



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 66/2017

In the matter between:

THE PROSECUTOR-GENERAL

APPLICANT

and

THE OMBUDSMAN

FIRST RESPONDENT

FREDERICH VINCENT MULLER

SECOND RESPONDENT

Neutral citation: *The Prosecutor-General v The Ombudsman* (CA 66/2017)
[2020] NAHCMD 119 (26 March 2020)

Coram: ANGULA DJP et MASUKU J

Heard: 13 August 2019

Delivered: 26 March 2020

Flynote: Constitutional law – Articles 25(2), 89, 91, 92 and 93 of the Namibian Constitution – Two issues for determination – Firstly, is the second respondent an aggrieved person, as envisaged in Article 25(2) of the Constitution? – Secondly, is the first respondent, the Ombudsman, under obligation to provide legal assistance in the form of legal representation to the first respondent, in a criminal appeal which essentially would necessitate an inquiry into the decisions of judicial officers?

Summary: The second respondent was convicted in the Magistrate Court held in the small town of Aranos situated in the southern part of this Republic, of a traffic offence relating to parking of a motor vehicle – He was sentenced to a fine of N\$1 500 or four months imprisonment wholly suspended for five years on condition that he is not convicted of the same offence during the period of suspension – The second respondent was not satisfied with his conviction, and he accordingly lodged an appeal to this court against his conviction – Second respondent approached the Office of the first respondent to represent him before the appeal court – The Prosecutor-General challenged the authority of the first respondent to represent the second respondent in that criminal appeal – That appeal is now in abeyance pending the outcome of this application lodged by the Office of the Prosecutor-General, the applicant.

This is an application lodged by the applicant, wherein she seeks an order 'Disallowing the first respondent to act on behalf of the second respondent as his legal practitioner in the criminal appeal in the matter *Frederick Vincent Muller v The State, case number CA 66/2017*'.

Held: Article 25(2) provides a two staged inquiry. Firstly, substantively, it vests the aggrieved person who claims that his or her fundamental right or freedom has been infringed, with the right to approach a competent court to enforce or protect such right or freedom; and secondly, it provides the procedure to be followed by the aggrieved person in approaching the court which is either to seek legal assistance from the Ombudsman.

Held: The second respondent has not been found by a competent court to be an aggrieved person as envisaged by Article 25(2).

Held: Section 3(6) of the Ombudsman Act, and Articles 89, 1, 92 and 93 of the Namibian Constitution read together, preclude the Ombudsman from rendering legal assistance in the form of legal representation to persons, in matters where he would be inquiring into the decisions of a judicial officer.

ORDER

1. The Ombudsman is disallowed from acting on behalf of the second respondent as his legal practitioner in the criminal appeal *Frederick Vincent Muller v The State*, Case No. CA 66/2017.
2. There is no order as to costs.
3. The matter is removed from the roll and is finalised.

JUDGMENT

ANGULA DJP (MASUKU J concurring)

Introduction:

[1] We are not aware of a case where the two Constitutional-established Persons to these proceedings, have ever contested a dispute between them before this court. To our knowledge this is the first time ever that the Prosecutor-General General and the Ombudsman are in a duel before this court.

[2] In a constitutional State, such as Namibia, this is a development to be welcomed, rather than deprecated because it bears resonance with the foundational principles of the rule of law and legality. It is also consonant with the concept of good constitutional citizenship, which requires that any contested legal territory, even by Constitution-established bodies, is to be resolved by the courts, in the exercise of their constitutional mandate.¹

¹ *Merafong City Local Municipality v Anglo Ashanti* 2017 (2) SA 211 (CC), paras 59 and 60 and *Central Procurement Board v Nangolo* N.O 2018 (4) NR 1188 (HC) at 1191.

[3] The dispute in this matter concerns the question whether the second respondent is an aggrieved person within the meaning of Article 25(2) of the Namibian Constitution, and that as such the first respondent is obliged to provide him with such legal assistance or advice as second respondent may require. First respondent contends that the second respondent is an aggrieved person within the meaning of Article 25(2) and he is therefore entitled to provide him with the assistance he requires in the form of legal representation in a criminal appeal pending before another court. The applicant, on her part, contends that the second respondent is not an aggrieved person, and therefore the first respondent has no right to provide legal assistance to him.

Factual background

[4] Most of the facts, if not all, are common cause between the parties. The second respondent was convicted in the Magistrate Court held in the small town of Aranos situated in the southern part of this Republic, of a traffic offence relating to parking of a motor vehicle. He was sentenced to a fine of N\$1 500 or four months imprisonment wholly suspended for five years on condition that he is not convicted of the same offence during the period of suspension. The Second Respondent was not satisfied with his conviction, and he accordingly lodged an appeal to this court against his conviction.

[5] He then approached the Ombudsman to assist him with the prosecution of his appeal. The first respondent filed a notice of his representation for the second respondent. At the appeal criminal case management conference, Ms Rakow from the Ombudsman's office, appeared on behalf of the second respondent. Ms Jacobs, who appeared on behalf of the applicant, objected to the first respondent appearing on behalf of the second respondent, contending that the first respondent has no right to appear for a party in criminal matters, more particularly in that criminal appeal. The first respondent, for his part, contended that he has the necessary right at law to represent the second respondent. As a result of this development the criminal appeal was held in abeyance pending one of the contesting parties bringing a formal application for adjudication by a civil court regarding the right of the first respondent to represent the second respondent in the criminal appeal proceedings.

[6] In due course the applicant brought this application in which she seeks an order in the following terms:

‘ Disallowing the first respondent to act on behalf of the second respondent as his legal practitioner in the criminal appeal in the matter *Frederick Vincent Muller v The State*, case number CA66/2017.

The respondents oppose the application.’

[7] Given the constitutional implications attendant upon the matter, the Judge-President constituted a Full Bench to hear the matter.

[8] Since there is no factual dispute between the parties, the supporting affidavit filed on behalf of the first respondent mainly contains legal argument. It is therefore unnecessary to traverse the contents thereof. We will consider those arguments in the course of this judgment.

[9] The Ombudsman, John Robert Walters, deposed to the main opposing affidavit. He states that Mr Muller, the second respondent, approached him to assist him with the prosecution of his criminal appeal which was already pending before the appeal court. He states further that he perused the record of the proceedings before the Magistrate and was ‘convinced that a fundamental right (of the second respondent) guaranteed by the Constitution has been infringed, i.e that the conviction is wrong in law and fact and thus cannot be left unchallenged’.

[10] Mr Walters further states that he invoked the powers conferred upon him by Article 25(2) of the Constitution to provide assistance to the second respondent when the latter approached him.

[11] The second respondent, Mr Muller, states in his opposing affidavit that he was dissatisfied with the Magistrate’s judgment as he felt that it was not correct. He states, however, that his right to appeal was explained to him by the Magistrate. He thereafter filed his appeal against the conviction for reasons, amongst others, that ‘the Magistrate was clearly confused and her reasons could never support my

conviction'. He further felt that he was 'unfairly treated' and that his 'human right to a fair trial was infringed'.

[12] As regards the question of legal aid, he states that he initially applied for legal aid but later learned that he would not qualify for legal aid as he was employed. He therefore decided to proceed with his appeal without legal aid because he has confidence in the legal system and thus he trusted that he will receive a fair trial even if he represented himself. Later on he decided to approach the Ombudsman to assist him to prosecute his appeal.

Submissions on behalf of the Prosecutor-General

[13] The Prosecutor-General, in her written submissions advances a number of grounds why the Ombudsman should not be allowed to render the assistance intended by the Ombudsman to the second respondent. We will refer to some of them. First, that the power vested upon the Ombudsman by Article 25(2) of the Constitution to provide 'legal or other assistance' to aggrieved persons must be interpreted having regard to the purpose, power and functions of the Ombudsman, as described in the Ombudsman Act, No. 9 of 1990. In this connection the Prosecutor-General submits that it is not the constitutional mandate of the Ombudsman to represent appellants in criminal appeals, for the reason that conviction in a criminal trial does not necessarily mean the trial was unfair even if the court *a quo* might have misdirected itself on the law or facts.

[14] Secondly, a person who alleges that his or her fundamental rights or freedoms have been infringed can lodge an appeal because the right to fair trial is not limited to the court *a quo*. Such person can raise his complaint with the appeal court. Accordingly, an appellant who claims that his or her fundamental rights or freedoms have been infringed by the court *a quo* does not necessarily need to approach a court in terms of Article 25(2) of the Constitution to vindicate his or her rights.

[15] Thirdly, and finally, as regards the Ombudsman's assertion that he has the power to challenge decisions by the courts if in his opinion such a decision is unfair

and amounts to an infringement of a person's right to a fair trial through legal process, the Prosecutor-General points out that Article 93 excludes from the function of the Ombudsman the right to entertain complaints concerning the performance of a judicial function of a Judge or any other judicial officer. Furthermore, s 3(6) of the Ombudsman Act, 1990, which sets out the duties and functions of the Ombudsman, specifically excludes from the Ombudsman powers, the power to inquire into any decision taken in connection with any civil or criminal case by a court of law. For these reasons, the Prosecutor-General concludes, the Ombudsman has no right in law to provide the assistance envisaged to the second respondent.

Submissions by the Ombudsman

[16] Like the Prosecutor-General, the Ombudsman referred the court to the principles of interpretation of the Constitution and impressed upon the court to have regard thereto when considering Article 25(2) of the Constitution. He points out that the power of the Ombudsman to assist aggrieved persons to approach the courts is unique to the Namibian Constitution.

[17] The Ombudsman further pointed out that he will only exercise his discretion vested upon him by Article 25(2) in favour of an aggrieved person if he is satisfied that a fundamental right or freedom of that person has been infringed. In this regard, when he decided to provide legal assistance to the second respondent, he acted independently and assessed his own competency. He did not usurp the functions of the Director of Legal Aid in discharging his constitutional duty and obligation. He submits that he is entitled to give legal assistance in the form of legal aid, advice, representing a party or any assistance, which he considers convenient or practical in the peculiar circumstances.

[18] As regards the infringement of the right to a fair trial guaranteed by Article 12 of the Constitution, followed by a list of minimum rights contained in sub-articles (1) (a) to (f), the Ombudsman argues that those rights are not exhaustive to a fair trial of an accused person. He relied for this submission on *The Government of the Republic of Namibia and Others v Geoffrey Mwilima*² where the court held that in

² *The Government of the Republic of Namibia and Others v Geoffrey Mwilima* 2010 (2) NR 565 (HC).

order for a trial to be fair there should be a disclosure to the accused of the information contained in the docket, even though this right is not specified in Article 12.

[19] The Ombudsman further points out that he does not make a final determination on the fairness of the trial or otherwise as long as the person 'claims' that his or her fundamental right or freedom has been infringed. He submits further that Article 25(2) requires a subjective test by the aggrieved person and does not necessitate an objective finding by the Ombudsman as to whether it was indeed infringed or not.

[20] Regarding the right of appearance by the Ombudsman, it is submitted that the Ombudsman as a qualified legal practitioner has a right to appear on behalf of the persons he decides to assist under Article 25(2). Furthermore, it is argued that the Ombudsman has the right to give instructions to any legal practitioner, whether in private or public practice, to render legal assistance to an aggrieved person.

Applicable legal principles

[21] At the core of the dispute between the parties is the interpretation of Article 25(2) of the Constitution. It reads:

'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.'

[22] Article 89 of the Constitution establishes the Ombudsman, and provides inter alia that 'the Ombudsman shall be independent and subject only to the Constitution'. The functions and powers of the Ombudsman are set out in Articles 91 and 92 of the Constitution, as well as in s 4 of the Ombudsman Act, 1990.³ It is unnecessary to

³ Act No. 7 of 1990.

reproduce all of them here but we will refer to the most pertinent ones later in the judgment.

Issues for decision

[23] We have earlier in this judgment alluded to the issues for decision. The first issue is whether the second respondent is an aggrieved person within the meaning of Article 25(2) of the Constitution. The second issue is whether the Ombudsman is entitled or obliged to provide legal assistance in the form of legal representation to the second respondent within the meaning of Article 25(2).

Discussion

[24] The provisions of Article 25(2) have been considered and interpreted by both the High Court and the Supreme Court.

[25] A matter in which the provisions of Article 25(2) have been considered and interpreted by both the High Court as well as the Supreme Court is the *Alexander* matter⁴.

[26] In that matter the Applicant had been arrested, pursuant to the provisions of the Extradition Act 1996, No. 11 of 1996, for extradition to the requesting State. Pending the decision of the Minister he was granted bail. He brought an application challenging the constitutionality of s 21 of the Extradition Act, which provides *inter alia* that a person who has been committed to prison while awaiting the decision of the Minister to return him to the requesting State, is not entitled to bail. The applicant alleged that the section was unconstitutional in that it infringed on his fundamental rights in Article 7 (Protection of Liberty), Article 10 (Equality and Freedom from Discrimination) and Article 11 (Arrest and Detention) of the Constitution. He thus asked for the section to be struck down as being unconstitutional.

[27] The court at para 61 of the judgment said the following with regard to the applicant's standing:

⁴ 2009 (2) NR 712 (HC) at para 61.

'[In] every application where the Applicant relies on Article 25(2) of the Constitution, the threshold he or she must cross in order to persuade a competent Court that he or she is entitled to approach the Court for redress, is that he or she must show that he or she is an 'aggrieved' person and that a human right guaranteed to him or her by the Constitution has already been violated (infringed) or is likely to be violated or is immediately in danger of being violated (threatened).'

[28] The court refused to strike down the said section, reasoning that the applicant had failed to show that his rights were likely to be violated just because s 21 of the Extradition Act was on the statute books. Thereafter the Applicant appealed to the Supreme Court.

[29] The Supreme Court⁵ reiterated the court *a quo*'s approach to Article 25(2) by a person who claims that his or her fundamental right has been violated. It stated at para 71⁶ of the judgment as follows:

'The standing of a party to approach a Court to protect him/her against unlawful interference with his/her rights is dependent on whether his or her rights are infringed or there is a threat of such infringement.'

[30] The Supreme Court however held that in view of the fact that the extradition proceedings had been set in motion by the issuing of the provisional warrant of arrest of the appellant, the appellant's right to liberty was threatened by the provisions of s 21 of the Extradition Act. The court therefore held that the court *a quo* was wrong in holding that there was no threat to the appellant's right and declared s 21 of the Extradition Act, 1996 as unconstitutional and struck it down.

[31] What is to be deduced from both the *Alexander* matters is that a person who claims that his or her fundamental right or freedom has been violated has to make a formal application to court, asking the court for an order to protect or enforce his or her right of freedom. In our view, Article 25(2) stipulates a substantive right and a procedural right. Substantively, it vests 'the aggrieved person' with the right to approach the court. Procedurally, it stipulates the procedure to be followed by the

⁵ *Jacob Alexander v Minister of Justice and Others* 2010 NR 328 (SC) at para 71.

⁶ *Jacob Alexander v Minister of Justice and Others* 2010 (1) NR 328 (SC) at p 340.

aggrieved person. It stipulates that such person 'shall be entitled to approach a competent Court' and such aggrieved person 'may approach the Ombudsman' for legal assistance.

[32] The word 'approach' is to be understood in its ordinary and grammatical meaning. The *World English Dictionary*, Bloomsburg, defines 'approach' as 'to speak to somebody with a view of asking for something'. In the context of the present matter it means to bring a formal request in a form of an application before a competent court.

[33] A further reading of Article 25(3) fortifies this interpretation in that that sub-article vests the courts with power to make 'all such orders...to secure such applicants the enjoyment the rights and freedoms...' (underlining supplied for emphasis). It is clear that the word 'applicants' read and understood in its ordinary and grammatical meaning connotes that the aggrieved person must be the applicant and must 'ask for something' – some relief or an order – from the court for protection or enforcement of his fundamental right which has been or is about to be violated. It is elementary to note that a court can only grant 'orders' if an applicant has requested for such an order and if the court is satisfied that the applicant has made out a case for the order sought and the court is further satisfied that it is appropriate to grant such an order in view of the facts alleged by the applicant. Ordinarily, courts do not grant orders which have not been requested by either of the parties appearing before them.

[34] The present proceedings have been brought by the Prosecutor-General and not by the second respondent. There is no application or a counter-application before us by the second respondent alleging that his fundamental right has been infringed or is likely to be infringed. No relief in the form of any order is sought from this court by the second respondent 'to enforce or protect' his fundamental right to a fair trial which he alleged has been infringed.

[35] This means that even if this court were to find that the second respondent's right to a fair trial has been infringed as he alleges, he has not apply to this court for an order 'to enforce or protect' his said fundamental right to a fair trial. Furthermore,

even if the relief sought by the Prosecutor-General is refused, for whatever reasons, it would not mean that the second respondent is automatically an aggrieved person within the meaning of Article 25.

[36] As regards the Prosecutor-General's argument that a convicted person who claims his fundamental rights to fair trial have been infringed during a criminal trial does not need to approach a court in terms of Article 25(2) if he or she chooses to appeal like in the case of the second respondent, because the criminal appeal court is to rectify the infringement by setting aside the conviction or sentence. It suffices to say that might be so, depending on what the 'aggrieved person' wishes to achieve. If for instance, all that the 'aggrieved person' seeks is for the irregular proceedings, which infringed on his right to a fair trial to be set aside, that can be done by an appellate court. However, if the aggrieved person wants to claim compensation for damages he has suffered as a result of the violation to his or her fundamental rights or freedom during the criminal trial, the 'competent court' would be a civil court.

[37] In the circumstances we are of the view that the first respondent's approach is procedurally flawed. The second respondent should have filed an application as stipulated by Article 25(2). Alternatively, he should have filed a counter-application to the present application seeking whatever relief he might be might have been advised of. That being the case, this court is therefore unfortunately not in position to come to the assistance of the second respondent in the absence of an application by him seeking an order from this court to enforce or protect his fundamental right or freedom which he claims has been infringed. We move to consider the Prosecutor-General's application.

The Prosecutor-General's application

[38] As has been observed when we dealt with the parties' respective arguments, the Prosecutor-General raised a number of grounds why she contends that the Ombudsman has no right to provide the second respondent with assistance in the appeal proceedings pending before the appeal court. One of those grounds is that s 3(6) of the Ombudsman Act, 1990, which sets out the duties and functions of the Ombudsman, specifically excludes the power of the Ombudsman to inquire into to

any decision taken in connection with any civil or criminal case by a court of law. We are the view that there is merit in this submission.

[39] It is not only s 3(6) of the Ombudsman Act that prohibits the Ombudsman from inquiring into the decisions of judicial officers. Most importantly, Article 91 of the Constitution stipulates the functions of the Ombudsman as to *inter alia* 'investigate complaints concerning alleged violations of fundamental rights and freedoms, abuse of power, or unfair, harsh, insensitive or discourteous treatment of an inhabitant of Namibia by an official in the employ of the Government...' (Underlined for emphasis). The meaning of 'official' is explained in Article 93 as 'not to include a Judge of the Supreme Court or High Court or, in so far as a complaint concerns the performance of a judicial function, any other judicial officers'.

[40] The Ombudsman agrees that he cannot take remedial action against any decision taken by any court. He contends, however, that he can challenge those decisions perceived to be unfair and an infringement of a person's right to a fair trial, such as the criminal appeal before court, which triggered this application. The Ombudsman points out that upon perusal of the record of proceedings of the trial he was satisfied that there is a real possibility that the second respondent's right to a fair trial was infringed. 'This is because the charge sheet was defective; and the Magistrate allowed the second respondent to plead to a defective charge'. He states further that he was 'convinced that a fundamental right guaranteed by the Constitution has been infringed i.e that the conviction is wrong in law and in fact and thus cannot be left unchallenged'.

[41] In our view, the exercise of the Ombudsman's power in terms of Article 25(2) is firstly dependent upon a person who approach him claiming to be an aggrieved person because his or her fundamental right or freedom has been infringed. In exercising his discretion to determine whether the person qualifies for his assistance, the Ombudsman must act judiciously and objectively. It is not for the Ombudsman, as he argued in the present matter, to 'be convinced that a fundamental right guaranteed by the Constitution has been infringed'. Article 25(3) is clear that it is for the court 'to come to the conclusion that such rights and freedoms have been unlawfully denied or violated'. In this connection we have found that the second

respondent has not been found by a competent court to be an aggrieved person within the meaning of Article 25(2) in that his fundamental right to fair trial has been violated. This is because he has not complied with the procedure peremptorily prescribed by Article 25(2).

[42] We consider the argument by the Ombudsman to be rather contradictory. We say this for the reason that on the one hand he agrees that he cannot take remedial action against any decisions taken by any court, but on the other hand he is saying he can challenge those decisions that he perceives 'to be unfair and an infringement of a person's right to a fair trial through legal processes specifically provided for such challenged; in this specific instance, the criminal appeal process'. We consider this argument below.

[43] Article 92 states that:

'The powers of the Ombudsman shall be defined by an Act of Parliament and shall include the power:

- (a) to issue subpoenas requiring the attendance of any person before the Ombudsman and the production on any documents or record relevant to any investigation by the Ombudsman;
- (b) to cause any person contemptuous of any such subpoena to be prosecuted;
- (c) to question any person; and
- (d) to require any person to co-operate with the Ombudsman and to disclose truthfully and frankly any information within his or her knowledge relevant to any investigation of the Ombudsman.' (Underlined supplied for emphasis)

[44] It is to be noted that amongst the powers stipulated by Article 92 there is no power vested upon the Ombudsman to challenge decisions of judicial officers.

[45] As stated in para.37 above, Article 93 explains the meaning of the word 'official', which is used in Article 91, which sets out the functions of the Ombudsman. It specifically provides that the function of the Ombudsman to investigate 'shall not

include a Judge of the Supreme Court or High Court or insofar as a complaint concerns the performance of a judicial function, any other judicial officer'. (Underlined for emphasis)

[46] The second respondent's complaint to the Ombudsman was that 'the Magistrate was clearly confused and her reasons could never support my conviction' and that he felt that he was unfairly treated and that his human right to a fair trial was infringed. He further complained that the Magistrate refused to admit into evidence his photos which would otherwise have proved that his parking of the vehicle did not contravene the relevant traffic regulations.

[47] It is clear that the second respondent's 'complaint' to the Ombudsman concerns the performance of a judicial function by the Magistrate. The Ombudsman is not permitted by Article 93, read with Article 91, to entertain such a complaint. If the case was otherwise, the Ombudsman would be elevated to the position of an appellate court, effectively reviewing the decisions and performance by judicial officers, which is a route already provided internally, within the court's system, in part, constituting of appeals and reviews of court decisions, including judicial conduct.

[48] In our view, the 'findings' by the Ombudsman that the trial was not fair because the Magistrate did not examine the charge sheet; that the Magistrate allowed the second respondent to plead on a defective charge; and that the conviction was wrong on the facts and in law are directed to a series of decisions made by a judicial officer during criminal proceedings. The Ombudsman is not allowed by law to inquire into those decisions of that Magistrate, being a 'judicial officer' within the meaning Article 93 read with Article 91.

[49] Article 92 states that in addition to the power stipulated in that Article the power of the Ombudsman shall be defined in an Act of Parliament. We have carefully scrutinised s 4 of the Ombudsman Act which sets out the powers of the Ombudsman, but could not find any power vested in the Ombudsman by that section to challenge decisions of judicial officers. Section 3 of the Ombudsman Act, sets out the duties and functions of the Ombudsman. Subsection (6) provides that 'this

section shall not apply in respect of any decision in connection with any civil or criminal case by a court of law'. This means, in our considered view, that it is not the function or duty of the Ombudsman to inquire into any decision taken by a court of law. The Magistrate's decision in the second respondent's criminal case is one of such decisions which the Ombudsman is not allowed to inquire into.

[50] Taking everything into account, we have arrived at the conclusion that the Ombudsman's assertion that he is entitled to challenge decisions by judicial officers if he considers such decisions to be unfair and an infringement of a person's right to a fair trial has no foundation in law and is liable to be rejected.

[51] Our finding that the Ombudsman is not allowed to render assistance to persons who challenge the decision of a judicial officer, whether a Judge or a Magistrate, in our view, accords with the principle of separation of powers. This is because in terms of the Constitution the Ombudsman is independent and subject only to the Constitution and the law⁷. Similarly, the courts are independent and are only subject to the Constitution and the law⁸. Article 80 of the Constitution vests the courts with power to adjudicate all civil disputes and criminal prosecutions, which may involve the 'interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed under the Constitution'.

[52] The Constitution does not vest the Ombudsman with any adjudicative power and accordingly, the Ombudsman, cannot decide that a fundamental right of a person has been infringed. The Constitution only vests him or her with an obligation to provide assistance to a person who claims that his or her fundamental rights or freedoms have been infringed.

[53] We are of the considered view that if the Ombudsman was correct in his conclusion that the second respondent is an aggrieved person, which we have found not to be the case, in the scheme of the Act, he cannot take the bull by the horns as it were and seek to represent him. He has no power to do so as we have held above.

⁷ Article 89 (2).

⁸ Article 78 (2).

[54] The fact of the matter is that the second respondent did not apply for legal aid assistance. He prejudged what the outcome would be – rightly or wrongly. In this regard, the Ombudsman could have, using his good offices, made representations to the Directorate of Legal Aid, to assist the second respondent. In all probability, the latter office would have viewed the Ombudsman's entreaties favourably.

[55] It must be stated that if it was the intention of the Lawgiver, to imbue the Ombudsman with the power to represent individuals in court proceedings, that power would have been expressed in explicit terms in the Ombudsman's Act. The existence, by Parliamentary sanction of the Directorate of Legal Aid, to assist those who do not have the means, detracts from the argument that the Ombudsman's powers to render assistance, includes legal representation to those who cannot afford same where they claim their fundamental rights and freedoms have been infringed.

[56] There is another argument advanced by the Ombudsman, to the effect that because he is an admitted legal practitioner, and qualifies to be appointed as a Judge of this court, that should be an indicator that in appropriate cases, he can and should be allowed to represent individuals. We have considered this argument but we hold the view that it is unnecessary to rule thereon for the reason that the second respondent, is not an aggrieved person within the meaning of the Constitution, as we have held above.

[57] Furthermore, the result of our conclusion means that the Ombudsman cannot provide assistance in criminal appeals such as the one which triggered this application because the appeal concerns an inquiry into a decision of a judicial officer.

[58] In summary and in answer to the issues for determination identified and posed earlier in this judgment: As regards the question whether the second respondent is an aggrieved person within the meaning of Article 25(2), the answer is that the second respondent is not an aggrieved person within the meaning Article 25(2) because he has not been found by a competent court to an aggrieved person. As regards the question whether the Ombudsman is entitled to provide assistance to the

second respondent as an appellant in a criminal appeal, the answer is that the Ombudsman is precluded from rendering such assistance for the reasons that the second respondent is not an aggrieved person, and because the Ombudsman is precluded from doing so both by the Constitution and the Ombudsman Act, from which he derives his existence and power.

Costs

[59] What remains is the issue of costs. We are of the view that since the main parties are Constitutionally established Offices, and have approached the court for the clarification of their respective Constitutional mandates and are further dependent on the State for their financial resources, it would, in the circumstances, be fair and reasonable not to make any order as to costs.

[60] In the result we make the following order:

1. The Ombudsman is disallowed from acting on behalf of the second respondent as his legal practitioner in the criminal appeal *Frederick Vincent Muller v The State*, Case No. CA 66/2017.
2. There is no order as to costs.
3. The matter is removed from the roll and is finalised.

H Angula
Deputy-Judge President

I agree.

T S Masuku

Judge

APPEARANCES

APPLICANT:

L MATOTA

Of Office of the Prosecutor-General, Windhoek

FIRST RESPONDENT:

J R WALTERS

Of Office of the Ombudsman, Windhoek