide whether it was necessary to provide legal representation at public expense or not. It was stated that the presiding judges would be in a better position to judge the complexity or simplicity of the case, the aptitude or ineptitude of the accused person to fend for himself in a matter of those dimensions, and to determine how grave the consequences of a conviction would be, and any other factors that needed to be evaluated to determine the likelihood or unlikelihood that, if the trial proceeded without a defence lawyer, it would result in substantial injustice for the accused. (See at 292C–H.)

[**29.**] I must point out that the Constitutional Court did not have jurisdiction in this particular instance because of its finding that the Constitution did not sanction that process. That is not the issue that we must decide as there is no statutory impediment in the present instance which would forbid the High Court to hear the matter, and the case therefore does not assist Ms Verhoef.

[**30.**] What was further said in regard to the suitability of the presiding judges to decide whether legal representation should be provided at state expense is no doubt correct, but does also not assist the argument of Ms Verhoef. In the present instance, it is clear from the record handed in by agreement that the trial has not yet commenced, so that under the circumstances the judges of the full bench were in as good a position to make an evaluation and to determine the issue as any other judge.

[**31.**] Mr Smuts also submitted that if the application was brought in the criminal court and the application was dismissed it was, at the very least, uncertain whether the applicants would have been able to take the matter on appeal at that stage as section 316(1) of the Criminal Procedure Act provides that an accused convicted of any offence by a superior court may, within 14 days after the passing of any sentence, apply for leave to appeal against his conviction, sentence or any order. See in this regard *S v Harman* 1978 (3) SA 767 (A) at 771B and S v *Majola* 1982 (1) SA 125 (A). Although it was stated in the latter case that section 316 does not absolutely prohibit an accused from applying for leave to appeal before sentence, the position is at least uncertain. See the discussion of these cases in the *Strowitzki* case *supra* at 419f–420b.

[**32.**] The result would be that if leave to appeal could not be obtained before the trial was completed and sentence was imposed then the trial would continue. If it is later found, in a subsequent appeal, that the accused did not have a fair hearing, because they were not legally repre-

sented, it could lead to the setting aside of the matter which, in a case of this magnitude, would be disastrous.

[**33.**] Although in the present matter legal representation is sought in connection with a criminal trial, I am not persuaded that that, by itself, is sufficient to classify it now as so closely connected to the criminal process that it takes on that character or that only the court in the criminal trial will have jurisdiction to try the matter. If one looks at all the surrounding circumstances such as the relief claimed, the parties who have a direct and substantial interest in the subject matter of the relief claimed and whether they are before court or not, and that the relief claimed is not relief of criminal prosecution or germane to the criminal process then, in my opinion, it cannot be said that the criminal trial court has exclusive jurisdiction to hear the application. This must also be seen in conjunction with the constitutional provisions of article 25(2) and (3) which grant to aggrieved persons a right to approach a competent court for protection where a fundamental right or freedom has been infringed or threatened and which empower that Court to make all such orders which shall be necessary and appropriate to protect the enjoyment of such rights or freedoms. The High Court is a competent court to deal with these issues. See *S v Heidenreich* 1995 (NR 234 (HC) at 238 f–g 1996 (2) SACR 171 (Nm) at 175d).

[**34.**] It was suggested to Ms Verhoef that if the applicants had pleaded before a judge that that would have strengthened her argument. This may be so. However, the record, which was handed in by agreement, reflected various pre-trial proceedings but none containing any pleas except that there was record that applicants 126–128, when they were added as accused, were required to plead. This being a pre-trial hearing, it is not altogether clear whether these applicants were merely required to indicate what they would plead. I say so because none of their rights in terms of section 115 of Act 51 of 1977 were explained to them and neither was any attempt made to determine what the real disputes between the parties were. There also being no record of pleas from any of the other applicants, it is not possible to consider this issue and the effect it may have had on the proceedings.

[**35.**] It is so that in this matter the applicants also asked for a temporary stay of the proceedings. However, in the Court *a quo,* as well as in this Court, counsel for the applicants conceded that the trial court would be better placed to deal with such issue if and when it arises. No order was therefore asked or made in this regard.

[**36.**] Under the circumstances I am not persuaded that the Court *a quo* was wrong to dismiss this point *in limine.*

[**37.**] The second point *in limine* that was argued by Ms Verhoef is, in my opinion, without any merit. The application was brought on a semi-urgent basis and was, according to the dates on the documents, launched by the

applicants on 25 October 2001. In the notice of motion the respondents were called upon to file their notice of opposition, if any, on or before 17h00 on 1 November 2001. This was done on behalf of all the respondents on 30 October 2001. The respondents were further called upon to file opposing affidavits before noon on 14 November 2001. Two affidavits were filed by the third respondent, one on 14 and one on 15 November. (There seems to have been no objection to the late filing of the second affidavit.)

[**38.**] The first affidavit, consisting of two pages, raised the two points *in limine* later argued by Ms Verhoef, and the second affidavit, which was even shorter, denied the allegation by first applicant that there were inordinate delays to bring the matter to trial. The application with exhibits can by no means be described as voluminous and there was no complaint that any of the respondents were prejudiced by the shortening of the periods prescribed by the rules of the High Court.

[**39.**] This could also hardly have been argued in the light of the answering affidavits that were filed by the Prosecutor-General. The first applicant explained that the trial was to commence on 4 February 2002 and if the times, prescribed by the rules, were adhered to the matter would only be ready for hearing sometime after 4 February. At most it can be stated that the applicants should have launched their application at an earlier stage, but in this regard consideration must also be given to the fact that those who had applied for legal aid were still waiting for an answer to their applications and a positive answer could have obviated the bringing of an application to court, as that would have opened the door to the others to also apply. In the result I am satisfied that the Court *a quo* correctly dismissed this point *in limine*.

[**40.**] During argument on the merits of the appeal, counsel on both sides discussed various articles of the Constitution. Counsel did not only differ in their interpretation of some of the articles but were also not in agreement as to the effect of those articles on the issues, which the Court was called upon to decide. These articles were mainly nos 10, 12, 25, 80(2), 95, 101 and 144.

[**41.**] Ms Erenstein Ya Toivo nailed her colours to article 95(h) read with articles 101 and 12(1)(e). In developing her argument counsel submitted that the said articles limited the duty of the respondents to grant legal aid to available resources. She submitted that the Court *a quo* wrongly found that the issue was not the resources available to the Ministry of Justice through its Department of Legal Aid, but the resources of the state which were at stake, and as it was not proven that the state did not have the necessary resources, the second respondent was obliged to grant legal aid to the applicants. Counsel submitted that the effect of the order was that the Court now intruded on a function which, in terms of the Constitution, was the exclusive domain of the legislature to make available and allocate funds to the various ministries. Although the Court may have the national

power to make such an order, it would, under all the circumstances, not be appropriate.

[**42.**] Mr Smuts, on the other hand, submitted that there was a duty on the first respondent to uphold the provisions of the Constitution and, more particularly the provisions of chapter 3, which deal with fundamental human rights. Counsel submitted that, bearing in mind the magnitude of the case, the fact that all the applicants were lay persons and the difficult legal issues which would inevitably arise in a case of this nature, their right to a fair trial, as is guaranteed by article 12, would be jeopardised if they had to fend for themselves without any legal representation in the criminal trial. Counsel further submitted that none of the applicants were able to afford legal representation of their own and that it was therefore the duty of the first respondent to provide them with such representation. If I understood counsel correctly it was submitted that this obligation arose, not as a result of the policy of the first respondent to make legal aid available to indigent persons out of and insofar as available resources permit, but that it arose from the provisions of, *inter alia,* article 12(1)(a), which guarantees a fair trial.

[**43.**] It is clear from the submissions made by Ms Erenstein Ya Toivo that she was of the opinion that the expression of the first respondent's policy re legal aid cuts across all other provisions of the Constitution and has the effect that it limits the obligation of the first respondent to grant legal aid to available resources as provided in article 95(h). If such resources available were insufficient or exhausted, that was the end of the matter. It would therefore be necessary to look at the relevant provisions of the Constitution.

[**44.**] Article 95 is part of chapter II of the Constitution under the heading of Principles of State Policy and the relevant sub-article provides as follows:

> *Promotion of the Welfare of the People*
>
> The state shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following: . . . (h) a legal system seeking to promote justice on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the state; . . .

[**45.**] Article 101 determines the legal effect of the provisions contained under chapter 11 of the Constitution and provides as follows:

> *Application of the Principles contained in this chapter*
>
> The principles of state policy contained in this chapter shall not of and by themselves be legally enforceable by any court, but shall nevertheless guide the government in making and applying laws to give effect to the fundamental objectives of the said principles. The courts are entitled to have regard to the said principles in interpreting any laws based on them.

[**46.**] The provisions of article 12, which are relevant to the present enquiry, are the following:

Fair trial
(1)(a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent court or tribunal established by law, provided that such court or tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society. (b) A trial referred to in sub-article (a) hereof shall take place within reasonable time, failing which the accused shall be released. (c) Judgments in criminal cases shall be given in public, except where the interests of juvenile persons or morals otherwise require. (d) All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them. (e) All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice. (f) No persons shall be compelled to give testimony against themselves, their spouses, who shall include partners in a marriage by custom law, and no court shall admit in evidence against such persons testimony which has been obtained from such persons in violation of article 8(2)(b) hereof.

[**47.**] The policy statement of the first respondent, which is set out in article 95(h), culminated into the promulgation of the Legal Aid Act of 1990, Act 29 of 1990. Section 10(2) deals with the powers of the second respondent to grant legal aid to an applicant who is charged with an offence and provides as follows:

Any person charged with an offence may apply to the Director for legal aid and if the Director is of the opinion that (a) having regard to all the circumstances of the case, it is in the interest of justice that such person should be legally represented; and (b) such person has insufficient means to enable him or her to engage a practitioner to represent him or her, the Director may grant legal aid to such person.

[**48.**] In terms of Act 29 of 199O, judges of the High Court were given the power to issue a legal aid certificate under certain circumstances and the Director was obliged to give effect to such certificate. These provisions were set out in sections 8(2) and 10(1)(a) of the Act and provided as follows:

8(2) If an accused before the High Court is not legally represented and the court is of the opinion that there is sufficient reason why the accused should be granted legal aid, the court may issue a legal aid certificate.
10(1) The Director — (a) shall grant legal aid to any person in respect of whom a legal aid certificate has been issued under section 8(2).

[**49.**] Sections 4 and *5*(a) of Act 17 of 2000 amended Act 29 of 1990 by deleting sections 8(2) and 10(1)(a) as it was felt that certificates were issued indiscriminately by the judges without due regard to available funds, with the result that during successive years the funds allocated for legal aid were exceeded. To overcome this difficulty the granting of legal aid was now left entirely in the hands of the second respondent, the Director of Legal Aid. In the Court *a quo* the applicants submitted that

these amendments were unconstitutional and requested the court to set them aside.

[**50.**] However, the Court did not find it necessary to deal with the constitutionality of these provisions and came to its conclusion on other grounds. In argument before us both counsel referred, sometimes in a wide sense, to legal aid without thereby referring to the same situation.

[**51.**] Ms Erenstein Ya Toivo was mostly referring to legal aid granted under the Legal Aid Act, whereas Mr Smuts, when using the term 'legal aid', was mostly referring to his interpretation of article 12 of the Constitution and, as was submitted by him, the first respondent's obligation to provide legal aid under circumstances where that was necessary as a result of the constitutional duty of the first respondent. In order to avoid confusion I will further in this judgment refer to aid granted in terms of the Legal Aid Act as 'statutory legal aid' to contrast it with the alleged obligation of the first respondent to provide legal aid in terms of article 12.

[**52.**] I think there can be little doubt that article 95(h) expresses no more than the intention of the first respondent to promote justice by providing statutory legal aid to those who have not the means to afford legal representation. This was done against the background and awareness of the founding fathers who drafted the Constitution that, given the high ideals expressed by the Constitution of equality, dignity and non-discrimination, inequalities which exist in this regard should also be addressed as they also affect those who were once disadvantaged by discriminatory laws and practices. However, given Namibia's resources in manpower and finances, it would be, and still is, impossible to provide free legal aid for each and every person who is indigent and in need of such assistance. This fact is recognised in that the state limited itself to certain defined cases and in regard to available resources. It is further clear that article 95(h) is not limited to criminal cases only or civil cases only but is intended to include the whole spectrum of instances where the need for legal aid may exist.

[**53.**] Article 95(h) is therefore an expression by the state of its willingness to assist indigent persons to obtain legal assistance insofar as the state's resources may permit. It further seems to me that even without the disclaimer for legal liability, set out in article 101, that the article makes it clear that the state's self-imposed duty to provide indigent persons with free legal aid cannot by any means be regarded as limitless. Any attempt by a court of law to force the government to, for instance, increase the amount allocated for statutory legal aid might be an intrusion into the exclusive domain of the government as to its expenditure and allocation of state funds, which, as was submitted by Ms Erenstein Ya Toivo, was not permissible. What was said in this regard by Bertus de Villiers referring to the Indian Constitution in his article *Directive Principles of State Policy and Fundamental Rights: The Indian Experience* (1992) 8 SAJHR 29 at 34 is equally applicable in regard to the expressed Principles of State Policy set out in the Namibian Constitution, namely:

> The directive principles have two important characteristics. First, they are not enforceable in any court of law and, therefore, should they be ignored or infringed the aggrieved have no legal remedy to compel positive action. Secondly, the principles are fundamental to the governance of the country and oblige the legislature to act in accordance with them. They consequently fulfil an important role in the interpretation of statutes. . . . The unenforceability of the directive principles from a judicial perspective, has led Seervai to describe them as 'rhetorical language, hopes, ideals and goals rather than the actual reality of government'.

[**54.**] Article 101 further provides that the courts were entitled to have regard to the principles set out under chapter 11 in interpreting any laws based on them. It therefore seems to me that as far as statutory legal aid is concerned that that must be left in the hands of the state. The divergence of opinion between counsel for the applicants and counsel for the respondents arises from Ms Erenstein Ya Toivo's further submission that in terms of the Constitution the first respondent's duty to assist begins and ends with statutory legal aid.

[**55.**] If I understood Mr Smuts correctly, he conceded that this Court, or for that matter any court, could not prescribe to the first respondent what amounts it should allocate to its system of statutory legal aid. Counsel, however, submitted that section 8(2) read with section 10(1)(a) of the Legal Aid Act 29 of 1990 was the mechanism by which judges could give effect to the provisions of the Constitution, more particularly article 12 thereof, to ensure a fair trial for an accused person. However, the main issue argued before us on behalf of the applicants was whether there was a constitutional duty upon the first respondent to provide the applicants with legal representation if it was shown that otherwise they would not have a fair trial as guaranteed by the Constitution. Counsel nevertheless invited the Court to express itself in regard to the constitutionality of the amendments whereby the power of judges to issue legal aid certificates was abrogated, even though this may be *obiter*. The Court *a quo* did not find it necessary to do so and in my opinion this Court should decline to accept the invitation.

[**56.**] Although, as was pointed out by Mr Smuts, the principles underlying a fair trial formed part of our common law and were, in certain instances, given statutory impetus, for example, section 73(1) of the Criminal Procedure Act 51 of 1977, there was prior to 1990 not a right to fair trial to be assessed and tested against specific constitutional provisions. However, since the coming into operation of the Constitution, numerous decisions by the High and Supreme Courts gave content to the fair trial provisions in article 12. The change brought about by the Constitution was aptly stated in *S v Scholtz* 1998 NR 207 (SC) at 216H–I as follows:

> What, however, has happened is that the law has undergone some metamorphosis or transformation and some of the principles of criminal procedure in the Criminal Procedure Act are now rights entrenched in a justiciable Bill of Rights. That is, in my view, the essence of their inclusion in art 12 of the Constitution.

> Any person whose rights have been infringed or threatened can now approach a competent Court and ask for the enforcement of his right to a fair trial.

[**57.**] There are numerous other examples to be found in our case law on this point. In article 12(1)(e), the right of an accused to legal representation was entrenched. The courts laid down that a presiding officer in a criminal matter has a duty to inform an accused person of his or her right to legal representation and has the further duty to explain to an unrepresented accused his or her procedural rights, more particularly those rights set out in article 12. A failure to do so may result in the setting aside of that proceeding on appeal. (See in this regard *S v Soabeb and Others* 1992 NR 280 (HC); *S v Bruwer* 1993 NR 219 (HC) and *Albertus Mondayv The State* unreported judgment of the Supreme Court, delivered on 21 February 2002.) In cases such as *S v Kapika and Others* (1) 1997 NR 285 (HC) and S *v De Wee* 1999 NR 122 (HC) the duty to inform an accused person of his right to legal representation was extended to the pre-trial process and a duty was placed on the police officer dealing with the matter to inform the accused of such right. Again failure to do so could lead to the Court disallowing evidence obtained through a pointing-out or statements made by an accused.

[**58.**] In the development of the law of a fair trial, courts are not limited to the instances mentioned in article 12. This is amply demonstrated by the case of *S v Scholtz (supra),* where this Court came to the conclusion that in order for a trial to be fair there should be discovery of the information, contained in the police docket relating to the case, to an accused person. The case provided for full discovery by the state unless the Court is satisfied that the disclosure of any such information might reasonably impede the ends of justice or otherwise be against public interest. Also in this instance it was spelt out that the tenets of a fair trial would not require disclosure in every case. See *S v Angula and Others* 1996 NR 323 (HC).

[**59.**] Mr Smuts further submitted that the necessity for legal representation in criminal trials, as entrenched in article 12, essentially flows from two fundamental principles:

> (a) the basic principle that an accused person is entitled to a fair trial now entrenched in article 12; and (b) the equally fundamental principle of equality before the law entrenched in article 10, and the application of these two fundamental principles to the adversarial process presupposed by criminal trials in Namibian law.

[**60.**] How this application should take place and how the two articles, articles 10(1) and 12, interrelate with each other was again set out in the *Scholtz* case *supra* at 218A–C, namely:

> Article 10(1) is fundamental and central to the new perceptions. Courts of law have to interpret and enforce the protection of fundamental rights and freedoms. Article 10(1) provides: 'All persons shall be equal before the law.' Apart from this, equality pervades the political, social and economic life of the Republic of Namibia. A reading of the Constitution leaves one in no doubt as to what is

intended to be achieved in order for the people of Namibia to live a full life based on equality and liberty. It is in this light that article 12 should be looked at and interpreted in a broad and purposeful way.

[**61.**] In applying the principles of equality before the law it is certainly clear that, because of the limitations placed upon statutory legal aid, there will be cases where persons similarly placed will not be granted legal aid because of a lack of funds, or because they do not qualify in terms of the means test. If I understood the *Scholtz* case correctly, article 10(1) would therefore also play a role in the determination whether, in a particular instance, it can be said that a trial is fair according to article 12. The equality principle, in its application, may however also have a limiting effect in the sense that article 10(1) was interpreted by this Court not to mean absolute equality but equality between persons equally placed. See *Muller v President of the Republic of Namibia and Another* 1999 NR 190 (SC).

[**62.**] Bearing in mind the principles set out above, I am satisfied that there may be instances where the lack of legal representation due to the fact that an accused person is indigent, and where statutory legal aid was or could not be granted, have the effect of rendering his or her trial unfair and where this happens it would result in a breach of such person's guaranteed right to a fair trial in terms of article 12.

[**63.**] I did not understand Ms Erenstein Ya Toivo to say that in all circumstances a lack of legal representation due to the indigence of an accused person could not result in an unfair trial. Counsel argued that the first respondent's obligation to provide legal aid is circumscribed in article 95(h) read with article 12(1)(e) of the Constitution and there it ends. Coupled therewith is the argument that an order by any court which would require of the first respondent to give aid, whether statutory or non-statutory, would be inappropriate as it intrudes on the exclusive domain of Parliament to decide how and in what way funds should be allocated to its various ministries. Because this posed certain difficulties counsel was asked what a presiding officer should do if, halfway through a trial, it became clear that an indigent accused would not have a fair trial due to the absence of legal representation. Counsel's answer that in such a case the Court would have to postpone the trial to give the accused an opportunity to find funds somewhere is, in my opinion, not a solution as it would be a futile exercise to postpone a case where there is no real possibility of finding funds and postponement under such circumstances would not be in the interests of justice.

[**64.**] In support of her contentions counsel referred the Court to the South African Constitution as well as the constitutions of some other countries. Various cases were also cited and I shall deal with these submissions as it becomes necessary. Counsel in any event submitted that the lack of legal representation in this instance would not result in a breach of the fair trial provisions of article 12.

[**65.**] The Constitution is, in my opinion, clear as to who must uphold the

rights and freedoms set out in chapter 3. Article 5, which is part of chapter 3 of the Constitution, provides as follows:

> *Protection of Fundamental Rights and Freedoms*
> The fundamental rights and freedoms enshrined in this chapter shall be respected and upheld by the executive, legislature and judiciary and all organs of the government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the courts in the manner hereinafter prescribed.

[**66.**] Further elaboration of the powers of the Court to enforce and protect the rights and freedoms is to be found in article 25. Sub-article (1) deals with the Court's powers in regard to legislative acts infringing upon such rights and freedoms, whereas sub-articles (2), (3) and (4) are relevant for the present instance. They provide as follows:

> *Enforcement of Fundamental Rights and Freedoms*
> . . .
> (2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.
> (3) Subject to the provisions of this Constitution, the court referred to in sub-article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.
> (4) The power of the court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases.

[**67.**] Article 5 clearly requires from the first respondent and all its agencies as well as from the judiciary to uphold the rights and freedoms set out in chapter 3. Whereas the judiciary must uphold them in the enforcement thereof in their judgments, the first respondent and its agencies have the duty to ensure that they do not overzealously infringe upon these rights and freedoms in their multifarious interaction with the citizens and must further ensure the enjoyment of these rights and freedoms by the people of Namibia. The argument by Ms Erenstein Ya Toivo that the Court would intrude on the functions of Parliament would it grant an order for legal aid may be correct insofar as it deals with statutory legal aid. However, where the obligation of the first respondent arises from its duty to uphold the provisions of the Constitution, in this case article 12, the Court, in enforcing that right, can never be said to intrude into the affairs of Parliament. By doing so the Court is merely doing what is required of it in terms of the

Constitution, and is exercising the powers given it according to article 25(2) and (3). The argument of Ms Erenstein Ya Toivo that such an order would not be 'appropriate' as required by article 25(3) must therefore be rejected. It seems to me that this argument is based on the wrong premise that the duty to uphold the rights and freedoms are all of a negative nature, that is that as long as those who must uphold the rights and freedoms refrain from doing anything, their obligation is fulfilled. That may be so in regard to some of the rights and freedoms, but there are also rights where positive action is required such as article 16(2). In terms of this article the state may, in the public interest, expropriate property subject to the payment of just compensation. If the compensation paid is not just I cannot imagine anybody arguing that the Court, after determining what just payment would be, would be intruding on the function of Parliament by ordering the state to pay such compensation. If this were not so it would mean that the right becomes illusory and affords no protection to the aggrieved person. In my opinion there is also a positive duty on the first respondent to ensure the right to a fair trial and where this means that an indigent accused must be provided with legal representation in order to achieve that object that duty cannot be shirked by the first respondent.

[**68.**] Ms Erenstein Ya Toivo, in developing her argument, compared the relevant provisions of the Namibian Constitution with those set out in various other constitutions such as Australia, Botswana, Zimbabwe, South Africa, Canada and others. Counsel further referred the Court to various cases, also of the Constitutional Court of South Africa, such as *Soobramoney v Minister of Health, Kwazulu Natal* 1998 (1) SA 765 (CC) and *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

[**69.**] A comparative study of the constitutional law of other countries is always helpful, and in matters concerning the interpretation of fundamental rights and freedoms, this has more or less become the norm, bearing in mind the almost universal application of those rights with more or less the same content. However, there are also clear differences among the various constitutional instruments and for such a comparative study to be of real value, due cognisance must be given to these differences when interpreting the Namibian Constitution.

[**70.**] In this regard it is relevant to note that the Australian Constitution does not contain a Bill of Rights, although according to the law it is recognised that an accused has a right to a fair trial. See *Dietrich v R* (1993) 3 LRC 272. As such the position does not seem to be much different from the position in South Africa, and indeed also that of Namibia, before the change of the constitutional dispensation in 1996 and 1990. See *S v Rudman and Another* 1992 (1) SA 343 (A). This notwithstanding, the majority in the *Dietrich* case affirmed the right of an accused to a fair trial and allowed the appeal because the trial of the accused miscarried as

a result of the trial judge's failure to postpone or stay the trial so that arrangements could be made for legal representation for the accused at public expense. The Court further found that the power to stay proceedings necessarily extended to cases in which representation of an accused by counsel was essential to a fair trial, as it was in most cases where an accused was charged with a serious offence.

[**71.**] Although the Botswana and Zimbabwean Constitutions contain Bills of Rights, section 10(2)(d) of the Botswana Constitution and section 18(4)(d) of the Zimbabwe Constitution expressly provide that every person charged with a criminal offence shall be permitted to defend himself in person or, at his own expense, by a legal representative of his own choice. That, in my opinion, clearly excludes the right of such person to claim legal aid at public expense from the state.

[**72.**] The Canadian Charter of Rights provides for the right to retain counsel (section 10(b)) and a fair hearing (section 11(d)). Ms Erenstein Ya Toivo correctly pointed out that the Charter does not constitutionalise the right of an indigent accused to be provided with state-funded counsel, regardless of the facts of a particular case. However, in *R v Rowbotham* (1988) 41 CCC (3d) 1 the accused was denied legal aid because her annual income was too high and she did not qualify under the legal aid scheme. The Court found that this was in breach of section 7 and 11(d) of the Charter and on a new trial it ordered that legal aid must be provided.

[**73.**] Counsel also referred us to section 25(3)(e) of the interim Constitution of South Africa Act 200 of 1993. This section provides as follows:

> Every accused person shall have the right to a fair trial, which shall include the right to be represented . . . by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights.

(The relevant wording in the final Constitution is substantially the same.)

[**74.**] Counsel argued that the words 'where substantial injustice would otherwise result, to be provided with legal representation at state expense . . .' clearly placed an obligation on the state, in the instance of South Africa, to grant legal aid where substantial injustice would otherwise result. Counsel submitted that it was necessary to insert these words in order to establish an obligation on the part of the state to grant legal aid notwithstanding the fact that the Constitution also contains fair trial provision. By comparison counsel argued that the absence of these words in the Namibian Constitution indicates that there is no such obligation on the first respondent over and above the obligation undertaken in terms of article 95(h) insofar as resources may permit.

[**75.**] I do not agree with counsel. Counsel is correct that the constitutional scheme in South Africa pertaining to legal aid differs from that in Namibia. In South Africa the obligation to give legal aid to an accused person is a right because it is contained in the Bill of Rights and it is only qualified by

the words 'where substantial injustice would otherwise result'. (I need not discuss the effect, if any, of the limitation clauses contained in section 33(1) of the interim Constitution and section 36(1) of the final Constitution.) In Namibia, statutory legal aid is not a right *per se* because it is contained in the policy statement and is made subject to the availability of resources. As such it is available to all indigent persons who cannot afford to pay for legal representation provided that funds and other resources are available. However, article 12 guarantees to accused persons a fair hearing which is not qualified or limited and it follows, in my opinion, as a matter of course, that if the trial of an indigent accused is rendered unfair because he or she cannot afford legal representation, there would be an obligation on the first respondent to provide such legal aid.

[**76.**] This obligation does not arise as a result of the provisions of article 95(h), but because of the duty upon the first respondent to uphold the rights and freedoms contained in chapter 3 of the Constitution.

[**77.**] Ms Erenstein Ya Toivo's reliance on the cases of *Soobramoney* and *Grootboom (supra)* can also not assist her, as those cases are distinguishable from the present case. This is so because the rights, which the applicants in those cases sought to enforce, were both qualified by the availability of resources of the government. See sections 27(2) and 26(2) of the Constitution of South Africa Act 108 of 1996. As such it would have assisted the argument of counsel based on statutory legal aid, but it does not assist the respondents in regard to the interpretation of article 12 of the Constitution.

[**78.**] In *Constitutional Rights in Namibia,* Naldi interpreted article 12(e) of the Constitution as not providing for free legal assistance in the interests of justice. That is so, but it guarantees the right to legal representation of own choice and article 12(1)(a) guarantees a fair hearing. Where this cannot be achieved because of the absence of legal representation through the indigence of an accused, it is only the first respondent which can step in to uphold the guaranteed right. The learned author, however, accepted that the right to a fair trial enshrined in article 12, and the various guarantees specified therein, constituted the minimum that is acceptable and is not an exhaustive list. He continued to state that the prime aim is the protection of the individual interest in fundamental justice and is mainly designed to protect the principle of legal certainty and the interests of the accused. (See at 61.) This is precisely what this Court endeavours to do.

[**79.**] I am therefore of the opinion that it cannot be said that article 95(h) in any way qualifies or limits the right to a fair hearing as contained in article 12, and as was contended for by counsel for the respondents. There is nothing contained in the wording of either article which would support such an interpretation, nor would one expect that a policy statement would have such a far-reaching effect as to limit a fundamental right unless it is clearly and unambiguously spelt out. It seems that this approach is

very much the same as that in Canada where it was recognised that, notwithstanding a legal aid scheme, which was mostly based on earning capacity, there would be instances where the legal aid scheme would fall short, but where the dictates of a fair trial would require that an accused should be legally represented. See *R v Rowbotham (supra).*

[**80.**] For the same reasons, set out above, I cannot agree with Ms Erenstein Ya Toivo that the provisions of article 14(3)(d) of the International Covenant on Civil and Political Rights are in conflict with the Constitution of Namibia and can therefore be ignored. The Namibian Parliament acceded to this Covenant on 28 November 1994. It also, on the same date, acceded to the First and Second Optional Protocols. This article provides as follows:

> 14(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him in any case where the *interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it* (my emphasis*).*

[**81.**] According to article 63(2)(e) read with article 144, 'international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia'. From this it does not follow that the said article is now part of the Constitution of Namibia, but being part of the law of Namibia it must be given effect . As such it lays down the parameters within which legal representation to an indigent accused is required, namely in cases where the interests of justice so require. Although no law is permitted to limit the rights set out under chapter 3 of the Constitution, except as is provided for under the chapter itself, the interests of justice lie at the root of a fair trial and the provision of the Covenant are therefore clearly compatible with the tenets of a fair trial. As was pointed out by Mr Smuts, the state not only has an obligation to foster respect for international law and treaties as laid down by article *96*(d) of the Constitution, but it is also clear that the International Covenant on Civil and Political Rights is binding upon the state and forms part of the law of Namibia by virtue of article 144 of the Constitution.

[**82.**] It is furthermore clear from article 2(2) of the Covenant, that states parties who have acceded thereto are under an obligation to take the necessary steps to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the Covenant. In my opinion the Legal Aid Act, as amended, does no longer give full effect to the rights of an indigent accused as provided for in article 14(3)(d) of the Covenant, if that was the only source whereby assistance could be given to such accused. This is so because in terms thereof the first respondent's obligation to provide statutory legal aid is subject to the availability of resources and is therefore subject and made dependent on the availability

of funding. Article 14(3)(d) creates an obligation in regard to all those cases where the interests of justice require that an indigent accused person be legally represented. The present case illustrates the difference. Under statutory legal aid there would not be an obligation on the first respondent if the resources provided under the Legal Aid Act were not sufficient. However, if the interests of justice require that those of the applicants who cannot afford legal representation should be legally represented, such an obligation to provide such representation for them would arise from the provisions of article 14(3)(d) of the Covenant, which is not qualified by the availability of resources.

[**83.**] The above findings now necessitate an investigation into the nature of the trial and whether, given all the circumstances of the case, there is a reasonable possibility that the indigent accused would not get a fair trial if they were denied legal representation. On this issue counsel are divided. Mr Smuts submitted that legal representation in this instance is a necessity and he referred us to various authorities underscoring this point. Ms Erenstein Ya Toivo submitted that the absence of legal representation would not of necessity render the trial of the accused unfair. She pointed out that the presumption of innocence together with the other guarantees contained in article 12 and the Criminal Procedure Act would ensure fairness of the criminal trial under the supervision of the presiding judge. Counsel submitted that the judge has considerable latitude in the measures that he can implement to promote the fairness of a trial by, for instance, taking time to explain to the accused their rights and the charges against them as well as the ground rules of the trial, and to assist the accused in general. Furthermore, there is also a duty on the prosecutor to treat the accused fairly by assisting the Court in finding the truth and in providing information to the court, which would be favourable to the accused. Ms Erenstein Ya Toivo further pointed out that the accused do not have the profile of typical criminal defendants and that there are among their ranks people who are relatively well educated. There are, for instance, a former parliamentarian, some teachers, civil servants as well as former policemen and others.

[**84.**] This argument, in my opinion, loses sight of the fact that a case of the dimensions of the instant one brings with it its own unique characteristics and problems. With 128 accused facing 275 charges, mostly of a serious nature, and with some 500 or more witnesses to be called only by the state, the case has all the makings of a logistical and organisational nightmare for both the prosecution and the defence and will no doubt run for a couple of years rather than months.

[**85.**] Whereas the prosecution will no doubt be able to afford a transcription of the evidence, those of the accused who are indigent will not be able to afford it and will have to make do with notes taken by themselves if they are able to do so. We are also told that five interpreters will serve the accused so that one can accept that they are not all proficient in English,

which further complicates matters even if they are provided with a transcription of the record. Because of the possible long duration of the trial and the many witnesses who will be called by the state, it is necessary that each accused should know what the evidence is that involves him and be able to relate it to specified charges. This is essential in order to be able to take informed decisions about the conduct of their trial and to be able to cross-examine witnesses properly and effectively. In a case of this magnitude the task to cross-examine would be a daunting one, even for a legal practitioner, and no matter how many times the presiding judge may explain to the accused what the art of cross-examination involves, there would be those who would not be able to master it.

[**86.**] Counsel for the applicants further pointed out that according to the record many of the accused made statements and confessions, which have now been challenged. This will necessitate the holding of trials within the trial, which involves difficult issues of law and of fact and the outcome of which could be conclusive for the guilt or otherwise of the accused.

[**87.**] The charges against the accused are wide ranging and include high treason, sedition, murder and attempted murder, malicious damage to property, robbery with aggravating circumstances, theft and various contraventions of the Immigration Control Act 7 of 1993, and the Arms and Ammunition Act 7 of 1996. There can be no doubt that most of these charges are serious and would on conviction attract long periods of imprisonment. The complicity of the accused in the commission of these crimes is, in certain instances, based on the doctrine of common purpose and conspiracy to commit the crime both of which contain pitfalls for the unwary and which sometimes even baffle those who are supposed to be informed. See, in general, Snyman *Criminal Law* (3rd ed) at 249 ff and Burchell *SA Criminal Law and Procedure* vol1 (3rd ed) at 308 ff and 366 ff.

[**88.**] Before the start of the trial, various steps would have to be considered such as the asking of further particulars. The asking of further particulars is particularly relevant were charges are based on common purpose and also conspiracy and where the state, as is the case here, refuses to make discovery of all the statements to the defence. In these circumstances the asking of further particulars will be a necessity to attempt to determine the complicity of each of the applicants in relation to the charges. However, in order to do so, knowledge of the elements of the crimes charged is necessary as well as knowledge of the doctrine of common purpose and conspiracy. The framing of the questions must also be within the parameters of what is permissible.

[**89.**] Counsel for the respondents relies heavily on the role to be played by the presiding judge in the trial and on the procedural and evidential rules which are aimed at achieving fair trial. It is correct to say that the judge is not a mere umpire who must only see that these rules are complied with. One such power that the Court has is the discretion to summon witnesses if it is of the opinion that such evidence is essential for the just decision of

the case (see sections 186 and 167 of Act 51 of 1977 and see further *Albertos Monday v The State* (*supra*)). However, the fairness of a trial does not only depend on the compliance with these rules. A criminal trial has many other facets which will determine whether in a specific instance the trial was a fair one.

[**90.**] To explain to an accused his rights to cross-examination does not guarantee an effective and proper exercise of that right by the accused. Mostly that is not the case. In most cases where there are a limited number of accused charged with a number of offences, the assistance which a presiding judge may be able to give will differ completely from a case such as the present with 128 accused persons facing 275 charges. In the first instance the judge may be able even to suggest a particular line of cross-examination and may advise the accused of what previous witnesses have testified. In a case of the magnitude of the instant case this would be an impossibility. How would the judge ever be able to advise accused no 101 that the evidence given by witness A differs from the evidence given by witness M six months later. That is the task and duty which can only be performed by the legal representative of the accused.

[**91.**] It was pointed out by Didcott J in *S v Khanyile and Another* 1988 (3) SA 795 (N) at 798G–799C that the judge cannot and ought not be counsel for the prisoner. The learned judge motivated his statement as follows:

> A lawyer doing the work confers confidentially with his client and with witnesses whom the client would like to call. Having learnt what each has to say, he advises the client on the line to be taken, on the plea to be tendered, the admissions to be offered, the particular allegations to be disputed. He plans the strategy and tactics he will use in answering these, then executes the plan. He decides what testimony the defence will present and, when his turn comes, he presents it. Mindful in the meantime of his expectations from that quarter, he determines those parts of the prosecutor's case which the defence will challenge, and he proceeds to challenge them. He objects to the admissibility of any evidence questionable on that score. Cross-examining, he does not content himself with clarification and elucidation. He seeks to draw from the witnesses for the prosecution information damaging to it and, where they incriminate his client all the same, to show errors by them in observation and recollection, to demonstrate uncertainty and confusion in their minds, to exploit inconsistencies and improbabilities in their versions, to expose bias and downright lying once such looks likely. And the case for the client he argues at the end, casting on it the best light that the law and the evidence shed. Hardly any of this can effectively or may properly be done for an accused person by the judicial officer trying him, under the system we have at all events, a system in which the judicial officer is no inquisitor conducting his own investigations but an adjudicator who by and large must leave the management of the trial he hears and the combat waged in them [it] to the adversaries thus engaged. Above all, to quote again from the article I have mentioned, your judicial officer whose role is that functionally detached one '. . . cannot fling the whole weight of his understanding into the opposite scale against the counsel for the prosecution and produce that collision of faculties which . . . is supposed to be the happiest method of arriving at the truth'.

[**92.**] In the *Khanyile* case *supra* at 815 Didcott J mentioned three factors which a court should take into consideration to determine whether the absence of legal representation would cause substantial injustice to an accused. The first is the inherent simplicity or complexity of the case, as far as both the law and the facts go. Secondly, the court must look at the ability or otherwise of an accused to fend for himself. Thirdly, the court must consider the gravity of the case and the possible consequences of a conviction. I have already tried to show that the present case is unique and, as far as criminal litigation goes in Namibia, certainly exceptional. No one argued that the case was not one in which complex issues of both law and fact will arise. This being the case it seems to me that the applicants are ill-equipped to deal with these issues, which are complicated and where a thorough knowledge of the law concerning issues such as common purpose and conspiracy would be required. Again, as far as the gravity of the case is concerned, no one even suggested that a conviction on most of the charges, even if it only were on one of these serious charges, would not have dire consequences for the applicants.

[**93.**] As regards the capability of an accused to fend for himself, I agree with what was generally said in *Powell v Alabama* 287 US 45 (1932) at 68–9 which was cited with approval by Goldstone J (as he then was) in *S v Radebe* 1988 (1) SA 191 (T) at 195E–G, namely:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue, or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

[**94.**] For the reasons set out above I have come to the conclusion that those applicants who cannot afford legal representation will not have a fair trial as guaranteed by the provisions of article 12 of our Constitution. As there is a duty upon the first respondent to uphold the provisions of the Constitution, it follows that the obligation to provide legal representation, or the means thereto, rests on the first respondent. Whether it does so by means of the machinery put in place by the Legal Aid Act, or by any other means, is not for the court to prescribe. At this stage I want to put on record that most, if not all, of the instances where the tenets of a fair trial require that an indigent accused should be legally represented such representation is made available through the statutory legal aid scheme by the first and second respondents. However, because this is a finding under article 12, it follows that the means test provided for by the Legal Aid Act is not without more applicable and it may be found that it does not meet with the exigencies of this case.

[**95.**] Furthermore, as the obligation to provide legal aid by the first re-

spondent is limited to indigent accused persons, it follows that it would be necessary to screen the various applicants in order to determine who would qualify for such assistance. One can hardly think that, for instance, the first applicant, who testified at one stage that the value of his cattle alone amounts to N$ 1 million, would qualify. Nevertheless, a factor which must be considered in determining whether a particular applicant qualifies would be the duration of the trial. It may also be that an applicant who does not qualify in a simple case may qualify in a case such as the present, or an accused that does not qualify at the outset may qualify as the case progresses and his or her funds become depleted. In the latter instance such an accused must be given the opportunity to apply, or if an application has been rejected, to re-apply. It follows that, where there is no conflict of interest, one or two counsel may represent groups of applicants as long as the groups are not so big that they become unmanageable.

[**96.**] Because the instant case is an exceptional one where the absence of legal representation clearly constitutes unfairness, it can hardly serve as an example of when it can be said that a trial is fair or not fair. Whether, on the other hand, one applies the qualification of the Covenant in determining if a trial is unfair or uses some other formula such as substantial injustice, it seems to me that our law in this regard is still in a developing phase and that it may not be appropriate to lay down hard and fast rules at this stage. It is, however, clear that the absence of legal representation will not in every instance result in a trial being unfair and that there are limits whereby this right, guaranteed by article 12, can be invoked.

[**97.**] Counsel also argued various other points such as whether the applicants had a vested right to legal assistance unaffected by the amendments brought about to the Legal Aid Act. Ms Erenstein Ya Toivo also attacked certain findings by the Court *a quo.* The conclusion to which I have come makes it unnecessary to deal with these points; they also do not affect that finding.

[**98.**] In regard to the payment of costs, Ms Erenstein Ya Toivo referred us to a decision of this Court in the case of *Hameva and Another v Minister of Home Affairs, Namibia* 1996 NR 380 (SC) (1997 (2) SA 756 (NmS)) in which the Court confirmed a decision of the High Court whereby a review against the decision of the Taxing Master to disallow counsel's fees paid by the Legal Assistance Centre, which acted on behalf of the appellants, was not successful. The ratio of the Court of Appeal was, so it seems to me, that on an interpretation of the Deed of Trusts of the Legal Assistance Centre, they were not entitled to claim these costs as disbursement.

[**99.**] In the Court *a quo* the order included the costs of two instructed counsel as part of the disbursements. Ms Erenstein Ya Toivo is of course correct that if the situation pertaining to the Deed of Trust was amended to also include the costs of counsel as disbursements then the Centre would be entitled to recoup such costs. Under the circumstances I agree with Mr Smuts that this is a matter for the Taxing Master, but I think that

this Court should frame the order in such a way that cognisance is taken of this matter. I also am of the opinion that the Court *a quo* correctly allowed the costs of two counsel, that is if the Legal Assistance Centre is entitled thereto.

[**100.**] As the reasoning of this Court, in coming to its conclusion, differs to a certain extent from that of the Court *a quo*, it will also be necessary to reframe the order granted by that Court.

[**101.**] In the result, the appeal is dismissed and the following order is substituted for the order made by the Court *a quo*:

(a) First respondent is directed to provide such legal aid to those of the applicants who are indigent as assessed by it so as to enable them to have legal representation for the defence of all the charges brought against them in the trial referred to as the Caprivi treason trial

(b) First respondent shall pay the costs in the Court *a quo* and the costs of appeal in this Court limited to disbursements and to include therein the costs of two instructed counsel provided that provision is made therefore in the Deed of Trust of the Legal Assistance Centre.

NIGERIA

Uke and Another v Iro

(2002) AHRLR 155 (NgCA 2001)

Alajemba Uke and Anna Alajiofor v Albert Iro
Court of Appeal (Port Harcourt Division), 18 January 2001
Judges: Pats-Acholonu JCA, Akpiroroh JCA and Ikongbeh JCA
Previously reported: [2001] 11 NWLR 196

Equality, non-discrimination (discrimination on the grounds of sex, 7–11)

Pats-Acholonu JCA

[**1.**] This is an appeal from the Customary Court of Appeal of Imo state which sat on appeal on a judgment of the Customary Court at Okigwe.

[**2.**] The respondent as plaintiff has sued the appellants in the Customary Court below over a piece of land on Ikponkwo land which, he stated, he inherited from his father who had farmed on it, and had planted trees for economic benefit on it without any objection. He stated that the defendants/appellants are his neighbours, sharing his boundary as do others. He has complained that the defendants had recently laid claim to a part of that land, hence this action in court. He said that his father had been unable to institute the action over this land because of ill health. He denied that the land case had been settled. He was supported in his evidence by his father who also testified that his own father had farmed on the land and had lived to the age of 100 years before he had died. PW2, the father of the plaintiff, said that the land in dispute was his share of his father's land. It was also in evidence that the land on which the defendants/appellants were living was given to them by one Okorie Obioha, a kinsman of the plaintiff/respondent. This was corroborated by PW4 Nwafor Nwanjo.

[**3.**] The defendant's case is that the land belongs to Alajemba Uke himself, on the grounds that some seven men from his family had lived and died in that land. During the cross-examination he stated that the plaintiff had once taken them to the Igwekala Juju over this land and had been warned to stay away from the land. In regard to the plaintiff's claim to have planted palm and cashew trees on that land, that Court had asked why then he had cut them. He had answered that he had merely pruned them. The defendant's evidence of ownership and how the land had devolved to

him was corroborated by the second defendant, who stated that the land had been given to the first defendant and one Okereke by Obioha in her presence. However, they had had to throw his son Okori out because he had brought the plaintiff onto that land. DW3 Mgbememe Duru, said that he was a neighbour to the second defendant. His evidence did not ever refer to the first defendant who claimed that the land was his.

[**4.**] The Court had visited the *locus in quo* and had come to the conclusion that the stream referred to in the evidence had looked like the natural boundary between the two warring parties of Ubaha and Akawa. After reviewing the evidence of the parties, the Court had given judgment to the plaintiff. The defendants had appealed to the Customary Court of Appeal. The Customary Court of Appeal diligently examined the evidence of the proceedings in the Court below and carefully took account of all the issues. After the appraisal and evaluation of the judgment, the Customary Court eventually came to the following conclusion:

> I have not seen any evidence on record of the proceedings before me of ownership by the defendants/appellants to oust the possessory title of the family of the plaintiff. It is not the function of the appellate court to disturb the findings of fact of the trial (court) unless such findings are shown to be unreasonable or perverse and not a result of proper exercise of judicial discretion.

It confirmed the judgment of the court of the first instance.

[**5.**] Aggrieved by the judgment, the defendants appealed to this Court by filing four grounds of appeal from which they, inelegantly and I must add too, astonishingly, framed 14 issues for determination. The respondent framed three issues for determination and they are as follows:

> 1. Whether there is enough evidence given by the plaintiff to justify the finding of the Customary Court Okigwe and supported by Customary Court of Appeal Owerri Imo State.
> 2. Whether the defendant was misled or prejudiced by the fact that plaintiff/respondent sued for a piece and parcel of land called Ikpa Nkwo which is situated in an area called Ikpa Nkwo Chukwu Nneato, the cradle of Nneato.
> 3. Whether a woman, married or a widow, can be sued for a trespass committed by the woman.

[**6.**] I must confess quite candidly that it is patently difficult to make head or tail of the appellant's case. There is utter confusion. The three qualities or characteristics of issues contained in a brief are clarity, brevity and precision.

[**7.**] It is quite obvious that the learned counsel for the appellant does not quite appreciate or know how to frame issues. I have therefore had to go thorough the maze or labyrinth of the confusion-laden issue and brief to know what the appellants are talking about. They argue that, by Nneato Nnewi custom, a woman cannot give evidence in relation to title to land. This assertion or argument is oblivious of the constitutional provision which guarantees equal rights and protection under the law. The rights

of all sexes are protected under the organic law of the land. I refer to section 39(1) of the 1979 Nigerian Constitution which states as follows:

> 39(1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not by reason only that he is such a person (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion, or political opinions are not made subject; or (b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion, or political opinions.
> (2) No citizen of Nigeria shall subjected to any disability or deprivation merely by reason of the circumstances of his birth.

[**8.**] This same provision is now repeated in section 41(1) of the 1999 Constitution. Any customary law which flies against decency and is not consonant with notions, beliefs or practice of what is acceptable in a court where the rule of law is the order of the day should not find its way in our jurisprudence and should be disregarded, discarded and dismissed as amounting to nothing.

[**9.**] Any laws or custom that seeks to relegate women to the status of second-class citizens, thus depriving them of their invaluable and constitutionally guaranteed rights, are laws and customs fit for the garbage and consigned to history.

[**10.**] Let us consider the case of *Mojekwu v Mojekwu* (1997) 7 NWLR (Pt 512) 283. In that case one of the issues before the Enugu Division of the Court of Appeal was the incidence of the 'Oli-Ekpe' custom of Nnewi by which a surviving brother of a deceased is by custom allowed to inherit property of the late deceased brother because the surviving wife has no son. Niki Tobi, JCA had this to say:

> We need not to travel all the way to Beijing to know that some of our customs including the Nnewi 'Oli Ekpe customs' relied upon by the appellant are not consistent with our civilised world in which we all live today, including the appellant. In my humble view, it is the monopoly of God to determine the sex of a baby and not the parents. Although the scientific world disagrees with this divine truth, I believe that God, the creator of human beings, is also the final authority on who should be male and female. Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the 'Oli-Ekpe' custom of Nnewi, is repugnant to natural justice, equity and good conscience.

[**11.**] It is an apostacy to say that a woman cannot be sued or cannot be called to give evidence in relation to land subject to customary rights of occupancy. I reject that argument in its entirety. A custom which strives to deprive a woman of constitutionally guaranteed rights is otiose and offends the provisions that guarantee equal protection under the law. It

seems that the appellant has really nothing to add in that area. It is no issue at all. It offends all decent norms as applicable in a civilised society.

[**12.**] The real issue in this case is whose story attracted more credence in the lower courts. A careful appraisal by the Customary Court of Appeal of the judgment and the proceedings of the lower Court impressed upon it that there was nothing that could change the 'verdict' of the Customary Court in its findings. Let me here recapitulate the judgment of the Court of first instance:

> The present boundary of the both Akawa and Ubaha is open and both parties accepted this fact in court and at the locus. The first defendant mentioned Miri-Nnimaka as another boundary but the court did not see Nmiri Nnimaka. The court only stopped at Nkwo Chukwu Nneato. Under normal Igbo custom and in relation to land, women do not trace community or kindred land boundaries as long as there are yet men in that family. If Alajemba is old, there are yet able bodied adults and custodians of their father's Ofo who would have done that. His claims and counter-claims of almost every corner of Nkwo Chukwu is doubtful. Although she later accepted the original boundary, second defendant had denied in court that she had no male issues but she has adult male children who would have let (*sic*) the court. We also accept that the plaintiff had occupied the land for more than a century and according to custom. It was inherited from their great grandfathers and cannot now be snatched away from them. Okori Obioha, the major actor in this case, traced ownership up to his third grandfather at his present age of over seventy years old. The blood ties that bound Alajemba Uke and Alajiofor Okereke ha[ve] nothing to do with the plaintiff's claim of title; evidence before the court did not include the sale or pledge of land to Obioha Okori and his relations of Awo Ubaha. In the instant case, as hammered by the defendants, the transaction, it is believable was not a pledge but a gift carried out for more than one century ago. Legally and in the other way round, according to [the] present-day tenure system in Nigeria, Land Use Decrees section 36, sub-sections 3, 4, 5 and 6, the plaintiff is the owner of the land.

[**13.**] The appellant's case was based on an alleged gift of land, while the respondent based his case on devolution of title dating back even to his grandfather. Even the evidence of his star witness was in disarray in that in one breath she gave the impression that the land belonged to her and Alajemba, and in another breath she said that the land was solely that of the first appellant. Her evidence occasionally gave the impression that the land belonged to Alajemba and Okereke as well. Her testimony is a tissue of confusion. I shall illustrate this:

> After his death, both sides continued to farm there and my husband even planted some palm trees there. There are many widows in that compound but I sued because the land belongs to my husband. We have not shared it because we use it in common.

Later she said: 'They saw that Alajemba (first respondent) is alone in the family and then moved in force to take it away from him.' Importantly she said: 'Whatsoever I will say in court would be as I heard from my late husband.'

[**14.**] However, it turns out that the evidence she proffered wears the garb of the testimony of a parrot. Her evidence lacked depth and substance which explains why the lower courts disregarded its weight and substance. Even if she could have given hearsay evidence, the confusion latent in her testimony renders it valueless. The appellants submit that the lower Court rejected admissible evidence of their witnesses. A proper evaluation of these testimonies as indicated shows that the respondent had a better mastery of the history of the land than the appellants and this was the finding of the Court of the first instance which was confirmed by the lower appellate Court. The appellants have sought to make a big issue of the fact that PW4 called the land Nkwo Chukwu Nneato, while the respondent called it Ikpa Nkwo. In fact all three witnesses for the respondent called it Ikpa Nkwo. This obvious discrepancy does not go to the essence of the case because it is not in issue that the parties do not know the identity of the land in question. The way I see this case is that the respondent made out a better case than the appellants in the first Court and obviously in the lower appellate Court.

[**15.**] In my view, there is no merit in the appeal. It is therefore dismissed with costs assessed at N4000.00.

* * *

Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo

(2002) AHRLR 159 (NgSC 2001)

Medical and Dental Practitioners Disciplinary Tribunal v Dr John Emewulu Nicholas Okonkwo
Supreme Court, 2 March 2001
Judges: Belgore JSC, Onu JSC, Achike JSC, Uwaifo JSC and Ayoola JSC
Previously reported: [2001] WRN 1
Extract: Leading judgment of Ayoula JSC, Full text of judgment on www.chr.up.ac.za

Conscience (religious objection to medical treatment, 73–76)
Health (religious objection to medical treatment, 73–76; responsibility of medical doctor, 78-81)

Emmanuel Olayinka Ayoola JSC

[**1.**] Of the several issues raised by this appeal the central issue is whether a medical practitioner is guilty of infamous conduct when, in deference to the patient's religious objection to blood transfusion, he failed either to adopt such course of treatment; terminate his medical contract; or refer the patient to another health institution or another medical doctor.

[**2.**] The facts which led to this question are largely undisputed and can be briefly stated. Mrs Martha Okorie (the patient) and her husband belonged to a religious sect known as Jehovah's Witnesses who believe that blood transfusion is contrary to God's injunction. They take their stand from the scriptures. In Leviticus 17: 10–11 God said:

> And I will turn my face against anyone, whether an Israelite or a foreigner living among you, who eats blood in any form. I will excommunicate him from his people. For the life of the flesh is in the blood, and I have given you the blood to sprinkle upon the altar as an atonement for your souls; it is the blood that makes atonement because it is the life.

[**3.**] They believe that the prohibition was passed to the 'Gentiles', that is non-Jews, in Acts 5:29 where it is stated that 'ye abstain from meats offered to idols, and from blood, and from things strangled, and from sexual immorality'. They believe that blood transfusion is 'eating' of blood.

[**4.**] Mrs Okorie, a 29-year-old woman, having had a delivery at a maternity hospital on 29 July 1991, was admitted as a patient at Kenayo Specialist Hospital for a period of nine days from 8 August to 17 August 1991. She had complained of difficulty in walking and severe pain in the pubic area. At Kenayo Hospital the diagnosis disclosed a severe ailment and a day after her admission blood transfusion was recommended. The patient and her husband refused to give their consent to blood transfusion. Dr Okafor, for the hospital, consequently discharged the patient, giving her a document in the following terms.

> To whom it may concern: Re: Martha Okorie. The patient and her husband strongly refused blood transfusion despite appeals, explanations and even threats that she may die. The husband rather asked for his wife to be discharged and he took her away on 17/8/91.

[**5.**] Upon her discharge from Kenayo Hospital she was taken to Jeno Hospital by her husband on 17 August 1991. There he produced to Dr Okonkwo (the respondent) a card signed by the patient titled 'Medical directive/release' which reads as follows:

> I Martha K Okorie, direct that no blood transfusions be given me, even though physicians deem such vital to my health or my life. I accept non-blood expanders, such as Dextran, saline of Ringer's solution, hetastarch. I am 29 years old and execute this document of my own initiative. It accords with my rights as a patient and my beliefs as one of Jehovah's witnesses. The bible commands: 'keep abstaining from blood' (Acts 15:28,29).
>
> This is, and has been, my religious stand for 6 years. I direct that I be given no blood transfusions. I accept any added risk this may bring. I release doctors, anaesthesiologists, hospitals and their personnel from responsibility for any untoward results caused by my refusal, despite their competent care. In the event that I lose consciousness, I authorize witness below to see that my decision is held.
>
> Sgd Martha Okorie Date: 23/2/91
> Witness Sgd Loveday C Okorie — husband
> Witness Sgd Ukwuoma CA — uncle
> Printed in Nigeria.

[**6.**] In another document signed by the patient's husband, dated 17 August 1991 and titled 'Release from liability', the patient's husband stated as follows:

> To Jeno Hospital, and the medical and nursing personnel having anything to do with the case of Mrs Martha Okorie (my wife). You are hereby notified and instructed that I do not wish any transfusion of whole blood, blood plasma, packed cells blood fractions or blood derivatives to be used in the treatment of this patient. I regard the transfusion of blood and blood products as unnecessarily dangerous treatment producing too many bad effects to justify the risk. It is also contrary to my faith as one of Jehovah's Witnesses. I recognise and understand that the attendant physicians have advised that they are of [the] opinion that blood transfusion is necessary perhaps [to] save the life of the patient. I do not share their opinion and adhere to the instructions given in this notice. This restriction leaves open the use by transfusion or otherwise of Ringer's lactate solution, glucose or other volume expanders not derived from blood. This matter has been carefully considered by me and my instructions are not going to change because I or the above named patient is unconscious. The hospital, the medical and nursing personnel caring for the above patient are hereby released from responsibility and liability of any and all untoward effects which flow from the decision not to accept the treatment prohibited in this release. Dated this 17th day of August, 1991.
>
> Sgd Loveday Okorie (husband)
>
> Patient, Parent or Guardian.

[**7.**] The respondent proceeded to treat the patient without transfusing blood. However, the patient died on 22 August 1991.

The charge

[**8.**] The respondent was charged before the Medical and Dental Practitioners Disciplinary Tribunal (the tribunal) in 1993 in two counts. In the first count he was charged with attending to the patient in a negligent manner and thereby conducting himself infamously in a professional respect contrary to 'medical ethics' and punishable under section 16 of the Medical and Dental Practitioners Act (the Act). In the second count he was charged with acting contrary to his oath as a medical practitioner and thereby conducting himself infamously in a professional respect contrary to the same section of the Act.

The allegations in the first count were that:

> (a) [A]lthough it was clear from the referral letter from Kenayo specialist hospital, Onitsha, where the patient had been previously admitted, that the patient was severely anaemic, which said diagnosis you confirmed upon the patient being admitted in your hospital, you nevertheless made no plans and in fact failed to transfuse blood to the patient until she died on 22/8/91;
>
> (b) [A]lthough you claimed inhibition for your failure to apply an obviously correct treatment to the patient, you failed to transfer the patient to a bigger centre where such inhibition would not operate to the patient's disadvantage.

[**9.**] In regard to the second count the allegations were that he allowed

religious consideration to influence his treatment of the patient in the following circumstances:

> (a) [I]t was clear that only blood transfusion could possibly save the patient's life, but
> (b) [B]ecause of your religious belief against blood transfusion as a Jehovah's Witness yourself, you readily agreed with the patient's husband not to transfuse blood, even when the patient's relations pleaded with you to the contrary.

The trial

[**10.**] The respondent pleaded not guilty to the charge. At the trial, witnesses who gave evidence for the prosecution were an officer of the Medical and Dental Council (the council), who tendered certain documents, the uncle of the patient, and the mother of the patient. Apparently, the last two were the persons who lodged a complaint against the respondent. The respondent, who gave evidence in his own defence, testified that the patient and her husband objected to blood transfusion and persisted in their objection even after he had made them to understand the gravity of their decision. It was at that stage that the patient's husband signed the document (exhibit G) releasing him and his hospital from liability. He gave the following evidence concerning his willingness to transfer the patient to another hospital:

> I then invited the husband to my office and made it clear to him that I am not used to trouble and that I think the best thing I was going to do was to move them over to the Teaching Hospital, so as to wash my hand off the trouble. And the husband said to me that he was no more prepared to go to anywhere and that he had confidence that whatever my best comes to he would take it.

[**11.**] Under cross-examination he said that had the patient consented to a blood transfusion he would have arranged for it. He gave evidence that he was not influenced by any consideration other than the patient's refusal to give consent for a blood transfusion in his failure to provide a blood transfusion. He said that he had obeyed the request of the patient's husband not to transfer the patient despite his offering them a transfer. The patient's husband, Loveday Okorie, the only other witness for the defence, corroborated the evidence of the defendant in material particulars, particularly in regard to the refusal of the patient and himself to consent to a blood transfusion even after being warned by the defendant of the possible consequence of their decision.

The judgment of the tribunal

[**12.**] The tribunal proceeded on the basis that the respondent was 'being charged with medical negligence arising from the fact that he failed to administer a life-saving measure to his patient'. The life-saving measure, the tribunal stated, was 'a simple blood transfusion'. What the tribunal regarded as the main issue in the case was what course of action should a doctor take who had been denied informed consent to carry out a medical life-saving measure?

[**13.**] The tribunal referred to a 'published code of ethics' (code) and stated that the code enjoined a doctor 'not to allow anything, including religion to intervene between him and his patient and that he must always take measures that lead to the preservation of life'. Still claiming to rely on the code, the tribunal went on to say:

> When therefore he is faced with a dilemma arising from the refusal to grant informed consent our Code of Ethics prescribes that a doctor faced with such dilemma has 2 options: (a) he can terminate his medical contract or; (b) refer him or her to another institution where necessary measures for the preservation of life may be taken.

[**14.**] Having thus set out the basis on which it would proceed, the tribunal made the critical finding that the respondent colluded with the patient to deny life on religious grounds. Being of the opinion that the consideration which influenced the respondent's treatment of the patient was the respondent's religious belief, the tribunal went on to hold:

> We found therefore that although a doctor as well as anybody else may hold to his religious beliefs he must not allow those religious beliefs to lead ultimately to the loss of life. A blood transfusion does not guarantee life, but it is held by the whole profession that it can be a life-saving measure in certain circumstances, as in this case. For a doctor to collude with those who will deny this life-saving measure on grounds of religion is unethical to the medical profession. In the event the doctor waited and watched over the patient until she died 4 days later. That is, without giving other doctors and other health institutions an opportunity to obtain the consent and administer the correct treatment.

[**15.**] The tribunal concluded its judgment by holding that the respondent was not criticised for holding 'this religious belief' or for respecting the religious belief of others, but for holding onto the patient knowing full well that the correct treatment could not be given in the face of failure to obtain consent. The tribunal found the respondent guilty 'on the 3 counts', and suspended him for a period of six months 'on each of the charges' to run concurrently.

The appeal to the Court of Appeal

[**16.**] The respondent appealed to the Court of Appeal. In that Court three main questions arose, namely: (1) whether the allegations in the charge amounted to criminal offences so as to take them out of the jurisdiction of the tribunal; (2) whether failing to allege in the charge that the conduct of the respondent constituted a breach of the rules of professional conduct affected the validity of the charge; (3) whether the tribunal should have found the respondent guilty when it had itself found that the patient and her husband refused to give consent to blood transfusion. The Court of Appeal (Oguntade, Aderemi and Nzeako JJCA) held that the charge as laid in the first count connoted that the inaction on the part of the respondent amounted to negligence leading to the death of the patient and was an allegation of a criminal offence. In the result it held that the tribunal had no jurisdiction to try the allegations in the first count and that its decision

was for that reason null and void. In regard to the second count, being of the view that no criminal offence was charged in that count, the Court of Appeal held that the tribunal had jurisdiction to try the count.

[**17.**] In regard to the second issue the Court below held that the failure to charge the respondent with the violation of any of the rules made pursuant to section 1(2)(c) of the Act was fatal to the charge. Nzeako, JCA, who delivered the leading judgment of the Court of Appeal reasoned, rightly, that a party who is brought to court is entitled to know the claim or the charge which he is called upon to answer. But she went further to hold that since the charge did not allege contravention of any particular code of ethics and the code did not prescribe what a doctor should do when faced with a dilemma arising from the refusal by the patient of informed consent, the respondent did not have a fair hearing.

[**18.**] Although on the basis of the determination of the second issue the Court below set aside the decision of the tribunal in its entirety, it took a wise and helpful course in considering the third issue as well. On that issue it was of the view that when the tribunal decided that the respondent was guilty because he held onto the patient knowing full well that the correct treatment could not be given in the face of failure to obtain consent, it deviated from the charge. In the opinion of the Court below the real question was whether a medical practitioner should proceed to administer the medical measure refused by the patient, without the patient's informed consent. It was of the view that the combined effect of section 35 and section 36(1) of the 1979 Constitution, dealing with freedom of conscience and freedom of expression respectively, was that an adult of sound mind has a right to choose what medical treatment made available to him he could accept or refuse. The Court below criticised the code of ethics for failing 'to pin down on the conflict between the right of a patient to decide on what medical measures to agree to and the doctor's code of ethics'. To support its conclusion it cited the Canadian case of *Malette v Shulma* 47 DLR (4th ed) 18a and the English case of *Didaway v Board of Governor Bethlehem Royal Hospital* [1985] 1 AC 871.

[**19.**] The Court of Appeal, having resolved all the issues substantially in favour of the defendant, allowed the respondent's appeal and set aside the decision of the tribunal. The tribunal appealed to this Court.

This appeal

Preliminary objection

[**20.**] The tribunal raised eight grounds of appeal by its notice of appeal dated 12 July 1999. From these grounds of appeal six for determination were formulated by counsel for the tribunal. These are contained in the appellant's brief of argument filed on 29 December 1999. The respondent's counsel, for his part, formulated five issues for determination, distilled also from all the eight grounds of appeal. They are contained in the respondent's brief of argument filed on 11 February 2000.

[**21.**] Notwithstanding that counsel for the respondent had, in the respondent's brief, argued all the issues formulated as arising from the eight grounds of appeal, the defendant, by the notice of preliminary objection filed on 14 November 2000 by his counsel, objected to the fifth, seventh and eighth grounds of appeal on the ground that they did not involve questions of law alone and that requisite leave to appeal had not been obtained. Ground six was objected to on the ground that it was vague and its purport was unclear.

[**22.**] Without stating the particulars the grounds of appeal to which objection have been taken are as follows:

> (5) The Court of Appeal erred in law when it held that for a charge against an erring medical practitioner to be valid it must state clearly the particular code of ethics that has been violated.
>
> (6) The Court of Appeal misconceived the decision of the tribunal in relation to the charge and thereby came to a wrong conclusion when the Court of Appeal stated as follows:
>
> > The point being made by the appellant, not therefore answered by the respondents, is simply that the tribunal found that blood transfusion was not done because the patient and her husband had denied informed consent. They should therefore not have found the appellant liable in counts 1(a) and count 2, charging him with making no plans to transfuse blood and not transfusing blood. For it was the tribunal that stated as follows: 'We criticised the defendant doctor not for holding this religious belief But for holding onto the patient knowing fully (sic) well that the correct treatment cannot be given in the face of failure to obtain consent.' The statement by the tribunal has clearly jettisoned the charge or blame of failure to transfuse blood or failure to make plans to transfuse blood as set out in the charge. The tribunal has replaced it with a new blame, viz: that the appellant failed to take certain actions which he ought to [have], when 'he was faced with a dilemma arising from the refusal to grant informed consent', and that he held 'onto the patient knowing full (sic) well that the correct treatment cannot be given in the face of failure to obtain consent'.
>
> (7) The Court of Appeal failed to appreciate the submission in the respondent's brief of argument, and thereby came to a wrong conclusion when the court stated:
>
> > For the respondent, it was submitted that the appellant's excuse that he was denied informed consent to transfuse blood by both the patient and her husband was an after-thought (see page 8 of the written brief) That submission for the respondent as to 'after-thought' does not answer the serious question raised in issue no 3, arising from the decision (for) [of] the tribunal which had indeed found that the appellant did not transfer (sic) blood because of the refusal of the patient and her relations to give consent
>
> (8) The Court of Appeal misconceived the issue before the court when it held as follows:
>
> > Be that as it may, in view of the decision of the Tribunal, it has not been considered worthwhile in considering this appeal to go into the details of the evidence relating to failure to transfuse blood, who was responsible for the failure to transfuse blood, etc as the respondent's counsel was doing.
> >
> > Rather, the legal issue which seems very important and requiring some attention is the medical and legal status of informed consent of a patient

> vis-à-vis the professional duty of the medical practitioner, in the face of studied refusal by a patient and/or his guardian and next-of kin, as the case may be. Should the medical practitioner proceed to administer the medical measure refused without that consent?

[**23.**] In regard to grounds 5, 6, 7 and 8 the issues formulated by counsel for the respondent were respectively as follows:

> Issue 2: Whether the Court of Appeal was right in holding that the tribunal lacked jurisdiction to try the respondent for offences not known to the rules of professional conduct for Medical and Dental Practitioners in Nigeria.
>
> Issue 3: Whether the Court of Appeal was right in holding that the tribunal replaced the counts 1 (a) and 2 of the charge with a new blame.
>
> Issue 4: Whether the Court of Appeal was right in rejecting the submission in the respondent's brief (appellant in the court below) as an 'after thought'
>
> Issue 5: Whether the Court of Appeal was right to hold that the issue in the instant case is the legal status of informed consent of a patient vis-à-vis the professional duty of the medical practitioner in the face of studied refusal of a patient and/or his next of kin as the case may be

[**24.**] Section 233(2)(a) of the 1999 Constitution is clear in its provisions that:

> An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in the following cases: (a) Where the ground of appeal involves questions of law alone, (from) decision in any civil or criminal proceedings before the Court of Appeal.

The important consideration in the determination of the nature of a ground of appeal is not the form of the ground but the question it raises. A ground of appeal involves a question of law alone when the complaint of the appellant in that ground can be dealt with without resort to determination of any question of fact, that is to say, when the facts are agreed or admitted, or when determination of the ground is not dependent on any facts to be proved. It is not wise to attempt a list of instances in which a ground involves a question of law alone.

[**25.**] It suffices to say that there is now a growing list of authorities affording guidance to the determination of the nature of a ground of appeal. The most often cited is *Ogbechie & Ors v Onochie & Ors* [1986] vol 7 NSCC 443 [no 1]. However, in each case in which an objection such as in this case is raised to the ground of appeal the Court still has to examine the ground and determine its nature. Recently, objection was raised to grounds which raised questions that are broadly similar to the questions raised by the grounds objected to in this appeal in the case of *Shanu & Anor v Afribank (Nigeria) Ltd* [2000] 13 NWLR (Pt 684) 392. In that case this Court held thus:

> Where the ground of appeal complains that the tribunal has failed to fulfil an obligation cast on it by law in the process of coming to a decision in the case, such a ground would involve a question of law, namely: whether or not there is such an obligation or whether what the tribunal did amounted to an infraction

of such obligation, provided that all the facts needed are there on the record and are beyond controversy.

[**26.**] In the present case it is evident that ground 5 raises a question of law alone. Whether a charge is deficient in its contents or not involves a question of law alone. In regard to grounds 6, 7 and 8 no question of fact is to be resolved in order to determine whether an appellate tribunal misconceived the decision of a lower one or whether a tribunal failed to appreciate the submission of counsel. What is involved in the determination of such question is an interpretation of the judgment under review in the light of the issues in the case or of the submissions alleged to have been misconceived.

[**27.**] When a party objects to a ground of appeal on the ground that it raises a question of fact or mixed fact and law and that requisite leave has not been obtained, the court will determine the question on a reasonable understanding of the nature of the ground of appeal and not on what the party raising the object may have misconceived to be the question involved in the ground. In the present case, it is clear that the respondent's counsel's understanding of the grounds of appeal objected to, as portrayed in the notice of preliminary objection, does not represent the true purport of the grounds of appeal. Having regard to the issues formulated by the counsel himself in the respondent's brief, which are all issues of law, the inescapable conclusion is that the preliminary objection is utterly disingenuous.

[**28.**] Before I part with the aspect of the appeal, it is expedient to note that learned counsel for the tribunal was absent at the hearing of the preliminary objection and could therefore not proffer oral argument thereon. However, later, he forwarded a written brief on the objection. It was not necessary to consider the written brief for the purpose of dealing with the preliminary objection since the objection is completely without substance. The preliminary objection is overruled.

The issues for determination

[**29.**] Although six issues for determination were formulated by counsel for the tribunal and five issues by the counsel for the defendant, the main issues that arise in this appeal are three, namely: (i) whether the tribunal had no jurisdiction to try count 1 because it disclosed allegation of criminal offences; (ii) whether in regard to both counts the proceedings are a nullity in that particulars of code of ethics that the respondent was alleged to have infringed were not disclosed in the charge; and (iii) whether there was a failure to understand the charge itself by the tribunal and, the issue tried by the tribunal by the Court below.

Did the tribunal have jurisdiction?

[**30.**] The Court below held that the tribunal had no jurisdiction to try the offence charged in count 1 because, as stated in the leading judgment

delivered by Nzeako, JCA, the defendant was charged with criminal negligence in count 1. In her view, the charge connoted that the inaction on the part of the appellant amounted to negligence that led to the death of the patient. The offence disclosed in count 1 the Court below held was an offence under section 303 of the Criminal Code, punishable under section 304(5), or an offence under section 343(1)(e).

[**31.**] Realising that there was no allegation in count 1 that the respondent either by act or by omission caused the death of the deceased, the Court below, per Nzeako, JCA, held that 'the inference can be drawn that is the imputation'. The learned justice said:

> Where however a charge and evidence impute that the negligence by way of omission to act, or not acting correctly led to the death of the patient, this implies negligence which may be charged under section 303 of the Criminal Code and 343(1)(e).

[**32.**] Relying on *Denloye v Medical and Dental Practitioner Disciplinary Committee* [1968] 1 ALL NLR 306, the Court below held that the tribunal was wrong to have proceeded to try offences punishable under the Code. In *Denloye*'s case the defendant was tried by a tribunal on five counts of infamous conduct. In the first he was alleged to have neglected a patient who was seriously ill and for whose treatment he was responsible, while several criminal offences covered by section 82 and 89 of the Criminal Code were charged in the remaining four counts. He was found guilty and his name ordered to be removed from the medical register. On his appeal to the Supreme Court it was argued by his counsel, relying on section 22(2) of the 1963 Constitution, that it was not competent for the tribunal to try an offence chargeable under the Criminal Code. This Court held that the allegation in the first count was not of such an offence. However, in regard to the other counts which it found to have charged offences covered by the Criminal Code, it held that the tribunal had no jurisdiction to try them. Its decision was not based on section 22(2) of the 1963 Constitution but on what it considered to be intendment of the Act. Ademola, CJN, delivered the judgment of the Court and said:

> Under the English Medical Act 1956, charges of this nature which are covered by the criminal law are not dealt with under the Act in the first instance, but are left to the courts. After convictions have been obtained in the courts, disciplinary actions would follow. We have no doubt in our minds that this is the intention in this country as well. [At 264.]

At 265 he said:

> In effect *where the unprofessional conduct of the practitioner amounts to a crime, it is matter for the courts to deal with*; and once the court has found a practitioner guilty of an offence, if it comes within the type of cases referred to in section 13(1) (b), then the Tribunal may proceed to deal with him under the Act (Italics supplied).

[**33.**] In *Sokefun v Akinyemi & 3 Ors* [1980] 5–7 SC 1 and *Garba & Ors v University of Maiduguri* [1986] 1 NSCC 245 substantially the same conclusions were arrived at, albeit, by a slightly different route. This Court decided in those cases the broad question of the jurisdiction of an administrative disciplinary tribunal to try allegations of a criminal nature on the basis of the exclusive judicial powers vested in the courts or tribunals established by law as provided in section 6(1)(2), and section 33(1) and (4) of the 1979 Constitution.

[**34.**] Constitutional provisions apart, it is clear that the tribunal with which the present case is concerned is set up to try specified offences under the Act. It has no jurisdiction to try criminal offences at large. The function of the tribunal, established under section 15 of the Act, is to consider and determine any case referred to it by the panel established under subsection 3 of section 15 and any other case of which the tribunal has cognisance under the Act. The function of the Medical and Dental Practitioners Investigation Panel, so far as is relevant to this case, is to conduct preliminary investigation into any case where it is alleged that a registered person has misbehaved in his capacity as a medical practitioner, or should for any other reason be the subject of proceedings before the tribunal. Section 16(1) contains provisions for award of disciplinary measure after conviction of the practitioner for a criminal offence. Where infamous conduct cannot be established without proving facts that would amount to an offence covered by the Criminal Code the tribunal should yield to the criminal courts established for the trial of such offence. To hold otherwise may lead to a conflict of verdicts, where a tribunal had first tried the matter and found the practitioner not guilty of infamous conduct, while on the same set of facts a criminal court finds him guilty of a criminal offence and convicts him; or vice versa. That may lead to the incongruous situation of the tribunal having to revisit the matter and act pursuant to section 16 in case of a conviction by the criminal court. Where the criminal court acquits a practitioner who has been found guilty by the tribunal and penalised, some complications may arise.

[**35.**] The recent English case of *Law Society v Gilbert, The Times* 12 January 2001, affords a comparison in approach. In that case a solicitor who had admitted conduct unbefitting a solicitor before a disciplinary tribunal and has been suspended from practice for three years, was subsequently convicted of offences of dishonesty on the basis essentially of the same facts. The Law Society then brought a second set of disciplinary proceedings based on that conviction. It was held by the English Queen's Bench Divisional Court that the second set of disciplinary proceedings was not an abuse of process. As reported, Lord Justice Woolf, CJ, said:

> Disciplinary proceedings brought by the Law Society in relation to its members were brought primarily not with the intention of imposing punishment on the solicitor in question, but with the important purpose of maintaining the standards of the profession. The important feature of the present case was that when the first Tribunal considered the matter, it did not know that Mr Gilbert

> would subsequently be convicted. That was not a matter which was before the first tribunal. It would have been open to the Law Society to await the outcome to any criminal proceedings before commencing the first set of disciplinary proceedings. However, such a course had disadvantages. The Law Society would have had to defer for maybe a substantial period before the bringing of disciplinary proceedings. That could have meant that the public was put to risk.

[**36.**] Notwithstanding the case of *Law Society v Gilbert* to which reference has just been made merely for the purpose of comparison of approach, our law stands as decided in *Denloye*'s case. However, it may well be worthwhile to consider, should an appropriate occasion arise, how best to deal with the problems that may arise from the inability of the disciplinary body to enforce discipline with the necessary dispatch in the face of the slowness of our criminal justice system. Be that as it may, the tribunal would have had no jurisdiction to try count 1 if that count had charged a criminal offence covered by the Criminal Code.

Was the charge of an offence covered by the Criminal Code?

[**37.**] Having agreed with the Court below that the tribunal has no jurisdiction to try offences covered by the Criminal Code, the question that arises is whether count 1 charge is such an offence. It is evident from the judgment of the Court below that it is only by a process of reasoning by implication that it was able to hold that such an offence was charged. Several passages from the leading judgment delivered by Nzeako, JCA, show this. Some of the passages are as follows:

> There can be no doubt that this court charges the accused of negligence. What is the degree of negligence can be read from the particulars and that is what determined whether it be criminal negligence, or not.
>
> The use of the word 'negligent' in the charge may sound general in nature but when read with the particulars, it seems to lead to an inference that the failure of the appellant to transfuse blood or to transfer the patient to a bigger hospital operated to the patient's disadvantage. What disadvantage? The answer is that it led to death. In other words, the charge as laid connotes that the in-action on the part of the appellant amounting to negligence led to the death of Martha Okorie.

In another passage the Court below said:

> Although it is not implicitly (sic) stated that the omission was the cause of the death of the patient, the inference can be drawn that is the imputation.

Finally, after considering the materials which the tribunal considered to reach its conclusion in the matter, the learned justice said:

> In my view, all the foregoing point to the nature of the charge of negligence influenced by the appellant's religious faith resulting in the death of Martha.

She also emphatically stated thus:

> It is not entirely correct, as submitted by learned respondent's counsel in his brief, that the appellant 'was not charged with killing or causing the death of the

> patient, but for attending to her in a negligent manner'. He is by *implication* charged with causing her death (italics supplied).

[**38.**] Having made pronouncements as above, the learned justice of the Court of Appeal concluded that section 303 of the Criminal Code 'encompassed the charge' and that the offence was punishable under section 304(5). She said the same charge could be made under section 343(1)(e).

[**39.**] Section 303 of the Criminal Code provides as follows:

> It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person to have reasonable skill and to use reasonable care in doing such act; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty.

[**40.**] Section 303 states the duty of persons doing a dangerous act such as administering surgical and medical treatment and their responsibility for the consequences that may result to the life or health of any person by reason of any omission to observe or perform that duty. The section does not by itself create an offence but creates a duty where it would have been doubtful whether or not one existed in criminal law. It establishes liability for consequences of the breach of that duty. In circumstances where it is applicable it makes negligence the basis of criminal liability for offences against the person (excluding murder) where the need to establish intention, knowledge and such mental elements as the basis of liability would have been required.

[**41.**] The Court below seemed to have realised that the section does not by itself create an offence when it tried to invoke section 305A(4) as the punishment section. In doing this the Court below erred because section 305A(4) is applicable only to 'an offence against any of the provision[s] of this section', that is section 305A.

[**42.**] Section 303 does not dispense with the need to allege in a charge the causal connection between an alleged breach of duty of reasonable skill and care and its consequence, nor does it dispense with the need to charge a specific offence.

[**43.**] Section 343(1)(e) of the Criminal Code provides that:

> (1) Any person who in a manner so rash or negligent as to endanger life or to be likely to cause harm to any person . . . (e) gives medical or surgical treatment to any person whom he has undertaken to treat; is guilty of a misdemeanor and is liable to imprisonment for one year.

[**44.**] In a charge under section 343(1)(e) the prosecution must allege that the offender (1) gave medical (or surgical) treatment to a person whom he has undertaken to treat; (2) that he did so in a manner so rash and negligent; (3) as to endanger life or to be likely to cause harm. Rashness and negligence in this instance connote a disregard for life and safety of the person treated. The manner of treatment itself must be the likely cause of danger to life or harm to the person treated. It is not part of our system

of criminal justice that the contents of a charge should be the subject of speculation and inference. The law is clear beyond peradventure that the essential elements of the offence should be disclosed in the charge. Section 33(6) of the 1979 Constitution provided, and now section 36(6) of the 1999 Constitution provides, that every person charged with a criminal offence is entitled, among other things, to be informed in detail of the nature of the offence. Where a charge before a disciplinary tribunal is, as framed, adequate for the purpose of the disciplinary proceedings and contains enough information for the purpose of such proceedings, it is not right to impute an intention in the framers of the charge to charge an offence not expressly mentioned in the charge. A simple test of the validity of the conclusion reached by the Court below on this issue, I venture to think, is whether on the charge as framed, and not as it could be, and should have been, framed, had the trial been before a criminal court, the respondent could have been found guilty of an offence under section 343 (1)(e) of the Criminal Code, whether read alone or with section 303. I am satisfied that he could not.

[**45.**] Counsel for the respondent submitted that the charge in the first count was an offence under section 343(1)(e) of the Criminal Code; murder under section 316 and manslaughter. That cannot be a right or sensible way of looking at any charge, nor of looking at one framed in consonant with the mandate of the tribunal, which was to consider a case of infamous conduct in a professional respect referred to it by the panel. The mere mention of negligence in the charge does not reasonably lead to the inference which the Court below strained to put on the charge.

[**46.**] From the foregoing it is clear that learned counsel for the tribunal was right when he submitted that count 1 of the charge did not imply and could not legally have implied any criminal offence on the part of the respondent. It is indeed difficult to see the difference in substance between the first count in this case and the first count in the case of *Denloye* (*supra*). The Court of Appeal was in error in holding that the tribunal lacked jurisdiction to try count 1 of the charge.

Should the charge have alleged a breach of the Rules of Professional Conduct?

[**47.**] The Court below held (per Nzeako, JCA) that because it was not alleged that any particular 'code of ethics' has been breached and that the rules or 'code of ethics' did not state what a medical practitioner faced with a dilemma arising from the refusal to give informed consent to a course of treatment should do, that the respondent did not have a fair hearing. For these reasons the decision of the tribunal was set aside.

[**48.**] Learned counsel for the tribunal has argued that the framers of the Act had intended to adopt the common law definition of infamous conduct as declared in *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750, 760–761 and *In Re: Idowu: A Legal Practi-*

tioner [1971] Vol 7 NSCC 147; [1971] 1 All NLR 128, 136. Furthermore, he argued that no form is prescribed for a charge under the Act.

[**49.**] For his part, learned counsel for the respondent quoted rule 9 of the Rules of Professional Conduct as follows:

> All registered doctors and dental surgeons shall in all areas of their professional conduct, practice and comportment, in professional and other relationships with patients and other persons be guided and bound by the rules contained in these codes. Any registered practitioner who, after investigation and trial during which he is given every opportunity to defend his actions and conduct, is found to have contravened these rules by the Disciplinary Tribunal of the Medical and Dental Council of Nigeria shall be guilty of professional misconduct.

[**50.**] Relying thereon he submitted that the provision of section 16(1)(a) of the Act and of the Rules must be read together and that, doing so, a charge of infamous conduct in a professional respect must allege a violation of specific provisions of the Rules.

[**51.**] The term 'infamous conduct' is wide. It is futile, in the absence of a statutory definition limiting its ambit, to restrict its meaning within the confines of a code of ethics. In *Sloan v General Medical Council* [1970] 2 All ER 686, Lord Guest, at 688, put it this way:

> There are no closed categories of infamous conduct and in every case it must be a question for the committee to decide first whether the facts alleged have been proved, and second whether the appellant was in relation to those facts guilty of infamous conduct in a professional respect.

[**52.**] A code of ethics, no doubt, sets a standard of professional conduct. An infraction of the code may amount to professional misconduct but not every infraction amounts to infamous conduct in the sense in which that term has been used in *Allinson v General Council of Medical Education and Registration*; or *In Re Idowu: A Legal Practitioner*, or as it is generally understood. In the case of *Allison* 'infamous conduct' in relation to a practitioner was described as conduct 'regarded as disgraceful or dishonourable by his professional brethren of good repute and competency'. In *Re Idowu*, this Court cited with approval the opinion expressed in the Australian case *Ex parte Medical Practitioner's Act* [1965] NSWR 30 that the expression 'infamous conduct in any professional respect' refers to conduct which, being sufficiently related to the pursuit of the profession, is such as would reasonably incur the strong reprobation of professional brethren of good repute and competence. It may well be added that in the Australian case, the Australian court went on to hold that the word 'infamous' must be understood by reference to the context of professional disapprobation and conduct may be infamous either in general estimation or merely in the special professional sense or in the professional sense accompanied by some element of moral turpitude. (See 33 *The Digest* no 2369 at page 297.)

[**53.**] In rule 9 of the Rules of Professional Conduct referred to by counsel for the respondent, an infraction of the rules was to be regarded as 'pro-

fessional misconduct', while the Act, apart from the penalty that can be imposed consequent to conviction of a registered person, provided for the penalty to be imposed on a registered person who is adjudged by the disciplinary tribunal to be guilty of infamous conduct in any professional respect. There is thus an apparent incongruity in the Rules and the Act. However, it is generally accepted that the words 'infamous conduct' mean the same as 'serious professional misconduct'. A note to that effect is contained in 33 *The Digest* p 2360 as follows:

> The words 'serious professional misconduct' first enacted in the Medical Act 1969 as an amendment to the original phrase 'infamous conduct in any professional respect' (Medical Act 1956 s 33(1)(b) and earlier enactments) were not intended to change the law but to replace outdated phraseology.

[**54.**] A breach of the rules may amount to misconduct, but not every conduct that may be open to objection will amount to infamous conduct. To attract that classification the conduct must be a serious misconduct. By way of analogy, in *Davies v Davies* [1960] 3 All ER 248, 253–254, it was held that:

> If in conducting proceedings, a solicitor follows a course which, although possibly open to objection, does not infringe any clear practice, what he does will not amount to conduct unbefitting a solicitor.

[**55.**] From what I have said, it should be clear that the myriad of circumstances that may constitute infamous conduct cannot be exhaustively set out in a code. The proper approach is first to ask what facts have been alleged. The next step is to ascertain whether they have been proved. When facts alleged have been proved, the next step is to determine whether they amount to infamous conduct. When, therefore, the respondent was charged with infamous conduct and particulars were given in the charge of the acts or omission alleged to amount to infamous conduct that, in my judgment, is sufficient. The respondent could only be pronounced guilty and penalised pursuant to section 16(1) and (2) of the Act if the facts alleged and proved lead reasonably to his being adjudged guilty of 'infamous conduct in any professional respect'. At best, reference to particular breaches of rules in the particulars of the charge is an optional matter of detail which can be dispensed without injustice to the person charged. What is important is that the person charged should have sufficient notice of the acts alleged to have been committed by him which add up to 'infamous conduct'.

[**56.**] Furthermore, the law is clear that conviction which states a known offence with incomplete particulars can be upheld where the defence was not misled and no substantial miscarriage of justice has taken place: *Commissioner of Police v Ohoyen* [1964] vol 7 NSCC 217, *R v Iyoma* [1962] vol 2 NSCC 295. For these reasons, I am unable to agree with the conclusion arrived at by the Court below that the proceedings before the tribunal were a nullity. The respondent did not complain at the trial about any deficiency in the particulars supplied. Even if the charge should have spe-

cified, but had omitted to specify, the rule breached, the Court below should have regarded such defect in the charge as an irregularity and determined whether it had occasioned a substantial miscarriage of justice. I cannot see how any miscarriage of justice had been occasioned to the respondent who had shown that he was misled by the charge. I hold that the Court of Appeal was in error in holding that the charge as framed was defective and that the decision of the tribunal should for that reason be set aside.

Did the tribunal and/or Court below confuse the issues?

[**57.**] The first arm of the charge was that the respondent failed to transfuse blood to the patient, and the second arm was that he, having claimed inhibition to apply an obviously correct treatment to the patient, failed to transfer the patient to a bigger centre. The second charge was that the respondent allowed his own religious belief against blood transfusion to influence his treatment of the patient and thereby acted contrary to his oath as medical practitioner. The tribunal rightly summed up the main question when it stated that: 'The whole issue therefore boils down to a course of action by a doctor who has been denied an informed consent to carry out a medical life-saving measure.' The tribunal proceeded to answer the question by considering what it regarded as the two options open to a medical practitioner faced with such a situation relying, as it claimed, on the 'code of ethics' of the medical profession. Its statement of those two options has been set out earlier in this judgment.

[**58.**] The tribunal proceeded to make the following finding:

> (i) The respondent 'colluded' with the patient to deny life on religious grounds and such is [in]compatible with a doctor's duty.
> (ii) The human rights of the patient must give way to legislation made in respect of public order and public health.
> (iii) The respondent should not have 'colluded' with those who will deny life-saving measure on grounds of religion as such is unethical to the medical profession.
> (iv) The respondent is not criticised for holding the material religious belief or for respecting such belief or other, 'but for holding onto the patient knowing fully well that the correct treatment cannot be given in the face of failure to obtain consent.'

[**59.**] I may well add that in passing sentence the tribunal recognises 'the difficulty which the doctor must have had in reconciling his own religious beliefs as well as the patient's religious beliefs with his duty as a medical doctor.'

[**60.**] In the Court of Appeal counsel for the respondent took the point that the tribunal was wrong to have found the respondent guilty on counts 1(a) and 2 of the charge when it had found as a fact that the respondent could not have transfused blood in the absence of the patient's consent. The Court of Appeal agreed with this view and went on to say that:

> The Tribunal has clearly jettisoned the charge or blame of failure to transfuse blood or failure to make plans to transfuse blood as set out in the charge. The Tribunal has replaced it with a new blame viz; that appellant failed to take certain actions which he ought to [have], when 'he was faced with a dilemma arising from the refusal to grant informed consent', and that he held 'onto the patient knowing fully well that the correct treatment cannot be given on the failure to obtain consent'.

[**61.**] Being of the view that the only issue in the case was whether the medical practitioner should 'proceed to administer the medical measure refused without that consent' the Court below held that:

> [I]f a patient refuses to give informed consent, the law seems to be that the medical practitioner will not proceed to administer the medical measure or treatment eg in the case of surgery or blood transfusion as in the present case.

It relied for the view on the Canadian case of *Melette v Shulman* 47 DLR [4th Ed] 18 and the English case of *Sideway v Board of Governor Bethlehem Royal Hospital* [1985] 1 AC 871; [1985] All ER 643.

[**62.**] The Court of Appeal acknowledged that the tribunal limited itself 'to proposing optional measures which a medical practitioner caught in the web of the conflicting duties and rights, as Dr Okonkwo was, ought to adopt'. However, that Court disposed of that aspect of the matter by holding that those measures have not been part of the rules or code already enacted by the council pursuant to the Act. Having noted, in effect, that the code of ethics was itself deficient in offering guidance in circumstances such as arose in the case, the Court below held that the tribunal was not right in finding the appellant guilty as charged.

[**63.**] The main criticisms raised by counsel for the tribunal against the conclusion of the Court of Appeal can be summarised as follows:

(1) The Court of Appeal failed to take cognisance of the fact that count 1(b) on the charge sheet alleged that the respondent failed to transfer the patient to a bigger centre where there would be no inhibition that would operate to the patient's advantage.

(2) The options suggested by the tribunal can be deduced from rule 18 of the Rules of Professional Conduct upon a proper construction of that rule read together with rule 5. The Court of Appeal did not take due regard of these rules.

(3) The constitutional provisions and authority relied on by that court are irrelevant.

Learned counsel for the respondent defended the Court below against these criticisms, supporting the opinion of that Court.

[**64.**] The opinion of the Court of Appeal that the tribunal jettisoned the charge of failure to transfuse blood to the patient and substituted it with one that the respondent ought to have terminated his contract with the patient or transferred the patient emanated from the concluding part of

the tribunal's decision which was not in the exact terms of the charge. Particular (b) of the first count had alleged failure to transfer the patient to a bigger centre. The concluding part of the tribunal's decision was that he held onto the patient. Having regard to the tribunal's earlier finding that the respondent failed to give other doctors and other health institutions an opportunity to obtain the patient's consent and administer the correct treatment, it cannot rightly be said that the tribunal substituted a new charge. To that extent the Court below was in error. However, no miscarriage of justice has been occasioned by this error, since the Court below proceeded to hold that the rules did not specify any such options as were found by the tribunal. That view has been challenged by counsel for the tribunal in this appeal.

[**65.**] He argued that rule 18 and rule 5 of the Rules of Professional Conduct form the basis of the tribunal's view as to what the respondent ought to have done in the circumstances that arose. Rule 18, as quoted in the appellant's brief, is as follows:

> If the patient insists upon an unjust or immoral course in the course of treatment, or if he deliberately disregards an agreement, or obligation as to fees or expenses, the doctor may be warranted in withdrawing on due notice to the patient, allowing him time to employ another doctor. Other instances as they arise may justify withdrawal. Upon withdrawal from a case after a fee has been paid, the doctor should refund such part of the fee as has not been clearly earned.

Rule 5 as quoted in the appellants' brief provides, *inter alia*, that:

> [A] doctor owes to his patient complete loyalty and all resources of his science. Whenever an examination or treatment is beyond his capacity, he should summon another doctor who has the necessary ability.

[**66.**] I would not have considered it needful to consider these rules in view of the opinion I have expressed that a charge of infamous conduct need not be tied to rules of conduct only. However, the tribunal had not relied on any other standard for judging the conduct of the respondent apart from the rules. It thus becomes necessary to inquire, as the Court below did, whether such a rule existed.

[**67.**] I am able to say that the Court of Appeal was right in the view it held that the two options which the tribunal stated in its decisions as open to the respondent were not expressly stated in the Rules of Professional Conduct, contrary to the tribunal's emphatic assertion that:

> When therefore he (ie the practitioner) is faced with a dilemma arising from the refusal to grant informed consent *our code of ethics prescribe* that a doctor faced with such a dilemma has 2 options; (a) he can terminate the contract or (b) refer him or her to another doctor or health institution where necessary measures for preservation of life may be taken (italics supplied).

[**68.**] Neither rule 18 nor rule 5, nor both read together, justified the above assertion. I give two reasons. In the first place, rather than make it mandatory that the practitioner must withdraw his services, rule 18 merely

stated that the practitioner 'may be warranted' to withdraw in the circumstances stated in the rule. The words 'may be warranted' I understand to mean 'may be justified'. Where the law or a rule is merely permissive or merely provides a justification for doing an act, what it permits cannot be regarded as a matter of obligation. There is a difference between a matter of obligation and a matter of liberty to do something. When the case of the tribunal is that a section breach by the practitioner of a duty imposed by the rules amounts to serious misconduct or infamous conduct, it must be clearly shown that such duty exists under the rules in clear language. It is an acceptable principle of interpretation that: 'Where there is an enactment which may entail penal consequences, you ought not to do violence to the language in order to bring people within it by express language.' (See *Rumball v Schmidt* (1882) 8 QBD 603, 608, cited in *Craies on Statute Law* (7th Ed) p 532.) If the respondent was to incur a penalty on the grounds that he had been guilty of infamous conduct by reason of a breach of the rules of conduct, it must be shown that those rules expressly prohibited what he did.

[**69.**] In the second place, for the occasion to exercise the liberty to withdraw from treating the patient to arise, the patient, in terms of rules 18, must have insisted 'upon an unjust or immoral course'. Whatever the law permits cannot be described as an 'unjust or immoral course'. The liberty which the law permits a competent adult to determine what would be done with or to his own body, when exercised by the competent adult, cannot be regarded as an unjust and immoral course. Rule 18 provides that 'Other instance as they arise may justify withdrawal'. That leaves the judgment primarily to the practitioner. If he made an error of judgment, that cannot be regarded as infamous conduct.

[**70.**] Rule 5 does not enjoin the practitioner to refer a patient who has refused medical treatment for religious reasons to another doctor or health institutions. The situation envisaged in rule 5 is one in which an examination or treatment is beyond that practitioner's capacity. Where a patient refuses medical treatment for religious reasons, the professional capacity of the practitioner is not called into question by that fact alone.

[**71.**] In these circumstances, it is clear that the Court of Appeal was right when it concluded that the measure which the tribunal held the respondent should have adopted had not been part of the rules or code of conduct. It is evident that the Rules of Professional Conduct which the tribunal appeared to have relied heavily on did not offer much guidance in answering the question which the tribunal considered central to the case, namely: what course of action should a practitioner who has been denied informed consent to carry out a medical life-saving measure take?

Religious objection to medical treatment: limit of practitioner's responsibility

[**72.**] The scope and limit of the duty of a practitioner faced with a pa-

tient's refusal to give informed consent to life-saving medical treatment cannot be considered in isolation of the right of the patient. Although, there is a dearth of local authorities in this area of our law, there are ample provisions of our Constitution which show the basis on which the Court should proceed in these matters. It is expedient at the outset to recognise that a consideration of a religious objection to medical treatment involves a balancing of several interests, namely: the constitutionally protected right of the individual, state interest in public health, safety and welfare of society; and, the interest of the medical profession in preserving the integrity of medical ethics and, thereby, its own collective reputation. To give undue weight to one of these other interests over the rights of the competent adult patient may constitute a threat to liberty of the individual, unless legally recognised circumstances justify that weight should be ascribed to one over the others. Where, for instance, the health and safety of society is under threat, for instance in an epidemic, public health and safety may be given a higher weight than the individual's human rights. Where, however, the direct consequence of a decision not to submit to medical treatment is limited to the competent adult patient alone, no injustice can be occasioned in giving individual right primacy. In my judgment, any rule of ethics or professional conduct that ignores the need to balance these interests or that gives undue weight to any of them without regard to individual circumstances will be out of touch with reality and may lead to unjust consequences. This, in my understanding, was what Nzeako, JCA, tried to emphasise when she stated thus:

> Everything put together, it does appear that the code of ethics which requires a medical practitioner to 'always take measures that will lead to preservation of life' failed to pin down on the conflict between the right of a patient to decide on what medical measures to agree to and the doctor's code of ethics.

[**73.**] The patient's constitutional right to object to medical treatment or, particularly, as in this case, to blood transfusion on religious grounds is founded on fundamental rights protected by the 1979 Constitution as follows: (i) right to privacy: section 34; (ii) right to freedom of thought, conscience and religion: section 35. All these are preserved in section 37 and 38 of the 1999 Constitution respectively. The right to privacy implies a right to protect one's thought, conscience or religious belief and practice from coercive and unjustified intrusion; and, one's body from unauthorised invasion. The right to freedom of thought, conscience or religion implies a right not to be prevented, without lawful justification, from choosing the course of one's life, fashioned on what one believes in, and a right not to be coerced into acting contrary to religious belief. The limits of these freedoms, as in all cases, are where they impinge on the rights of others or where they put the welfare of society or public health in jeopardy. The sum total of the rights of privacy and of freedom of thought, conscience or religion which an individual has, put in a nutshell, is that an individual should be left alone to choose a course for his life, unless a clear and compelling overriding state interest justifies the contrary. The law's

role is to ensure the fullness or liberty when there is no danger to public interest. Ensuring liberty of conscience and freedom of religion is an important component of that fullness. The courts are the institution society has agreed to invest with the responsibility of balancing conflicting interests in a way as to ensure the fullness of liberty without destroying the existence and stability of society itself. It will be asking too much of a medical practitioner to expect him to assume this awesome responsibility in the privacy of his clinic or surgery, unaided by materials that are available to the courts or, even, by his training. This is why, if a decision to override the decision of an adult competent patient not to submit to blood transfusion or medical treatment on religious grounds is to be taken on the grounds of public interest or recognised interest of others, such as dependent minor children, it is to be taken by the courts.

[**74.**] It is to the credit of the tribunal in this case that it acknowledged the right of the individual to hold his religious belief and that it also accepted that a practitioner should respect the religious beliefs of others. Its decision in the case, however, progressed into error when it deviated from the correct path into ignoring the concomitants of the right of the patient to reject medical treatment or blood transfusion on religious grounds, and concluded that the respondent was guilty of infamous conduct 'for holding onto the patient knowing fully well that the correct treatment cannot be given in the face of failure to obtain consent'.

[**75.**] Since the patient's relationship with the practitioner is based on consensus, it follows that the choice of an adult patient with a sound mind to refuse informed consent to medical treatment, barring state intervention through judicial process, leaves the practitioner helpless to impose a treatment on the patient. That helplessness presents him with choices. He could terminate the contract, and, I would say, callously, force the patient out of his clinic or hospital; he could continue to give him refuge in his hospital and withdraw any form to treatment; he could do the best he could to postpone or ameliorate the consequences of the patient's choice. To a large extent the practitioner should be the judge of the choice that may be better in the circumstances. The choices become a question of personal attitude rather than one of professional ethics. Indeed, in one case it has been said that the prevailing medical ethical practice does not, without exception, demand that all efforts towards life prolongation be made in all circumstances, but seems to recognise that the dying are more often in need of comfort than of treatment. (See *Superintendent of Belckerton State School v Sackewicz* noted in 93 ALR 3d 75.) That the patient's consent is paramount has been determined in several cases in the United State of America where this area of law has received considerable judicial attention. If a competent adult patient exercising his right to reject life-saving treatment on religious grounds thereby chooses a path that may ultimately lead to his death, in the absence of judicial intervention overriding the patient's decision, what meaningful option is the practitioner left with, other, perhaps, than to give the patient comfort?

[**76.**] In several cases the courts have refused to override the patient's decision; in others, they have found ways round the problem of the paramountcy of the patient's consent. What is important is that in no case has the decision to override the patient's decision been left with the medical practitioner or the hospital. Several of these cases have been noted in 93 ALR 3d 67–85. *In re Yetter* (1973) 62 Pa D & C 2d 619, upon evidence that the patient was a mature, competent adult, had no children, and had not sought medical attention and then attempted to restrict it, the Court said that the constitutional right of privacy includes the right of a competent, mature adult to refuse treatment that may prolong his or her life even though that refusal may seem unwise, foolish or ridiculous to others. (See 93 ALR 3d 77.) *In re Osborne* (1972, Dist Col App) 294 A 2d 372, the Court affirmed the lower court's order refusing to appoint a guardian to give consent for the administration of a blood transfusion to a patient who had refused it on religious grounds, and whom the physician feared would die without blood, upon evidence that the patient had validly and knowingly chosen this course, and upon the lower court's finding that there was no compelling state interest which justified overriding the patient's decision to refuse blood transfusions.

[**77.**] The principle of these cases is to some extent reflected in the opinions in *Sideway v Board of Governor Bethlehem Royal Hospital* (*supra*) where at page 645 (of [1985] 1 All ER) Lord Scarman, albeit in a slightly different context, said:

> [T]he courts should not allow medical opinion of what is best for the patient to over-ride the patient's right to decide for himself whether he will submit to the treatment offered him.

And Lord Templeman, at 666 said:

> The patient is free to decide whether or not to submit to treatment recommended by the doctor . . . If the doctor making a balanced judgment advises the patient to submit to the operation, the patient is entitled to reject the advice for reasons which are rational or irrational or for no reason.

[**78.**] There is no duty, contrary to what was suggested in the particulars of the first count, on the respondent to transfer the patient to another hospital merely because she had refused to submit herself to blood transfusion by reason of her religious belief. An inadequate consideration of the law as it now stands has no doubt misled the tribunal into assuming that a 'bigger centre' would have been free from the constraints of legal inhibition so as to be able to brush aside the patient's right and override her decision. As rightly held by the Court below, the respondent was not influenced by his personal belief in failing to effect blood transfusion to the patient. His only inhibition, it would appear, was the legal inhibition that would have operated on any other medical practitioner, or hospital, as it did him and Dr Okafor of Kenayo Hospital before him. The charge is misconceived in implying that a 'bigger centre' would have been free from the legal inhibition which operated on the respondent in failing to over-

ride the patient's decision. Even bigger hospitals have to respect the patient's decision and choice.

[**79.**] There is no doubt that the tribunal came to a wrong conclusion by its misplaced emphasis on the respondent's belief rather than the patient's belief. It ignored the respondent's evidence that notwithstanding his belief he had transfused blood to consenting patients before. It misinterpreted the respondent's rightful regard for the patient's wishes as collusion. It failed to give adequate regard to the conduct of the respondent in the light of accepted principles of law enjoining medical practitioners to respect a competent adult patient's refusal of medical treatment, including blood transfusion, for religious reasons. It ignored the choice made by the patient and her husband of where she would be treated and the evidence that the patient and her husband rejected an offer of discharge. All these considerations were implicit in the judgment of the Court of Appeal.

[**80.**] A charge of infamous conduct must be of a serious infraction of acceptable standards of behaviour or ethics of the profession. It connotes conduct so disreputable and morally reprehensible as to bring the profession into disrepute if condoned or left unpenalised. Although the medical profession is the primary judge of what is infamous conduct, it cannot do so without paying attention to what the law permits, either of the patient or of the practitioner. From the facts as found by the Court of Appeal it is difficult to see anything that is infamous in the conduct of the respondent.

[**81.**] If I may proffer an opinion, gratuitous though it may be, it is that the medical profession and the public will profit more if more attention is paid to a consideration of what legal remedies may be available to make objecting competent adult patients, in appropriate cases, submit to life-saving medical treatment. If such remedies as there are are found inadequate, the solution is to be found in making the legal system fashion adequate remedies. The solution, in my opinion, is not in, unwittingly, making a hapless practitioner a scapegoat of the consequence of whatever deficiency there may be in the remedy provided by our laws; nor is it in making the medical practitioner pay for the failure of concerned relations of the patient to seek legal advice and such remedies as the law might have offered at the time when such might have made a difference. Had such remedies been sought, the responsibility of deciding whether or not the decision of the patient should be overridden would have shifted to the courts, which are the proper forum for such decision. Besides, granted that the medical profession may offer guidance to its members at any time, it is unjust to find a practitioner guilty of infamous conduct in an issue on which there have been neither rules nor can be regarded as standard practice, or for conduct which is not inherently infamous.

[**82.**] Be that as it may, for the reasons that I have stated, I feel no hesitation in holding that the Court of Appeal came to a correct decision on the merits of the case. In the result I dismiss the appeal with N10 000 costs to the respondent.

SENEGAL

Guengueng and Others v Habré

(2002) AHRLR 183 (SeCC 2001)

Souleymane Guengueng et autres v Hissène Habré
Court of Cassation, 20 March 2001
Judges: Ndiaye, Camara and Gaye
Translated from French. Judgment available at www.icrc.org.

Torture (extradite or prosecute, 38–40)
Jurisdiction (Convention against Torture ratified but domestic legislation not enacted, 38–40)
International law (need for domestic legislative measures, 39)

[**1.**] Ruling on the appeal made in accordance with a signed declaration to the clerk of the Court of Appeal of Dakar on 7 July 2000, by Maître Boucounta Diallo, advocate at the Court of Dakar, invested with special powers, acting in the name of, and on behalf of Souleymane Guengueng, Zakaria Fadoul Khidir, Issac Haroun Abdallah, Younouss Mahadjir, Togoto Lonaye Samuel, Ramadane Souleymane, Valentin Neatobet Bidi and the Association of Victims of Political Crimes and Repression in Chad, against the judgment given on 4 July 2000 by the Court of Criminal Appeal of Dakar in the action brought against Hissène Habre on charges of complicity in crimes against humanity, acts of torture and barbarity and which, rejecting the exceptions of admissibility of the appeal for annulment of the proceedings introduced by Hissène Habré, as well as the last note during the deliberation of Maître Madické Niang, counsel for the accused, declared the appeal admissible in form, and annulled in fact the charge statement and the subsequent proceedings due to the incompetence of the presiding judge;

The Court

[**2.**] In view of Organic Law 92.25 of 30 May 1992 on the Court of Cassation;

[**3.**] Heard Ms Mireille Ndiaye, presiding judge of the Chamber in her report;

[**4.**] Heard Mr Ciré Aly Ba, counsel for the prosecution representing the Public Prosecutor's office in his conclusions;

[**5.**] After having deliberated in accordance with the law;

[**6.**] On the appeals of 10 August 2000, 18 August 2000 and 20 December 2000;

[**7.**] Whereas Souleymane Guengueng *et al* who lodged an appeal on 7 July 2000 against the ruling of the Court of Criminal Appeal dated 4 July 2000, submitted to the clerk's office of the Court of Cassation the above-mentioned appeals, containing grounds for cassation in support of their appeal;

[**8.**] But, whereas no mention could be made of these statements of case which, not having been lodged within the period of one month allowed by article 46 of the above-mentioned Organic Law, do not refer the grounds stated therein to the Court of Cassation;

[**9.**] In view of the statement of case of 17 July 2000 properly lodged and the statements of case in defence;

[**10.**] Whereas it is evident from the contested judgment and from documents submitted as evidence in the proceedings that during January 2000, Souleymane Guenggueng *et al*, all Chad nationals, lodged a complaint as well as an independent action for damages with an examining judge of Dakar against an unnamed person and Hissène Habré for torture, cruel, inhuman or degrading punishment or treatment, of which they claimed to have been the victims in Chad between June 1982 and December 1990, a period during which the latter exercised the function of President of the Republic of this country; whereas on 3 February 2000, the examining judge charged Hissène Habré with complicity in crimes against humanity, acts of torture and barbarity with reference to articles 45, 46, 294a, 288 of the Criminal Code and placed him under house arrest; whereas by the appeal of 18 February 2000, the accused applied to the Court of Criminal Appeal in order to have the proceedings annulled on the basis of incompetence of Senegalese courts of law, a legally based defect and prescription of the public lawsuit; whereas by the contested judgment, the Court of Criminal Appeal granted his appeal on the grounds of incompetence of the presiding judge;

[**11.**] On the first motive for cassation resulting from the violation of article 165(4) of the Code of Criminal Procedure in that the Court of Criminal Appeal, responding to the conclusions of the private parties associating with the public prosecutor who had asserted that the accused, plaintiff for the annulment, had not, in his appeal, designated, identified and specified the examining chambers to which the proceedings were referred, declared the appeal admissible on the grounds that in support of the exception of inadmissibility of the appeal raised by the private parties, they did not cite any legal text nor did they specify the action penalised and that no obstacle prevents the Court of Criminal Appeal, a second level court, from calling for legal proceedings; that it is permissible for the judge hearing the complaint to ask for details needed to identify the proceedings while

judges must not rely on personal knowledge of a case to supplement the shortcomings of a moving party, and while the above-mentioned text demands that the appeal for annulment be motivated, that the request for the report be immediate and finally while the rules concerning the organisation of the judiciary are of a public nature and while the violation of a rule concerning the organisation of the judiciary must be dealt with as a matter or course by judges and while the Court of Criminal Appeal, to which the case had been referred on the basis of the 1st paragraph of article 165 of the Code of Criminal Procedure, could not consider itself to be a second level court in the absence of an appeal against a ruling of the examining judge;

[**12.**] Whereas the grievances raised do not result from article 165 of the Code of Criminal Procedure; whereas this text allows the accused to appeal to the Court of Criminal Appeal, apart from any other appeal, to have a null and void deed annulled;

[**13.**] Whence it follows that the motive cannot be allowed;

[**14.**] On the second motive for cassation resulting from the violation of article 165 of the Code of Criminal Procedure in that the Court of Criminal Appeal received and examined an appeal dated 18 February 2000, which rectified a material omission contained in the initial appeal while the text alluded to only allows for a single appeal and not a revised appeal once the debate has begun;

[**15.**] Whereas it appears from the documents submitted as evidence in the proceedings that on 18 February 2000, Hissène Habré addressed to the President of the Court of Criminal Appeal an appeal aimed at having the charge statement and the subsequent deeds annulled and whereas he submitted, on the same day, to the President of the Court of Criminal Appeal and the Counsellors of the Court of Appeal an identical appeal;

[**16.**] Whereas, in order to respond to the private parties associating with the public prosecutor who were asking the Court of Criminal Appeal to declare the second appeal inadmissible and to decide that the first appeal had not been properly submitted to the Court, the Court rightly pronounced that Hissène Habré had invoked, in support of his appeal, article 165 of the Code of Criminal Procedure that authorises the accused to lodge an appeal with the Court when he considers that a nullity has been committed and, not its presiding judge whose own powers are prescribed by articles 210 and following of the same Code;

[**17.**] Whence it follows that the motive cannot be allowed.

[**18.**] On the third motive for cassation resulting from the lack of response to the conclusions properly lodged by the private parties associating with the public prosecutor according to which the Court of Criminal Appeal, which is not a court of substance, cannot give a verdict on the repressive law of procedure of content or form liable to determine the incompetence

of Senegalese courts, which incompetence can only be appreciated with regard to the clauses of the relevant article 669 of the Code of Criminal Procedure or the clauses of the New York Convention of 10 December 1984 [Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] while the Court of Criminal Appeal was only applied to for a dispute concerning nullities, the regulation of which is governed by articles 101 to 105 of the Code of Criminal Procedure and while, consequently, the Court had to restrict itself to ascertaining whether there had been any ignorance of a substantial formality provided for by the Code of Criminal Procedure which could have undermined the interests of the accused;

[**19.**] Whereas the incompetence of repressive courts of law is of a public nature and can be raised by all parties in any event or noted as a matter of course by the judge if necessary;

[**20.**] Whence it follows that the motive cannot be accepted;

[**21.**] On the fifth motive for cassation resulting from the denaturation of the facts in that the Court of Criminal Appeal constantly noted that 'Hissène Habré, accused on 3 February 2000 on charges of a crime against humanity, acts of torture and barbarity and placed under house arrest' while the latter was never accused of a crime against humanity and while the private parties associating with the public prosecutor never alleged that he had been accused of this charge;

[**22.**] Whereas the contested judgment reproduced the terms of the charge against Hissène Habré;

[**23.**] Whence it follows that the motive does not have any grounds;

[**24.**] On the eighth motive for cassation resulting from the textual error applicable in that the Court of Criminal Procedure attributed to article 9 of the New York Convention of 10 December 1984, which deals with judicial cooperation between States party to the agreement, the contents of article 5;

[**25.**] Whereas a purely material error in quoting the number of a text liable to be repaired according to the procedure provided for in article 681 of the Code of Criminal Procedure, cannot open the door to cassation;

[**26.**] Whence it follows that the motive cannot be allowed;

[**27.**] On the ninth motive for cassation resulting from the violation of article 669 of the Code of Criminal Procedure in that the Court of Criminal Appeal excluded the competence of the examining judge without noting that Hissène Habré was a foreigner;

[**28.**] Whereas it ensues from the statements of the contested judgment that Hissène Habré was accused of the abovementioned charges committed in Ndjaména during a period in which he was exercising the functions of President of the Republic of Chad ... whereas the Senegalese

courts cannot take cognisance of the acts of torture committed by a foreigner . . .;

[**29.**] Whence it follows that the motive is groundless.

[**30.**] On the tenth motive for cassation resulting from the violation of article 166 of the Code of Criminal Procedure in that the Court of Criminal Appeal accepted that the nullity was substantial without specifying in what way it was substantial, without sufficient motivation and without alluding to the text sanctioning the nullity;

[**31.**] Whereas ruling on the competence of Senegalese courts to prosecute, Hissène Habré for the specified charges, the Court of Criminal Appeal notes that the rules of competence are of a public nature, that ignorance of them must be penalised by a nullity that is substantial;

[**32.**] Whence it follows that the motive cannot be allowed.

[**33.**] On the fourth motive for cassation resulting from the violation of article 79 of the Constitution in that the Court of Criminal Appeal declared the Senegalese courts incompetent on the grounds that criminal justice has always demonstrated its autonomy in relation to other juridical standards and has refused to apply the above-mentioned text, which is a juridical standard imposed in all matters even in criminal law;

[**34.**] On the sixth motive for cassation resulting from the violation of the New York Convention against torture of 10 December 1984 in that the Court of Criminal Appeal declared the Senegalese courts incompetent by refusing to apply an international convention on the grounds that article 669 of the Code of Criminal Procedure constitutes an obstacle to the legal proceedings against Hissène Habré and to the application of this Convention while the Convention was ratified by Senegal on 16 June 1986 and published in the government gazette of 9 August 1986;

[**35.**] On the seventh motive for cassation resulting from the violation of the principle of universal competence in that the Court of Criminal Appeal declared the Senegalese courts incompetent on the grounds that universal competence cannot be allowed without the modification of article 669 of the Code of Criminal Procedure when this article cannot interfere with the application of an international convention enacting universal competence nor with the clauses of the Vienna Convention, applicable to Senegal, in particular articles 27 and 53 that do not allow a state signatory to an international convention to use as an excuse the gaps and insufficiencies of its internal law to extricate itself from its international commitments;

[**36.**] The grounds/motives [for cassation] being taken together;

[**37.**] Whereas to annul the statement of the charge against Hissène Habré and the subsequent proceedings, the Court of Criminal Appeal states in particular that in order to conform to article 4 of the New York Convention that obliges every state party to it to ensure that all acts of torture con-

stitute violations with regard to its criminal law and are punishable by appropriate penalties, the legislator promulgated Law 96.15 of 28 August 1996 instituting article 295(1) of the Criminal Code incriminating these acts, which, before this date, only constituted, in the terms of article 288 of the same Code alluded to in the charge statement, aggravating circumstances of certain crimes against persons; whereas the judges note that no modification of article 669 of the Code of Criminal Procedure intervened and deduce from this that the Senegalese courts are incompetent to take cognisance of acts of torture committed by a foreigner outside of the territory regardless of the nationality of the victims;

[**38.**] Whereas in this condition, the Court of Cassation is in a position to make sure that the decision does not incur the alleged grievances; whereas article 5(2) of the New York Convention of 10 December 1984 against torture and other cruel, inhuman or degrading punishments or treatments obliges every state party to the Convention to take necessary measures to establish its competence for the purposes of taking cognisance of the offences alluded to in article 4 in the event of the presumed perpetrator of these offences being found on any territory under its jurisdiction and the said state not extraditing him;

[**39.**] Whereas it follows that article 79 of the Constitution cannot be applied so long as the enforcement of the Convention makes it necessary for Senegal to take prior legislative measures;

[**40.**] Whereas no text of procedure recognises the universal competence of the Senegalese courts with a view to prosecute and judge, if found on the territory of the Republic, the presumed perpetrators or accomplices of acts contained in the previsions of the Law of 28 August 1996 concerning the adaptation of the legislation of Senegal to the clauses of article 4 of the Convention when these acts have been committed outside of Senegal by foreigners; that the presence in Senegal of Hissène Habré cannot on its own justify the legal proceedings instituted against him;

[**41.**] Whence it follows that the grounds cannot be accepted;

[**42.**] And whereas the judgment is legitimate in form;

[**43.**] Rejects the appeal lodged by Souleymane Guenggueng *et al* against the judgment handed down on 4 July 2000 by the Court of Criminal Appeal of Dakar;

[**44.**] Pronounces the confiscation of the fine;

[**45.**] Places the costs to the account of the appellants.

[**46.**] Declares that this judgment will be printed, that it will be transcribed in the registers of the Court of Appeal in the margin or underneath the contested decision;

[**47.**] Entrusts the execution of this judgment to the diligence of the Attorney-General of the Court of Cassation.

SOUTH AFRICA

Minister of Health and Others v Treatment Action Campaign and Others

(2002) AHRLR 189 (SACC 2002)

Minister of Health, Member of the Executive Council for Health, Eastern Cape, Member of the Executive Council for Health, Free State, Member of the Executive Council for Health, Gauteng, Member of the Executive Council for Health, KwaZulu-Natal, Member of the Executive Council for Health, Mpumalanga, Member of the Executive Council for Health, Northern Cape, Member of the Executive Council for Health, Northern Province, Member of the Executive Council for Health, North West v Treatment Action Campaign, Dr Haroon Saloojee, Children's Rights Centre
Constitutional Court, 5 July 2002
Judges: Chaskalson CJ, Langa DCJ, Ackermann J, Du Plessis AJ, Goldstone J, Kriegler J, Madala J, Ngcobo J, O'Regan J, Sachs J and Skweyiya AJ
Previously reported: 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC)

HIV/AIDS (constitutional obligation to make antiretroviral drugs available to prevent mother-to-child transmission of HIV, 5, 18, 23, 25, 67–69, 80–81, 93–95, 125, 135)
Socio-economic rights (justiciability, 23, 25, 29–30, 32, 35–36, 39, 94–95, 100, 135; minimum core, 26–28, 34)
Health (right to access to public health, 4, 30, 32, 39, 46)
Children (children should be given special attention; right to health care, 4, 74–79)

The Court

Introduction

[**1.**] The HIV/AIDS[1] pandemic in South Africa has been described as 'an incomprehensible calamity' and 'the most important challenge facing South Africa since the birth of our new democracy' and government's fight against 'this scourge' as 'a top priority'. It 'has claimed millions of lives, inflicting pain and grief, causing fear and uncertainty, and threaten-

[1] This is the term commonly used for the human immunodeficiency virus (HIV) leading to the acquired immune (or immuno-) deficiency syndrome (AIDS). Transmission of this disease, its progression and dire consequences are set out in lay language from para 11 onwards in the judgment of Ngcobo J in *Hoffmann v South African Airways* 2001 (1) SA 1 (CC); 2000 (11) BCLR 1211 (CC).

ing the economy'. These are not the words of alarmists but are taken from a Department of Health publication in 2000 and a ministerial foreword to an earlier departmental publication.[2]

[**2.**] This appeal is directed at reversing orders made in a High Court against government because of perceived shortcomings in its response to an aspect of the HIV/AIDS challenge. The Court found that government had not reasonably addressed the need to reduce the risk of HIV-positive mothers transmitting the disease to their babies at birth. More specifically the finding was that government had acted unreasonably in (a) refusing to make an antiretroviral drug called Nevirapine[3] available in the public health sector where the attending doctor considered it medically indicated and (b) not setting out a time frame for a national programme to prevent mother-to-child transmission of HIV.

[**3.**] The case started as an application in the High Court in Pretoria on 21 August 2001. The applicants were a number of associations and members of civil society concerned with the treatment of people with HIV/AIDS and with the prevention of new infections. In this judgment they are referred to collectively as 'the applicants'. The principal actor among them was the Treatment Action Campaign (TAC). The respondents were the national Minister of Health and the respective members of the executive councils (MECs) responsible for health in all provinces save the Western Cape.[4] They are referred to collectively as 'the government' or 'government'.

[**4.**] Government, as part of a formidable array of responses to the pandemic, devised a programme to deal with mother-to-child transmission of HIV at birth and identified Nevirapine as its drug of choice for this purpose.[5] The programme imposes restrictions on the availability of Nevirapine in the public health sector. This is where the first of two main issues in the case arose. The applicants contended that these restrictions are unreasonable when measured against the Constitution, which commands the state and all its organs to give effect to the rights guaranteed by the

[2] *HIV/AIDS & STD Strategic Plan for South Africa 2000–2005* and an earlier report to which it refers.

[3] Nevirapine is a fast-acting and potent antiretroviral drug long since used worldwide in the treatment of HIV/AIDS and registered in South Africa since 1998. In January 2001 it was approved by the World Health Organization for use against intrapartum mother-to-child transmission of HIV, ie transmission of the virus from mother to child at birth. It was also approved for such use in South Africa. The nature and precise date of such approval were contested and this led to some vigorously debated subsidiary issues, dealt with more fully below.

[4] The Western Cape MEC was originally a party to the proceedings in the High Court. The applicants later withdrew the application against him. A dispute between the Premier and the MEC of KwaZulu-Natal arose at a later stage, when leave to appeal to this court was being debated.

[5] The drug is currently available free to government and its administration is simple: a single tablet taken by the mother at the onset of labour and a few drops fed to the baby within 72 hours after birth.

Bill of Rights. This duty is put thus by sections 7(2) and 8(1) of the Constitution respectively:

> 7(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.
> 8(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

At issue here is the right given to everyone to have access to public health care services and the right of children to be afforded special protection. These rights are expressed in the following terms in the Bill of Rights:

> 27(1) Everyone has the right to have access to — (a) health care services, including reproductive health care; . . .
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
> . . .
> 28(1) Every child has the right — . . . (c) to basic nutrition, shelter, basic health care services and social services.

[**5.**] The second main issue also arises out of the provisions of sections 27 and 28 of the Constitution. It is whether government is constitutionally obliged and had to be ordered forthwith to plan and implement an effective, comprehensive and progressive programme for the prevention of mother-to-child transmission of HIV throughout the country. The applicants also relied on other provisions of the Constitution which, in view of our conclusions, need not be considered.

[**6.**] The affidavits lodged by the applicants addressed these two central issues from a variety of specialised perspectives, ranging from paediatrics, pharmacology and epidemiology to public health administration, economics and statistics. The applicants' papers also include the testimony of doctors, nurses and counsellors confronted daily with the human tragedies of HIV-infected mothers and their babies. In addition there are poignant accounts of HIV-positive pregnant women's pleas for access to Nevirapine for themselves and their babies at public health institutions where its supply is prohibited.

[**7.**] The principal deponents to the government's answer are the Director-General of the national Department of Health, Dr Ayanda Ntsaluba, and Dr Nono Simelela, the Chief Director of the Department's HIV/AIDS programme, whose affidavits were signed on 20 October 2001. They are supported by a number of experts and by the administrative heads of the respective provincial health departments. Although the two main issues relate to government policy, as distinct from mere administration, neither the Minister nor any of the MECs was a deponent.

[**8.**] On 14 December 2001 the High Court made an order substantially in accord with the notice of motion as then worded. Its main provisions were the following:

> 1. It is declared that the first to ninth respondents are obliged to make Nevir-

apine available to pregnant women with HIV who give birth in the public health sector, and to their babies, in public health facilities to which the respondents' present programme for the prevention of mother-to-child transmission of HIV has not yet been extended, where in the judgment of the attending medical officer, acting in consultation with the medical superintendent of the facility concerned, this is medically indicated, which shall at least include that the woman concerned has been appropriately tested and counselled.

2. The first to ninth respondents are ordered to make Nevirapine available to pregnant women with HIV who give birth in the public sector, and to their babies, in public health facilities to which the respondents' present programme for the prevention of mother-to-child transmission of HIV has not yet been extended, where in the opinion of the attending medical practitioner, acting in consultation with the medical superintendent of the facility concerned, this is medically indicated, which shall at least include that the woman concerned has been appropriately tested and counselled.

3. It is declared that the respondents are under a duty forthwith to plan an effective comprehensive national programme to prevent or reduce the mother-to-child transmission of HIV, including the provision of voluntary counselling and testing, and where appropriate, Nevirapine or other appropriate medicine, and formula milk for feeding, which programme must provide for its progressive implementation to the whole of the Republic, and to implement it in a reasonable manner.

4. The respondents are ordered forthwith to plan an effective comprehensive national programme to prevent or reduce the mother-to-child transmission of HIV, including the provision of voluntary counselling and testing, and where appropriate, Nevirapine or other appropriate medicine, and formula milk for feeding, which programme must provide for its progressive implementation to the whole of the Republic, and to implement it in a reasonable manner.

A number of supporting provisions and a costs order against the government were added.

[**9.**] Because of the importance and urgency of the matter, an early date was allocated for the hearing of government's appeal against the order of the High Court. This was followed by an unsuccessful interim application to this Court by government aimed at staying the High Court's order pending the determination of this appeal. At the commencement of the appeal hearing we dismissed a belated application for admission as an additional *amicus curiae* and an application by an *amicus* to adduce evidence. The High Court had also granted an application by the Premier of KwaZulu-Natal to be substituted for his MEC for Health and that substitution gave rise to both an appeal to this Court and an application to present further evidence. These were heard immediately after argument in the main proceedings had ended and both were refused at the time, the reasons to follow. Then, some days after the hearing, the Court addressed an enquiry to the parties which, instead of enlightenment, unfortunately elicited a great deal of contention and yet another application to adduce further evidence, dealt with below. This judgment focuses on the principal issues and these minor matters will be dealt with either in passing or in separate judgments.

Factual background

[**10.**] The two principal issues had been in contention between the applicants and government for some considerable time prior to the launching of the application in the High Court. Thus, when the TAC in September 1999 pressed for acceleration of the government programme for the prevention of *intrapartum* mother-to-child transmission of HIV, it was told by the Minister that this could not be done because there were concerns about, among other things, the safety and efficacy of Nevirapine. Nearly a year later (in August 2000), following the 13th International AIDS Conference in Durban and a follow-up meeting attended by the Minister and the MECs, the Minister announced that Nevirapine would still not be made generally available. Instead each province was going to select two sites for further research and the use of the drug would be confined to such sites.

[**11.**] Close to a year later, in a letter dated 17 July 2001 written by their attorney, the applicants placed on record that

> [t]he Government has decided to make NVP [Nevirapine] available only at a limited number of pilot sites, which number two per province. The result is that doctors in the public sector, who do not work at one of those pilot sites, are unable to prescribe this drug for their patients, even though it has been offered to the government for free.

At the same time they pointedly asked the Minister to

> (a) provide us with legally valid reasons why you will not make NVP available to patients in the public health sector, except at the designated pilot sites, or *alternatively* to undertake forthwith to make NVP available in the public health sector; (b) undertake to put in place a programme which will enable all medical practitioners in the public sector to decide whether to prescribe NVP for their pregnant patients, and to prescribe it where in their professional opinion this is medically indicated.

The Minister's reply dated 6 August 2001 did not deny the restriction imposed by government on the availability of Nevirapine; nor was any plan or programme to extend its availability mentioned. The undertakings requested were neither given nor refused outright. The meaning of the Minister's letter is, however, quite unmistakable. It details a series of governmental concerns regarding the safety and efficacy of Nevirapine requiring continuation of government's research programme.

[**12.**] Nevirapine had been registered in 1998 by the Medicines Control Council, a specialist body created by the Medicines and Related Substances Control Act 101 of 1965 to determine the safety of drugs before their being made available in South Africa. In terms of this Act registration of a drug by definition entails a positive finding as to its quality, safety and efficacy. In January 2001 the World Health Organization recommended the administration of the drug to mother and infant at the time of birth in order to combat HIV and between November 2000 and April 2001 the Medicines Control Council settled the wording of the package insert deal-

ing with such use. The insert was formally approved by the Council in April 2001 and the parties treated that as the date of approval of the drug for the prevention of mother-to-child transmission of HIV.

[**13.**] It was this date of approval that led to the Court's enquiry after the hearing and to the application to adduce further evidence relating to the date of the 'registration' of Nevirapine for the prevention of mother-to-child transmission of HIV. At the time it appeared that this date might be relevant and that Nevirapine may have been approved for the prevention of mother-to-child transmission earlier than April 2001. In the result, however, nothing turns on this. That being the case, further evidence directed to this issue is irrelevant. It follows that the application to adduce further evidence must be refused and no order be made in relation to the costs thereof.

[**14.**] The letter from the Minister also lists a number of social, economic and public health implications of breastfeeding by HIV-positive mothers, emphasises the cultural and financial impact of formula-feeding as a substitute and outlines the overall complexity of providing a comprehensive package of care throughout the country. The Minister, although not responding directly to the undertakings sought on behalf of the applicants, quite clearly intimated that neither undertaking was or would be given. The decision was to confine the provision of Nevirapine in the public sector to the research sites and their outlets.

[**15.**] It can be accepted that an important reason for this decision was that government wanted to develop and monitor its human and material resources nationwide for the delivery of a comprehensive package of testing and counselling, dispensing of Nevirapine and follow-up services to pregnant women attending at public health institutions. Where bottle-feeding was to be substituted for breastfeeding, appropriate methods and procedures had to be evolved for effective implementation, bearing in mind cultural problems, the absence of clean water in certain parts of the country and the increased risks to infants growing up with inadequate nutrition and sanitation. At the same time, data relating to administrative hitches and their solutions, staffing, costs and the like could be gathered and correlated. All of this obviously makes good sense from the public health point of view. These research and training sites could provide vital information on which in time the very best possible prevention programme for mother-to-child transmission could be developed.

[**16.**] This point is also made in the *Protocol for providing a comprehensive package of care for the prevention of mother to child transmission of HIV in South Africa (draft version 4)* issued by government in April 2001:

> There is however, a need to assess the operational challenges inherent in the introduction of anti-retroviral regimen for the reduction of vertical transmission in rural settings as well as in urban settings in South Africa. This is due in part because the introduction of ARV [antiretroviral] interventions needs to be accompanied by a series of other interventions such as the delivery of voluntary

> and confidential counseling and HIV testing, and revised obstetric practices and infant feeding practices. These require extensive capacity building, infrastructure development, improved management and community mobilization efforts. In order to gain better understanding of the operational challenges of introducing the intervention on a wider scale, MINMEC [a body consisting of the Minister of Health and the provincial MECs for Health] endorsed the establishment of two research sites in all nine Provinces for a period of two years.

[**17.**] The crux of the problem, however, lies elsewhere: what is to happen to those mothers and their babies who cannot afford access to private health care and do not have access to the research and training sites? It is not clear on the papers' how long it is planned to take before Nevirapine will be made available outside these sites. Some of the provinces had not yet established any test sites by the time the application was launched in late August 2001. The first sites were established only in May 2001, following a meeting the previous month at which government had endorsed the establishment of the sites for a period of two years. These sites were to be selected according to stated criteria, one in an urban and one in a rural community in each province. Whether the programme was to be maintained strictly until the last of the provincial test sites had been functioning for two years or could possibly be extended beyond that period does not appear from the papers. What is plain, though, is that for a protracted period Nevirapine would not be supplied at any public health institution other than one designated as part of a research site.

The issues

[**18.**] The founding affidavit, signed by the TAC deputy-chairperson, Ms Siphokazi Mthathi, commences with a useful summary of the case presented by the applicants. In paragraphs 20 and 21 of her affidavit the two principal issues are stated thus:

> 20. The first issue is whether the respondents are entitled to refuse to make Nevirapine (a registered drug) available to pregnant women who have HIV and who give birth in the public health sector, in order to prevent or reduce the risk of transmission of HIV to their infants, where in the judgment of the attending medical practitioner this is medically indicated.
> 21. The second issue is whether the respondents are obliged, as a matter of law, to implement and set out clear timeframes for a national programme to prevent mother-to-child transmission of HIV, including voluntary counselling and testing, antiretroviral therapy, and the option of using formula milk for feeding.

[**19.**] Then, in paragraph 22, she summarises the applicants' case in the following terms:

> 22. In summary, the applicants' case is as follows:
> 22.1 The HIV/AIDS epidemic is a major public health problem in our country, and has reached catastrophic proportions.
> 22.2 One of the most common methods of transmission of HIV in children is from mother to child at and around birth. Government estimates are that since 1998, 70 000 children are infected in this manner every year.
> 22.3 The Medicines Control Council has the statutory duty to investigate

whether medicines are suitable for the purpose for which they are intended, and the safety, quality and therapeutic efficacy of medicines.
22.4 The Medicines Control Council has registered Nevirapine for use to reduce the risk of mother-to-child transmission of HIV. This means that Nevirapine has been found to be suitable for this purpose, and that it is safe, of acceptable quality, and therapeutically efficacious.
22.5 The result is that doctors in the private profession can and do prescribe Nevirapine for their patients when, in their professional judgment, it is appropriate to do so.
22.6 In July 2000 the manufacturers of Nevirapine offered to make it available to the South African government free of charge for a period of five years, for the purposes of reducing the risk of mother-to-child transmission of HIV.
22.7 The government has formally decided to make Nevirapine available only at a limited number of pilot sites, which number two per province.
22.8 The result is that doctors in the public sector, who do not work at one of those pilot sites, are unable to prescribe this drug for their patients, even though it has been offered to the government for free.
22.9 The applicants are aware of the desirability of a multiple-strategy approach to the prevention of mother-to-child transmission. However, they cannot and do not accept that this provides a rational or lawful basis for depriving patients at other sites of the undoubted benefits of Nevirapine, even if at this stage the provision can not be done as part of a broader integrated strategy — a point that is not conceded.
22.10 To the extent that there may be situations in which the use of Nevirapine is not indicated, this is the situation in both the private and the public sector. Whether or not to prescribe Nevirapine is a matter of professional medical judgment, which can only be exercised on a case-by-case basis. It is not a matter which is capable of rational or appropriate decision on a blanket basis.
22.11 There is no rational or lawful basis for allowing doctors in the private sector to exercise their professional judgment in deciding when to prescribe Nevirapine, but effectively prohibiting doctors in the public sector from doing so.
22.12 In addition to refusing to make Nevirapine generally available in the public health sector, the government has failed over an extended period to implement a comprehensive programme for the prevention of mother-to-child transmission of HIV.
22.13 The result of this refusal and this failure is the mother-to-child transmission of HIV in situations where this was both predictable and avoidable.
22.14 This conduct of the government is irrational, in breach of the Bill of Rights, and contrary to the values and principles prescribed for public administration in section 195 of the Constitution. Furthermore, government conduct is in breach of its international obligations as contained in a number of conventions that it has both signed and ratified.

[**20.**] The main response on behalf of government by Dr Ntsaluba and Dr Simelela is detailed and lengthy and raises numerous disputes, mostly as to emphasis, opinion or inference but occasionally also of fact. The reply on behalf of the applicants likewise raises many issues of one kind or another. Many of these disputes gave rise to a regrettable degree of animosity and disparagement, culminating in unsubstantiated and gratuitous allegations of untruthfulness being levelled at one of the attorneys on an insignificant side issue. In our country the issue of HIV/AIDS has for some time been

fraught with an unusual degree of political, ideological and emotional contention. This is perhaps unavoidable, having regard to the magnitude of the catastrophe we confront. Nevertheless it is regrettable that some of this contention and emotion has spilt over into this case. Not only does it bedevil future relations between government and non-governmental agencies that will perforce have to join in combating the common enemy, but it could also have rendered the resolution of this case more difficult.

[**21.**] Ultimately, however, we have found it possible to cut through the overlay of contention and arrive at a straightforward and unanimous conclusion. Most if not all of the disputation is beside the point. The essential facts, as we see them, are not seriously in dispute.

[**22.**] In their argument counsel for the government raised issues pertaining to the separation of powers. This may be relevant in two respects — (i) in the deference that courts should show to decisions taken by the executive concerning the formulation of its policies; and (ii) in the order to be made where a court finds that the executive has failed to comply with its constitutional obligations. These considerations are relevant to the manner in which a court should exercise the powers vested in it under the Constitution. It was not contended, nor could it have been, that they are relevant to the question of justiciability.

Enforcement of socio-economic rights

[**23.**] This Court has had to consider claims for enforcement of socio-economic rights on two occasions.[6] On both occasions it was recognised that the state is under a constitutional duty to comply with the positive obligations imposed on it by sections 26 and 27 of the Constitution.[7] It was stressed, however, that the obligations are subject to the qualifications expressed in sections 26(2) and 27(2). On the first occasion, in *Soobramoney*, the claim was dismissed because the applicant failed to establish that the state was in breach of its obligations under section 26 insofar as the provision of renal dialysis to chronically ill patients was concerned. In *Grootboom* the claim was upheld because the state's housing policy in the area of the Cape Metropolitan Council failed to make reasonable provision within available resources for people in that area who had no access to land and no roof over their heads and were living in intolerable conditions.

[**24.**] In both cases the socio-economic rights, and the corresponding obligations of the state, were interpreted in their social and historical context.[8] The difficulty confronting the state in the light of our history

[6] *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC); *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).
[7] *Soobramoney* above n 6 para 36; *Grootboom* above n 6 para 24 and 38.
[8] *Soobramoney* above n 6 para 11; *Grootboom* above n 6 para 25.

in addressing issues concerned with the basic needs of people was stressed. Thus, in *Grootboom*, Yacoob J said:

> This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the State to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The State must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.
>
> I am conscious that it is an extremely difficult task for the State to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the State is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the State to give effect to them. This is an obligation that Courts can, and in appropriate circumstances, must enforce.[9]

[**25.**] The question in the present case, therefore, is not whether socio-economic rights are justiciable. Clearly they are.[10] The question is whether the applicants have shown that the measures adopted by the government to provide access to health care services for HIV-positive mothers and their newborn babies fall short of its obligations under the Constitution.

Minimum core

[**26.**] Before outlining the applicants' legal submissions, it is necessary to consider a line of argument presented on behalf of the first and second *amici*. It was contended that section 27(1) of the Constitution establishes an individual right vested in everyone. This right, so the contention went, has a minimum core to which every person in need is entitled. The concept of 'minimum core' was developed by the United Nations Committee on Economic, Social and Cultural Rights which is charged with monitoring the obligations undertaken by states parties to the International Covenant on Economic, Social and Cultural Rights. According to the Committee a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a state has discharged its minimum core obligations must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each state party to take the necessary steps 'to the maximum of its available resources'. In order for a state party to be able to attribute its failure to

[9] Above n 6 para 934.

[10] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para 78.

meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.[11]

[**27.**] Support for this contention was sought in the language of the Constitution and attention was drawn to the differences between sections 9(2)[12], 24(b)[13], 25(5)[14] and 25(8)[15] on the one hand, and sections 26 and 27 on the other.

[**28.**] It was contended that section 25(5), which obliges the state to 'take reasonable legislative and other measures within its available resources' towards 'access to land', imposes an obligation on the state, but is not associated with a self-standing right to have access to land. Section 24(b), on the other hand, confers on everyone a right 'to have the environment protected . . . through reasonable legislative and other measures', but is not coupled with a separate duty on the state to take such measures. Sections 9(2) and 25(8) contain permissive powers to take reasonable measures but no obligation to do so. In the case of sections 26 and 27, however, rights and obligations are stated separately. There is accordingly a distinction between the self-standing rights in sections 26(1) and 27(1), to which everyone is entitled, and which in terms of section 7(2) of the Constitution '[t]he state must respect, protect, promote and fulfil', and the independent obligations imposed on the state by sections 26(2) and 27(2). This minimum core might not be easy to define, but includes at least the minimum decencies of life consistent with human dignity. No one should be condemned to a life below the basic level of dignified human existence. The very notion of individual rights presupposes that anyone in that position should be able to obtain relief from a court.

[**29.**] In effect what the argument comes down to is that sections 26 and 27 must be construed as imposing two positive obligations on the state:

[11] CESCR General Comment 3 The nature of States parties obligations (art 2, par 1) 14/12/90 para 10.

[12] Section 9(2) provides: Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

[13] Section 24(b) provides that everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

[14] Section 25(5) provides: The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

[15] Section 25(8) provides: No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

one an obligation to give effect to the 26(1) and 27(1) rights; the other a limited obligation to do so progressively through 'reasonable legislative and other measures, within its available resources'. Implicit in that contention is that the content of the right in subsection (1) differs from the content of the obligation in subsection (2). This argument fails to have regard to the way subsections (1) and (2) of both sections 26 and 27 are linked in the text of the Constitution itself, and to the way they have been interpreted by this Court in *Soobramoney* and *Grootboom*.

[**30.**] Section 26(1) refers to the 'right' to have access to housing. Section 26(2), dealing with the state's obligation in that regard, requires it to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'. The reference to 'this right' is clearly a reference to the section 26(1) right. Similar language is used in section 27 which deals with health care services, including reproductive health care, sufficient food and water, and social security, including, if persons are unable to support themselves and their dependants, appropriate social assistance. Subsection (1) refers to the right everyone has to have 'access' to these services; and subsection (2) obliges the state to take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'. The rights requiring progressive realisation are those referred to in sections 27(1)(a), (b) and (c).

[**31.**] In *Soobramoney* it was said:

> What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, *and that the corresponding rights themselves are limited by reason of the lack of resources*.[16]

The obligations referred to in this passage are clearly the obligations referred to in sections 26(2) and 27(2), and the 'corresponding rights' are the rights referred to in sections 26(1) and 27(1).

[**32.**] This passage is cited in *Grootboom*.[17] It is made clear in that judgment that sections 26(1) and 26(2) 'are related and must be read together'.[18] Yacoob J said:

> The section has been carefully crafted. It contains three subsections. The first confers a general right of access to adequate housing. The second establishes and delimits the scope of the positive obligation imposed upon the State . . .[19]

It is also made clear that '[s]ection 26 does not expect more of the State than is achievable within its available resources'[20] and does not confer an

[16] Above n 6 para 11 (emphasis added).
[17] Above n 6 para 46.
[18] *Id* para 34.
[19] *Id* para 21.
[20] *Id* para 46.

entitlement to 'claim shelter or housing immediately upon demand'[21] and that as far as the rights of access to housing, health care, sufficient food and water, and social security for those unable to support themselves and their dependants are concerned, 'the State is not obliged to go beyond available resources or to realise these rights immediately'.[22]

[**33.**] In *Grootboom* reliance was also placed on the provisions of the Covenant. Yacoob J held that in terms of our Constitution the question is 'whether the measures taken by the State to realise the right afforded by s 26 are reasonable'.[23]

[**34.**] Although Yacoob J indicated that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable,[24] the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. Minimum core was thus treated as possibly being relevant to reasonableness under section 26(2), and not as a self-standing right conferred on everyone under section 26(1).[25]

[**35.**] A purposive reading of sections 26 and 27 does not lead to any other conclusion. It is impossible to give everyone access even to a 'core' service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis. In *Grootboom* the relevant context in which socio-economic rights need to be interpreted was said to be that

> [m]illions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted . . .[26]

[**36.**] The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section 1. As the Bill of Rights indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable. As this Court said in *Grootboom*: '[i]t is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations.'[27]

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[21] *Id* para 95.
[22] *Id* para 94.
[23] *Id* para 33.
[24] *Id.*
[25] *Id.*
[26] *Id* para 25, quoting from *Soobramoney* above n 6 para 8.
[27] *Id* para 41.

[**37.**] It should be borne in mind that in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimumcore standards called for by the first and second *amici* should be, nor for deciding how public revenues should most effectively be spent. There are many pressing demands on the public purse. As was said in *Soobramoney*:

> The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt an holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.[28]

[**38.**] Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.

[**39.**] We therefore conclude that section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the state to 'respect, protect, promote and fulfil' such rights. The rights conferred by sections 26(1) and 27(1) are to have 'access' to the services that the state is obliged to provide in terms of sections 26(2) and 27(2).

Government policy on the prevention of mother-to-child transmission of HIV

[**40.**] Government's policy for the treatment of HIV/AIDS including mother-to-child transmission of HIV is dealt with in various documents. In particular, government adopted an *HIV/AIDS & STD strategic plan for South Africa 2000–2005*. This was followed by a number of HIV/AIDS-related policy guidelines that deal with various aspects of the strategic plan. These included guidelines on managing HIV in children, prevention of mother-to-child transmission and management of HIV-positive pregnant women, feeding of infants of HIV-positive mothers and testing for HIV. It is not necessary to refer in any detail to these documents and the policies embodied in them. Where particular matters are relevant, they will be referred to in the judgment. Government policy was also the subject of discussion at the meetings of the Department of Health's National Steer-

[28] Above n 6 para 31.

ing Committee on Prevention of Mother-to-Child Transmission and at meetings of Minmec.

[**41.**] Following the 13th International Conference on HIV/AIDS held in Durban in July 2000, government took a decision to implement a programme for the prevention of mother-to-child transmission of HIV/AIDS. This programme entailed the provision of voluntary HIV counselling and testing to pregnant women, the provision of Nevirapine and the offer of formula feed to HIV-positive mothers who chose this option of feeding. The implementation of this programme was to be confined to selected sites in each province for a period of two years. As pointed out earlier, these pilot sites were to be used primarily to evaluate the use of Nevirapine, monitoring and evaluating its impact on the health status of the children affected as well as the feasibility of such an intervention on a countrywide basis. Information gathered from these sites was to be used in developing a national policy for the extension of this programme to other public facilities outside the pilot sites. Nevirapine was not to be made available to public facilities outside the pilot sites.

[**42.**] This programme was to be implemented in accordance with the *Protocol for providing a comprehensive package of care for the prevention of mother to child transmission of HIV in South Africa*, draft version 4 of which was adopted in April 2001. This protocol made provision for a comprehensive package of care for the prevention of mother-to-child transmission of HIV. It was based on two propositions: first, the acceptance that there is enough scientific evidence confirming the efficacy of various antiretroviral drugs for reducing the transmission of HIV from mother to child; and second, that there is a need to assess the operational challenges inherent in the introduction of an antiretroviral regimen for the reduction of mother-to-child transmission of HIV in South Africa in both rural and urban settings. The protocol recognised that appropriately trained staff is a prerequisite for the successful implementation of any programme. To this end, provision was made in the protocol for the development of materials for the required training of staff, including training in counselling, testing for HIV, the medical and obstetric interventions necessary to reduce mother-to-child transmission at the time of birth and other related matters.

[**43.**] The protocol contemplated that the programme would be introduced at two sites, one rural and one urban, in each of the provinces. A full package of care would be available at these sites and the progress made by the infants receiving the treatment would be carefully monitored for a period of two years.

The applicants' contentions

[**44.**] It is the applicants' case that the measures adopted by government to provide access to health care services to HIV-positive pregnant women were deficient in two material respects: first, because they prohibited the

administration of Nevirapine at public hospitals and clinics outside the research and training sites; and second, because they failed to implement a comprehensive programme for the prevention of mother-to-child transmission of HIV.

[**45.**] The two questions are interrelated and a consequence of government's policy as it was when these proceedings were instituted. The use of Nevirapine to reduce the risk of mother-to-child transmission of HIV was confined to mothers and newborn children at hospitals and clinics included in the research and training sites. At all other public hospitals and clinics the use of Nevirapine for this purpose was not provided for. Public hospitals and clinics outside the research and training sites were not supplied with Nevirapine for doctors to prescribe for the prevention of mother-to-child transmission. Only later would a decision be taken as to whether Nevirapine and the rest of the package would be made available elsewhere in the health system. That decision would depend upon the results at the research and training sites. The applicants contend that this is not reasonable and that government ought to have had a comprehensive national programme to prevent mother-to-child transmission of HIV, including voluntary counselling and testing, antiretroviral therapy and the option of substitute feeding.

[**46.**] In *Grootboom*, relying on what is said in the *First Certification Judgment,*[29] this Court held that

> [a]lthough [section 26(1)] does not expressly say so, there is, at the very least, a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.[30]

That 'negative obligation' applies equally to the section 27(1) right of access to 'health care services, including reproductive health care'. This is relevant to the challenges to the measures adopted by government for the provision of medical services to combat mother-to-child transmission of HIV.

[**47.**] The applicants' contentions raise two questions, namely, is the policy of confining the supply of Nevirapine reasonable in the circumstances; and does government have a comprehensive policy for the prevention of mother-to-child transmission of HIV?

The policy confining Nevirapine to the research and training sites

[**48.**] In deciding on the policy to confine Nevirapine to the research and training sites, the cost of the drug itself was not a factor. This is made clear in the affidavit of Dr Ntsaluba. He says:

> I admit that the medicine has been offered to the first to ninth respondents for

[29] Above n 10 para 78: At the very minimum, socio-economic rights can be negatively protected from improper invasion.
[30] Above n 6 para 34.

> free for a period of five years by the manufacturer. The driving cost for the provision of Nevirapine however is not the price to be attached to the medicine but the provision of the formula feeding for those persons who are not in a position to afford formula feeds in order to discourage breast feeding and other costs incurred to provide operational structures which are appropriately and properly geared toward counselling and testing persons who are candidates for the administration of Nevirapine.

He also says that

> [t]he public health sector hospitals, as it is, are under tremendous pressure, and while it may be ideal for such doctors to go on to provide Nevirapine with the appropriate advice, counselling and follow-up care is presently not immediately attainable. It is imperative that appropriate support structures for counselling, follow-up etc. be put in place to ensure that Nevirapine is effective and that it delivers the promised benefits.

[**49.**] The costs that are of concern to the government are therefore the costs of providing the infrastructure for counselling and testing, of providing formula feed, vitamins and an antibiotic drug and of monitoring, during bottle-feeding, the mothers and children who have received Nevirapine. These costs are relevant to the comprehensive programme to be established at the research and training sites. They are not, however, relevant to the provision of a single dose of Nevirapine to both mother and child at the time of birth.

[**50.**] The implementation of a comprehensive programme to combat mother-to-child transmission of HIV, such as that provided at the research and training sites, is no doubt the ideal. The real dispute between the parties on this aspect of the case is not, however, whether this optimum was feasible, but whether it was reasonable to exclude the use of Nevirapine for the treatment of mother-to-child transmission at those public hospitals and clinics where testing and counselling are available and where the administration of Nevirapine is medically indicated.

[**51.**] In substance four reasons were advanced in the affidavits for confining the administration of Nevirapine to the research and training sites. First, concern was expressed about the efficacy of Nevirapine where the 'comprehensive package' is not available. The concern was that the benefits of Nevirapine would be counteracted by the transmission of HIV from mother to infant through breastfeeding. For this reason government considered it important to provide breast milk substitutes to the mother and a 'package' of care for mother and infant including vitamin supplements and antibiotics. They considered it necessary to establish a system and to put in place the infrastructure necessary for that purpose, to provide advice and counselling to the mothers to ensure that the substitute and supplements were used properly and to monitor progress to determine the effectiveness of the treatment. There are significant problems in making this package available. There are problems of resources insofar as counselling and testing are concerned and budgetary constraints affecting the expansion of facilities at public hospitals and clinics outside the research and training sites. There is

a cultural objection to bottle-feeding that has to be overcome, and in rural areas there are also hazards in bottle-feeding by mothers who do not have access to clean water. There are still millions of people living in such circumstances, and effective treatment of infants by the provision of Nevirapine at birth by no means resolves all difficulties.

[**52.**] Secondly, there was a concern that the administration of Nevirapine to the mother and her child might lead to the development of resistance to the efficacy of Nevirapine and related antiretrovirals in later years.

[**53.**] Thirdly, there was a perceived safety issue. Nevirapine is a potent drug and it is not known what hazards may attach to its use.

[**54.**] Finally, there was the question whether the public health system has the capacity to provide the package. It was contended on behalf of government that Nevirapine should be administered only with the 'full package' and that it was not reasonably possible to do this on a comprehensive basis because of the lack of trained counsellors and counselling facilities and also budgetary constraints which precluded such a comprehensive scheme being implemented.

[**55.**] Related to this was a submission raised in argument that, from a public health point of view, there is a need to determine the costs of providing the breast milk substitute, the supplementary package and the necessary counselling and monitoring. Without knowing the full extent of these costs and the efficacy of the treatment, it would be unwise for government to commit itself to a wide-ranging programme for treating mother-to-child transmission that might prove to be neither efficacious nor sustainable.

[**56.**] We deal with each of these issues in turn.

Efficacy

[**57.**] First, the concern about efficacy. It is clear from the evidence that the provision of Nevirapine will save the lives of a significant number of infants even if it is administered without the full package and support services that are available at the research and training sites. Mother-to-child transmission of HIV can take place during pregnancy, at birth and as a result of breastfeeding. The programme in issue in this case is concerned with transmission at or before birth. Although there is no dispute about the efficacy of Nevirapine in materially reducing the likelihood of transmission at birth, the efficacy of the drug as a means of combating mother-to-child transmission of HIV is nevertheless challenged. How this comes about requires some discussion.

[**58.**] The challenge was first expressed in the Minister's letter of 6 August 2001 which precipitated these proceedings.[31] The first of a number of

[31] See para 11 above.

what the Minister called '[o]ur most pressing concerns' was put in the following terms:

> There is evidence that NVP is effective in the prevention of intra-partum transmission. However, there is also evidence that a percentage of the babies who, as a result of the use of NVP, are born HIV negative, nevertheless sero-convert and become HIV positive in the months that follow their birth. For this reason, the registered claim for NVP in South Africa is not that it can prevent MTCT but that it can prevent intra-partum transmission. It appears from the data at hand that the most compelling reason for this sero-conversion is the fact that the HIV positive mothers were breast-feeding their babies.

The letter adds that

> although we do not have the formal results [of a test reported a year before], we have reason to believe that breastfeeding continues to pose a risk which reverses the benefits of medical intervention.

Then, in the answering affidavit of Dr Ntsaluba, this doubt about the efficacy of intrapartum administration of Nevirapine is repeated:

> Breastfeeding is contra-indicated where Nevirapine is used to reduce or prevent MTCT of the HIV. It must be remembered that MTCT of HIV-1 through breast-milk negates all the gains of the use of Nevirapine in the mother during delivery and in the newborn child within 72 hours after birth. Thus, it is not safe to expose a largely breastfeeding populace to Nevirapine, unless certain stringent measures are taken to ensure that breastfeeding would not occur when the medicine is taken to treat MTCT of the HIV.

These allegations by the Minister in her letter and by Dr Ntsaluba are, however, not supported by the data on which Dr Ntsaluba relies. Indeed, the wealth of scientific material produced by both sides makes plain that sero-conversion of HIV takes place in some, but not all, cases and that Nevirapine thus remains to some extent efficacious in combating mother-to-child transmission even if the mother breastfeeds her baby.

Resistance

[**59.**] As far as resistance is concerned, the only relevance is the possible need to treat the mother and/or the child at some time in the future. Although resistant strains of HIV might exist after a single dose of Nevirapine, this mutation is likely to be transient. At most there is a possibility of such resistance persisting, and although this possibility cannot be excluded, its weight is small in comparison with the potential benefit of providing a single tablet of Nevirapine to the mother and a few drops to her baby at the time of birth. The prospects of the child surviving if infected are so slim and the nature of the suffering so grave that the risk of some resistance manifesting at some time in the future is well worth running.

Safety

[**60.**] The evidence shows that safety is no more than a hypothetical issue. The only evidence of potential harm concerns risks attaching to the ad-

ministration of Nevirapine as a chronic medication on an ongoing basis for the treatment of HIV-positive persons. There is, however, no evidence to suggest that a dose of Nevirapine to both mother and child at the time of birth will result in any harm to either of them. According to the current medical consensus, there is no reason to fear any harm from this particular administration of Nevirapine. That is why its use is recommended without qualification for this purpose by the World Health Organization.

[**61.**] There is also cogent South African endorsement of the safety of Nevirapine in general and specifically for the prevention of mother-to-child transmission. As indicated earlier, the Medicines Control Council registered Nevirapine in 1998 (affirming its quality, safety and efficacy) and later expressly approved its administration to mother and infant at the time of birth in order to combat HIV. Although it recommends that if this is done the infant should be bottle-fed and not breastfed, that is to enhance the efficacy of Nevirapine and not because it is considered to be dangerous. The risk to be guarded against is the transmission of HIV from mother to child through breastfeeding. That is a risk that exists whether Nevirapine is administered or not. Far from being harmful, there is evidence that even with breastfeeding the risk of infection is materially reduced by administering Nevirapine at birth.

[**62.**] The decision by government to provide Nevirapine to mothers and infants at the research and training sites is consistent only with government itself being satisfied as to the efficacy and safety of the drug. These sites cater for approximately 10% of all births in the public sector and it is unthinkable that government would gamble with the lives or health of thousands of mothers and infants. In any event, the research and training sites are intended primarily to train staff and to study the operational problems of the comprehensive prevention of mother-to-child transmission package. As to the research component at these sites, it is intended to focus on the efficacy of the treatment rather than its safety. There is no evidence to suggest that a single dose of Nevirapine administered at birth is likely to harm children during the first two years of their lives. The risk of Nevirapine causing harm to infants in the public health sector outside the research and training sites can be no greater than the risk that exists at such a site or where it is administered by medical practitioners in the private sector.

[**63.**] In any event the main thrust of government's case was that Nevirapine should be administered in circumstances in which it would be most effective, not that it should not be administered because it is dangerous. Dr Ntsaluba seems to acknowledge this in his affidavit where he says:

> As I have pointed out earlier, to extend the programme to every hospital in each province is practically and financially not feasible. It would have been ideal but while that is a goal that the first to ninth respondents are working towards, it is not implementable at once.

[**64.**] It is this that lies at the heart of government policy. There are ob-

viously good reasons from the public health point of view to monitor the efficacy of the 'full package' provided at the research and training sites and determine whether the costs involved are warranted by the efficacy of the treatment. There is a need to determine whether bottle-feeding will be implemented in practice when such advice is given and whether it will be implemented in a way that proves to be more effective than breastfeeding, bearing in mind the cultural problems associated with bottle-feeding, the absence of clean water in certain parts of the country and the fact that breastfeeding provides immunity from other hazards that infants growing up in poor households without access to adequate nutrition and sanitation are likely to encounter. However, this is not a reason for not allowing the administration of Nevirapine elsewhere in the public health system when there is the capacity to administer it and its use is medically indicated.

Capacity

[**65.**] According to Dr Simelela, there have been significant problems even at the research and training sites in providing a comprehensive programme using Nevirapine for the prevention of mother-to-child transmission. A lack of adequately trained personnel, including counsellors, a shortage of space for conducting counselling and inadequate resources due to budgetary constraints made it impossible to provide such a programme.

[**66.**] Although the concerns raised by Dr Simelela are relevant to the ability of government to make a 'full package' available throughout the public health sector, they are not relevant to the question whether Nevirapine should be used to reduce mother-to-child transmission of HIV at those public hospitals and clinics outside the research sites where facilities in fact exist for testing and counselling.

Considerations relevant to reasonableness

[**67.**] The policy of confining Nevirapine to research and training sites fails to address the needs of mothers and their newborn children who do not have access to these sites. It fails to distinguish between the evaluation of programmes for reducing mother-to-child transmission and the need to provide access to health care services required by those who do not have access to the sites.

[**68.**] In *Grootboom* this Court held that

> [t]o be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.[32]

The fact that the research and training sites will provide crucial data on

[32] Above n 6 para 44.

which a comprehensive programme for mother-to-child transmission can be developed and, if financially feasible, implemented is clearly of importance to government and to the country. So too is ongoing research into safety, efficacy and resistance. This does not mean, however, that until the best programme has been formulated and the necessary funds and infrastructure provided for the implementation of that programme, Nevirapine must be withheld from mothers and children who do not have access to the research and training sites. Nor can it reasonably be withheld until medical research has been completed. A programme for the realisation of socio-economic rights must

> be balanced and flexible and make appropriate provision for attention to . . . crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable.[33]

[**69.**] The applicants do not suggest that Nevirapine should be administered indiscriminately to mothers and babies throughout the public sector. They accept that the drug should be administered only to mothers who are shown to be HIV-positive and that it should not be administered unless it is medically indicated and, where necessary, counselling is available to the mother to enable her to take an informed decision as to whether or not to accept the treatment recommended. Those conditions form part of the order made by the High Court.

[**70.**] In dealing with these questions it must be kept in mind that this case concerns particularly those who cannot afford to pay for medical services. To the extent that government limits the supply of Nevirapine to its research sites, it is the poor outside the catchment areas of these sites who will suffer. There is a difference in the positions of those who can afford to pay for services and those who cannot. State policy must take account of these differences.[34]

[**71.**] The cost of Nevirapine for preventing mother-to-child transmission is not an issue in the present proceedings. It is admittedly within the resources of the state. The relief claimed by the applicants on this aspect of the policy, and the order made by the High Court in that regard, contemplate that Nevirapine will only be administered for the prevention of mother-to-child transmission at those hospitals and clinics where testing and counselling facilities are already in place. Therefore this aspect of the claim and the orders made will not attract any significant additional costs.

[**72.**] In evaluating government's policy, regard must be had to the fact that this case is concerned with newborn babies whose lives might be saved by the administration of Nevirapine to mother and child at the time of birth. The safety and efficacy of Nevirapine for this purpose have

[33] *Id* para 43.
[34] *Id* para 357.

been established and the drug is being provided by government itself to mothers and babies at the pilot sites in every province.

[**73.**] The administration of Nevirapine is a simple procedure. Where counselling and testing facilities exist, the administration of Nevirapine is well within the available resources of the state and, in such circumstances, the provision of a single dose of Nevirapine to mother and child where medically indicated is a simple, cheap and potentially life-saving medical intervention.

Children's rights

[**74.**] There is another consideration that is material. This case is concerned with newborn children. Sections 28(1)(b) and (c) of the Constitution provide that

> [e]very child has the right — (a) . . . (b) to family care or parental care, or to appropriate alternative care when removed from the family environment; (c) to basic nutrition, shelter, basic health care services and social services.

The applicants and the *amici curiae* relied on these provisions to support the order made by the High Court.

[**75.**] In *Grootboom* it was held that paragraphs (b) and (c) must be read together.

> They ensure that children are properly cared for by their parents or families, and that they receive appropriate alternative care in the absence of parental or family care. The section encapsulates the conception of the scope of care that children should receive in our society. Subsection 1*(b)* defines those responsible for giving care while ss 1*(c)* lists various aspects of the care entitlement.
>
> It follows from ss 1*(b)* that the Constitution contemplates that a child has the right to parental or family care in the first place, and the right to alternative appropriate care only where that is lacking.[35]

[**76.**] Counsel for the government, relying on these passages in the *Grootboom* judgment, submitted that section 28(1)(c) imposes an obligation on the parents of the newborn child, and not the state, to provide the child with the required basic health care services.

[**77.**] While the primary obligation to provide basic health care services no doubt rests on those parents who can afford to pay for such services, it was made clear in *Grootboom* that '[t]his does not mean . . . that the State incurs no obligation in relation to children who are being cared for by their parents or families.'[36]

[**78.**] The provision of a single dose of Nevirapine to mother and child for the purpose of protecting the child against the transmission of HIV is, as far as the children are concerned, essential. Their needs are 'most urgent' and their inability to have access to Nevirapine profoundly affects their ability

[35] *Id* para 76-7.
[36] *Id* para 78.

to enjoy all rights to which they are entitled. Their rights are 'most in peril' as a result of the policy that has been adopted and are most affected by a rigid and inflexible policy that excludes them from having access to Nevirapine.

[**79.**] The state is obliged to ensure that children are accorded the protection contemplated by section 28[37] that arises when the implementation of the right to parental or family care is lacking.[38] Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means. They and their children are in the main dependent upon the state to make health care services available to them.

Evaluation of the policy to limit Nevirapine to research and training sites

[**80.**] Government policy was an inflexible one that denied mothers and their newborn children at public hospitals and clinics outside the research and training sites the opportunity of receiving a single dose of Nevirapine at the time of the birth of the child. A potentially life-saving drug was on offer and where testing and counselling facilities were available it could have been administered within the available resources of the state without any known harm to mother or child. In the circumstances we agree with the finding of the High Court that the policy of government insofar as it confines the use of Nevirapine to hospitals and clinics which are research and training sites constitutes a breach of the state's obligations under section 27(2) read with section 27(1)(a) of the Constitution.

[**81.**] Implicit in this finding is that a policy of waiting for a protracted period before taking a decision on the use of Nevirapine beyond the research and training sites is also not reasonable within the meaning of section 27(2) of the Constitution.

Does government have a comprehensive plan to combat mother-to-child transmission of HIV?

[**82.**] The issues relating to the alleged failure to implement a comprehensive national programme for the prevention of mother-to-child transmission are intertwined with the averments concerning the refusal to permit Nevirapine to be prescribed at public hospitals and clinics outside the research and training sites. Foundational to all aspects of the case was the challenge to the policy concerning the use of Nevirapine.

[**83.**] Because of the policy restricting the use of Nevirapine, the counsellors at the hospitals and clinics outside the research and training sites have had no training in its use for the prevention of mother-to-child transmis-

[37] *Id* para 78.
[38] *Id* para 77.

sion of HIV. That, however, should not be a major concern. According to the *National programme for the prevention of mother to child transmission of HIV (MTCT): Trainer's guide*, the total training time required to prepare counsellors for the mother-to-child transmission programme is 15 hours spread over 10 sessions of 1 hours each. For counsellors who are already trained in the programme and merely need to be updated regarding the use of Nevirapine, the time must be very much shorter.

[**84.**] It is therefore important to know what facilities exist outside the research and training sites for testing and counselling. The applicants alleged in the founding affidavit that testing and counselling were not comprehensively available outside the research and training sites. This allegation was not substantiated by any direct evidence and most of the evidence was directed to government's policy concerning Nevirapine, the central issue in the case. The allegation that there was no programme dealing with mother-to-child transmission outside the research and training sites was denied by Dr Ntsaluba. He referred to a number of policy documents which deal with this topic. These documents include the *HIV/AIDS & STD strategic plan for South Africa 2000–2005*. Various goals and strategies are set out in this plan. Strategies include introducing counselling services in all new testing sites, expanding the use of rapid testing methods, increasing the proportion of workplaces that have counselling services and promoting access to such services.

[**85.**] Reference is also made to a policy document dealing with managing HIV in children. This document is dated March 2000 and includes a section on reducing mother-to-child transmission which deals with a number of interventions. These include voluntary counselling and HIV testing of pregnant women. It is stated that 'all pregnant women should be offered counselling and an HIV test' and a detailed rationale is given.

[**86.**] Another policy document dated May 2000 states explicitly that '[v]oluntary testing and counselling must be made available to *all* pregnant women' (emphasis added). It goes on to say that the benefits to a woman of knowing her HIV status include the ability to make informed choices about feeding options, earlier access to care for both mother and child, the opportunity to terminate pregnancy where desired and legal, and the ability to make informed decisions about sexual practices and future fertility.

[**87.**] In August of the same year there was a further policy document dealing with the feeding of infants of HIV-positive mothers. It proceeds on the assumption that voluntary counselling and testing for HIV are necessary. In the same month policy guidelines for such testing were prescribed. It is made clear that testing cannot be carried out without informed consent, including pre-test counselling. It does not focus on where or to what extent counselling should be available, except to say that where a health facility lacks the appropriate pre- or post-test counselling facilities, the patient should be referred to an agency or facility that can provide the counselling.

[**88.**] In their replying affidavits the applicants do not seek to contradict these policy documents, but say that, if correct, they show latent capacity outside the research and training sites to prescribe Nevirapine for prevention of mother-to-child transmission where it is medically indicated. They also introduce an affidavit by Professor Schneider to show that testing and counselling facilities, though not available throughout the public health sector, are in fact widely available at hospitals and clinics outside the research and training sites. Government does not dispute this, but says that such counsellors are not trained in counselling for the use of Nevirapine for the reduction of mother-to-child transmission.

[**89.**] The affidavits by the heads of the provincial health departments deal with their budgets and the difficulties confronting them in expanding existing facilities for addressing mother-to-child transmission and in training counsellors. What is apparent from these affidavits is that some provinces had more extensive facilities for testing and counselling than others; also that at the time the proceedings commenced the budgets of most of the health departments were strained, and in many parts of the country there were problems in implementing health policies.

Testing and counselling

[**90.**] The evidence shows that at the time of the commencement of these proceedings there was in place a comprehensive policy for testing and counselling of HIV-positive pregnant women. The policy was not, however, implemented uniformly. Professor Schneider's research is the only evidence on record concerning the extent of the testing and counselling facilities at fixed clinics[39] in the provinces. She refers to a number of studies — particularly two surveys conducted by the Health Systems Trust in 1998 and 2000. Her conclusions on the basis of these surveys were as follows:

Province	Percentage of fixed clinics offering HIV testing	Percentage of fixed clinics offering HIV counselling
Eastern Cape	44,0	91,2
Free State	87,5	96,0
Gauteng	100,0	92,9
KwaZulu-Natal	40,0	80,0
Mpumalanga	79,0	60,7
Northern Cape	100,0	91,7
Northern Province	14,6	68,8
North West	53,1	71,9
Western Cape	100,0	96,7

[39] Fixed clinics are contrasted with mobile clinics for which there are no statistics on the record.

It is not clear whether these statistics include facilities at public hospitals, or whether it is assumed that such facilities exist there and that what was being addressed was the extent of the facilities at places other than hospitals. The statistics are relevant in any event because a significant proportion of pregnant women are counselled at clinics and treated there. Indeed, over 84% of South African women deliver in the health system, that is, under the supervision of a health professional.

Formula-feeding

[**91.**] Some of the policy documents also refer to the substitution of formula-feeding for breastfeeding without setting that as policy. The *HIV/AIDS policy guideline on prevention of mother-to-child HIV transmission and management of HIV positive pregnant women (May 2000)* states in its introduction that appropriate alternatives to breastfeeding should be made available and affordable for HIV-positive women. Professor Schneider's research shows that many hospitals and clinics have stocks of formula feed to be provided as a substitute for breastfeeding where appropriate. It is not clear, however, that a policy commitment is made to achieving this. In none of the policy documents is it said that government will actually provide the formula feed. The furthest that the policy on the provision of feeding substitutes seems to go is the statement in the *HIV/AIDS policy guideline on feeding of infants of HIV positive mothers (August 2000)* which indicates that the policy concerning the provision of breast milk substitutes (such as infant formula feed) by the health care services needs to be taken up by the provincial authorities and by any other relevant authority. The point is made here that the cost of providing breast milk substitutes must also be compared with or offset by the savings in preventing newborn babies being infected with HIV and consequently needing care.

Summary of the relevant evidence

[**92.**] To sum up, the position when the application was launched was this. Two research and training sites had been selected at hospitals in each province to use Nevirapine for the prevention of mother-to-child transmission of HIV.[40] These research and training sites were linked to access points at satellite clinics. There were approximately 160 access points. (During the course of the proceedings these had increased to over 200.) At the project hospitals and satellite clinics a full package for the treatment of mother-to-child transmission was to be available. This included testing, counselling, Nevirapine if medically indicated, the provision of formula feed as a substitute for breastfeeding, aftercare including the provision of vitamins and antibiotics, and monitoring of the progress of the children. At all other public hospitals and clinics Nevirapine would not be available.

[40] The Western Cape adopted a programme for the progressive expansion of the supply of Nevirapine for such use at its hospitals and clinics.

There was, however, to be a programme for testing and counselling, including counselling on matters related to breastfeeding. Formula feed was available at some hospitals and clinics, but it was not a requirement of the programme to combat mother-to-child transmission outside the research and training sites that it be made available to HIV-positive mothers of newborn babies who would like to avoid breastfeeding but cannot afford the formula feed. Although the programme envisaged the progressive establishment of testing and counselling facilities at all hospitals and clinics, progress had been slow in certain parts of the country, particularly in clinics in the Northern Province, Mpumalanga, the Eastern Cape and KwaZulu-Natal. The bulk of the rural population lives in these provinces where millions of people are still without access to clean water or adequate sanitation.

Findings concerning government's programme

[**93.**] In the present case this Court has the duty to determine whether the measures taken in respect of the prevention of mother-to-child transmission of HIV are reasonable. We know that throughout the country health services are overextended. HIV/AIDS is but one of many illnesses that require attention. It is, however, the greatest threat to public health in our country. As the government's *HIV/AIDS & STD strategic plan for South Africa 2000–2005* states:

> During the last two decades, the HIV pandemic has entered our consciousness as an incomprehensible calamity. HIV/AIDS has claimed millions of lives, inflicting pain and grief, causing fear and uncertainty, and threatening the economy.

[**94.**] We are also conscious of the daunting problems confronting government as a result of the pandemic. And besides the pandemic, the state faces huge demands in relation to access to education, land, housing, health care, food, water and social security. These are the socio-economic rights entrenched in the Constitution, and the state is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of them. In the light of our history this is an extraordinarily difficult task. Nonetheless it is an obligation imposed on the state by the Constitution.

[**95.**] The rigidity of government's approach when these proceedings commenced affected its policy as a whole. If, as we have held, it was not reasonable to restrict the use of Nevirapine to the research and training sites, the policy as a whole will have to be reviewed. Hospitals and clinics that have testing and counselling facilities should be able to prescribe Nevirapine where that is medically indicated. The training of counsellors ought now to include training for counselling on the use of Nevirapine. As previously indicated, this is not a complex task and it should not be difficult to equip existing counsellors with the necessary additional knowledge. In addition, government will need to take reasonable measures to extend the testing and counselling facilities to hospitals and clinics throughout the public health sector beyond the test sites to

facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.

The powers of the courts

[**96.**] Counsel for the government contended that even if this Court should find that government policies fall short of what the Constitution requires, the only competent order that a court can make is to issue a declaration of rights to that effect. That leaves government free to pay heed to the declaration made and to adapt its policies insofar as this may be necessary to bring them into conformity with the Court's judgment. This, so the argument went, is what the doctrine of separation of powers demands.

[**97.**] In developing this argument counsel contended that under the separation of powers the making of policy is the prerogative of the executive and not the courts, and that courts cannot make orders that have the effect of requiring the executive to pursue a particular policy.

[**98.**] This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others.[41] All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy.

[**99.**] The primary duty of courts is to the Constitution and the law, 'which they must apply impartially and without fear, favour or prejudice'.[42] The Constitution requires the state to 'respect, protect, promote, and fulfil the rights in the Bill of Rights'.[43] Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. Insofar as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself. There is also no merit in the argument advanced on behalf of government that a distinction should be

[41] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) para 180 and 183; *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) para 46; *Soobramoney* above n 6 para 29; *Grootboom* above n 6 para 41; *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) para 63-4; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) para 66.

[42] Section 165(2) of the Constitution.

[43] Section 7(2).

drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of state can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so. Thus, in the *Mpumalanga* case,[44] this Court set aside a provincial government's policy decision to terminate the payment of subsidies to certain schools and ordered that payments should continue for several months. Also, in the case of *August*[45] the Court, in order to afford prisoners the right to vote, directed the Electoral Commission to alter its election policy, planning and regulations, with manifest cost implications.

[**100.**] The rights that the state is obliged to 'respect, protect, promote and fulfil' include the socio-economic rights in the Constitution. In *Grootboom* this Court stressed that insofar as socio-economic rights are concerned

> [t]he State is required to take reasonable legislative *and* other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the Executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the State's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the State's obligations.[46]

[**101.**] A dispute concerning socio-economic rights is thus likely to require a court to evaluate state policy and to give judgment on whether or not it is consistent with the Constitution. If it finds that policy is inconsistent with the Constitution, it is obliged in terms of section 172(1)(a) to make a declaration to that effect. But that is not all. Section 38 of the Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant 'appropriate relief'. It has wide powers to do so and in addition to the declaration that it is obliged to make in terms of section 172(1)(a) a court may also 'make any order that is just and equitable'.[47]

[**102.**] In *Fose v Minister of Safety and* Security[48] this Court held that

> [a]ppropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other

[44] *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC).
[45] *August and Another v Electoral Commission and Others* 1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC).
[46] Above n 6 para 42.
[47] Section 172(1)(b).
[48] 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC).

> relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.[49]

The judgment (per Ackermann J) went on to state:

> I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal.[50]

[**103.**] In *Mohamed v President of the RSA*,[51] this Court dealt with an rgument similar to that addressed to us by counsel for the appellants, in these terms:

> Nor would it necessarily be out of place for there to be an appropriate order on the relevant organs of State in South Africa to do whatever may be within their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best the consequential prejudice caused to him. To stigmatise such an order as a breach of the separation of State power as between the Executive and the Judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of State and it is our constitutional duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights.[52]

[**104.**] The power to grant mandatory relief includes the power where it is appropriate to exercise some form of supervisory jurisdiction to ensure that the order is implemented. In *Pretoria City Council v Walker*,[53] Langa DP said:

> [T]he respondent could, for instance, have applied to an appropriate court for a declaration of rights or a *mandamus* in order to vindicate the breach of his s 8 right. By means of such an order the council could have been compelled to take appropriate steps as soon as possible to eliminate the unfair differentiation and to report back to the Court in question. The Court would then have been in a position to give such further ancillary orders or directions as might have been necessary to ensure the proper execution of its order.

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[49] Id para 19 (footnote omitted).
[50] *Id* para 69 (footnote omitted).
[51] *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC).
[52] *Id* para 71 (footnotes omitted).
[53] 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) para 96.

[**105.**] This Court has said on other occasions that it is also within the power of courts to make a mandatory order against an organ of state[54] and has done so itself. For instance, in the *Dawood* case, a *mandamus* was issued directing the Director-General of Home Affairs and immigration officials to exercise the discretion conferred upon them in a manner that took account of the constitutional rights involved.[55] In the *August* case a mandatory order, coupled with an injunction to submit a detailed plan for public scrutiny, was issued by this Court against an organ of state — the Electoral Commission.[56]

[**106.**] We thus reject the argument that the only power that this Court has in the present case is to issue a declaratory order. Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case.[57] Where necessary this may include both the issuing of a *mandamus* and the exercise of supervisory jurisdiction.

[**107.**] An examination of the jurisprudence of foreign jurisdictions on the question of remedies shows that courts in other countries also accept that it may be appropriate, depending on the circumstances of the particular case, to issue injunctive relief against the state. In the United States, for example, frequent use has been made of the structural injunction — a form of supervisory jurisdiction exercised by the courts over a government agency or institution. Most famously, the structural injunction was used in the case of *Brown v Board of Education*[58] where the US Supreme Court held that lower courts would need to retain jurisdiction of *Brown* and similar cases. These lower courts would have the power to determine how much time was necessary for the school boards to achieve full compliance with the court's decision and would also be able to consider the adequacy of any plan proposed by the school boards 'to effectuate a transition to a racially nondiscriminatory school system'.[59]

[**108.**] Even a cursory perusal of the relevant Indian case law demonstrates a willingness on the part of the Indian courts to grant far-reaching reme-

[54] *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) para 39; *New National Party of South Africa v Government of the Republic of South Africa and Others* 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) para 46.

[55] Above n 41 para 67 and 70.

[56] Above n 45.

[57] *Hoffmann* above n 1 para 45.

[58] *Brown et al v Board of Education of Topeka et al* 347 US 483 (1954) (Brown I) and *Brown et al v Board of Education of Topeka et al* 349 US 294 (1955) (Brown II).

[59] *Brown II id* 300-1. See too *Swann et al v Charlotte-Mecklenburg Board of Education et al* 402 US 1 (1971) where the Supreme Court gave some general guidelines to assist courts and school authorities in the implementation of school desegregation focusing on various techniques which could be employed to ensure that desegregation took place more expeditiously.

dial orders. Most striking in this regard is the decision in *MC Mehta v State of Tamil Nadu and Others*[60] where the Supreme Court granted a wide-ranging order concerning child labour that included highly detailed mandatory and structural injunctions.

[**109.**] Although decisions of the German Federal Constitutional Court are mostly in the form of declaratory orders, the Court also has the power to prescribe for a temporary period which steps have to be taken in order to create a situation in conformity with the Basic Law.[61] The most far-reaching execution order was probably that made by the Court in the *Second Abortion Case*,[62] declaring several provisions of the Criminal Code unconstitutional and void and replacing them by a detailed interim law to remain in place until new legislation came into force.

[**110.**] In Canada, it appears that both the Supreme and the lower courts have the power to issue mandatory orders against organs of state.[63] Canadian courts have, however, tended to be relatively cautious in this regard. For example, in *Eldridge v British Columbia (Attorney-General)*,[64] the Supreme Court of Canada considered a declaration of unconstitutionality preferable to 'some kind of injunctive relief' on the basis that 'there are myriad options available to the government that may rectify the unconstitutionality of the current system'. The Canadian courts have also tended to be wary of using the structural injunction.[65]

[**111.**] In the United Kingdom, although injunctive relief may be granted against officers of the Crown, the House of Lords has held that this should only be done in the most limited circumstances. In the majority of situations so far as final relief is concerned, a declaration will continue to be the appropriate remedy on an application for judicial review involving officers of the Crown. As has been the position in the past, the Crown can be relied upon to co-operate fully with such declarations.[66]

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[60] [1996] 6 SCC 756.

[61] This power is derived from article 35 of the Federal Constitutional Court Act which reads: In its decision the Federal Constitutional Court may state by whom it is to be executed; in individual instances it may also specify the method of execution.

[62] *BVerfGE* 88, 208.

[63] See for example, the Supreme Courts decision in *Reference re: Manitoba Language Rights* (1985) 19 DLR (4th) 1 and the decision of the High Court of Ontario in *Marchand v Simcoe County Board of Education et al* (1986) 29 DLR (4th) 596.

[64] (1997) 151 DLR (4th) 577 (SCC) para 96.

[65] See *Doucet-Boudreau v Nova Scotia (Department of Education)* (2001) 203 DLR (4th) 128 para 50 where the Nova Scotia Court of Appeal refused to exercise supervisory jurisdiction on the basis that there is no history in this country of occasions when the administrative or legislative branches of government have refused to comply with court ordered remedies under the *Charter*.

[66] *In re M* [1994] 1 AC 377 (HL) at 422-3. Where it would be more convenient to leave it to the applicant to return to court with a complaint that governments duties, as declared by the court, had not been complied with, it was considered preferable to give mere declaratory relief, rather than a *mandamus*. See for example *R v Secretary of State for the Home Department, Ex parte Anderson* [1984] 1 QB 778 at 795.

[**112.**] What this brief survey makes clear is that in none of the jurisdictions surveyed is there any suggestion that the granting of injunctive relief breaches the separation of powers. The various courts adopt different attitudes to when such remedies should be granted, but all accept that within the separation of powers they have the power to make use of such remedies — particularly when the state's obligations are not performed diligently and without delay.

[**113.**] South African courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. These include mandatory and structural interdicts. How they should exercise those powers depends on the circumstances of each particular case. Here due regard must be paid to the roles of the legislature and the executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, courts may — and if need be must — use their wide powers to make orders that affect policy as well as legislation.

[**114.**] A factor that needs to be kept in mind is that policy is and should be flexible. It may be changed at any time and the executive is always free to change policies where it considers it appropriate to do so. The only constraint is that policies must be consistent with the Constitution and the law. Court orders concerning policy choices made by the executive should therefore not be formulated in ways that preclude the executive from making such legitimate choices.

Circumstances relevant to the order to be made

[**115.**] The finding made concerning the restricted use of Nevirapine has implications for government's policy on the prevention of mother-to-child transmission of HIV. If Nevirapine is now made available at all state hospitals and clinics where there are testing and counselling facilities, that will call for a change in policy. The policy will have to be that Nevirapine must be provided where it is medically indicated at those hospitals and clinics within the public sector where facilities exist for testing and counselling.

[**116.**] At the time the proceedings were instituted, the provincial health authorities charged with the responsibility of implementing the programme for testing and counselling attributed their failure to do this to constraints relating to capacity. There were financial constraints owing to limited budgets and there was also a shortage of suitably trained persons to undertake testing and counselling. The question whether budgetary constraints provided a legitimate reason for not implementing a comprehensive policy for the use of Nevirapine, including testing and counselling, was disputed. It was contended that the use of Nevirapine would result in significant savings in later years because it would reduce the number of HIV-positive children who would otherwise have to be treated in the public health system for all the complications caused by that condition.

[**117.**] In the view that we take of this matter it is not necessary to deal with

that issue. Conditions have changed since these proceedings were initiated. This is relevant to the order that should follow upon the findings now made.

[**118.**] During the course of these proceedings the state's policy has evolved and is no longer as rigid as it was when the proceedings commenced. By the time this appeal was argued, six hospitals and three community health care centres had already been added in Gauteng to the two research and training sites initially established, and it was contemplated that during the course of this year Nevirapine would be available throughout the province for the treatment of mother-to-child transmission. Likewise, in KwaZulu-Natal there was a change of policy towards the supply of Nevirapine at public health institutions outside the test sites. According to a statement by the provincial MEC for Health referred to by Dr Ntsaluba at the time of the interlocutory proceedings:

> The proposal that we will table is that of a phased approach consisting of three phases, in which the current study is the first phase. . . . The second phase will be the provision of this service at all major hospitals in every district, in total 27 of them. This we believe will bring access of this service to the majority of the people of our province while at the same time ensuring that the programme is not interrupted and remains sustainable. We are targeting that all these must have commenced by August. . . . The remaining hospitals they will only be given attention by March 2003. . . . These hospitals will be given 6 months to work out whatever teething problems and settle in the programme before phasing the second phase, March 2003. The third phase to complete the roll out of the programme incorporating all institutions in the province and their feeder clinics will also be approached in the same manner.

[**119.**] These developments clearly demonstrate that, provided the requisite political will is present, the supply of Nevirapine at public health institutions can be rapidly expanded to reach many more than the 10% of the population intended to be catered for in terms of the test site policy.

[**120.**] But more importantly, we were informed at the hearing of the appeal that the government has made substantial additional funds available for the treatment of HIV, including the reduction of mother-to-child transmission. The total budget to be spent mainly through the departments of Health, Social Development and Education was R350 million in 2001/2. It has been increased to R1 billion in the current financial year and will go up to R1,8 billion in 2004/5. This means that the budgetary constraints referred to in the affidavits are no longer an impediment. With the additional funds that are now to be available, it should be possible to address any problems of financial incapacity that might previously have existed.

[**121.**] We have earlier referred to section 172(1)(a) of the Constitution, which requires a court deciding a constitutional matter to 'declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. A declaration to that effect must therefore be made in this matter. The declaration must be in a form which identifies the

constitutional infringement. Whether remedial action must also be specified is a separate question involving a different enquiry.

[**122.**] In the present case we have identified aspects of government policy that are inconsistent with the Constitution. The decision not to make Nevirapine available at hospitals and clinics other than the research and training sites is central to the entire policy. Once that restriction is removed, government will be able to devise and implement a more comprehensive policy that will give access to health care services to HIV-positive mothers and their newborn children, and will include the administration of Nevirapine where that is appropriate. The policy as reformulated must meet the constitutional requirement of providing reasonable measures within available resources for the progressive realisation of the rights of such women and newborn children. This may also require, where that is necessary, that counsellors at places other than at the research and training sites be trained in counselling for the use of Nevirapine. We will formulate a declaration to address these issues.

Transparency

[**123.**] Three of the nine provinces[67] have publicly announced programmes to realise progressively the rights of pregnant women and their newborn babies to have access to Nevirapine treatment. As for the rest, no programme has been disclosed by either the Minister or any of the other six MECs, this notwithstanding the pertinent request from the TAC in July 2001[68] and the subsequent lodging of hundreds of pages of affidavits and written legal argument. This is regrettable. The magnitude of the HIV/AIDS challenge facing the country calls for a concerted, coordinated and co-operative national effort in which government in each of its three spheres and the panoply of resources and skills of civil society are marshalled, inspired and led. This can be achieved only if there is proper communication, especially by government. In order for it to be implemented optimally, a public health programme must be made known effectively to all concerned, down to the district nurse and patients. Indeed, for a public programme such as this to meet the constitutional requirement of reasonableness, its contents must be made known appropriately.

Relief

[**124.**] What remains to be considered is whether it is appropriate in the circumstances of the present case to grant further relief. We have come to the conclusion that it is appropriate to do so, though in terms differing from the orders made by the High Court.

[**125.**] It is essential that there be a concerted national effort to combat the HIV/AIDS pandemic. The government has committed itself to such an

[67] Western Cape, Gauteng and KwaZulu-Natal.
[68] Quoted in para 11 above.

effort. We have held that its policy fails to meet constitutional standards because it excludes those who could reasonably be included where such treatment is medically indicated to combat mother-to-child transmission of HIV. That does not mean that everyone can immediately claim access to such treatment, although the ideal, as Dr Ntsaluba says, is to achieve that goal. Every effort must, however, be made to do so as soon as reasonably possible. The increases in the budget to which we have referred will facilitate this.

[**126.**] We consider it important that all sectors of the community, in particular civil society, should cooperate in the steps taken to achieve this goal. In our view that will be facilitated by spelling out the steps necessary to comply with the Constitution.

[**127.**] We will do this on the basis of the policy that government has adopted as the best means of combating mother-to-child transmission of HIV, which is to make use of Nevirapine for this purpose. Government must retain the right to adapt the policy, consistent with its constitutional obligations, should it consider it appropriate to do so. The order that we make has regard to this.

[**128.**] We do not consider it appropriate to deal with the use of formula feed in the order. Whether it is desirable to use this substitute rather than breastfeeding raises complex issues,[69] particularly when the mother concerned may not have easy access to clean water or the ability to adopt a bottle-feeding regimen because of her personal circumstances. The result of the studies conducted at the research and training sites may enable government to formulate a comprehensive policy in this regard. In the meantime this must be left to health professionals to address during counselling. We do not consider that there is sufficient evidence to justify an order that formula feed must be made available by the government on request and without charge in every case.

[**129.**] The order made by the High Court included a structural interdict requiring the appellants to revise their policy and to submit the revised policy to the court to enable it to satisfy itself that the policy was consistent with the Constitution. In *Pretoria City Council*[70] this Court recognised that courts have such powers. In appropriate cases they should exercise such a power if it is necessary to secure compliance with a court order. That may be because of a failure to heed declaratory orders or other relief granted by a court in a particular case. We do not consider, however, that orders should be made in those terms unless this is necessary. The government has always respected and executed orders of this Court. There is no reason to believe that it will not do so in the present case.

[69] See conclusions and recommendations regarding infant feeding in the WHO Technical Consultation entitled *New data on the prevention of mother-to-child transmission of HIV and their policy implications* approved 15 January 2001.

[70] Above n 53 para 96.

[**130.**] The anxiety of the applicants to have the government move as expeditiously as possible in taking measures to reduce the transmission of HIV from mother to child is understandable. One is dealing here with a deadly disease. Once a drug that has the potential to reduce mother-to-child transmission is available, it is desirable that it be made available without delay to those who urgently need it.

[**131.**] We do not underestimate the nature and extent of the problem facing government in its fight to combat HIV/AIDS and, in particular, to reduce the transmission of HIV from mother to child. We also understand the need to exercise caution when dealing with a potent and a relatively unknown drug. But the nature of the problem is such that it demands urgent attention. Nevirapine is a potentially life-saving drug. Its safety and efficacy have been established. There is a need to assess operational challenges for the best possible use of Nevirapine on a comprehensive scale to reduce the risk of mother-to-child transmission of HIV. There is an additional need to monitor issues relevant to the safety and efficacy of and resistance to the use of Nevirapine for this purpose. There is, however, also a pressing need to ensure that where possible loss of life is prevented in the meantime.

[**132.**] Government policy is now evolving. Additional sites where Nevirapine is provided with a 'full package' to combat mother-to-child transmission of HIV are being added. In the Western Cape, Gauteng and KwaZulu-Natal, programmes have been adopted to extend the supply of Nevirapine for such purpose throughout the province. What now remains is for the other provinces to follow suit. The order that we make will facilitate this.

[**133.**] It is necessary that the government programme, as supplemented to comply with the requirements of this judgment, be communicated to health caregivers in all public facilities and to the beneficiaries of the programme. Having regard to the nature of the problem, the steps that have to be taken to comply with the order that we make should be taken without delay.

Costs

[**134.**] The applicants had an order of the High Court in their favour and they were entitled to defend that order in this Court. The issues raised in these proceedings are of considerable importance. The applicants have also been substantially successful in relation to those issues. The order that we make differs from that made by the High Court. Yet it addresses similar issues, albeit in different terms, and we do not consider the differences to be sufficient reason for depriving the applicants of their costs. These are to include the costs occasioned by the Court's enquiry after the conclusion of the argument, save for the costs of the application by government to adduce further evidence, which are to be borne by the respective parties.

Orders

[**135.**] We accordingly make the following orders:

1. The orders made by the High Court are set aside and the following orders are substituted.
2. It is declared that:
a) Sections 27(1) and (2) of the Constitution require the government to devise and implement within its available resources a comprehensive and coordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.
b) The programme to be realised progressively within available resources must include reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and making appropriate treatment available to them for such purposes.
c) The policy for reducing the risk of mother-to-child transmission of HIV as formulated and implemented by government fell short of compliance with the requirements in sub-paragraphs (a) and (b) in that: i) Doctors at public hospitals and clinics other than the research and training sites were not enabled to prescribe Nevirapine to reduce the risk of mother-to-child transmission of HIV even where it was medically indicated and adequate facilities existed for the testing and counselling of the pregnant women concerned. ii) The policy failed to make provision for counsellors at hospitals and clinics other than at research and training sites to be trained in counselling for the use of Nevirapine as a means of reducing the risk of mother-to-child transmission of HIV.
3. Government is ordered without delay to:
a) Remove the restrictions that prevent Nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training sites.
b) Permit and facilitate the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV and to make it available for this purpose at hospitals and clinics when in the judgment of the attending medical practitioner acting in consultation with the medical superintendent of the facility concerned this is medically indicated, which shall if necessary include that the mother concerned has been appropriately tested and counselled.
c) Make provision if necessary for counsellors based at public hospitals and clinics other than the research and training sites to be trained for the counselling necessary for the use of Nevirapine to reduce the risk of mother-to-child transmission of HIV.
d) Take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.
4. The orders made in paragraph 3 do not preclude government from

adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods become available to it for the prevention of mother-to-child transmission of HIV.
5. The government must pay the applicants' costs, including the costs of two counsel.
6. The application by government to adduce further evidence is refused.

SWAZILAND

Gwebu and Another v Rex

(2002) AHRLR 229 (SwCA 2002)

Ray Gwebu and Lucky Nhlanhla Bhembe v Rex
Court of Appeal, cri case no 19/2002, 22 November 2002
Judges: Leon JP, Browde JA, Steyn JA, Tebbutt JA and Beck JA

Constitutional supremacy (unconstitutional change of government, 3, 28–37, 41, 42, 54, 55)
Fair trial (presumption of innocence, 11; independence of courts — jurisdiction of courts ousted, 49, 50, 54, 55)
Interpretation (international standards, 15–17)
Jurisdiction (incorporation of African Charter necessary for justiciability, 17, 20, 21)

Browde JA

[**1.**] The two appeals which came before us arose in the following manner. Each of the appellants was charged before the High Court with an offence in respect of which Decree 3 of 2001 (Decree 3), reinstating and/or validating the Non-Bailable Offices Order 14 of 1993 (as amended), provided that persons so charged may not be admitted to bail. The appellants, contending that Decree 3 was constitutionally invalid, each brought an application for bail to the High Court. The learned Chief Justice in his judgment stated that the applications were viewed by the parties as test cases, having far-reaching constitutional implications. For that reason he determined that the applications should be heard by a bench of two judges. As a result the two applications came before Sapire CJ and Masuku J who, since the same principles of law were in issue in both matters, heard them together. Each judge *a quo* delivered a judgment, and although they adopted somewhat different approaches to the problem there was agreement that the applications be dismissed. It is against that order that these two appeals have now been argued before us and we too have heard the matters together. In his judgment Masuku J, with reference to the order sought by appellant Bhembe that the King of Swaziland lacks the power to legislate by decree and lacked such power when Decree 3 was promulgated, set out in careful and extremely helpful detail the material events in the constitutional history of this kingdom.

[**2.**] It appears from such history that Swaziland was a British Protectorate

until 6 September 1968 when she gained independence from Britain. At independence there was put in place a Westminster-type constitution which provided for all aspects of government, civil liberties, the rights and powers of the *Ngwenyama*, the role of traditional institutions and stipulated a procedure for amending the Constitution.

[**3.**] Five years later, on 12 April 1973, His Majesty, King Sobhuza II issued what was termed the Proclamation to the Nation (the King's Proclamation). In that proclamation the King announced that after giving 'great consideration to the extremely serious situation which has now arisen in our country', he had come to various conclusions. Included among them was that the 1968 Constitution had failed to provide the machinery for good government and for the maintenance of peace and order, and that it was indeed the cause of unrest, insecurity and dissatisfaction with the state of affairs in the country. He went on to enlarge upon his criticism of the Constitution and to say that it permitted the importation of political practices which were, *inter alia*, designed to disrupt and destroy 'our own peaceful and constructive and essentially democratic methods of political activity'. There was, announced His Majesty, no constitutional way of effecting the necessary amendments to the constitution which in any event prescribed a method of amendment which was 'wholly impracticable'. Therefore, and because, as he put it, 'as a nation we desire to march forward progressively under our own constitution' he declared as follows:

> [I]n collaboration with my cabinet ministers and supported by the whole nation, I have assumed supreme power in the Kingdom of Swaziland and that all legislative, executive and judicial power is vested in myself and shall, for the meantime, be exercised in collaboration with a Council constituted by my cabinet ministers. I further declare that, to ensure the continued maintenance of peace, order and good government, my armed forces in conjunction with the Swaziland Royal Police have been posted to all strategic places and have taken charge of all government places and all public services. I further declare that I, in collaboration with my cabinet ministers, hereby decree that:
>
> > A. The Constitution of the Kingdom of Swaziland which commenced on 6 September, 1968, is hereby repealed; B. All laws with the exception of the Constitution hereby repealed, shall continue to operate with full force and effect and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this and ensuing decrees.

[**4.**] I return later in this judgment to consider the nature and effect of the King's Proclamation and particularly to the constitutionality or otherwise of Decree 3. Suffice it to refer at this stage to the following provisions of the 1968 Constitution. Section 2 provided as follows:

> This Constitution is the supreme law of Swaziland and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.

[**5.**] Section 134 made provision for the amendment or alteration of the Constitution providing that such amendment or alteration was to be

passed in a joint sitting of the Senate and House of Assembly summoned for the purpose as laid down in the Schedule to the Constitution. As pointed out by Masuku J, no provision was made for the repeal of the Constitution as this was never envisaged by the drafters of the Constitution. The learned judge then referred to the only power to make laws which was conferred on the King and Parliament by the Constitution; this was section 62(1) which reads: 'Subject to the provisions of this Constitution, the King and Parliament may make laws for the peace, order and good government of Swaziland.'

[**6.**] It is abundantly clear that the King, in the new political dispensation which he decided to introduce in the King's Proclamation, showed scant regard for the Westminster-type Constitution of 1968. In his abrogation of it he rode roughshod over some of its fundamental provisions and in doing so usurped power for himself which was not contemplated when Britain's Protectorate came to an end. It is noteworthy however, and this will be more specifically dealt with later in this judgment, that the King's Proclamation saved section 104 of the 1968 Constitution which provided that the High Court of this country had unlimited original jurisdiction in criminal and civil matters.

[**7.**] It is convenient at this stage to deal with the attack levelled at Decree 3, that is that it is null and void and of no force or effect inasmuch as it is inconsistent with articles 1, 7(b) and (d) of the African Charter on Human and Peoples' Rights as ratified by the government of the Kingdom of Swaziland on 15 September 1995 (the Charter). In his heads of argument, which are comprehensive and indicate that a good deal of research preceded their drafting, Mr N Maseko, who appeared for the appellant Gwebu, referred us in detail to the provisions of the Charter. The preamble sets the tone of the Charter and indicates its aims and objectives. It 're-affirms' the African States' pledge to:

> . . . coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.

[**8.**] This clear dedication to the upholding of human rights and the member states' (including, of course, this Kingdom's) firm intention to give effect to them is contained in article 1 of the Charter which reads:

> The member states of the Organisation of African Unity parties to the present Charter shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them.

[**9.**] With that solemn pledge in mind Mr Maseko referred us to article 7 of the Charter, and particularly 7(1)(b) and 7(1)(d) which read:

> 1. Every individual shall have the right to have his cause heard. This comprises . . . (b) The right to be presumed innocent until proved guilty by a competent

court or tribunal; . . . (d) The right to be tried within a reasonable time by an impartial court or tribunal.

[**10.**] It was submitted by counsel in the Court *a quo* and again before us that the presumption of innocence is violated by the aforementioned Non-Bailable Offences Order. In this regard he referred us to the proclamation of Decree 3 the relevant section of which reads:

Laws that have a constitutional bearing
2(1) All Orders-in-Council and Acts of Parliament that would otherwise be invalid on the sole ground that they are inconsistent with the Proclamation to the Nation of 12 April 1973 are hereby validated to that extent, unless repealed or amended by this Decree or any other law. (2) Notwithstanding section 104 of the 1968 Constitution (repealed with savings) and/or any other law, the Non-Bailable Offences Order 14 of 1993 (as amended) is hereby reinstated and/or validated.

[**11.**] It follows from the provisions of the Non-Bailable Offences Order that once charged with a scheduled offence the accused is committed to be imprisoned until his case has been heard and the verdict pronounced. This is clearly contrary to the presumption of innocence and is consequently, to that extent, inconsistent with the Charter. Mr Maseko has submitted that, on that ground alone, Decree 3 should be struck clown. The Charter has not, however, been incorporated in the domestic law of Swaziland and the question therefore arises whether counsel's submission is tenable.

[**12.**] I have already referred to the provision in the Charter that member states agreed to give effect to the rights enshrined in the Charter by undertaking to adopt legislative or other measures to give effect to them. This appears to be an acknowledgement that incorporation is required before the Charter becomes effective as part of the law of the member states.

[**13.**] This is in accordance with decided cases, of which there are many. In *Pan American World Airways Inc v SA Fire and Accident Insurance Co Ltd* 1965 (3) SA 150(A) at 161 B–D the Appellate Division of South Africa held:

Apart from this, there is a further difficulty in the way of the appellant. It is common cause, and trite law I think, that in this country the conclusion of a treaty, convention or agreement by the South African Government with any other Government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded are not embodied in the municipal law except by legislative process. . . In the absence of any enactment giving their relevant provisions the force of law, they cannot affect the rights of the subject.

[**14.**] See, too, *Maluleke v Ministry of Internal Affairs* 1981 (1) SA 707 (BSC) at 712H; *Tshwete v Ministry of Home Affairs (RSA)* 1988 (4) SA 586 (A); *Swissborough Diamond Mines v Government of RSA* 1999 (2) SA 279 (TPD).

[**15.**] On this aspect of the matter I would also refer to authorities for the proposition that if there is a dispute involving interpretation of the Constitution itself, it may be helpful to employ the contents of treaties or the

like, entered into by the government, as an aid to that interpretation. Thus in *Azapo and Others v President of the Republic of South Africa* 1996 (4) SA 671 (CC) Mahomed DP (as he then was) at page 688 said:

> The issue which falls to be determined in this court is whether s 20(7) of the Act is inconsistent with the constitution. If it is, the enquiry as to whether or not international law prescribes a different duty is irrelevant to that determination. International law and the contents of international treaties to which South Africa might or might not be a party at any particular time are, in my view, *relevant only in the interpretation of the constitution itself*, on the grounds that the law-makers of the constitution should not lightly be presumed to authorise any law which might constitute a breach of the obligations of the state in terms of international law. International conventions and *treaties do not become part of the municipal law* of our country, enforceable at the instance of private individuals in our courts, until and unless they are incorporated into the municipal law by legislative enactment (my emphasis).

[**16.**] Another eminent judge who expressed similar views was Aguda JA in the Court of Appeal of Botswana in the case of *The Attorney-General of the Republic of Botswana v Unity Dow* 1992 (BLR) 119. He said:

> I take the view that in all these circumstances a court in this country, *faced with the difficulty of interpretation* as to whether or not some legislation breached any of the provisions of Chapter II of our Constitution which deal with the fundamental rights of the individual, is entitled to look at the international agreements . . . to ensure that such domestic legislation does not breach any of the international agreements . . . save upon clear and unambiguous language (my emphasis).

[**17.**] This clearly demonstrates that unincorporated international agreements may be used as aids to interpretation, but not treated as part of domestic law for purposes of adjudication in a domestic court.

[**18.**] Mr. Maseko attempted to overcome this obstacle by submitting, albeit tentatively, that there was some ambiguity lurking behind the use of the word 'notwithstanding' in the phrase 'notwithstanding any provision of any law'. I can see no merit in this submission as the word is, in the context of the phrase, perfectly clear.

[**19.**] It follows from the above reasoning that counsel's contention that, because it contravenes the spirit of the Charter, the Non-Bailable Offences Order as re-enacted by Decree 3 of 2001 should be struck down places reliance on the provisions of the Charter which is not legally tenable. The Court *a quo* therefore correctly dismissed the prayers of the appellants based on the alleged inconsistency of the King's Proclamation with the African Charter on Human and Peoples' Rights.

[**20.**] Before leaving the subject of the Charter, it is appropriate to refer to the attitude of the government of this country to a democratic political dispensation. We are given to understand that a new Constitution is in the process of formulation and perhaps it will be helpful if I point out the following in relation to another member state's attitude to international

human rights norms as are incorporated in the Charter. In Botswana, section 10 of the Constitution entrenches the presumption of innocence of every person charged with a criminal offence. In the case of *The State v Moathlodi Marapo* Criminal Appeal 15/2002, Tebbutt AJP in delivering the judgment of the Court of Appeal of Botswana struck clown the section of the Penal Code which, in terms similar to the Non-Bailable Offences Order 1993, unequivocally imposed a total prohibition on the granting of bail to persons charged with rape. The learned judge said:

> Such rights (referring to constitutional rights) are jealously guarded and the development, extension and preservation of them are cornerstones of the intellectual processes of democracies throughout the world and are embodied in the laws and judicial pronouncements of such countries as the United States, the United Kingdom, the many members of the European Community and neighbours of Botswana such as South Africa. This trend has been particularly marked in the sphere of those rights personal to the individual and especially the right to personal liberty. This court as far back as 1992 has recognised that Botswana is one of the countries in Africa where liberal democracy has taken root (see the *Dow* case *supra* at 168 B–C) and international human rights norms should receive expression in the constitutional guarantees of this country. The court is accordingly required to balance the concept of the public interest against the right of personal freedom and to determine the precedence of the one in relation to the other by reference to the mores of the community and by using an assessment based on proportionality.

[**21.**] The norms to which Swaziland has pledged its adherence and which no doubt reflect the mores of the community are contained in the Charter, and should be reflected in the Constitution. This is necessary if this kingdom is to fulfil its obligation, solemnly undertaken 'to adopt legislative or other measures to give effect to the rights, duties and freedoms enshrined in the Charter'.

[**22.**] At this juncture no such legislation or measures are in existence and consequently, as I have already said, this part of the argument on behalf of the appellants cannot succeed.

[**23.**] I turn now to consider the other argument addressed to us on the validity or otherwise of Decree 3. Mr MLM Maziya presented us with a meticulously prepared and logically argued case on behalf of appellant Bhembe. Also, and in the best traditions of counsel as an officer of the court, he has provided us with copies of all the decrees, King's Orders-in-Council, textbooks and other references to case law and authoritative articles. We are indeed indebted to him for what was clearly a time-consuming but extremely helpful effort.

[**24.**] In *précis* counsel's main argument went as follows. The 1968 Constitution chapter IX, part 1, section 104(1) reads: 'The High Court shall be a superior court of record and shall have (a) unlimited original jurisdiction in civil and criminal matters.'

[**25.**] The King had no power, so the argument went, to repeal the 1968

Constitution and therefore the purported repeal of that Constitution by the King's Proclamation was constitutionally invalid. He pointed to section 2 of the 1968 Constitution which reads: 'This Constitution is the Supreme Law of Swaziland and if any other law is inconsistent, that other law shall, to the extent of the inconsistency, be void.'

[**26.**] On that basis counsel submitted that the orders-in-council and decrees which were purportedly promulgated in the exercise of powers vested in the King by the King's Proclamation — and which included Decree 3 — are all invalid and of no force or effect. If that is so, the argument proceeded, there is no valid reason why a judge of the High Court with the jurisdiction defined in section 104(1), should not grant bail to persons charged with any offence, if the circumstances warrant it.

[**27.**] This submission is predicated on the alleged ineffectiveness of the King's Proclamation and, in my view, overlooks the background to the proclamation and what occurred in this country after its promulgation.

[**28.**] The King's Proclamation was promulgated on the declared basis that the Westminster system was unsuitable for the needs of this country. There was, according to what is expressly stated (without any foundation laid for the averment), 'no constitutional way of effecting the necessary amendments to the Constitution' and the King in collaboration with his Council of Ministers therefore decided to introduce a new Constitution by a method which ignored the provisions of the Constitution of 1968. This was because the King and his council were of the view that 'the method prescribed by the Constitution (for effecting amendments) was impracticable (why so is not expressed) and will result in the very disorder any Constitution is meant to inhibit'. What we must accept is that because of the political circumstances prevailing at the time, the King and his council were of the considered view that to follow the procedures laid down in the 1968 Constitution was not feasible. What then occurred, namely the promulgation of the King's Proclamation accompanied by the deployment of the army and police to 'strategic places' and the taking charge of all government places and all public services, amounted to a revolutionary seizure of power. It was illegal, but the question one must ask is whether that necessarily means that the government should not thereafter be regarded as a lawful government with the powers vested in it by the 'new' Constitution. In the celebrated case of *Madzimbamuto v Lardner-Burke and Another* (1968) 3 All ER 561 (PC) at 573, Lord Reid observed that:

> It is a historical fact that in many countries — and indeed in many countries which are or have been under British sovereignty — there are new regimes which are universally recognised as lawful but which derive their origins from revolutions or *coups d'état*. The law must take account of that fact. So there may be a question how or at what stage the new regime became lawful.

[**29.**] What occurred in this country after the King's Proclamation seems to have been at least a tacit acceptance by the population of the King's

usurpation of power, which there is little doubt it was. As far as we know there was no counter-revolution or any violent opposition to the new dispensation. It seems that the repeal of the 1968 Constitution was probably regarded by the populace as inevitable since it was generally accepted that it was inappropriate to the traditional way of life of the Swazi. This attitude was expressed as follows by the then Minister of Finance:

> Such revision is in the best interests of Swaziland and a suitable revision will lead to a much better degree of stability, ie political stability. There is nothing unusual in altering a constitution, and when a constitution such as ours is out of tune with the people of the country and in fact is out of tune with the times in which we are living, then we would be failing in our duty unless we make a move to correct the situation.

(See *A History of Swaziland* by Dr JSM Matsebula.)

[**30.**] Although there were harsh measures taken between the years 1973 and 1978 to control political activists, Dr Matsebula *op cit* states:

> Immediately after the Attorney General finished reading the decree the politicians shed their political identities and the political hot dust that was blinding the Swazi people began to settle down. The Swazis who had hitherto been slinging political mud against one another began to bury their political hatchets, and began to communicate amicably.

[**31.**] This perhaps paints too rosy a picture of this country after the coup. Many draconian measures were introduced, among them the notorious 'detention without trial' Order. Political debate appears to have been stifled, and those opposed to the usurpation of power by the King virtually silenced, either actively or by threat.

[**32.**] Mr Maziya has referred us to some of the more repressive measures taken against would-be opponents of the new regime. He has submitted that although the King's Proclamation was 'effective', it was certainly not supported by the whole nation. One can only hope that the new Constitution will cater for the desires and aspirations of the vast majority of citizens of this country. We must accept, however, (and no suggestion to the contrary appears from the papers before us or emanated from counsel) that the *coup d'état* was a successful one and the majority of the people of this country behaved, by and large, in conformity with the government as constituted by the King's Proclamation. What is the effect of that?

[**33.**] In his judgment in *Mangope v van der Walt and Another NNO* 1994 (3) SA 850 (BGD), Comrie J has a useful reference to many cases and legal writings pertaining to the question *in casu*. I refer particularly to the following:

> [I]n Madzimbamuto's case (*supra*) [Lord Reid (at p 574) said]:
> A recent example occurs in *Uganda v Comr of Prisons, Ex p Matovu* (1966) EA 514. On 22 February 1966, the Prime Minister of Uganda issued a statement declaring that in the interests of national stability and public security and tranquillity he had taken over all powers of the government of Uganda. He was

completely successful, and the High Court had to consider the legal effect. In an elaborate judgment Sir Udo Udoma CJ said ((1966) EA at 535):

> 'We hold, that the series of events, which took place in Uganda from February 22 to April 1966 when the 1962 Constitution was abolished in the National Assembly and the 1966 Constitution adopted in its place, as a result of which the then Prime Minister was installed as Executive President with power to appoint a Vice-President, could only appropriately be described in law as a revolution. These changes had occurred not in accordance with the principle of legitimacy, but deliberately contrary to it. There were no pretensions on the part of the Prime Minister to follow the procedure prescribed by the 1962 Constitution, in particular for the removal of the President and the Vice-President from office. Power was seized by force from both the President and Vice President on the grounds mentioned in the early part of this judgment.'

Later he said ((1966) EA at 539):

> '[O]ur deliberate and considered view is that the 1966 Constitution is a legally valid constitution and the supreme law of Uganda; and that the 1962 Constitution, having been abolished as a result of a victorious revolution, in law does no longer exist nor does it now form part of the Laws of Uganda, it having been deprived of its *de facto* and *de jure* validity.'

[**34.**] There are other judgments which deal specifically with a 'usurper' of power within his own country and the criteria which must exist before recognition is given to his regime by the courts. Thus in *Mitchell and Others v Director of Public Prosecutions and Another* (1987) LRC (Const) 127 (Grenada Court of Appeal), Haynes P said:

> I would hold that for a revolutionary government to achieve *de jure* status, that is, to become internally a legal and legitimate government, the following conditions should exist: (a) the revolution was successful, in that the government was firmly established administratively, there being no other rival one; (b) its rule was effective, in that the people by and large were behaving in conformity with and obeying its mandates; and (c) such conformity and obedience was due to popular acceptance and support and was not mere tacit submission to coercion or fear of force; and (d) it must not appear that the regime was oppressive and undemocratic.

[**35.**] Liverpool JA in the same case said at 115:

> In my view when a government in power has effective control with the support of a majority of people and is able to govern efficiently, that government should be recognised as legal.

After referring to De Smith *Constitutional and Administrative Law* and to Bryce *Studies in History and Jurisprudence*, the learned Judge of Appeal continued:

> I am of the view that sovereignty, or revolutionary legality, or *de jure* status, by whatever name it is called, ultimately depends on consent or acceptance by the people in the particular country under consideration which is manifested by the obedience to the precepts of those claiming to exercise authority over them. Once this is firmly established, it is trite law that in the case of a successful revolution the validity of the new government's laws date back to the day when the revolution first broke out.

[**36.**] The events in this country, to which I have referred, demonstrate in

my view that Swaziland did experience a successful 'revolution' in that the government was firmly established administratively; the rule by the government was effective in that the people, by and large, were behaving in conformity with it; such conformity was due to acceptance by the majority and was not only submission to coercion or fear of force — in this regard one must assume that the army and police did not remain posted in 'strategic places' or in charge of public services for years and that comparative peace prevailed despite their later dispersion. Finally, the indications before us are that the government was not opposed, at least ostensibly, to a democratic dispensation. I say this despite a strong feeling among some that thus far this ostensible attitude has been mere lip service.

[**37.**] In regard to this latter aspect, it appears from the King's Proclamation that the King himself, and his council, regarded the revolutionary government as a temporary measure, since the King, in regard to the powers he assumed, declared 'for the meantime' he would exercise them in collaboration with his Ministers. He also referred in the Proclamation to 'our own peaceful and constructive and essentially democratic methods of political activity'. A promising sign of the King's regard for a democratic dispensation in this country is that in 1978 he expressed his intention of issuing decrees only after the introduction of the new Constitution. And of course many of the provisions of the 1968 Constitution were 'saved' in the King's Proclamation including that providing for the unlimited jurisdiction of the High Court in criminal and civil matters. If the King wished to become an absolute despot in 1973, he could have then and there placed a limitation on the court's jurisdiction. His apparent respect for the courts is sufficiently consistent with the criterion of a democratic approach required for the legitimacy of a 'usurping' power.

[**38.**] In my judgment, therefore, the submission by Mr Maziya that the King's Proclamation should be regarded as null and void and of no force or effect cannot be sustained.

[**39.**] In making the abovementioned judicial pronouncements applicable to this country I am nonetheless cognisant of the enormity of the decision not to observe the provisions of the 1968 Constitution. Mr Maziya referred us to authorities which describe the character of the Constitution and its sacrosanct position in a country's political life. Counsel referred us, *inter alia*, to the landmark judgment of Mahomed AJ (as he then was) in *S v Acheson* 1991 (2) SA 805 (NmHC) which was decided by the Court of Appeal of Namibia. The learned judge said: —

> The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a 'mirror' reflecting the national soul; the identification of the ideals and the aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial adjudication.

Leon, AJA (as he then was) (with whom Dumbutshena, AJA, and Mahomed, CJ agreed) expressed similar sentiments in *Ex Parte Attorney-General, Namibia: in Re: the Constitutional Relationship between the Attorney-General and the Prosecutor General* 1995 (8) BCLR 1070 (NmS) at 1078 H—I thus:

> In a constitutional state the government is constrained by the Constitution and shall govern only according to its terms, subject to its limitations and only for agreed powers and agreed purposes. But it means much more. It is a wonderfully complex and rich theory of political organisation. It is a composite of different historical practices and philosophical traditions. There are structural limitations and procedural guarantees that limit the exercise of state power. It means in a single phrase immortalised in 1656 by James Harrington in *The Commonwealth of Oceana* 'a government of laws and not of men'.

[**40.**] Finally on this note Mahomed CJ summed up the role of the Constitution in a free society by saying:

> One of the great and irreversible truths yielded by the ethos of human rights generated after the Second World War is that Parliament is not sovereign — Only the Constitution is.

[**41.**] I agree entirely with those sentiments. There is no doubt, however, and this was conceded by Mr Maziya, that the King's Proclamation has operated since 1973 — it has been effective since then. Thus, whether or not it is an exaggeration to say that the 'whole nation' supports it, to attempt now to restore the 1968 Constitution would not only be impracticable but may well result in sinking this kingdom into an abyss of disorder if not anarchy.

[**42.**] In my judgment this explains why courts have declared regimes to be valid, even though created unlawfully — it is a question of facing reality rather than causing confusion in the public mind and possibly political mayhem.

[**43.**] Mr Maziya's other line of attack on the Non-Bailable Offences Order was this: he referred to the fact that in terms of the King's Proclamation the King undertook to exercise his powers in collaboration with his Council of Ministers. Any doubt that may have existed regarding the intention of the King in this regard was laid to rest with the King's Order-in-Council cited as The Establishment of the Parliament of Swaziland Order, 1978. This Order makes provision for such fundamental matters as the composition of Parliament, the electoral system, legislation and procedure in Parliament, and the executive. Section 80 of that Order is crucial to the issues in these appeals. The relevant subsections read as follows:-

> *Repeal and Savings*
> 80(1) Nothing in this Order shall affect the validity of any prior law save as hereby amended or repealed, but all existing laws shall continue to operate with full force and effect but shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Order as read with any subsequent law amending it. (2) Save in so far

as is hereby expressly repealed or amended the King's Proclamation of 12 April 1973 shall continue to be of full force and effect: Provided that the King may by Decree published in the Gazette amend or repeal the said Proclamation after a new Constitution for the Kingdom of Swaziland has been accepted by the King and the people of Swaziland and brought into force and effect.

[**44.**] Mr Maziya has submitted that the section makes the following clear, namely:

(i) In 1978 the High Court's jurisdiction as defined in the 1968 Constitution and saved in the King's Proclamation was of full force and effect, ie it was unlimited. (ii) The King's Proclamation, save for the respects in which it was expressly repealed or amended by the 1978 Order, (which are irrelevant to the present enquiry) could only be amended or repealed after 1978 by a King's Decree issued after a new Constitution for the Kingdom of Swaziland has been accepted by the King and the people of Swaziland and brought into force and effect.

[**45.**] As this has not happened, counsel submitted, the High Court's jurisdiction is inviolable and no measure can take place which detracts from the unlimited nature of that jurisdiction. I agree with that submission which, in my judgment, is the only logical deduction from the legislative enactments with which we have been called upon to deal.

[**46.**] I should here point out that although there is a clear distinction to be drawn between a king's decree and a King's order-in-council, in this kingdom's legislation there appears to be some confusion regarding these two entities. For example, in the King's Proclamation, the king declared that the decision to repeal the 1968 Constitution was arrived at in collaboration with his Cabinet Ministers with the support of the whole nation. There then follows 'The King in collaboration with his Council decrees that . . .'. Whether that means a decree has been issued or whether it is an Order-in-Council is not clear. Another random example is that reflected in the supplement to the Swaziland Government Gazette Extraordinary vol XVIII no 23 dated 28 March 1980. It contained what was termed the King's Decree to amend the Establishment of the Parliament of Swaziland Order, 1978. This Decree is referred to under Part B — Orders, and is described as being a king's order-in-council. In these appeals we have been called upon to adjudicate upon the validity of Decree 3 only. What follows must not therefore be construed as applying in any way to other legislative enactments which have been promulgated after 1978. Whether such enactments were 'decrees' properly so called, or king's orders-in-council is peculiarly within the knowledge of His Majesty the King. I do not, therefore, intend anything I say to refer to them.

[**47.**] Decree 3 appears to have been a decree properly so called. In his judgment *a quo* Masuku J said the following:

It will be remembered that the Court of Appeal, in *Professor Dlamini v The King* (Appeal Case 41/2000) had declared the Non-Bailable Offences Order no 14 of 1993 unconstitutional. The executive reacted to this by swiftly procuring the promulgation of Decree 2 of 2001 which purported not only to validate or re-enact the order but to make other far reaching constitutional changes.

I return to this 'swift' reaction and its significance below.

[**48.**] In referring to the judgment in *Professor Dlamini*, Sapire CJ correctly observed that the:

> Court of Appeal having found that the Non-Bailable Offences Order, as an Order-in-Council, was unconstitutional, may not have had to go further, and to indicate how the changes to the constitution could validly be effected.

The learned Chief Justice stated that the sentence in the *Professor Dlamini* judgment which reads 'where the Constitution is amended by the King that must be done by decree published in the Gazette' was therefore an *obiter dictum* which, of course, is not a binding statement of the law. It is not inappropriate, therefore, to explain the precise conclusions arrived at by this Court in that case.

[**49.**] The Non-Bailable Offences Order 14/1993 made no reference whatsoever to section 104(1) of part 1 of chapter IX of the 1968 Constitution, which was saved by the King's Proclamation. It did not purport to be an amendment of the Constitution, nor was it intended by the legislature to be an amendment to the Constitution. When its validity was attacked on the ground that it was inconsistent with section 104(1) of the Constitution, the Crown's contention was that there was no inconsistency because — so it was submitted — the Order did not oust the court's jurisdiction, it only limited the court's discretion, and the Order was therefore not inconsistent with section 104(1) of the Constitution.

[**50.**] The Court in its judgment found that submission untenable and held that the Order did indeed oust the Court's jurisdiction to entertain bail applications by persons charged with any of the offences specified. By reason of such ouster of jurisdiction it was held that the Order was inconsistent with section 104(1) of the Constitution and was therefore unconstitutional and invalid. That was the *ratio decidendi* of the judgment which could have ended there.

[**51.**] However, when confronted with the difficulty that the Order ousted the Court' s jurisdiction so as to be inconsistent with section 104(1), the Director of Public Prosecutions on behalf of the Crown advanced an alternative submission, which was that if the Order 'in effect amended the Constitution' it could validly do so because the King had assented to the Order.

[**52.**] In addressing that submission this Court did not hold that the Order purported to amend the Constitution 'in effect', or at all, but only that it could not validly do so because of the manner in which it was enacted. The Order, I repeat, was not struck down because it was an amendment of the Constitution that was enacted in an impermissible manner; it was struck down because it was inconsistent with the unamended section 104(1) of the Constitution. What this Court did say in relation to the Crown's alternative submission was that any amendment of the Constitution, to be valid, would have to be done by way of a decree published in

the Gazette and not by way of an 'inferior law', such as an act of parliament or an order-in-council. I agree with Sapire CJ that in saying this the Court was speaking *obiter* — it was not part of the *ratio decidendi*.

[**53.**] This is not to say that the *obiter* portion of the *Dlamini* judgment is incorrect. So far as it goes it is correct that the Constitution can only be amended by Royal Decree published in the Gazette, but, as Mr Maziya correctly submitted, such a decree, to be valid, must be promulgated on the advice of the King's Council, and must await the putting in place of a new Constitution. The *Dlamini* judgment is incomplete with regard to these last-mentioned two requirements, to which no argument was addressed and to which the Court's attention was never drawn.

[**54.**] It may be thought that there is no longer a requirement that a king's decree can only be made after a new Constitution is in place. This is because the proviso to section 80(2) of the Establishment of the Parliament Order, 1978, containing that requirement, was purportedly repealed by King's Decree 1 of 1980. However, the latter Decree is itself invalid as it was made prior to the new Constitution being in place. That a king's decree can, as the legislation presently stands, only be made once the new Constitution is in place therefore remains an essential requirement.

[**55.**] Before us the constitutionality of Decree 3 has been fully argued. Having regard to the fact that it was obviously 'a swift' reaction to the point raised in the *obiter dictum* in the *Professor Dlamini* judgment, Decree 3 was intended to be, and was, 'a decree published in the Gazette'. It must be assumed therefore that this was a decree properly so called and this was not contested by the Attorney-General. The new Constitution has not yet been put in place, and, therefore, counsel's submission that Decree 3 is invalid and that it does not affect the High Court's unlimited jurisdiction as defined in the King's Proclamation, in my judgment, is sound and must be sustained.

[**56.**] In the result the appeals are upheld. Decree 3 of 2001 is declared to be invalid and the cases of the two appellants are remitted to the High Court to decide whether or not to admit them to bail.

TANZANIA

Ndyanabo v Attorney-General

(2002) AHRLR 243 (TzCA 2002)

Julius Ishengoma Francis Ndyanabo v Attorney-General
Court of Appeal, 14 February 2002
Judges: Samatta CJ, Kisanga JA, and Lugakingira JA
Previously reported: [2002] 3 LRC 541

Interpretation (purposive, not literal, 17, 18)
Limitations of rights (must be proportionate and pursue a legitimate aim, 18, 33–37, 40, 41, 44)
Fair trial (access to justice, high deposit required as security for costs, 23–26, 29–32, 39)

Samatta CJ

[**1.**] This is an appeal from a decision of the High Court (Kyando and Ihema JJ, Kimaro J, dissenting) dismissing a petition filed by the appellant for a declaration that section 111(2), (3) and (4) of the Elections Act of 1985 (the Act), is unconstitutional for being in violation of article 13(1), (2) and 6(a) of the Constitution of the United Republic of Tanzania (hereinafter referred to as the Constitution).

[**2.**] Essentially, the appeal is about access to justice. The background to the appeal may, we think, be stated as follows. In the general election held in this country in October 2000 the appellant, an advocate by profession, entered into a contest for the parliamentary seat in Nkenge constituency. According to the results of the contest announced by the Returning Officer, the appellant lost the election. He was aggrieved by those results. As he was entitled under section 111(1) of the Act, he filed an election petition before the High Court, questioning the validity of the declared victory of one of his opponents in the election. The registrar of the Court has not, in compliance with the provisions of section 111(2) of the Act, fixed a date for the hearing of the petition. The subsection, as amended by the Electoral Laws (Miscellaneous Amendments) Act of 2001, reads:

> (2) The registrar shall not fix a date for the hearing of any election petition unless the petitioner has paid into the court as security for costs, a sum of five million shillings in respect of the proposed election petition.

[**3.**] The appellant, who has not paid the required deposit, decided to file, under article 30(3) of the Constitution and section 4 of the Basic Rights

and Enforcement Act of 1994, a petition questioning the constitutionality of the subsection and praying for a declaration that the said statutory provision is unconstitutional. It is the decision of the High Court on that petition which has given rise to the appeal now before us. Before the High Court it was the appellant's contention that the requirement in the subsection is unconstitutional, on the ground that it is arbitrary, discriminatory and unreasonable and therefore it constitutes an unjustified restriction on the right of a citizen to be heard by the Court on his complaint against illegalities or irregularities in the conduct of a parliamentary election. The learned Attorney-General's response to the petition was a fairly simple one: the requirement to deposit five million shillings as security for costs was consistent with the avoidance of unnecessary and unreasonable costs to the government, as well as individuals involved which can be caused by unreasonable and vexatious petitioners who might bring petitions without any reasonable cause.

[**4.**] The learned Attorney-General urged the learned judges of the High Court to hold that the appellant had taken a wrong step in law in challenging the constitutionality of the requirement of depositing five million shillings as security for costs; what he should have done was to file an application under rule 11(3) of the Elections (Election Petitions) Rules, 1971 as amended (for short 'the Rules') for a direction that he gives such other form of security as the court would consider fit, or that he be exempted from payment of any form of security for costs. The learned Attorney-General also rested his defense to the petition on the provisions of article 30(2)(a) and (1) of the Constitution, asserting that those claw-back clauses save the statutory requirement of depositing five million shillings as security for costs complained against by the appellant from the vice of unconstitutionality. It was his argument that the provisions of section 111 meet the test of constitutionality laid down by this Court in *Kukutia Ole Pumbun and Another v Attorney-General and Another* [1993] TLR 159. Kyando and Ihema JJ, who examined the issues raised before the Court at great length, entertained no doubt whatsoever that the statutory provision under attack does not suffer from unconstitutionality. In the course of their ruling they said:

> We have carefully considered the parties' pleadings and their lucid submissions thereto and we are of the firm view that the petition has been filed without any colour of merit. It is bound to fail.

[**5.**] Accepting, as they did, the contention of counsel for the learned Attorney-General that the impugned statutory provision was aimed at protecting respondents in election petitions on the question of costs, the learned judges said:

> As a general principle payment of security for costs is intended to secure 'the payment of costs if such person does not prevail'. And as correctly submitted by Mr Mwidunda, learned Senior State Attorney, for the respondent, the provision for costs puts a just and fair obligation on the part of the petitioner to secure the costs of those he drags to court and as such the provision is legally necessary to

protect a respondent in the costs to be incurred in the litigation. We agree and hold that the provisions of section 111(2) of the Elections Act 1985, as amended, are in tandem with article 30(1) and 2(a) and (f) of the Constitution of the United Republic of Tanzania, imposing limitations upon, and enforcement and preservation of basic rights, freedoms and duties.

[**6.**] Article 30(1) and (2)(a) and (f) of the Constitution provides:

(1) The human rights and freedoms, the principles of which are set out in this Constitution, shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest.
(2) It is hereby declared that the provisions contained in this part of this Constitution which set out the basic human rights, freedoms and duties, do not invalidate any existing legislation or prohibit the enactment of any legislation or the doing of any lawful act in accordance with such legislation for the purpose of — (a) ensuring that the rights and freedoms of other people or of the interests of the public are not prejudiced by the wrongful exercise of the freedoms and rights of individuals; . . . (f) enabling any other thing to be done which promotes or preserves the national interest in general.

[**7.**] The learned judges dismissed as untenable the contention of the appellant that the provisions of section 111(2) and (3) of the Act are discriminatory on the ground that they deny equal access to the High Court because they place a private election petitioner and the Attorney-General on unequal footing on the matter of depositing a sum of money as security for costs. They said:

The petitioner supports his proposition by contending that adherence to the rule of law demands equal treatment before the law in terms of article 13(1) of the Constitution and the extent that a legal provision which is discriminatory in itself or its effect is prohibited by article 13(2) of the Constitution. We quite agree that is a correct proposition of the law but we hasten to say that litigation, including election petitions involving the government, are governed and/or regulated by a specific legislation, the Government Proceedings Act of 1967 as amended, whereas, as correctly submitted by the learned Senior State Attorney, litigants' costs against the government are more than secured under section 15 of that Act. We are of the considered view that such a practice is more of an exception than outright discrimination as alluded to by the petitioner. There is therefore no violence done to article 13(1) and (2) of the Constitution which basically guarantees equality before the law.

[**8.**] A little later, the learned judges concluded their consideration of the arguments of counsel. They said:

We agree that the spirit behind the amendment to section 111 of the Elections Act 1985 was intended to ensure that respondents in election petitions are protected in terms of costs which they are forced to incur in defending their cases. We are not persuaded that the amendment was either intended to introduce a new aspect unknown to law or a precondition to curtail the right to fair hearing and equality before the law. For we reiterate that the legal requirement for payment of security for costs is well-established and accepted in many jurisdictions where the rule of law is vigorously followed. We on the other hand find it desirable to introduce such adequate safeguards for a peti-

> tioner (sic) who is not able to give the prescribed security for costs. Essentially this is what is provided for in rule 11(3) of the Election (Elections Petitions) Rules 1971 which we believe is still in force and applicable. For the avoidance of doubt we advise that the wording of rule 11(3) of the Election (Election Petitions) Rules 1971 be also uplifted and introduced in the provisions of section 111 of the Elections Act 1985.

[**9.**] As already indicated, Kimaro J, found herself unable to share her brethren's views on the constitutional status of the challenged statutory provision. She held that the provisions of section 111(2) and (3) of the Act are in violation of the Constitution. In the course of her dissenting ruling, she said:

> By any standard the provisions of section 111(2) and (3) have been made arbitrarily and the limitations imposed in the law cannot be said to be reasonably necessary for achieving a legitimate objective. The impression created by the provisions is that they are safeguards of interests of few people.

[**10.**] Dealing with the argument of counsel for the Attorney-General that the amount of money required to be deposited as security for costs is not excessive, the learned judge said:

> My views are that the amount being required to be deposited as security for costs being excessive, it is only few people who can afford to pay. This means that the right to sue though given by the Constitution and the law concerned, will be curtailed. Accessibility to justice will be open to only those who can afford to pay security for costs.

[**11.**] The appellant now says that Kyando and Ihema JJ misdirected themselves in law in finding no merit in his petition, and Kimaro J was right in dissenting from that view. Before us he was represented by Prof Shivji, who was assisted by Messrs Maira, Rweyongeza and Magafu. The High Court's decision is impugned on the following six grounds of appeal:

> 1. The trial judges erred in law and in fact in holding that the right to access to court as provided under article 13(1) of the Constitution of the United Republic of Tanzania is fulfilled by simply filing the pleadings and payment of requisite court fees.
>
> 2. The trial judges erred in law and in fact in not holding that the principle of equality before the law as contained in article 13(1) and 13(16)(a) of the Constitution of the United Republic of Tanzania means that all persons must have free access to court and must be equally protected from discriminatory preconditions which curtail the right to be heard.
>
> 3. The trial judges erred in law and in fact in holding that the mandatory precondition of payment of TShs 5 million as per section 111(2) of the Elections Act 1985 is realistic, reasonable and necessary to achieve legitimate purpose of securing Respondent's costs in a petition without taking into account that the majority of Tanzanians are poor.
>
> 4. The trial judges erred in law and in fact in not holding that implementation of section 111(3) of the Elections Act 1985 is discriminatory in nature rather than an exception as natural persons are mandated to deposit security amounting to TShs 5 million for costs unlike the Attorney-General.
>
> 5. The trial judges erred in law and in fact in not holding that sections 111(2)

and (3) of the Elections Act 1985 have been made arbitrarily and the limitations therein are unreasonable and unfair to the citizens of Tanzania.
6. The trial judges erred in law and in fact in not holding that the mandatory pre-condition for security for costs as provided under section 111(2) of the Elections Act 1985 operates as to stultify or curtail the right to fair hearing [of] an ordinary citizen who cast his vote.

[**12.**] Prof Shivji argued grounds 1, 2, 3 and 6 together, and the remaining two grounds also together. Mr Mwidunda, Senior State Attorney, who appeared, together with Mr Salula, for the respondent Attorney-General, adopted the same method of presentation of his arguments. We hope we are not misrepresenting or failing to do justice to counsel if we seek to summarise their submissions.

[**13.**] Dealing with grounds of appeal 1, 2, 3 and 6, and citing article 13(1) and (6) of the Constitution, *Farooque v Secretary of the Ministry of Irrigation, Water Resources and Food Control (Bangladesh) and others* [2000] 1 LRC 1, *Sugumar Balakrishnan v Pengarah Imiresen Negeri Sabah and another* [2000] 1 LRC 301, among other authorities, the learned advocate for the appellant pressed us to attach special importance to the right of unimpeded access to justice. In this connection, he called our attention to a number of passages from some judgments from various cases, including *Balakrishnan*'s case (*supra*) in which, speaking for the Court of Appeal of Malaysia, Gopal Sri Ram JCA, said:

> We are of the view that the liberty of an aggrieved person to go to court and seek relief, including judicial review of administrative action, is one of the many facets of the personal liberty guaranteed by art 5(1) of the Federal Constitution. Were it otherwise, the protection afforded by arts 5(11) and 8(1) of the Federal Constitution [would] be illusory and the language of the supreme law no more than high sounding words of no practical significance.

[**14.**] Prof Shivji challenged the constitutionality of section 111(2) of the Act with great force. He submitted that the statutory provision creates almost an insurmountable obstacle to the exercise of the right of access to justice because a trial of an election petition is made contingent upon paying the deposit. According to counsel, the requirement, which leaves no discretion in the court, is a violation of article 13(1) and (6) of the Constitution. Relying on a passage in the judgment of the High Court of Hong Kong in *Harvest Sheen Ltd and another v Collector of Stamp Revenue* 2 CHRLD 246, the learned advocate submitted that 'if a litigant is entitled to a fair trial, it must be implicit that the litigant gets to trial in the first place'. He went on to contend that a petitioner in an election petition cannot ask the High Court to summon the aid of the provisions of rule 11(3) of the Rules in his favour. The sub-rule provides:

> Where on application made by the petitioner, the court is satisfied that compliance with the provisions of paragraph (1) or paragraph (2) of this rule will cause considerable hardship to the petitioner, the court may direct that — (a) the petitioner give such other form of security as the court may consider fit; or (b) the petitioner be exempted from payment of any form of security for costs:

> Provided that no order shall be made under this paragraph unless an opportunity had been given to the respondent, or, where there are two or more respondents, to each of the respondents to make representations in that behalf.

[**15.**] Prof Shivji contended that a petitioner cannot now make an application referred to in the sub-rule because, as the learned advocate put it, the sub-rule has, by necessary implication, been repealed by section 111(2) of the Act. Mr Mwidunda's response to these arguments was an uncompromising one. He sought to combat the arguments by contending that section 111(2) of the Act does not in any way constitute an impediment to access to justice; what its provisions do is to balance rights and duties of litigants in election petitions. Treating article 30(2)(a) and (f) of the Constitution as the sheet-anchor of his response, the learned Senior State Attorney went on to submit that section 111(2) and (3) was enacted to ensure that the rights and freedoms of petitioners in election petitions are not used to the prejudice of respondents in those proceedings as far as costs are concerned. According to the learned Senior State Attorney, the provisions of section 111(2) of the Act meet the test of reasonableness of a restriction on a fundamental right, laid down by this court in *Pumbun*'s case (*supra*). Very fairly, however, he conceded that the *Hansard* does not disclose the criterion which was used in fixing five million shillings as the amount of deposit to be made. Mr Mwidunda further submitted that, contrary to Prof Shivji's contention, section 111(2) has not abolished the discretionary power of the High Court under rule 11 of the Rules to direct that a petitioner provide some other form of security or to waive the requirement to deposit five million shillings as security for costs. According to the learned Senior State Attorney, the requirement of depositing five million shillings does not limit the right of access to justice in election petitions.

[**16.**] Making his submissions on the fourth ground of appeal, Prof Shivji contended that section 111(3) of the Act is discriminatory against a private petitioner because the Attorney-General is exempted from being required to make a deposit for security for costs. According to the learned advocate, whether the Government Proceedings Act is applicable to election petitions or not, the private petitioner is discriminated against because an award for costs against the government is most insecure. Mr Mwidunda's response to this argument was that section 15 of the Government Proceedings Act protects the interests of a decree holder in a case against the Attorney-General; the costs of such a litigant are more than secure. The learned Senior State Attorney also sought to meet Prof Shivji's challenge of the constitutional validity of section 111(3) of the Act by submitting that the discrimination envisaged under article 13(5) of the Constitution does not include the alleged discrimination in that section because the vice frowned upon by the constitutional provision is one relating to natural persons.

[**17.**] In support of the five grounds of appeal, Prof Shivji submitted that

the requirement in section 111(2) of the Act, complained against by the appellant, is arbitrary in two respects: (1) It does not leave any discretion in the court; and (2) The amount was fixed arbitrarily. Putting it interrogatively, the learned advocate asked: Why was not the amount fixed at 10 million shillings or at 50 million shillings? He reminded us that costs of litigation cannot reasonably be fixed before trial. He then went on to submit, citing *Director of Public of Prosecutions v Daudi Pete* [1993] TLR 22, that a restriction on a fundamental right must serve a legitimate purpose and has to be proportionate.

[**18.**] According to the learned advocate, the net in section 111(2) has been cast too widely, and the statutory provision should, therefore, be struck down as being unconstitutional. Mr Mwidunda, calling our attention to the fact that litigation costs have been on the rise in this country, valiantly contended that the sum of five million shillings cannot, in the circumstances, be said to be arbitrary. If the appellant finds it impossible to raise that amount it is open to him, the learned Senior State Attorney went on to submit, to ask the High Court to invoke its discretionary power under rule 11(3) of the Rules in his favour. It will be recalled that the learned Senior State Attorney had earlier contended that the provisions of that sub-rule are still in force.

[**19.**] We propose, before commencing to examine the correctness or otherwise of counsel's arguments, to allude to general principles governing constitutional interpretation which, in our opinion, are relevant to the determination of the issues raised by counsel in this appeal. These principles may, in the interests of brevity, be stated as follows. First, the Constitution of the United Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the Preamble and Fundamental Objectives and Directive Principles of State Policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in time with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and rule of law. As was correctly stated by Mr Justice EO Ayoola, a former Chief Justice of The Gambia, in his paper presented at seminar on the Independence of the Judiciary, in Port Louis, Mauritius, in October 1998: 'A timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the constitution a stale and sterile document.'

[**20.**] Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, that our young democracy not only functions but also grows, and that the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed. Thirdly, until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if pos-

sible, a legislation should receive such a construction as will make it operative and not inoperative. Fourthly, since, as stated a short while ago, there is a presumption of constitutionality of a legislation, save where a clawback or exclusion clause is relied upon as a basis for constitutionality of the legislation, the onus is upon those who challenge the constitutionality of the legislation; they have to rebut the presumption. Fifthly, where those supporting a restriction on a fundamental right rely on a clawback or exclusion clause in doing so, the onus is on them; they have to justify the restriction.

[**21.**] With the above principles, among others, in mind, we proceed to deal with the arguments addressed to us. Convenience, we think, requires that we commence with Mr Mwidunda's argument on the true application of article 13(5) of the Constitution. It will be recalled that it was the learned Senior State Attorney's submission that the provisions of the sub-article have nothing to do with discrimination against persons. Who, we ask, are the intended beneficiaries of the principle of equality before the law, embodied in article 13 of the Constitution? Mr Mwidunda's answer would be: Natural persons only. According to the learned Senior State Attorney's submission, the principle does not relate to juristic persons or collective bodies. We have given anxious and careful consideration to this submission and in the upshot we are of the settled opinion that, though not lacking in attractiveness, it is without merit. But, first let us quote the sub-article. Correctly and literally translated the provision should read (we think the official translation of it is not entirely correct):

> (5) For the purposes of this article the expression 'discriminate' means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion or station in such that certain categories of people are regarded as weak or inferior and being subjected to restrictions or conditions whereas persons of other are treated differently or are accorded opportunities or advantage outside the specified condition, or the prescribed necessary conditions, provided that the expression 'discriminate' shall not be so construed as to prevent the government from taking deliberate steps aimed at solving problems in society. (The underlining is supplied.)

[**22.**] The language in this provision has exercised our minds considerably, but in the end we are satisfied that the use of the word 'and' immediately after the word 'inferior' could not have been intended, for, so read, the provision would not make much sense. The framers of the Constitution, it seems to us, bearing in mind the wording of the provision, intended the provision to comprise two limbs. They must, therefore, have intended to use the word 'or' immediately after the word 'inferior'. If that word is taken to be used there, it cannot be doubted, in our opinion, that the definition of the expression 'discriminate' in the provision also embraces juristic persons and collective bodies. We are emboldened in the view that the definition was not intended to relate to natural persons only by the fact that, while in article 12 of the Constitution the framers used the expression

'human beings', in article 13(4) and (5) they chose to use the expression 'person/s'. The use of those two different expressions strongly suggests to us that the framers intended to make a distinction between the beneficiaries of the principles underlying the two articles. It appears unlikely that they would have been indifferent to discrimination which juristic persons or collective bodies might be subjected to. While we recognise that the wording of a relevant constitutional provision is important in determining whether the Constitution treats juristic persons and collective bodies as beneficiaries of the principle of equality before the law, we wish to draw attention to a footnote in the book, *The Irish Constitution* (3rd Ed) by JM Kelly and G Whyte, in which the learned authors disclose, at 722, the way the courts in Germany and Italy have applied the principle on the aspect of beneficiaries. The footnote number 53, reads:

> The position reached in Ireland, on the mere strength of a narrow interpretation of the phrase 'as human persons', should be contrasted with that reached in Germany and Italy in respect of the 'equality before the law' guarantee in the constitutions of those countries. In both jurisdictions it has been for many years clear that juristic as well as natural persons are entitled to the benefit of the rule: and (in Germany) that even groups with no legal personality, such as political parties, may rely on it. The concise reasoning of the Italian Constitutional Court in a case about associations for the assistance of disabled persons be cited: 'An unjustified discrimination between the different associations must inevitably have repercussions on the legal sphere of the members, so must amount, even if only indirectly, to a violation of the equality of the citizen' (*Corte costituzionale* 1966/25). It is true that this conclusion is facilitated by article 2 of the Constitution, which guarantees the inviolable right of man 'whether as an individual, or in the social formations in which his personality unfolds'; but this is simply a handsome pleonasm. The very word 'citizen' carries within it the recognition that the subjects of the legal system exist within a society.

[**23.**] In an appropriate case a juristic person may, in our opinion, complain before the High Court of a violation of the principle of equality before the law. We observed at the beginning of this judgment that, essentially, this appeal is about access to justice. That right has, for a very long time and in many jurisdictions, been regarded as one of the most important rights a person is entitled to enjoy in a democratic society. Even in England where, consistent with the doctrine of parliamentary sovereignty legislative powers of Parliament have been regarded by courts to be unlimited, the right of access to justice has been jealously guarded by the courts. More than 80 years ago, in *In Re Boaler* [1915] 1 KB 21, Scrutton J emphasised the importance of that right. He said, at 26:

> One of the valuable rights of every subject of the King is to appeal to the King in his courts if he alleges that a civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him or has been committed by another subject of the King. This right is sometimes abused and it is, of course, quite competent to Parliament to deprive any subject of the King of it either absolutely or in part. But the language of any such statute should be jealously watched by the courts, and should not be extended beyond its least erroneous meaning unless clear words are used to justify such extension.

[**24.**] The importance of the right has also been emphasised in many other English cases, including *Chester v Bateson* [1920] 1 KB 829; *R and W Paul Limited v The Wheat Commission* [1937] AC 139; *Pyx Granite Co Ltd v Ministry of Housing and Local Government and Others* [1960] AC 260, and *Raymond v Honey* [1983] AC 1. In *Pyx Granite Co*'s case (*supra*), Viscount Simonds expressed the emphasis in the following celebrated words, at 286:

> It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as Mc Nair J called it in *Francis v Yiewsley and West Drayton Urban District Council* [1957] 2 QB 136, 138; [1957] 1 All ER 825, a 'fundamental rule' from which I would not for my part sanction any departure.

[**25.**] While in England a person's right to unimpeded access to courts can be limited by mere express enactment, in Tanzania that right can be limited only by a legislation which is not only clear but which is also not in violation of the provisions of the Constitution. Having considered the importance of access to courts in the context of circumstances prevailing in Bangladesh, Rahman J, in *Farooque*'s case (*supra*) said at 31: 'Effective access to justice can thus be seen as the most basic requirement, the most basic ''human rights'' of a system which purports to guarantee legal rights.'

[**26.**] We agree with Prof Shivji (we did not hear Mr Mwidunda expressing a view contrary to that submission) that the Constitution rests on three fundamental pillars namely (1) rule of law; (2) fundamental rights and (3) independent, impartial and accessible judicature. These three pillars of the constitutional order are linked together by the fundamental right of access to justice. As submitted by Prof Shivji, it is access to justice which gives life to the three pillars. Without that right the pillars would become meaningless, and injustice and oppression would become the order of the day. About two years ago, delivering his judgment in *Chief Direko Lesapo v (1) North West Agricultural Bank (2) Messenger of the Court, Ditsobotla*, case CCT 23/99 [2000 (1) SA 409 (CC)], with which the rest of the members of the Constitutional Court of South Africa agreed, Mokgoro J said, at 15:

> The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self-help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self-help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.

[**27.**] Access to courts is, undoubtedly, a cardinal safeguard against violations of one's rights, whether those rights are fundamental or not. Without that right, there can be no rule of law and, therefore, no democracy. A court of law is the 'last resort of the oppressed and the bewildered'. Anyone seeking a remedy should be able to knock on the doors of justice and

be heard. We deem it logical, before examining the question whether section 111(2) of the Act is in violation of article 13(2) of the Constitution, to deal first with the issue whether, as was very manfully contended by Mr Mwidunda, rule 11(3) of the Rules, as amended by the Elections (Election Petitions) (Amendment) Rules 1981 and the Elections (Election Petitions) (Amendment) Rules 1996 is still in force. Prior to the enactment of the section, the High Court had a discretionary power to direct either that a petitioner in a parliamentary election petition give such form of security it considered fit, or that the petitioner be exempted from payment of any form of security for costs. We propose, in the interests of clarity and for the sake of completeness, to quote the rule *in extenso*. It reads:

> 11(1) The registrar shall not fix a date of the hearing of any petition unless the petitioner has paid into the court, as security for costs, a sum of five hundred shillings in respect of each respondent.
> (2) Where any person is made a respondent pursuant to an order of the court, the petitioner shall within such time as the court may direct or if the court has not given any direction in that behalf, seven days of the date on which the order directing a person to be joined as a respondent is made, pay into the court a further sum of five hundred shillings in respect of such person.
> (3) Where on application made by the petitioner, the court is satisfied that compliance with the provisions of paragraph (1) or paragraph (2) of this rule will cause considerable hardship to the petitioner, the court may direct that — (a) the petitioner give such other form of security as the court may consider fit; or (b) the petitioner be exempted from payment of any form of security for costs: Provided that no order shall be made under this paragraph unless an opportunity had been given to the respondent, or, where there are two or more respondents, to each of the respondents to make representations in that behalf.
> (4) No security for costs shall be payable by a petitioner who has been granted legal aid under the Legal Aid Scheme of either the Faculty of Law, University of Dar-es-Salaam, the Tanganyika Law Society or the Tanzania Women Lawyers' Association.

[**28.**] Drawing our attention to the fact that the Rules were saved by section 129(b) of the Act when the legislation under which they were made was repealed, Mr Mwidunda strenuously argued that sub-rule (3) was not repealed or amended by the Electoral Laws (Miscellaneous Amendments) Act of 2000, and is therefore still in force. By that Act, Parliament enacted, among other things, section 111(2) and (3), the constitutionality of which the appellant challenged before the High Court. As already pointed out, Professor Shivji pressed us to hold that the sub-rule was, by necessary implication, repealed by the section.

[**29.**] In spite of the soldierly courage which he demonstrated while arguing this point, Mr Mwidunda has not succeeded to persuade us that rule 11(3) of the Rules is still in force. We entertain no doubt that Prof Shivji's contention that the sub-rule is no longer in force is incontrovertible. Why do we hold that view? That we will tell. It is an established principle of common law that rules must be read together with their relevant act. See *AG v De Keyser's Royal Hotel* [1920] AC 508, 551, per Lord Moulton. Rules cannot repeal or contradict express provisions in the

act from which they derive authority; see *Ex parte Davis* [1872] LR 7 Ch 526. Dealing with that point in that case, James LJ said, at 529:

> If the Act is plain, the rule must be interpreted so as to be reconciled with it, or if it cannot be reconciled, *the rule must give way to the plain terms of the Act* (the emphasis is ours).

[**30.**] It is also a well-established principle of law that where an act passed subsequently to the making of the rules is inconsistent with them, the act must prevail unless it was plainly passed with a different object and then the two will stand together: *Britt v Buckingham CC* [1964] 1 QB 77, 78. In their book, *Interpretation of Statutes and Legislation* (7th Ed) at 157, Mahesh Prasad Tandon and Rajesh Tandon make the same point by saying:

> Where a later enactment or a subordinate legislation is so inconsistent with or repugnant to an earlier enactment or subordinate legislation that the two cannot co-exist, then the latter one would effect repeal of the former by implication.

[**31.**] A later act can, by implication, restrict the scope of a regulation which has been brought into force under an earlier act: *Kruse v Johnson* [1898] 91, 94, per Lord Russell of Killowen CJ. We readily agree with Prof Shivji that section 111(2) of the Act has, by necessary implication, repealed rule 11(3) of the Rules. If Parliament had intended that the High Court continue having the power it had under the sub-rule, it could easily have added a provision in the section identical with or similar to the sub-rule or one saving the sub-rule. It seems clear that the law-making authority wanted to abolish the power and make it a rule without exception that each petitioner, regardless of his financial standing, must deposit the sum of five million shillings as security for costs before his petition can be fixed for hearing. We have no doubt that the subsection and the sub-rule are inconsistent with each other, and, therefore, they cannot co-exist or stand together. For the reasons we have given, we have reached the unhesitating conclusion that, contrary to the views expressed by Kyando and Ihema JJ on the point in their ruling, section 111(2) of the Act has, by necessary implication, repealed rule 11(3) of the Rules, and, therefore, the High Court no longer has the power to prevent or mitigate the rigours of the subsection by directing either that a petitioner give such form of security as it considers fit, or that the petitioner be exempted from payment of any form of security for costs.

[**32.**] Therefore, unless we are satisfied that the subsection is not, as submitted by Mr Mwidunda, in violation of the Constitution, a parliamentary election petition cannot, under any circumstances, be heard or tried before the petitioner pays into the High Court, as security for costs, a sum of five million shillings in respect of his petition. It must also be correct to say, as we do, that the provisions of sub-rule (4) of rule 11 of the Rules have also, by necessary implication, been repealed by section 111(2) of the Act. It will be recalled that sub-rule (4) exempted a petitioner who was granted legal aid under the Legal Aid Scheme of the Faculty of Law, University of

Dar-es-Salaam, the Tanganyika Law Society or the Women Lawyers' Association from paying security for costs in respect of his petition. It means that now even such petitioners must deposit a sum of five million shillings as security for costs. Having arrived at these conclusions, we must now turn our attention to the question whether subsections (2) and (3) of section 111 of the Act are unconstitutional.

[**33.**] Keeping in view the principles of constitutional interpretation we alluded to earlier, can it be said that those statutory provisions are in violation of article 13 of the Constitution? Prof Shivji valiantly attacked Kyando and Ihema JJ's conception of the right of access to justice. Referring to the requirements for paying or depositing security for costs under Order XXV, rule 1(1) of the Civil Procedure Code and section 111(2) of the Act, the learned judges said:

> It is pertinent to note that in both situations the party required to pay or deposit security for costs will have already accessed to the court by filing his/her pleadings and paid the necessary court fees.

[**34.**] With great respect to the learned judges, we cannot agree that access to justice constitutes mere filing of pleadings and paying the required court fees. The right to have recourse or access to courts means more than that. It includes the right to present one's case or defence before the courts. It cannot, therefore, be correct to say that once he files his petition a petitioner in an election petition has enjoyed the whole of his right of access to justice. Access to justice is not merely knocking on the door of a court. It is more than that.

[**35.**] Fundamental rights are not illimitable. To treat them as being absolute is to invite anarchy in society. Those rights can be limited, but the limitations must not be arbitrary, unreasonable and disproportionate to any claim of state interest: see *Pumbun*'s case (*supra*). Under the Constitution, an individual's fundamental right may have to yield to the common weal of society. What is observed by Dr Durga Das Basu in his book *Shorter Constitution of India* (12th Ed) at page 104, in connection with the Constitution of India, is entirely applicable to our own Constitution. The learned author states:

> There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint for that would lead to anarchy and disorder. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed to the governing authority of the country to be essential to the safety, health, peace, general order and moral of the community. Ordinarily every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to any other thing which he can lawfully do without let or hindrance by any other person. On the other hand, for the very protection of these liberties the society must arm itself with certain powers. What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control.

[**36.**] Personal freedoms and rights must necessarily have limits, for, as Learned Hand also rightly remarked in his eloquent speech on 'The Spirit of Liberty', cited by Khanna J in his judgment in His Holiness *Kesavananda Bharati Sripadanagalavaru v State of Kerala and another* [1973] Supp SCR I: 'A society in which men recognise no check upon their freedom soon becomes a society where freedom is the possession of only a savage few . . .'.

[**37.**] Prof Shivji submitted, as will be recalled, that section 111(2) of the Act is arbitrary and violates the principle of equality because it unreasonably classifies petitioners into two groups: those who can cause the registrar of the High Court, by paying a deposit of the sum of five million shillings as security for costs, to fix the hearing dates of their petitions, and those who can only sit by as they watch the files of their petitions accumulate dust because they cannot pay the deposits and there are no statutory provisions which empower the court to waive the requirement to make the deposits. While he appeared to concede that section 111(2) of the Act constitutes a restriction on the right of access to courts, Mr Mwidunda contended that, having been passed to protect respondents from frivolous or vexations petitions, and to ensure that those litigants recovered their expenses incurred while defending themselves if eventually the petitions are dismissed, the statutory provision cannot be said to be arbitrary or unreasonable. What is the test of reasonableness in this context? We find the observations of the Supreme Court of India in *State of Madras v VG Row* [1952] SCR 597 very helpful, if may we respectfully say so, in answering that question. Speaking by Patanjali Sastri CJ, the Court said, at 607:

> The test of reasonableness . . . should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.

[**38.**] We also find very useful the following passage from the judgment of Barnett J in *Harvest Sheen Ltd*'s case (*supra*) at 13:

> [T]he court must be satisfied, firstly, that the limitations applied do not restrict or reduce the access [to the courts] left to the individual in such a way or to such an extent that the very essence of the right is impaired. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved . . .

[**39.**] Applying the test stated in these two passages, we are of the settled opinion that section 111(2) of the Act is arbitrary. According to subsection (1) of the section, an election petition may be presented by, among others, a person who lawfully voted or had a right to vote at the election to which the petition relates. Many of such voters would be persons who cannot possibly raise even one-tenth of the required five million shillings as security for costs or for any other purpose. Bearing in mind the minimum wage in the civil

service, which we can take judicial notice of under section 58 of the Evidence Act 1967, a minimum wage-earner will require literally more than all his eight years' wages to pay five million shillings. When this fact is borne in mind, it cannot, in our opinion, be disputed that it is utterly impossible for an indigent voter to pay five million shillings as required by section 111(2) of the Act. The statutory provision, therefore, effectively denies access to justice to indigent petitioners. Is the infliction of this extreme disability on an indigent voter or candidate justified? We have no hesitation in answering that question in the negative. Mr Mwidunda strenuously contended that the provisions of the statutory provision are justified on the ground that they prevent the filing of frivolous or vexatious petitions and also they ensure that respondents in election petitions recover their litigation expenses in the event the petitions are unsuccessful. We find no merit in this argument. First, fundamental rights and costs of litigation should not be weighed in the scales against each other. Secondly, we think that the answer to the learned Senior State Attorney's argument is partly to be found in a statement by Lord Macaulay in his criticism of a preamble of a Bengal Regulation of 1795 which purported to justify court fees on the ground of discouraging the frivolous variety of litigation. The statement, quoted by CB Srinivasan in his book *Towering Justice* at 380 reads:

> It is undoubtedly a great evil that frivolous and vexatious suits should be instituted. But it is an evil for which the government has only itself and its agents to blame, and for which it has the power of proving a most efficient remedy. The real way to prevent unjust suits is to take care that there shall be just decision. No man goes to law except in the hope of succeeding. No man hopes to succeed in a bad cause unless he has reason to believe that it will be determined according to bad laws or bad judges. Dishonest suits will never be common unless the public entertains an unfavourable opinion of the administration of justice.

[**40.**] Thirdly, as was pointed out by Mr Justice (retired) Chandrachud in his article 'Fundamental Rights in their Economic Social and Cultural Context', published in the *Journal of Developing Human Rights Jurisprudence* at 142: 'The fact that a forum for justice is misused does not justify the closing of the doors of justice.'

[**41.**] Abolishing the right of an indigent petitioner to apply to the High Court for a direction that either he give some other form of security, or he be exempted from payment of any form of security for costs, and repealing the provisions of rule 11(4) of the Rules which provided that no security for costs were payable by a petitioner who had been granted legal aid under the Legal Aid Scheme of the Faculty of Law, University of Dar-es-Salaam, the Tanganyika Law Society or the Tanzania Women Lawyers Association amount, in practical terms, to closing the doors of justice to such seekers of legal remedies. To such petitioners, the right of access to justice becomes meaningless. Be that as it may, there appears to be no explanation why the so-called protection of respondents is not made available to respondents in litigation not arising from elections.

[**42.**] The repeal of rule 11(3) and (4) of the Rules has, as we have endea-

voured to demonstrate, effectively classified those who are aggrieved by the results of a parliamentary election and have a right to file a petition before the High Court into two distinct groups, namely, those who, because they can afford to pay a deposit of five million shillings, will be able to have their petitions heard by the court, and those who, as a result of their poverty, will have the doors of justice firmly shut against them. It is not a principle of law that all laws must be of universal application or that the state has no power of distinguishing or classifying persons or things for the purpose of legislation. What the law demands is that any classification or differentiation must have a rational nexus to the object sought to be achieved by the legislation in question. What is forbidden by article 13 of the Constitution is class legislation and not reasonable classification. The legislative power to make differentiation or classification is important, for, as Prof MP Jain states in his book, *Indian Constitutional Law* (4th Ed), at 472:

> All persons are not equal by nature, attainment, or circumstances. The varying needs of different classes or sections of people require differential and separate treatment. The legislature is required to deal with diverse problems arising out of an infinite variety of human relations. It must, therefore, necessarily have the power of making laws to attain particular objects and, for that purpose, of distinguishing, selecting and classifying persons and things upon which its laws are to operate.

[**43.**] It is, of course, for the courts to decide whether a classification adopted by a law is reasonable or not. The judicial antennae must be sensitive to any classification with a view to ensuring that the classification is rational. To be assured of a bright future a country must have its foundations of justice and equality truly and firmly laid. It is salutary to remember — and here we gratefully adopt the words of Rahman J in *Farooque*'s case (*supra*) at 28 as our own:

> If justice is not easily and equally accessible to every citizen there then can hardly be a rule of law. If access to justice is limited to the rich, the more advantaged and more powerful sections of society, then the poor and the deprived will have no stake in the rule of law and they will be more readily available to turn against it. Ready and equal access to justice is a *sine qua non* for the maintenance of the rule of law. Where there is a written Constitution and an independent judiciary and the wrongs suffered by any section of the people are capable of being raised and ventilated publicly in a court of law there is bound to be greater respect for the rule of law.

[**44.**] Frivolous or vexatious litigation is, undoubtedly, a detestable thing. But the right way to deal with that evil is not to close the doors of justice, but to depend upon courts invoking their inherent or statutory jurisdictions to strike out actions of that nature. The doors of justice must always be left open to the poorest man or woman in the country. Section 111(2) of the Act is likely to stultify *bona fide* petitions from indigent persons.

[**45.**] Having paid due attention to counsel's arguments, we are satisfied, for the reasons we have endeavoured to give, that Kyando and Ihema, JJ, erred in holding, as they did, that section 111(2) of the Act is not unconstitutional.

[**46.**] In our view, the statutory provision is a class legislation. It is also arbitrary and the limitation it purports to impose on the fundamental right of access to justice is more than is reasonably necessary to achieve the objective of preventing abuse of the judicial process. Plainly, Parliament exceeded its powers by enacting the unconstitutional provision. Legislative competence is limited to making laws which are consistent with the Constitution.

[**47.**] These conclusions are sufficient to dispose of the appeal, but we consider it useful to say a word or two on the arguments addressed to us concerning the exemption granted to the Attorney-General by section 111(3) of the Act. The importance of the role of the Attorney-General in his capacity as the guardian of public interest cannot, in our opinion, be over-emphasised. But the problem arising from section 111 of the Act is not that the statutory provision purports to exempt the law officer from giving security for costs, but, by repealing rule 11(3) of the Rules, that it purports to deprive a petitioner of his right, under the sub-rule, to apply for an exemption. As far as legislative discrimination is concerned, what is decisive is not the phraseology of the statute but the effect of the legislation. However, since we have held that subsection (2) of the section is unconstitutional, it follows, as day follows night, that rule 11(3) is still in force, and, therefore, a petitioner still has a right to apply for an exemption. In practical terms, therefore, an ordinary petitioner cannot be said to be subjected to discrimination by section 111(3) of the Act. In the circumstances, we agree with Kyando and Ihema JJ, though for different reasons, that the subsection is not in violation of the provisions of article 13(2) of the Constitution.

[**48.**] For the foregoing reasons, in our opinion, this appeal must succeed. Allowing the same with costs, we reverse the decision of the High Court and declare that section 111(2) of the Elections Act 1985 is unconstitutional and, therefore, devoid of any legal force *ab initio*, that is to say, from the date of its enactment. For the avoidance of doubt, it must be distinctly stated that, since the subsection has been so declared, the provisions of rule 11(3) of the Elections (Elections Petitions) Rules 1971, as amended, are still in force and, therefore, the powers conferred upon the High Court by those provisions may, in appropriate cases, be invoked by the court in favour of petitioners.

[**49.**] One of the results of section 111(2) being struck down for being unconstitutional is that the sum of money which a petitioner is required to pay as security for costs in a parliamentary election petition is still five hundred shillings. Bearing in mind the decline of the value of the shilling which has taken place since 1971, when the Rules were made, it cannot be disputed that that sum is now too little to serve any useful or practical purpose in terms of providing security for costs, but it is not within the competence of this Court or any other court, for that matter, to amend the rule.

ZAMBIA

Banda v The People

(2002) AHRLR 260 (ZaHC 1999)

John Banda v The People
High Court, Lusaka, 29 November 1999
Judge: Chulu

Cruel, inhuman or degrading treatment (corporal punishment, 9–13, 15, 19; absolute right, 13, 16–18)
Constitutional supremacy (14)

Chulu J

[**1.**] The appellant herein pleaded guilty to, and was convicted of malicious damage to property. The learned magistrate sentenced him to one month simple imprisonment which he suspended for a period of twelve months. In addition, the learned magistrate ordered ten strokes of a cane. It is this latter part of the sentence against which the appellant now appeals.

[**2.**] The brief facts of the case are that on 14 November 1998 at about midnight, police were patrolling Mulamba Street in Libala Stage 4B in their motor vehicle, a Jetta. They met and challenged the appellant, who was in company of his friends to stop. [The appellants and his friends] did not stop, but ran away in different directions. [The police gave] chase and the appellant was apprehended. In the process of executing an arrest, the appellant became violent and broke the rear window of the police vehicle.

[**3.**] He now appeals on the following grounds:

1. The sentence of ten strokes of the cane is too brutal, inhuman and barbaric. This brutality and barbarism are affirmed by section 27(5)(d) of the Penal Code which mandatorily requires a medical doctor to supervise the infliction of the corporal punishment [to ensure that the victims life is not threatened].

2. This honourable Court should declare this sentence null and void on the grounds of unconstitutionality in that the sentence, by reason of its brutal and barbaric nature, conflicts with the appellants guaranteed and entrenched constitutional right against torture, inhuman and degrading punishment under article 15 of the Constitution of Zambia.

3. The honourable Court being the sole custodian of the Bill of Rights, should now declare sections 24(c) and 27 of the Penal Code, chapter 87 of

the Laws of Zambia which provide for corporal punishment, unconstitutional. These two [malevolent] provisions should be excised or severed from the Penal Code.

4. The honourable Court should also pronounce, *obiter*, that all statutory provisions relating to corporal punishment are unconstitutional.

5. This brutal and barbaric sentence of corporal punishment is always administered discriminatively. The sentence is handed down mostly to the under privileged members of our society from shanty compounds. Affluent members of our society who commit similar or even more heinous crimes are never subjected to corporal punishment.

6. This Court should take judicial notice of the fact that the provisions of the Penal Code on corporal punishment were passed before the 1964 Independence Constitution, which contains the Bill of Rights. Before this Bill of Rights, corporal punishment was lawful in that the question of unconstitutionality did not arise at that time.

[**4.**] Learned counsel for the appellant Mr Chanda, submitted that the main grounds of appeal are that the sentence of ten strokes of a cane is unconstitutional on the grounds that it is against article 15 of the Constitution of Zambia. He also asked the Court to take note of the fact that there is no derogation of these guaranteed rights. He asked the Court to declare the sentence null and void on the grounds of unconstitutionality by reason of its brutal and barbaric nature, and further to declare that sections 24(c) and 27, chapter 87 of the Laws of Zambia, which provide for corporal punishment, [are] unconstitutional, and that these sections should be excised or severed from the Penal Code.

[**5.**] Section 24(c) of chapter 87 reads as follows: 'The following punishments may be inflicted by a court: (c) Corporal punishment' and section 27 subsections (2), (3), (4) and (5) of chapter 87 stipulates instances where corporal punishment may be administered. On the other hand, article 15 of the Constitution of Zambia states: 'A person shall not be subjected to torture, or to inhuman or degrading punishment or other like treatment'.

[**6.**] There are two aspects to this appeal. The first is the actual appeal against the sentence imposed by the lower Court of ten strokes of a cane. The second aspect arising from this appeal is of a constitutional nature. As such, I am aware of the provisions of article 28, clauses 1 and 4 of the Constitution regarding 'enforcement of protective provisions,' and that Mr Chanda should have made a proper application to the Court in terms thereof.

[**7.**] However, since the matter was already before me, and taking into account the fact that the state was duly represented by a very senior officer in the name of the Director of Public Prosecutions, who had been duly served with the notice and grounds of appeal, and who raised no objection to being heard on the constitutionality of the matters herein, the Court exercised its inherent jurisdiction by treating the application before

it as if the same had been properly brought under article 28 of the Constitution for the sake of a speedy determination of the matter.

[**8.**] As regards the first aspect of this appeal, the Director of Public Prosecutions, Mr Mukelabai, has expressly stated that the state does not support the sentence of ten strokes imposed by the learned magistrate on a charge of malicious damage to property.

[**9.**] The appellant in this case caused damage to the [rear window] of the Zambian police motor vehicle during his arrest. Neither the particulars of the offence nor the statement of facts discloses the value of the damaged property. Since it was a window of a small motor vehicle, I would be right to assume that it was of [low] intrinsic value. Taking into account the nature of the offence and circumstances of the appellant's arrest, I agree, as I did at the time of hearing this appeal, that the sentence of corporal punishment comes to me with a sense of shock, and is most inappropriate and entirely wrong in principle. Mr Chanda referred this Court to the case of *Adam Berejena v The People* (1984) ZR 19, and also to the Zimbabwe Supreme Court Judgment SC 156/87 of 6 October and 14 December 1987, reprinted in the *Commonwealth Law Bulletin* volume 14, no 2, April 1988 pages 593-595 [*S v Ncube and Others* 1987 (2) ZLR 247 (SC)].

[**10.**] In *Adam Berejena* case, the accused was convicted of theft of a motor vehicle and sentenced to five years imprisonment, plus ten strokes of a cane. In setting aside the sentence of corporal punishment, the Supreme Court had this to say:

> Corporal punishment . . . should be imposed very sparingly . . . only in the most serious circumstances, such as grave brutality or a most serious outbreak of crime; mere prevalence of crime is not enough. We think that in this modem day and age, this form of punishment should be discouraged in Zambia. Indeed, the legislature itself has moved towards this direction by its recent repeal of mandatory caning in stock theft cases.

[**11.**] In the Zimbabwean cases of *Stephen Ncube v the State*; *Brown Ishuma v the State* and *Innocent Ndhlovu v the State* whose judgment I have referred to *supra*, all the three accused were convicted and sentenced to various terms of imprisonment plus a whipping of six strokes for raping their victims of tender ages. The Supreme Court, sitting as full court, upheld the challenge to the constitutionality of a sentence of whipping. The Court instead ordered corporal punishment to be deleted from the sentences. In doing so, the Court greatly relied on the following adverse features regarded to be inherent in the infliction of whipping:

> 1. The manner in which it is administered . . . is somewhat reminiscent of flogging at the whipping post, a barbaric occurrence particularly prevalent a century or so past. It is a punishment, not only inherently brutal and cruel, for its infliction is attended by acute pain and much physical suffering, but one which strips the recipient of all dignity and self-respect. It is relentless in its severity and is contrary to the traditional humanity practised by almost the whole of the civilised world being incompatible with the evolving standards of decency;

2. By its very nature it treats members of the human race as non-humans. Irrespective of the offence he has committed, the vilest criminal remains a human being possessed of common human dignity. Whipping does not accord him human status;

3. No matter the extent of regulatory safeguards, it is a procedure easily subject to abuse in the hands of sadistic and unscrupulous prison officer who is called upon to administer it; and

4. It is degrading to both the punished and the punisher alike. It causes the executioner, and through him society, to stoop to the level of the criminal. It is likely to generate hatred against the prison regime in particular and the system of justice in general.

[**12.**] As I have already stated above, this sentence of corporal punishment cannot be sustained as it is inhuman, degrading and barbaric in nature. I therefore uphold the appeal and set aside the sentence of ten strokes of a cane imposed on the appellant by the lower Court.

[**13.**] In respect of the second part, Mr Chanda submits that sections 24(c) and 27 of the Penal Code are in contravention of article 15 of the Constitution which guarantees the protection of the individual from inhuman treatment, and that as such, this Court must declare that they are unconstitutional, and should be severed from the Penal Code. On the other hand, the learned Director of Public Prosecutions, Mr Mukelabai, submits that the state concedes that corporal punishment can indeed be described as inhuman and degrading as per article 15 of the Constitution. However, he further submits that, since all articles dealing with the Bill of Rights under Part III of the Constitution are subject to derogation, so is the case with article 15. Mr Mukelabai states that these derogations are designed to ensure that the enjoyment of the said rights by any individual does not prejudice the rights and freedoms of others or the public interest.

[**14.**] Upon consideration of the law before me, I hasten to point out that the Republican Constitution, which is a written Constitution of Zambia, is the supreme law of the land, and consequently all other laws derive their force of law from it, and are therefore subordinated to it. This being the legal position, it cannot therefore be doubted that unless the Constitution is specifically amended, any provision of an Act of Parliament that contravenes the provisions of the Constitution is null and void.

[**15.**] Article 15 of the Constitution is couched in very clear and unambiguous language, that no person shall be subjected to torture, or to inhuman or degrading punishment or other like treatment. On the contrary, it cannot be doubted that the provisions of sections 24(c) and 27 of the Penal Code, which permit the infliction or imposition of corporal punishment on offenders, are in total contravention, and conflict with the above provisions of article 15 of the Constitution. At the moment, there is no evidence on record to show that article 15 of the Constitution has been amended in compliance with article 79 which lays clown the rigorous procedure required to effect any such amendment. Similarly, the Penal

Code itself does not anywhere make reference to the amendment of the Constitution.

[**16.**] Mr Mukelabai, in his submission, stated that article 15, like all other articles of the Constitution under Part III is subject to derogations. Mr Chanda, on the contrary, urged the Court to take note of the fact that there is no derogation from the provisions of the said article 15 of the Constitution. I have quoted in full *supra*, the provisions of this article and I entirely agree with Mr Chanda's assertion that this particular article, unlike the other articles under Part III of the Constitution, makes no derogation or any exceptions whatsoever.

[**17.**] As a matter of interest, I have revisited the provision of the now repealed 1973 Constitution, and also the 1991 Constitution, to see how a similar provision to the present article 15 was worded. The striking feature about the 1973 Constitution is that article 17, which is similar to the present article 15, was divided into two parts. It reads:

> 17(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment. (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that it is shown that the law in question authorises the infliction of any description of punishment that was lawful in Zambia immediately before the coming into operation of this Constitution.

[**18.**] On the other hand, an examination of a similar provision under article 15 of the 1991 Constitution shows that the saving clause which existed in the 1973 Constitution was dropped. This status has been maintained by Parliament in the current Republican Constitution. Whatever the reason is for dropping the saving clause in the two successive Constitutions, Parliament must have had very good intentions for doing so, and it is not for this Court to query its wisdom. The duty of this Court is merely to interpret the law as it exists on the statute books.

[**19.**] What all this means is that it is section 24(c) and 27 of the Penal Code which are in direct conflict, and contravention of the provisions of the Supreme Law, namely article 15 of the Constitution.

[**20.**] In *Thomas Mumba v the People* (1984) ZR 38 (HC judgment HNR/438/1984) which was a case referred to the High Court by the subordinate court for determination, the applicant was being tried in the lower Court for an offence under the Corrupt Practices Act. Under section 53(1) of the Act, it was a requirement that if the accused elected to say something in defence, he had to say it on oath only. This clearly excluded the option to make an unsworn statement.

[**21.**] The defence submitted that the provisions of section 53(1) of the Act contravened article 20(7) of the Constitution. The Court held in that case that an accused person in a criminal trial cannot be compelled to give evidence on oath if he elects to make an unsworn statement. Consequently, the Court declared that the said section 53(1) of the Corrupt

Practices Act was unconstitutional and therefore null and void and that it should be severed from the Act.

[**22.**] In all the circumstances of this case, and upon due consideration of the law before me, I entirely agree with the senior learned defence counsel's submission that the Constitution does not provide for any derogation from the provisions of article 15. It follows therefore, that since this is the supreme law of the land, its provisions cannot be subordinated to any other statute. In the circumstances, I do not hesitate to find that section 24(c) and 27 of the Penal Code are in direct conflict with article 15 of the Constitution. In this regard, I therefore declare that the said sections 24(c) and 27 of the Penal Code, chapter 87 are unconstitutional and therefore null and void, and should be severed from the Penal Code.

ZIMBABWE

Biti and Another v The Minister of Justice, Legal and Parliamentary Affairs and Another

(2002) AHRLR 266 (ZwSC 2002)

Tendai Laxton Biti & The Movement for Democratic Change v The Minister for Justice, Legal and Parliamentary Affairs & the Attorney-General
Supreme Court, judgment no SC 10/02, 27 February 2002
Judges: Ebrahim JA, Sandura JA, Cheda JA, Ziyambi JA and Malaba JA
Extract: Ebrahim JA with whom Sandura JA, Cheda JA and Ziyambi JA concurred. The dissenting opinion of Malaba JA is available on www.chr.up.ac.za

Constitutional supremacy (32–44)
Separation of powers (35–36, 44)
Interpretation (foreign case law, 38–41)

Ebrahim JA

[**1.**] The applicants sought the following order:

> 1. That the rights of the applicants as contained in section 18(1) of the Constitution of Zimbabwe have been breached.
>
> 2. That the General Laws Amendment Act (2 of 2002) was not lawfully enacted by Parliament.
>
> Consequently it is ordered:
>
> 1. That the General Laws Amendment Act (2 of 2002) is illegal and of no force or effect.
>
> 2. That the first respondent shall pay the applicants' costs of suit.

[**2.**] The respondents submitted:

> . . . that this Honourable Court is precluded from enquiring into the internal proceedings of Parliament with regard to the third reading and passage of the General Laws Amendment Bill (now the General Laws Amendment Act number 2 of 2002).
>
> It is respectfully submitted that even if such competency were to be assumed, the passage of the Bill was wholly consistent with Constitutional provisions and Parliamentary Standing Orders.

[**3.**] At the conclusion of the hearing the Court made an order effectively as prayed. These are the reasons for that order.

Factual background

[**4.**] The undisputed facts are that the General Laws Amendment Bill was introduced into Parliament and was the subject of the usual procedures within Parliament, that is to say, a first reading, a second reading and committal to the committee of the whole house. During that process it was referred to the Parliamentary Legal Committee.

[**5.**] On 8 January 2002 the Bill was recommitted to the committee of the whole house for further amendments to be made. Once these amendments had been agreed, the Bill was then reported to the house, and referred again to the Parliamentary Legal Committee. Subsequently, that same day, a non-adverse report was received from the Parliamentary Legal Committee. The first respondent then moved the third reading of the Bill, but when a division was called, it was defeated by 36 votes to 24.

[**6.**] On 9 January 2002 the first respondent gave notice that he would move a motion that the house rescind its decision on the third reading in terms of Standing Order 69. In addition, he gave notice that he would move to suspend the provisions of Standing Order 127 in respect of the General Laws Amendment Bill. He later emphasised that he was acting also in terms of Standing Order 190, which provides as follows:

> 190(1) Save as is provided in Standing Order no 21, any Standing or Sessional Order or Orders of the House may only be suspended upon motion moved after notice . . .

[**7.**] On 10 January 2002 the two motions by the first respondent were debated by Parliament, both were affirmed, and a new third reading of the General Laws Amendment Bill took place. On this occasion the third reading was approved by a vote of 62 to 49.

[**8.**] On 4 February 2002 the General Laws Amendment Act 2002 (Act 2 of 2002) was promulgated.

[**9.**] The applicants complain that the manner in which the third reading of the General Laws Amendment Bill was undertaken for a second time by Parliament failed to afford them due process and protection of law and failed to follow correct legal processes, in that the provisions of the Constitution of Zimbabwe and Standing Orders were breached, and that therefore the General Laws Amendment Bill was not properly passed by Parliament, and is invalid legislation. In this regard their complaints in terms of the papers filed by them are:

> . . . that the purported amendments to the Electoral Act are of major importance and are having, and if they are to be continued to be implemented will continue to have, a crucial and decisive impact on the forthcoming presidential election.
> . . . that there is a real danger that the impact of these amendments on the forthcoming presidential election will be to completely undermine the validity and legitimacy of the election and to deny the electorate their constitutional right to elect a President of their choice.
> . . . that the various amendments made by the purported General Laws Amend-

ment Act to the Electoral Act, in terms of the new section 14B(1) of the Electoral Act monitors have substantial and far-reaching powers.
. . . that the appointment of monitors is restricted to members of the Public Service.
. . . that this Government (has) for a long time packed the Public Service with their own supporters and they will therefore act in a biased manner at the forthcoming presidential election in favour of their candidate. It is of course very important for them to act as impartial monitors.

[**10.**] There were also allegations made relating to the appointment of the Observers Accreditation Committee, the issue of voter education and that some of the amendments had done away with the 'fundamental concept of universal adult suffrage'.

[**11.**] It seems to me that these assertions justify that the Court sit as Constitutional Court to determine the issue whether section 18(1) of the Constitution has been breached. It follows that I hold that the applicants have satisfied the provisions of section 24(1) of the Constitution, which is the provision which gives them a right to seek redress before this Court.

[**12.**] Mr de Bourbon submitted that in terms of section 3 of the Constitution, the Constitution is the supreme law of Zimbabwe, and any law inconsistent with the Constitution is void. Section 3 provides:

This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.

[**13.**] Section 18 of the Constitution guarantees all persons, whether inside or outside Parliament, the right to the protection of the law, which includes the right to due process. In this regard see *Marumahoko v Chairman of the Public Service Commission and Another* 1991 (1) ZLR 27 (HC) at 42–44, where the following passage appears:

American authorities
The Constitution of the United States of America under the Fifth Amendment provides — 'No person shall. . .be deprived of life, liberty, or property, without due process of law . . .' and under the Fourteenth Amendment in section 1 specifies- '. . .No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

It was only well after the Civil War that the United States Supreme Court began significant developments under these amendments. The 'due process' clause governed both procedure and also what came to be known as 'substantive due process'. At first, on procedural content, the United States Supreme Court in *Don v Hoboken Land and Improvement Co* (1856) 18 How 272, 15 L Ed 372 (US Sup Ct) spoke of due process of law as having the same meaning as 'by the law of the land' in the English Magna Carta and sought guidance from English practice. Subsequently after *Hurtado v California* (1884) 110 US 516, 28 L Ed (US Sup Ct) it was not English practice itself but 'principles of liberty and justice' that determined due process. It was over quite some time that the United States Supreme Court under substantive due process evolved what

formed constitutionally protected 'liberty' and 'property' under these amendments. Beginning with *Goldberg v Kelly* (1970) 397 US 254, 25 L Ed 2d 287 (US Sup Ct), the United States Supreme Court acknowledged the rise of government as an important source of wealth that dispensed money, benefits, services, contracts, franchises and licences, which usually also involved claims by individuals and so to adjudication. In a number of cases involving claims the United States Supreme Court upheld that the due process mandated some form of adjudicatory hearings and dealt at length with the kind of hearings that was required under those amendments — *Perry v Sindermann* (1972) 408 US 593, 33 L Ed 2d 570 (US Sup Ct).

In *Board of Regents of State Colleges v Roth* (1972) 408 US 564, 33 L Ed 2d 548 (US Sup Ct), Stewart J at 572 pronounced on 'liberty' and 'property' in the following manner:

'Liberty' and 'property' are broad and majestic terms the court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights.

The court has also made clear that the property interests protected by procedural due process extends well beyond actual ownership of real estate, chattels, or money. By the same token, the court has required due process protection for deprivations of liberty beyond the sort of formal constraints imposed by criminal process. . .For the words 'liberty' and 'property' in the due process clause of the Fourteenth Amendment must be given some meaning.

While this court has not attempted to define with exactness the liberty. . .-guaranteed (by the Fourteenth Amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized. . .as essential to the orderly pursuit of happiness by free men. *Meyer v Nebraska* 262 US 390, 399. In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed. There might be cases in which a state refused to re-employ a person under such circumstances that interests in liberty would be implicated.

At the same time the equal protection clause of the Fourteenth Amendment was also touched. Initially it merely played a marginal role in judicial intervention — *Railway Express Agel1cy v New York* (1949) 336 US 106, 93 L Ed 533 (US Sup Ct). But during the era of the Warren Court a dynamic period of equal protection scrutiny unfolded with the United States Supreme Court identifying appropriate areas for intervention — *Griffin v Illinois* (1956) 351 US 12, 100 L Ed 891 (US Sup Ct). It was under the 'fundamental rights or interests' element, which allowed the United States Supreme Court, just as in the case of substantive due process, to articulate that certain protected constitutional rights could be derived directly from the equal protection clause — *Douglas v California* (1963) 372 US 353, 9 L Ed 2d 811 (US Sup Ct).

Scope of section 18 of the Zimbabwe Constitution

It is accepted that the notion of 'fair hearing' includes 'procedural fairness' and from this the courts have generally formulated a sort of code of fair play akin in some measure to the due process of the United States Constitution. It was by speaking of natural justice, as found in the two Latin maxims *audi alteram partem* ('hear the other side') and *nemo judex in causa sua* ('no man a judge in his own cause'), that the courts imposed upon other adjudicating authorities the duty to

act fairly. The form that natural justice took varied, as was clearly recognised by Tucker LJ in *Russell v Duke of Norfolk and Others* [1949] 1 All ER 109 (CA) at 188E, when he said:

The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.

In other words, it is true that under the maxims *audi alteram partem* and *nemo judex in causa sua* adjudicating bodies did not necessarily have to adopt all those important principles so fundamental to court proceedings — *Jeewa v Donges NO and Others* 1950 (3) SA 414 (A) at 422–3.

It is correctly pointed out that the words 'civil rights' are wide and their ambit is not easily defined — *Cole v Commonwealth of Australia* (1961) 106 CLR 653 (HC of Aust) at 656–657. Suffice to say that 'civil rights and obligations' would certainly include, not only the prejudicial effect on 'property' and 'liberty' set forth by Stewart J in *Board of Regents v Roth supra,* but also the recently extended use of what is said to be the reasonable and legitimate expectations of the aggrieved person — *Administrator, Transvaal and Others* v *Traub and Others*1989 (4) SA 731 (A).

[**14.**] See also *Mandirwhe v Minister of State* 1986 (1) ZLR 1 (SC), where Baron JA at 7 F–H stated:

We arrive at the same result if we consider simply the general structure of s 24 and the proper construction of subs (2) in the context of that structure. The purpose of s 24 is to provide, in a proper case, speedy access to the final court in the land. The issue will always be whether there has been an infringement of an individual's fundamental rights or freedoms, and frequently will involve the liberty of the individual; constitutional issues of this kind usually find their way to this court, but a favourable judgment obtained at the conclusion of the normal, and sometimes very lengthy, judicial process could well be of little value. And even where speed is not of the essence there are obvious advantages to the litigants and to the public to have an important constitutional issue decided directly by the Appellate Division without protracted litigation. Subsection (1) contemplates the situation in which it is clear from the outset that the existence of a remedy depends on whether there has been (or is likely to be) a contravention of the Declaration of Rights, when the person alleging to be aggrieved is given the right to go direct to the Appellate Division.

[**15.**] And see also *Smith* v *Mutasa NO and Another* 1989 (3) ZLR 183 (SC) at 208B, where Dumbutshena CJ stated:

The independence enjoyed by Parliament in the control of its internal affairs does not prevent its members from defending their fundamental rights should they believe that Parliament has wrongfully abrogated or infringed them. Section 24 of the Constitution of Zimbabwe enables such members to apply to the Supreme Court for redress.

[**16.**] I am satisfied therefore that this matter is properly before this Court. The Constitution creates Parliament as the law-making body in Zimbabwe. Schedule 4 to the Constitution lays down in broad terms the procedures regarding the introduction of bills, motions and petitions in Parliament. The Constitution distinguishes between a bill and a motion. In this regard see Schedule 4, which provides:

Procedure with regard to Bills and other matters in parliament
1. Introduction of Bills, motions and petitions
(1) Subject to the provisions of this Constitution and Standing Orders — (a) any member of Parliament may introduce any Bill into or move any motion for debate in or present any petition to Parliament; (b) a Vice-President, minister or deputy minister may introduce any Bill into or move any motion for debate in or present any petition to Parliament.
(2) Except on the recommendation of a Vice-President, minister or deputy minister, Parliament shall not — (a) proceed upon any Bill, including any amendment to a Bill, which, in the opinion of the Speaker, makes provision for any of the following matters — (i) imposing or increasing any tax; (ii) imposing or increasing any charge on the Consolidated Revenue Fund or other public funds of the state or varying any such charge otherwise than by reducing it;(iii) compounding or remitting any debt due to the state or condoning any failure to collect taxes; (iv) authorizing the making or raising of any loan by the state; (v) condoning unauthorized expenditure; (b) proceed upon any motion, including any amendment to motion, the effect of which, in the opinion of the Speaker, is that provision should be made for any of the matters specified in subparagraph (a); or (c) receive any petition which, in the opinion of the Speaker, requests that provision be made for any of the matters specified in subparagraph (a).
(3) The provisions of subparagraph (2) shall not apply to any Bill introduced, motion or amendment moved or petition presented by a Vice-President, minister or deputy minister.

[**17.**] By virtue of section 57 of the Constitution, it is clear that standing orders have constitutional standing. This section provides as follows:

Standing Orders
(1) Subject to the provisions of this Constitution and any other law, Parliament may make Standing Orders with respect to — (a) the passing of Bills; (b) presiding over Parliament; (c) any matter in connection with which Standing Orders are required to be made by this Constitution; and (d) generally with respect to the regulation and orderly conduct of proceedings and business in Parliament.
(2) Standing Orders made in terms of subsection (1) shall provide for the appointment, membership and functions of a Committee on Standing Rules and Orders.

[**18.**] There is therefore merit in the submission that, having made such a law, Parliament cannot ignore that law. Parliament is bound by the law as much as any other person or institution in Zimbabwe. Because standing orders arise out of the Constitution, and because the Constitution mandates Parliament to act in accordance with standing orders, they cannot be regarded merely as 'rules of a club'. Standing orders constitute legislation which must be obeyed and followed.

[**19.**] I turn now to deal with Standing Order 127, which provides as follows:

Same Bill may not be twice offered in same session
Subject to the provisions of the Constitution, no Bill shall be introduced which is of the same substance as some other Bill which has been introduced during the same session and which has not been withdrawn (emphasis added).

[**20.**] The reference therein to the Constitution clearly is a reference to subsections 51(3a) and (3b) of the Constitution. They provide:

> (3a) Where the President withholds his assent to a Bill, the Bill shall be returned to Parliament and, subject to the provisions of subsection (3b), the Bill shall not again be presented for assent.
> (3b) If, within six months after a Bill has been returned to Parliament in terms of subsection (3a), Parliament resolves upon a motion supported by the votes of not less than two-thirds of all the members of Parliament that the Bill should again be presented to the President for assent, the Bill shall be so presented and, on such presentation, the President shall assent to the Bill within twenty-one days of the presentation, unless he sooner dissolves Parliament.

[**21.**] It seems to me that the only bill that may be reintroduced into Parliament during the same session is one to which the President has withheld his assent.

[**22.**] Standing Order 127 is based on the convention in the United Kingdom to the same effect, see p 499 of Erskine May *Parliamentary Practice* (22nd Ed), where appears the following passage:

> *Bills with the same purpose as other bills of the same session.* There is no general rule or custom which restrains the *presentation* of two or more bills relating to the same subject, and containing similar provisions. *But if a decision of the House has already been taken on one such bill, for example, if the bill has been given or refused a second reading, the other is not proceeded with if it contains substantially the same provisions: nor could such a bill be introduced on a motion for leave (see p 493). On the same principle, in July 1994 the House agreed that the presentation of a bill substantially the same as one for which leave had previously been refused under the 'ten-minute' rule should be prohibited.* The Speaker has declined to propose the question for the second reading of a bill which would have had the same effect as a clause of a bill which had already received a second reading. Similarly, a new clause offered at the consideration stage of one bill was ruled out of order when it substantially repeated the provisions of another bill of the same session, the consideration stage of which had been adjourned. But if a bill is withdrawn, after having made progress, another bill with the same objects may be proceeded with (emphasis added).

[**23.**] There is therefore merit in the submission that Parliament, having set the rules in terms of section 57 of the Constitution, cannot suspend those rules for the expedience of a party. Not only does Standing Order 127 embody a convention, it is the rule or law applicable by virtue of section 57(1)(a) of the Constitution in relation to the passing of bills.

[**24.**] Standing Order 69 reads as follows:

> *Proceedings may be expunged, discharged or rescinded*
> The House may, by resolution after notice, direct that any *motion* submitted or any resolution or other vote, or entry in the journals, be expunged or discharged from the Order Paper or rescinded during the same session, or at any time thereafter. Such *motion* shall be moved only by a Vice-President, a Minister or by the member who had been in charge of the business concerned (emphasis added).

[**25.**] It is clear that this provision refers only to motions. It is made in terms

of section 57(1)(d) of the Constitution, and finds its place in standing orders in relation to what is termed *Public Business*, Standing Orders 31–81, and not in relation to *Public Bills*, Standing Orders 101–128.

[**26.**] Insofar as this rule applies in the House of Commons, Erskine May *supra* at p 368 states:

> The power of rescission has only been exercised in the case of a resolution resulting from a substantive motion, and even then sparingly. It cannot be exercised merely to override a vote of the House, such as a negative vote. *Proposing a negatived question a second time for the decision of the House, would be, as stated earlier, contrary to the established practice of Parliament* (emphasis added).

[**27.**] At p 370, the learned editors state:

> The reason why motions for open rescission are so rare and the rules of procedure carefully guarded against the indirect rescission of votes is that both houses instinctively realise that *parliamentary government requires the majority to abide by a decision regularly come to, however unexpected, and that it is unfair to resort to methods whether direct or indirect to reverse such a decision.* The practice, resulting from this feeling, is essentially a safeguard for the rights of the minority, and a contrary practice is not normally resorted to, unless in the circumstances of a particular case those rights are in no way threatened *(emphasis added).*

[**28.**] The reasoning of the learned editors is clear. Once Parliament has taken a vote, that vote cannot be rescinded simply by changing allegiances or changing numbers in the House in order to reverse the decision.

[**29.**] In any event, I agree that Standing Order 69 does not deal with bills. It is a matter legislated by Parliament 'with respect to the regulation and orderly conduct of proceedings and business in Parliament', in terms of section 57(1)(d) of the Constitution. It deals with motions, not with the passing of bills. Thus, Standing Order 69 could not be used to achieve the purpose sought by the first respondent.

[**30.**] Even assuming that Parliament was entitled to suspend Standing Order 127 and allow a second bill in terms thereof to be introduced in the same session, that bill must be introduced and dealt with in terms of the Constitution. Such requirement, as set out in paragraph 1 of Schedule 4, is for the matter to be dealt with in terms of standing orders. Thus, it must be introduced and a first and second reading held. It cannot have been the intention that one could go straight into debating the bill at the point where it had been negatived. The procedures relating to the introduction, or be it re-introduction, of public bills must follow the procedures stipulated in Standing Orders 101–128.

[**31.**] What happened in this matter is that the first respondent truncated the constitutional requirements regarding legislation and, having introduced a second bill of the same substance as that already dealt with, by virtue of purporting to suspend Standing Order 127, truncated the pro-

cedures in Parliament, and dealt only with a third reading, and then presented the bill for assent. This is clearly not permissible and was improper. Had the Minister arranged to prorogue Parliament and within days reintroduced the bill in terms of the Standing orders 101–128 there might have been no problem. See Erskine May *supra* at 501 where it is stated:

> In 1721 a prorogation for two days was resorted to in order to enable Acts relating to the South Sea Company to be passed, contradictory to clauses contained in another Act of the same session, CJ (1718–1721) 640 (1721).

This was held to be acceptable.

Jurisdiction of the courts

[**32.**] Common sense dictates that Parliament is required to comply with its own laws regarding the enactment of legislation. This principle stems from as far back as the decision in *Minister of the Interior and Another v Harris and Others* 1952 (4) SA 769 (A), in which the Appellate Division struck down legislation passed by the Nationalist government in South Africa to create a High Court of Parliament to override the Appellate Division's earlier decision in respect of voting rights of non-white persons, see *Harris and Others v Minister of the Interior and Another* 1952 (2) SA 428 (A).

[**33.**] In other jurisdictions, the courts have applied the principle that legislation which is enacted by a legislative body without compliance with the existing law in respect to the enactment of legislation will be declared void by the courts, even where the constitution provides for a parliamentary democracy form of govemment. See *Attorney-General of New South Wales v Trethowan* [1932] AC 526 (PC, Australia); *Bribery Commissioners v Ranasinghe* [1965] AC 172, [1963] 2 All ER 785 (PC, Ceylon); *R v Mecure* [1988] 1 SCR 234 (Supreme Court of Canada); and *Re Manitoba Language Rights* [1985] 1 SCR 721 (Supreme Court of Canada).

[**34.**] Zimbabwe, unlike the United Kingdom, is not a parliamentary democracy, but a constitutional democracy — see *Chairman, Public Service Commission and Others v Zimbabwe Teachers' Association and Others* 1996 (1) ZLR 637 (SC) at 651, 1997 (1) SA 209 (ZS) at 218–219 (following *Smith v Mutasa NO and Another* 1989 (3) ZLR 183 (SC) at 192, 1990 (3) SA 756 (ZS) at 761-762). The majority of the Court said:

> We consider that this argument fails to take into account the fact that Zimbabwe, unlike Great Britain, is not a parliamentary democracy. It is a constitutional democracy. The centre-piece of our democracy is not a sovereign parliament but a supreme law (the Constitution).

[**35.**] The learned judges continued:

> Similarly the principle of the separation of powers is a broad but flexible principle. The fact that certain powers, for an interim period, are given to a body other than the executive, the legislature or the judiciary, should be seen as a variation rather than a negation of the principle. And, of course, the legislature retained the power, which it has now exercised, to reclaim from the Commis-

sion the functions it exercised under the Constitution. But it had to do so by amending the Constitution, by following the procedures required. The Legislature could not, by the ordinary process of passing an Act by a simple majority, have ousted the authority of the Commission.

[**36.**] In a constitutional democracy it is the courts, not Parliament, that determine the lawfulness of actions of bodies, including Parliament.

[**37.**] In *Smith v Mutasa supra* it was specifically held that the judiciary is the guardian of the Constitution and the rights of citizens, see p 192. It was also held that Parliament could not disregard the fundamental rights enshrined in the Constitution, see p 192-193:

> In Zimbabwe the question of Parliamentary privileges has not remained static. It has to some extent been affected by the Declaration of Rights contained in the Constitution. *The result is that the Parliament of Zimbabwe unlike the House of Commons on 24 September 1923, may not enjoy, hold and exercise privileges, immunities and powers which are inconsistent with fundamental rights guaranteed by the Constitution. If in Zimbabwe there is conflict between fundamental rights and the privileges of Parliament, the conflict can only be resolved by the courts of justice.*
>
> The Constitution of Zimbabwe is the supreme law of the land. It is true that Parliament is supreme in the legislative field assigned to it by the Constitution but even then Parliament cannot step outside the bounds of the authority prescribed to it by the Constitution.
>
> As Gajendragadkar CJ said in *Special Reference no* 1 of 1964 [1965] 1 SCR at 445 G–H:
>
> > 'If the legislatures step beyond the legislative fields assigned to them or acting within their respective fields they trespass on the fundamental rights of the citizens in a manner not justified by the relevant articles dealing with the said fundamental rights, their legislative actions are liable to be struck down by courts in India. Therefore, it is necessary to remember that though our legislatures have plenary powers, they function within the limits prescribed by the material and relevant provisions of the Constitution.'
>
> The difference between the powers of the House of Commons and our House of Assembly is that the Constitution of the United Kingdom does not permit the judicature to strike out laws enacted by Parliament. Parliament in the field of legislation is sovereign and supreme. That is not the position in Zimbabwe, where the supremacy of the Constitution is protected by the authority of an independent judiciary, which acts as the interpreter of the Constitution and all legislation. *In Zimbabwe the judiciary is the guardian of the Constitution and the rights of the citizens.*
>
> It is essential to understand that all the three branches of government, the executive, the legislature and the judiciary, are bound by and work within the confines of the Constitution. For instance, the House of Assembly cannot, in the name of parliamentary privileges, immunities and powers, disregard the fundamental rights enshrined in the Constitution. If it does that, it invites the intervention of the judiciary:
>
> > '. . . there is no doubt that the Constitution has entrusted to the judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights of the citizen. When a statute is challenged on the ground that it has been passed by legislature without authority, or has otherwise unconstitutionally trespassed on fundamental rights, it is for the courts to determine the dispute and decide whether the law passed by the

> Legislature is valid or not. Just as the legislatures are conferred legislative authority and their functions are normally confined to legislative functions, and the functions and authority of the executive lie within the domain of executive authority, so the jurisdiction and authority of the judicature in this country lie within the domain of adjudication. If the validity of any law is challenged before the courts, it is never suggested that the material question as to whether legislative authority has been exceeded or fundamental rights have been contravened can be decided by the legislatures themselves. Adjudication of such a dispute is entrusted solely and exclusively to the judicature of this country. . .'

per Gajendragadkar CJ in *Special Reference no 1 of* 1964 *supra* at 446 D–G (emphasis added).

[**38.**] The Supreme Court in that matter referred to and approved the approach of the Supreme Court of India in *Special Reference no 1 of 1964* [1965] 1 SCR 413.

[**39.**] Likewise, in South Africa it has been held that all branches of the government are subject to scrutiny by the courts, and that even the President is subject to the provisions of the Constitution — see *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) at paragraphs 12 and 28, as well as *Executive Council, Western Cape Legislature* & *Ors v President of the Republic of South Africa* & *Ors* 1995 (4) SA 877 (CC).

[**40.**] The matter was dealt with more fully in the judgment of Hlophe J (as he then was) in *De Lille and Another v Speaker of the National Assembly* 1998 (3) SA 430 (C). Reference is made to paragraphs 22-25. At paragraph 25, p 449, he said:

> The National Assembly is subject to the supremacy of the Constitution. It is an organ of state and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution. It is subject in all respects to the provisions of our Constitution. It has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes which are not in conflict with the Constitution. It follows therefore that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication.

[**41.**] On appeal — see *Speaker of the National Assembly v De Lille and Another* 1999 (4) SA 863 (SCA) — Mahomed CJ put the matter thus in paragraph 14, pp 868-869:

> This enquiry must crucially rest on the Constitution of the Republic of South Africa Act 108 of 1996. *It* is supreme — not Parliament. It is the ultimate source of all lawful authority in the country. No parliament, however *bona fide* or eminent its membership, no President, however formidable be his reputation or scholarship, and no official, however efficient or well-meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligation imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of

> any official or body, which is not properly authorised by the Constitution, is entitled to the protection of the courts. No Parliament, no official and no institution is immune from judicial scrutiny in such circumstances.

See also *Sanderup v Tandelli and Another* 2001 (1) SA 1171 (CC) at paragraph 27, p 1183.

[**42.**] There is therefore no merit in the submission of Mr Majuru when he said that:

> . . . this Honourable Court is precluded from enquiring into the internal proceedings of Parliament with regards to the third reading and passage of the General Laws Amendment Bill (now the General Laws Amendment Act Number 2 of 2002).

[**43.**] It is my view that this Court has not only the power but also the duty to determine whether or not legislation has been enacted as required by the Constitution. Parliament can only do what is authorised by law and specifically by the Constitution.

[**44.**] The manner in which the third reading of the General Laws Amendment Bill was done on 10 January 2002 was contrary to the Constitution and the legislation thereunder, and accordingly was not validly enacted.

[**45.**] Section 3 of the Privileges, Immunities and Powers of Parliament Act [Chapter 2:08] provides as follows:

> *Privileges, immunities and powers generally*
> Parliament and members and officers of Parliament shall hold, exercise and enjoy — (a) the privileges, immunities and powers conferred upon Parliament, respectively, by this Act or any other law; and (b) all such other privileges, immunities and powers, not inconsistent with the privileges, immunities and powers referred to in paragraph (a), as were applicable in the case of the House of Commons of the Parliament of the United Kingdom, its members and officers, respectively, on the 18th April 1980.

[**46.**] The powers of Parliament by virtue of section 3 of that Act are those conferred upon Parliament by this Act or any other law (which would include the Constitution and standing orders), as well as the powers which are not inconsistent with the powers applicable to the House of Commons on 18 April 1980. Those powers are part of the general and public law, see section 4 of the Act.

[**47.**] Nowhere in that legislation is it provided that Parliament can bring for the second time the third reading of a bill; nor is it provided that a bill may be brought for the second time before the same session; nor is it provided that a matter that has been negatived may be brought again before the same session. Indeed, by virtue of section 3(b) of that Act, such would be inconsistent with the powers of the House of Commons as at 18 April 1980, and therefore also inconsistent with the law of Zimbabwe. Section 3 of the Privileges, Immunities and Powers of Parliament Act itself expressly forbids what was done in the present case. In terms of section 3 of the Act, our legislation provides succinctly that our parliamentary prac-

tice is guided by practices in the House of Commons. The 'Bible' on parliamentary practice of that body is enshrined in Erskine May *supra* and the editors of that work have no doubt that a negatived bill should not be reintroduced in the same session of Parliament. We therefore must stand guided by what the editors in Erskine May *supra* have indicated.

[**48.**] Accordingly, it must be held that the General Laws Amendment Act 2002 was invalidly enacted by Parliament.

[**49.**] I believe that we were left with no choice but to grant the application with costs. The order we made was as follows —

a) That the General Laws Amendment Act (2 of 2002) is invalid and of no force or effect.

b) That the first respondent shall pay the applicants' costs of suit.