IN THE SUPREME COURT OF NAMIBIA CASE NO.: SA 2/92

In the matter between

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA 1ST APPELLANT

THE MINISTER OF FINANCE 2ND APPELLANT

and

CULTURA 2 1ST RESPONDENT

000 J J 2ND RESPONDENT

BRANDT

Coram: Mahomed, C.J.
Dumbutshena, A.J.A.
Chomba, A.J.A.

Heard on: 1993/04/05

Delivered on: 1993/10/15

JUDGMENT

MAHOMED, C. J. : The Respondents in this appeal were the Applicants in an application brought against Appellants before a full Bench of the High Court of Namibia for an Order inter alia declaring the State Repudiation (Cultura 2000), Act 32 of 1991, ("The Act") to be unconstitutional, null and void. The Court a quo granted this declaration and directed the

Appellants to pay the costs of the Respondents including the costs of two Counsel.

The First Respondent is said to be an association not for gain incorporated in terms of the Companies Act of 1973 and the Second Respondent, who brought the application in his personal capacity, was the chairman of the Board of Directors of the First Respondent.

The First Respondent was incorporated on the 28th February 1989 and according to its memorandum of association its main object was the preservation of the culture of "The Afrikaans, German, Portuguese, English and other communities of European descent as represented by the founding members". In his founding affidavit the Second Respondent alleged that the main object in forming the First Respondent was the "Maintenance, development and promotion of the culture of the West European cultural groups", but in a letter addressed to the "Administration for Whites" on the 25th of March 1989, the Second Respondent (in his capacity as chairman of the Board of Directors of the First Respondent) informed Mr. Odendaal (in his capacity as member of the Executive Committee for the Administration for Whites) that the Second Respondent had decided first to "establish a privatised cultural centre for the Whites" with the available funds which included certain contributions from the "Administration for Whites". In various other documents emanating from this Administration for Whites the First Respondent is also often treated as being a body

established for the cultural activities of the "Whites" and the allocation of assistance to it is similarly justified as being for the activities of "Whites".

It is common cause that during March 1989, just one year before the independence of Namibia and during transitional period leading to such independence, the First Respondent was the recipient of a number of very valuable assets from the "Representative Authority for Whites[11] in the territory. On the 23rd March 1989 the farm "Regenstein" was sold to the First Respondent for a consideration of R318 000,00 and on the 28th March 1989 the same Representative Authority for Whites donated to the First Respondent a sum of R4 million on the condition that it was to be applied for the purposes set out in the memorandum of association of the First Respondent. On the same date a further sum of R4 million was paid by the same Authority to the First Respondent as a loan carrying interest at 1% per annum re-payable in 76 equal installments half yearly on the 31st March and 3 0th September of each year.

On the 28th February 1990, just three weeks prior to the formal independence of Namibia and after the results of the general election were therefore known, this loan of R4 million was converted into an outright donation by the then Administrator-General appointed by the South African Government. Mr. Gerhardus Hanekom, the Minister of Finance, in the First Appellant, claimed that these payments to the First Respondent were made "as a deliberate stratagem to support the

operation of the apprehended new Constitution", to "frustrate the anticipated results of the election" and "because of the apprehension of a new democratic society in which privilege on a racial basis would not be permitted". He said that these payments were the "dowry" which was "secured" before independence. These conclusions are denied by the Respondents, although no convincing reasons were suggested particularly for the timing of the conversion of the loan to a donation so shortly before the imminent formal independence of Namibia.

The Appellants also rely on the fact that the allocations, to which I have referred, were all made to the Respondent pursuant to a policy of compulsory, pseudo - ethnic and racial classification which was imposed upon the people of Namibia before independence in terms of Proclamation AG 8 of 1980 enacted by the Administrator-General. This was not in dispute.

Our attention was further drawn to the judgment of the Court in ex parte Cabinet for S.W.A. : in re Advisory Opinion 1988 (2) SA 832 (SWA) at 865 G in which it was said:

> "...members of the White population group receive substantially bigger advantages and privileges on account of their membership in that population group than do the members of the remaining population groups. Furthermore, they receive those advantages as a result of a group clearly being established (within the context of the proclamation) on either ethnic, racial or colour grounds, and therefore fall squarely within the unqualified prohibition set out in art. 3 of the Bill of Rights". (c/f Hollington v Hewthorn Co. Ltd., 1943(2) AER 35.)

Relying inter alia on these circumstances the Court a quo referred to the policy of racial discrimination followed under the previous administration and concluded that

> "First Applicants[1] roots and the roots of some of those responsible for the establishment and functioning of the first Applicants, originate in the murky depths of such policy"

Levy, AJP (as he then was) giving judgment on behalf of a unanimous Court also stated that:

> "... with the background which existed in Namibia and considering the part played by the Representative Authority for Whites in the formation of first Applicants and considering the highly suspect motives of the Administrator-General in converting a R4 million loan into a donation three weeks before independence, it can be understood that Respondents may well use harsh and critical tones when referring to Applicants or to those responsible for the formation of first Applicants".

The Constituent Assembly of Namibia adopted the Namibian Constitution on 9th February 1990. This Constitution was published in the Government Gazette of the 21rd March 1990. Namibia became an independence State on that day.

The Constitution of Namibia articulates a jurisprudential philosophy which, in express and ringing tones repudiates legislative policies based on the criteria of race and ethnicity, often followed by previous administrations prior to the independence of Namibia.

> "Throughout the preamble and substantive structures of the Namibian Constitution there is one golden and unbroken thread - an abiding 'revulsion' of racism and

> apartheid. It articulates a vigorous consciousness of the suffering and the wounds which racism has inflicted on the Namibian people 'for so long' and a commitment to build a new nation 'to cherish and to protect the gains of our long struggle[1] against the pathology of apartheid. I know of no other Constitution in the world which seeks to identify a legal ethos against apartheid with greater vigour and intensity". (S v Van Wvk. 1992(1) SACR 147 (Nm. SC) at 172 - 173) .

This basic temper of the Constitution appears throughout from the terms of the Preamble itself which provide inter alia that:

> "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace;
>
> Whereas the said rights include the right of the individual to life, liberty and the pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status;
>
> Whereas these rights have for so long been denied to the people of Namibia by colonialism, racism and apartheid;
>
> Whereas we the people of Namibia -
>
> > have finally emerged victorious in our struggle against colonialism, racism and apartheid;
> >
> > are determined to adopt a Constitution which expresses for ourselves and our children our resolve to cherish and to protect the gains of our long struggle; ....
>
> Now therefore, we the people of Namibia accept and adopt this Constitution as the fundamental law of our Sovereign and Independent Republic."

The same temper is manifest in Art. 10(2) which provide that no persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or

economic status and in the pungent terminology of Article 23(1) which provides that

> "The practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and by Act of Parliament such practices, and the propagation of such practices, may be rendered criminally punishable by the ordinary Courts by means of such punishment as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people at such practices."

Similarly Art. 63(2)(i) gives the National Assembly the power

> "to remain vigilant and vigorous for the purposes of ensuring that the scourges of apartheid, tribalism and colonialism do not again manifest themselves in any form in a free and independent Namibia and to protect and assist disadvantaged citizens of Namibia who have historically been the victims of these pathologies."

It is manifest from these and other provisions that the Constitutional jurisprudence of a free arid independent Namibia is premised on the values of the broad and universalist human rights culture which has begun to emerge in substantial areas of the world in recent times and that it is based on a total repudiation of the policies of apartheid which had for so long dominated lawmaking and practice during the administration of Namibia by the Republic of South Africa.

Article 144 of the Constitution sought to give expression to the intention of the Constitution to make Namibia part of the international community by providing that unless the

Constitution otherwise stipulated, "the general rules of public international. law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia" and further providing in Article 145 that

> "(1) Nothing contained in this Constitution shall be construed as imposing upon the Government of Namibia:
>
> b) any obligations to any other State which would not otherwise have existed under international law;
>
> c) any obligations to any person arising out of the acts or contracts of prior Administrations which would not otherwise have been recognised by international law as binding upon the Republic of Namibia.
>
> (2) Nothing contained in this Constitution shall be construed as recognising in any way the validity of the Administration of Namibia by the Government of the Republic of South Africa or by the Administrator-General appointed by the Government of the Republic of South Africa to administer Namibia."

What is the effect of Articles 144 and 145, regard being had to the fact that under international law, the administration of Namibia by South Africa, at all times relevant to this appeal, was illegal whilst its acts and laws performed in the territory continued nevertheless to be regarded as lawful and enforceable by the municipal Courts? (see Binaa v Administrator-General South West Africa and Others, 1984(3) SA 949 (SWA); Duqard: The South Africa - Namibia Dispute p. 477 -• 479) .

Clearly many of the laws enacted by the South African Government during its administration of Namibia and many of the

acts performed by that administration during that time were plainly inconsistent with both the ethos and the express provisions of the new Constitution and therefore unacceptable to the new Namibia. But there were clearly other acts with no ideological content such as the registration of births, deaths and marriages for example, which did not fall into that category and there would clearly be chaos in the administration of the Country by a future government, if all such acts, regardless of the their character or content, were to be considered invalid simply on the "logical" ground that they were performed by an administration considered to be illegal, (see: Dugard The South Africa - Namibia dispute p. 477 - 479). On the other hand acts of the previous Administration, which might appear on the face of it to be purely administrative and ideologically colourless and unobjectionable, might on proper investigation be discovered to be hopelessly unacceptable and entirely motivated by policies plainly inconsistent with the express and clear intention of the Constitution.

The Constituent Assembly applied its mind to these problems by enacting Art. 140 which provides as follows:

> d) Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.
>
> e) Any powers vested by such laws in the Government, or in a Minister or other official of the Republic of South Africa shall be deemed to vest in the Government of the Republic of Namibia or in a corresponding Minister or official of the

Government of the Republic of Namibia, and all powers, duties and functions which so vested in the Government Service Commission, shall vest in the Public Service Commission referred to in Article 112 hereof.

f) Anything done under such laws prior to the date of Independence by the Government, or by a Minister or other official of the Republic of South Africa shall be deemed to have been done by the Government of the Republic of Namibia or by a corresponding Minister or official of the Government of the Republic of Namibia, unless such action is subsequently repudiated by an Act of Parliament, and anything so done by the Government Service Commission shall be deemed to have been done by the Public Service Commission referred to in Article 112 hereof, unless it is determined otherwise by an Act of Parliament.

g) Any reference in such laws to the President, the Government, a Minister or other official or institution in the Republic of South Africa shall be deemed to be a reference to the President of Namibia or to a corresponding Minister, official or institution in the Republic of Namibia and any reference to the Government Service Commission or the government service, shall be construed as a reference to the Public Service Commission referred to in Article 112 hereof or the public service of Namibia.

h) For the purposes of this Article the Government of the Republic of South Africa shall be deemed to include the Administration of the Administrator-General appointed by the Government of South Africa to administer Namibia, and any reference to the Administrator-General in legislation enacted by such Administration shall be deemed to be a reference to the President of Namibia, and any reference to a Minister or official of such Administration shall be deemed to be a reference to a corresponding Minister or official of the Government of the Republic of Namibia."

Article 140(1) deals with laws which were in force immediately before the date of independence and which had therefore been enacted by or under the authority of the previous South African Administration exercising power within Namibia. Such laws are open to challenge on the grounds that they are unconstitutional

in terms of the new Constitution. Until such a challenge is successfully made or until they are otherwise repealed by an Act of Parliament, they remain in force.

Article 140(3) deals with actions done by the Government or Administration or other officials of the Republic of South Africa prior to the date of Namibia's independence under such laws. Such actions were not and could not have been performed by the Government of Independent Namibia or any official of the Republic of Namibia because at the time when they were performed, Namibia was not yet independent, but the effect of Section 140(3) is to create a fiction that they were deemed to be done by the Government of Namibia or a corresponding minister or official of the Republic of Namibia. That fiction is however, a reversible fiction and can be so reversed by an Act of Parliament.

Purporting to act under Article 140(3) of the Constitution Parliament enacted the Act in 1991, in which it sought to address itself to the allocation of monies and the sale of property to the First Respondent which I have previously described. This Act consists of seven short Sections and its full text reads as follows:

ACT

To provide for the repudiation of certain actions done under laws in force prior to the date of independence of Namibia by the Government or a Minister or other official of the Republic of South Africa pursuant to Article 140(3) of the Namibian Constitution; and to provide for matters incidental thereto.

(Signed by the President on 12 December 1991)

BE IT ENACTED by the National Assembly of the Republic of Namibia, as follows:-

1. In this Act, unless the context otherwise indicates -

"date of independence" means 21 March 1990;

"Minister", in any provision of this Act, means the Minister to whom, or the Minister to whom acting in consultation with another Minister, the adrninistration of that provision has been assigned by proclamation issued under section 5;

"the Association" means Cultura 2 000 incorporated as an association without gain in terms of section 21 of the Companies Act, 1973 (Act 61 of 1973), and includes its directors, agents, successors or assigns, as the case may be.

2. (1) Subject to the pt) visions of subsection (2), the following actions done under laws in force prior to the date of independence by the Government or a Minister or other official of the Republic of South Africa as contemplated in Anicle 140 of the Namibian Cojistitution, are hereby repudiated, namely -

i) the sale, donation or other alienation of movable or immovable property, whether corporeal or incorporeal, including any right in or over such property;

j) the entering into any lease;

k) the granting of any loan or subsidy;

l) the rendering of any other form of financial assistance,

whether in money or in kind, and of whatsoever nature, to or in respect of or with the Association.

(2) For the purposes of subsection (I), but subject to the provisions of this Act -

m) any transaction or agreement entered into bet ween the said Government or Minister or other official of the Republic of South Africa and the Association or any offer of settlement made or accepted by the said Government or Minister or official and the Association, as the case may be, by virtue of any action so repudiated, shall be null and void; and

n) any obligation of whatever nature of the Government or any Minister or official of the Republic of Namibia arising from or related to any action so repudiated is hereby terminated.

3.(1) Notwithstanding anything to the contrary in any law or the common law or any agreement or other document contained -

o) in the case of any action repudiated under paragraph (c) or (d) of subsection (1) of section 2, the whole amount owing in respect of any financial or other assistance already rendered by virtue of such action shall,- subject to the provisions of subsection (2), on the date of commencement of this Act, become due and repayable;

p) in the case of any aaion repudiated under paragraph (a) or (b) of subsection (1) of that section, any movable or immovable property

transferred, as the case may be, under any'Iaw by such Government, Minister or official of the Republic of South Africa to the Association, shall, subject to the provisions of subsection (2), on the date of commencement of this Act, vest from such date in the Government of Namibia, and any lease in respect of any such property shall on such date be regarded as cancelled.

(2) For the purposes of subsection (1)-

q) in the case of paragraph (a) of that subsection, any amount so due and repayable may be recovered by the institution of legal proceedings;

r) in the case of paragraph (b) of that subsection -

(i) the officer in charge of the deeds registry shall, without payment of transfer duty, stamp duty or any other fee or charge and upon production to him or her of the title deed of any immovable property which vests in terms of the provisions of this Act in the Government of Namibia, endorse such title deed to the effect that the immovable property described therein is vested in the Government of Namibia, and sh»H make the necessary entries in his or her registers, and thereupon the said title deed 5h*n serve and avail forall purposes as proof of the title of the Government of Namibia in respect of the said property; or

(ii) if the owner of the property in question fails to produce the title deed thereof or if the holder of any mortgage bond over such property fails to consent to the cancellation of the bond or the release of the property from the operation of the bond, such officer shall nevertheless pass transfer of the property and note the transfer on the duplicate title filed in his or her office and in the appropriate registers.

(3) Notwithstanding anything to the contrary in this Act or in any other law contained, the Minister may in his or her discretion on application by a person concerned determine the. terms and conditions subjea to which any

amount recoverable from such person under this Act shall be repayable.

4. (1) The President may by proclamation in the *Gazette* assign the adWnistration of the provisions of this Act to any Minister, or partly to one Minister and partly to another Minister, or assign to different Ministers the administration of any of the said provisions in so far as they relate to different specified actions, and may in such proclamation prescribe the powers and functions which shall be exercised and performed by the several Ministers, and may further prescribe that any power or duty conferred or imposed by this Act upon the Minister *han be exercised or performed by one Minister airing in consultation with another Minister.

(2) The President may from time to time vary or amend any such proclamation.

5. No action shall lie against the State, or any Minister or official of any Ministry as H*fin>*H in section 1 of the Public Service Act, 1980 (Act 2 of 1980), arising from or in consequence of anything done in good faith under this Act

s) This Act shall also apply in respect of actions repudiated under section 2 which may be the subject matter of pending legal proceedings, or in respect of which judgment may have been delivered prior to the date of commencement of this Act.

t) This Act shall be called the State Repudiation (Cultura 2 000) Act, 1991, and shall come into operation on a date to be determined by the President by proclamation in the *Gazette.*

The proceedings in the Court a quo.

The Respondents applied for and obtained from the Court a quo an order declaring unconstitutional the whole of the Act.

The grounds upon which the Respondents in the present appeal sought to attack the Act in the Court a quo are summarised in six paragraphs in the judgment of Levy, A.J.P., as follows, in which he refers to the present Respondents as the Applicants before him.

> "1. The Act, particularly Section 2 and 3, constitutes a statutory expropriation of First Applicant's property in conflict with Article 16, read with Articles 5 and 63 of the Constitution;
>
> u) constitutes a 'statutory derogation' of First Applicant's right to practise, profess, maintain and promote the culture, language or traditions of certain persons or groups in conflict with the provisions of Article 19 read with Articles 5 and 63 of the Constitution; and
>
> v) constitutes a derogation of Second Applicant's right to profess, maintain and promote his own culture, language or traditions, alone or in association with others in conflict with the provisions of Article 19 read with Articles 5 and 63 of the Constitution.
>
> w) Applicants allege furthermore that the Repudiation Act (particularly sections 2 and 3 thereof) discriminates against Applicants and those sections are arbitrary and unequal in their content and operation and therefore conflict with the provisions of Article 10 read with Articles 5 and 63 alternatively Article 22 of the Constitution.
>
> x) Applicants also allege that the provisions of the Repudiation Act in general but particularly Sections 2 and 3, 'violate the cultural rights promoted by First Applicant and practised, professed, enjoyed, maintained and promoted' by Second Applicant in association with others,

which are protected by International Law and discriminate in an arbitrary and/or racial and/or impermissible manner between persons in violation of International Law as incorporated in Namibian law under Article 144 of the Constitution.

6. Finally Applicants allege that the provisions of Section 3 and 5 of the Repudiation Act derogate from the First Applicant's right to have its rights and obligations determined in a fair trial by a competent Court as contemplated in Articles 1, 12, 78 and 80 of the Constitution."

The real ground on which the Court a quo declared the Act to be unconstitutional, was however, different from these submissions and was based on an argument apparently not articulated in the Court a quo and not supported before us on appeal by any of the parties. This ground, crisply stated, is based on two propositions:

The first proposition is that all the actions of the previous Administration in selling property and donating monies to the First Respondent were "completed" or "implemented" acts leaving the new State upon its independence with no further obligations to perform; and the second proposition is that upon a proper construction of Article 140(3) of the Constitution the legislature is only entitled to "repudiate" acts which had not been "completed" by the previous Administration and which would therefore otherwise have saddled the new State with obligations, (in the absence of a repudiation in terms of Article 140). This reasoning appears from the following passages in the judgment of Levy, A.J.P.

"Both the donations and the deed of sale were implemented and there were no further obligations on the State as a result thereof. First Applicant became

> the owner of the monies donated. It spent some of it, as it was entitled to do, and also took transfer into its name of the farm Regenstein paying the State the purchase price. First Applicant has occupied the farm since such transfer and according to the evidence before us, it has used it for the purpose intended. Article 140(3) provides that anything done by the Government or officials of the previous regime will be deemed to have been done by the Government of Namibia •unless such action is subsequently repudiated by an Act of Parliament[1]...
>
> ...the type of 'action' which can be repudiated in terms of Article 140(3) by the Namibian Parliament is not one which has already been fulfilled and which is final. The reference in Article 140(3) to 'an action' must both in its context and as a matter of reasonable practicality, be construed as an action in consequence of which the previous administration or its officials bound itself to do or forbear something in the future... The repudiation is not a denial of the act itself but is a declaration that the consequences which flow from it are not binding and will not be performed."

With great respect to a judgment formulated with considerable care and diligence, I am unable to agree with this reasoning.

Article 140(3) contains a deeming provision coupled with the power to reverse such deeming by an Act of Parliament, if it so wishes in the future. The effect of the deeming provision is to create a legal fiction as a substitution for the truth and the purpose of the reversing or repudiating power is to enable Parliament to enact legislation through which the fiction introduced by the deeming can be undone and again substituted with the true position.

As I have previously stated the actions taken under laws in operation prior to the independence of Namibia by officials by the previous Administration were never in truth and never could have been the actions of the subsequent Government of an

independent Namibia or by its corresponding minister or official, but they are deemed fictitiously to have been so. This legal fiction can be reversed however, by a repudiating act which reverses the fiction. The result of such an act is simply that the true position is restored and such acts continue to remain the acts of the previous Government or its officials and not deemed to be the acts of the new Government after independence (or its corresponding officials) . This is all that a repudiation in terms of Article 140(3) means. That this is the proper approach to the meaning of such a deeming provision appears from the judgment of Moulton, L.J., in the case of R. v Dibdin. (1910) P. 57, 125 where he stated that:

> "The fallacy of the proposed method of interpretation is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment."

This fallacy has also been pointed out on other occasions:

> (Ex parte Partington (1844) 6 Q.B. 649 and 653;
> Re Brocklebank, (1889) 23 Q.B.D. 461;
> Hill v East and West India Dock Co. , (1884) 9 App. Cas. 448).

Thus understood, there is nothing in the language of Article 140(3) of the Constitution which justifies" the conclusion that the intention of the Constitution was to limit the power of repudiation conferred on Parliament by Article 140(3), to "uncompleted" acts or acts of the previous Administration which

had not been "implemented". Indeed the opposite is true. As I have previously indicated, the Constitution expresses" "the strongest revulsion of the new State to the policies and actions of the previous Administration based on the policy of apartheid. There can therefore be no convincing reason why the power given to Parliament to repudiate, what is after all a reversible legal fiction, in substitution of the truth, should not be available for the restoration of the truth whether the act performed by the previous Administration had been "completed" or "uncompleted". To hold otherwise would be to oblige the Parliament of the new State forever to be saddled with imputation, that the acts of the previous Administration in making the donations and sales which it did to the First Respondent, are deemed to be the acts of the new Government and its officials, however, repugnant such acts might have been in the perception of the new Parliament.

Such a result would be anomalous and the result of giving to the Constitution a narrow, mechanistic, rigid and artificial interpretation. This is not the proper approach to the interpretation of the Constitution of a Country.

A Constitution is an organic instrument. Although it is enacted in the form of a Statute it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the "austerity of tabulated legalism" and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of

the nation, in the articulation of the values bonding its people and in disciplining its Government. An interpretation of Article 140(3) which limits its potential operation only to acts by the previous Administration which were "uncompleted", would not give to the clear words of the Article a construction which is "most beneficial to the widest possible amplitude" (James v Commonwealth of Australia, (1936) AC 578 at 614; Minister of Defence. Namibia v Mwandinghi. 1992(2) SA 355 (Nm SC) at 361 - 363; S. v Acheson. 1991(2) SA 803 (nM) AT 813 a-c; S v Marwane, 1982(3) SA 717 (A) at 748H - 749G; Ex parte Cabinet for the Interim Government of South West Africa: In re Advisory Opinion in terms of s 19(2) of Proc. R101 of 1985. (RSA) 1988(2) SA 832 (SWA) AT 853 C - G; Hewlett v Minister of Finance and Another, 1982(1) SA 490 (ZS); Minister of Home Affairs and Others v Dabengwa and Another, 1982(4) SA 301 (ZS) at 306 E - H; Minister of Home Affairs v Bickle and Others. 1984(2) SA 439 (ZS) at 447 G - G; Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd. 1984(2) SA 778(ZS); and Bull v Minister of Home Affairs. 1986(3) SA 870 (ZH & ZS) at 872 J - 873 C and at 880 J - 881 C.)

There is nothing in the ordinary meaning of the word "repudiation" which justifies giving to that expression the limited construction which found favour in the Court a quo. To "repudiate" means simply "to disown; to refuse to acknowledge; to refuse to recognise the authority of". This is exactly what Section 2(1) of the Act seeks to do. It simply give power to Parliament to disown or turn its back upon acts perpetrated by

the previous Administration before the independence of Namibia, whether such acts were at the time of their perpetration lawful or unlawful.

It is true that in the context of contracts, the word "repudiation" is often used in relation to unfulfilled obligations, but in the context of Article 140(3) it is quite unnecessary to give it so restrictive a meaning, particularly having regard to the fact that Section 2(1) of the Act (as distinct of Sections 2(2) and 3 of this Act) does not, for the reasons which I have discussed and will again return to later, purport to undo anything which had been done by the previous Administration prior to the independence of Namibia: it merely reverses a legal fiction.

Nothing contained in the case of Minister of Defence. Namibia v Mwandinghi. 1992(2) SA 355 (Nm SC) , upon which reliance was placed in argument before us is inconsistent with the view I have expressed as to the proper meaning and operation of Article 140(3). The issue' in that case was whether the Namibian Minister of Defence could be sued for damages suffered by a plaintiff in consequence of delicts committed in Namibia by the servants of the previous Administration before Namibia gained its independence. This Court upheld the submission of the plaintiff that he could maintain such an action for damages against the new State in the absence of an Act of the Namibian Parliament, under Article 140(3) of the Constitution, repudiating the relevant acts perpetrated by the previous

Administration before the independence of Namibia. The plaintiff in that case had not recovered his damages before the date of Namibia's independence and the Court therefore was dealing with what can be describe as. an "uncompleted or unimplemented transaction" but the Court did not say and did not intend to say that if the transaction had been "completed" or "implemented", a "repudiation" could not for that reason be enacted in terms of Article 140(3).

In my view therefore, the Court a quo erred in its conclusion that Article 140(3) of the Constitution precluded Parliament from enacting an Act which sought to "repudiate" the acts of donation and sale to the First Respondent which had been made by or on behalf of the previous Administration of Namibia, and further erred in its consequential conclusion that the Act was unconstitutional and invalid for that reason.

This, does not however, dispose of the issues articulated on appeal before us. What still remains open is:

firstly, whether or not Section 2(1) of the Act is unconstitutional on grounds other than the grounds upon which the judgment of the Court a. quo was based and

secondly, whether or not the relevant parts of the Act, other than Section 2(1) are unconstitutional, even if Section 2(1) itself might be constitutional.

The issues narrowed during the appeal.

In the original Notice of Appeal the Appellants appealed against the whole of the judgment and order of the Court a quo, but in a letter addressed to the Registrar on the 2 6th February 1993 the Office of the Government Attorney indicated that the attack which Appellants would on appeal make on the order of the Court a quo would be against the finding that Section 2(1) of the Act was unconstitutional. When argument in this matter commenced on appeal, Counsel for the Appellants originally maintained that real attack was confined to the finding that Section 2(1) of the Act was unlawful. Later, and in consequence of certain questions from the Bench, Counsel submitted that Section 2(2) was also constitutional and even suggested at some stage that Section 3 was constitutional, but it was eventually conceded by him that his attack was effectively confined only to the finding in the Court a quo that the substantive part of Section 2(1) of the Act (read with the defining and ancillary provisions of Sections 1 and 7) was unconstitutional and it was formally agreed by all the parties before us that the Notice of Appeal could be regarded as having been amended so as to confine the appeal on the merits to the single issue as to whether or not the Court a quo was correct

in its conclusion that Section 2(1) of the Act (read with Sections 1 and 7) was unconstitutional and therefore null and *4)*

void. In the result it is unnecessary for this Court to express any final conclusions as to the constitutionality or otherwise of Section 2(2) or Section 3. (The constitutionality

of the formal defining and administrative Sections of the Act, contained in Sections 1, and 7, if Section 2(1) was indeed valid, was never in real issue in argument before us.)

What therefore remains to be considered on the merits of this appeal are the attacks made on the constitutionality of Section 2(1) of the Act on grounds other than the grounds which found favour with the Court *a* quo and which I have, for the reasons previously stated, rejected.

In his very thorough argument, Mr. Hodes, SC, who appeared for the Respondents in this appeal (together with Mr. Maritz and Mr. Van Rooyen) vigorously maintained that what the legislature had sought to do in enacting the Act was to declare null and void the donations which the First Respondent had obtained from the previous Administration as well as the sale of the property to it and effectively to require the return of these assets to the State, without any compensation whatever and that this constituted a contravention of Article 16 of the Constitution which guaranteed to all persons in Namibia the right to acquire, own and dispose all forms of movable and immovable property and the right to just compensation if any such property was expropriated in the public interest. There can, in my view, be no doubt that the effect of Section 2(2) and Section 3 of the Act is indeed to declare these transactions between the First Respondent and the previous Administration

null and void and that no provision is made for any compensation to be paid to the First Respondent, but the constitutionality of these Sections is no longer an issue which this Court is required to determine, for the reasons which I have already mentioned. For the purposes of this appeal it must therefore be assumed that Section 2(2) and Section 3 of the Act are indeed null and void. The question which therefore arises is not whether these Sections of the Act invade Article 16 of the Constitution but whether Section 2(1) does so.

In his powerful analysis Mr. Kentridge, QC, (who appeared for the Appellants with Mr. Gauntlett, SC, and Mr. Coleman) contended that it does not.

For the purposes of resolving this debate it is necessary to examine what the legislature sought to do in enacting the Act. On a proper analysis of its provisions, it seems to me to contain three separate objectives (whatever be the constitutionality or otherwise of any one or more of such objectives).

In the first place it seeks to "repudiate" the actions of the previous Administration, which are detailed in sub-paragraphs (a), (b) , (c) and (d) of Section 2(1) and which all pertain to the allocation of funds made to the First Respondent and the sale of the property effected to it before Independence. This repudiating objective is expressed in Section 2(1) of the Act. The constitutional authority for this must ultimately be based on Article 140(3) of the Constitution;

Secondly it seeks to define certain statutory consequences and to create statutory machinery, following upon such repudiation, in terms of which the monies paid to the First Respondent by the previous Administration become repayable and the property transferred to it becomes vested in and retransferred to the Government of Namibian. The Act seeks to achieve that objective through the provisions of Section 2(2) and 3;

In the third place the Act makes incidental provisions such as the authority of the President to assign the administration of the Act from one minister to another, the regulation of immunity for certain officials performing act in good faith under the act, the application of the Act to legal proceedings determined prior to the date of the commencement of the Act the date upon which the Act came into operation and the definition of words. These incidental objectives are contained in Section 1, 4, 5, 6 and 7 of the Act.

It is crucial to understand the fundamental distinction between the first and the second objective. The first objective is simply repudiatory. It is effected in terms of Article 140(3) of the Constitution by Section 2(1). It simply reverses the fiction that the acts of the previous Administration in allocating monies to the First Respondent and in selling property to it, were the acts of the new Government or its officials. The effect of this repudiation is that these acts must, in law, continue to be regarded as the acts of the previous Administration as they in fact were. By itself,

Section 2(1) does not purported to attain any other objectives. It does not purport to enact that the agreements or transactions between the previous Administration and the First Respondent, are null and void. Section 2(2)(a) does this. It does not purported to terminate any obligations of the new Government of any of its officials arising from the repudiated action. Section 2(2) (b) does. It does not provides that the monies paid to the First Respondent by the previous Administration become due and repayable. Section 3(1)(a) does. It does not provide that the property transferred by the previous Administration to the First Respondent becomes vested in the Government of Namibia. Section 3(1)(d) does. It does not create machinery for the retransfer of the property of the First Respondent to the Government of Namibia. Section 3(1)(d) does.

Because the constitutionality of Section 2(2) and Section 3 of the State Repudiation Act, is not in issue in this appeal, it is unnecessary for me to consider whether these Sections are open to attack on the grounds that they invade the right of the First Respondent to acquire, own and dispose property in Namibia and its right to receive just compensation in the event of any expropriation of such property in the public interest. What is clear however, is that if the attack on the constitutionality of the State Repudiation Act based on Article 16 of the Constitution is a good attack, it must be an attack targeted against Section 2(2) and Section 3 of the Act and not an attack properly targeted against Section 2(1) of the Act, which seeks to reverse a fictitious deeming and no more.

Although, in arriving at this conclusion, I have considered only the attack based on Article 16 of the Constitution dealing with the fundamental right to property and to just compensation on expropriation, the reasoning upon which this conclusion is based, would also apply to the attack based on the proposition that State Repudiation Act invades the rights of the First Respondent and its members to enjoy, practise, profess, maintain and promote their culture, language or tradition by the depriving them of the means with which they can enjoy, practise, maintain or promote these rights. Even if I were to assume that the facts adduced in the evidence presented in this case establish such an attack and even if I were to assume that this would be a good attack on the Act, it is again an attack which must be targeted against Section 2(2) and Section 3 of the Act and not Section 2(1).

The same reasoning would apply to any other fundamental rights in the Constitution which could be said to be invaded by the Act.

Mr. Hodes drew our attention to the judgment of Strydom, AJP, (as he then was) in the case of Mwandinai v The Minister of Defence - Namibia, 1991(1) SA 851 (Nm) and more particularly to the following passages at pages 859.

> Although sub-art (3) (of art. 140) reserves the right to repudiate actions for which the previous Government may be responsible, this repudiation is by Act of Parliament which must comply with the provisions of the Constitution. Therefore, if such repudiation should be in conflict with cap 3 of the Constitution (Fundamental Human Rights and Freedoms), it is bound to be set aside by the Court."

Strydom, AJP, was perfectly correct in his observation that a repudiation in terms of Article 140(3) of the Constitution must be effected by an Act of Parliament. This is clear from Article 140(3). It therefore follows that if the Repudiating Act unlawfully invades any of the fundamental rights and freedoms guaranteed by chapter 3 of the Constitution, it would be vulnerable to constitutional attack, because in terms of Article 63 the power of the National Assembly to enact legislation must always be exercised "subject to (the) constitution". Strydom, AJP, in Mwandingi's case (supra) did not say however, that all Acts of Repudiation in terms of Article 140(3) would by themselves necessarily "be in conflict with chapter 3 of the Constitution" and therefore "bound to be set aside by the Court". What he did say was that ".if such repudiation should be in conflict with chapter 3 of the Constitution" it had to be set aside by the Court.

I have therefore carefully considered the terms of Section 2(1) of the Act to examine whether any of the fundamental rights and freedoms of the Respondents can be said to be invaded by that sub-section (as distinct from Section 2(2) or Section 3). For the reasons which I have previously discussed I have come to the conclusion that Section 2(1) does not in fact invade the right of the First Respondent in terms of Article 16 of the Constitution, to own the "immovable property" which it acquired from the previous Administration nor its right to just compensation in the event of expropriation of any such property nor its right in terms of Article 19 of the Constitution to

profess, maintain and promote the culture, languages or traditions of its members, (upon which reliance was placed on behalf of the Respondents). Was some other "right" of the Respondents perhaps invades by Section 2(1)?

The only other such conceivable right suggested during argument was the loss of the "right" of the Respondents to continue to regard the Namibian Government, after independence, or its corresponding official, to be a party to the original acts by which the First Respondent acquired the property and the monies which it did. It was suggested that before the repudiation effected by Section 2(1) of the Act, the First Respondent would have had the right therefore to hold the Namibian Government responsible, if for example its enjoyment of the property transferred to it was being impeded by some fault attributable to the original transferor, but that the effect of Section 2(1) of the Act, was to deprive the First Respondent of that "right" and that for this reasons it invaded the Constitutional guarantee contained in Article 16 of the Constitution.

I am not persuaded that there is any merit in these suggestions or that they can be of assistance to the case for the Respondents. These arguments assume that Article 140(3) of the Constitution, applied to the case of the First Respondent, firstly causes the First Respondent to acquire and to own property within the meaning of Article 16 of the Constitution and secondly to create machinery for the Namibian Parliament thereafter to take away that "right". This constitutes a

misinterpretation of what Article 140(3) of the Constitution seeks to do. It seeks to confer no "rights" at all. It attempts to deal with the jurisprudential problem pertaining to the obligation of successor States by deeming that the Acts performed by the previous Administration and its officials are fictitiously to be attributed to the new State or its corresponding officials unless Parliament repudiates that fiction. As Mr. Kentridge rightly pointed out, "unless" does not mean "until". The article does not mean that the Constitution vests a "right" in the First Respondent until it is taken away. Moreover, it is inherent in the very quality of this deeming that it is capable of reversal by an Act of repudiation. In my view the deeming provision in Article 140(3) which creates the fiction that the acts by which the First Respondents acquired the assets which it did, were deemed to be the acts by the Namibian Government or its officials, "unless repudiated by Parliament", was not a "right" to property protected by Article 16 of the Constitution.

Mr. Hodes suggested that this conclusion was inconsistent with the decision of this Court in the case of Minister of Defence - Namibia v Mwandingi. 1992(2) SA 355 (Nm. SC.)and for that contention he relied on the following passage in the judgment at 364 D:

> "Article 140(3) of the Constitution gives to the post-independence Government of Namibia the power to repudiate, by a proper Act of Parliament, any acts done by the previous administration or its officials. Such a repudiation would necessarily remove the repudiated act from being attributed to the Namibian Government in terms of art. 140(3)."

It was suggested that this passage meant that any act of repudiation in terms of Article 140(3) of the Constitution would necessarily impact upon the fundamental rights guaranteed by chapter 3 of the Constitution and that for this reason it would not be "a proper Act of Parliament" if just compensation was not paid. In my view the passage quoted does not bear that meaning and was never intended to do so. What it means is simply that the power of repudiation in terms of Article 140(3) must be exercised not through executive decree but by a "proper act of Parliament" i.e. an Act which satisfied the procedures by which laws initiated by the National Assembly acquire the status of being enforceable Acts in law.

In the result I am unpersuaded by any of the articulated or even suggested attacks on the constitutionality of Section 2(1) of the State Repudiation Act itself.

Severability.

Mr. Hodes contended that even if Section 2(1) of the Act otherwise survives the attacks which he made on its constitutionality, it must be struck down simply on the ground that it is not severable from the remaining parts of the Act and more particularly Section 2(2).

In support of that submission he relied on a large number of Australian, American, Indian, English and South African authorities. (R.M.D. Chamarbauowalla v Union (1057) SCR 930 at

945; Bank of New South Wales & Others v the Commonwealth & Others. 76 CLR 1 at 369* Corpus Juris Secundum, Vol. 82, par. 93, p. 159-160; Seervai: Constitutional Law of India, 3rd ed, vol. 1, at 126 - 130; 16 Am Jur 2d, p. 737, par. 261; p. 741 - 745, par. 265; p. 743.)

The test to be applied is set out as follows in the judgment of Centlivres, CJ, in the case of Johannesburg City Councel v Chesterfield House (Ptv) Ltd, 1952(3) SA 809 (A):

> "...where it is possible to separate the good from the bad in a Statute and the good is not dependent on the bad, then that part of the Statute which is good must be given effect to, provided that what remains carries out the main object of the Statute ..... Where, however, the task of separating the bad from the good is of such complication that it is impractical to do so, the whole Statute must be declared ultra vires. In such a case it naturally follows that it is impossible to presume that the legislature intended to pass the Statute in what may prove to be a highly truncated form: this is a result of applying the rule I have suggested and is in itself not a test."

In the Chesterfield House case an Ordinance had created a compensation Court and further provided for a right of appeal from that Court to the Supreme Court. It was held that the provision pertaining to the right of appeal to the Supreme Court was ultra vires, but the Court nevertheless upheld the remaining parts of the ordinance. That case was also applied in S. v O'Mallev, 1976(1) SA 469 (N) in which a certain notice had purported to prohibit meetings "convened, supported or approved" by certain organisations. It was successfully contended that the words "supported or approved" came "close

to being an unintelligible jumble of words". The Court nevertheless held that the word "convened" was not open to that objection and could properly be severed from the remainder.

Mr. Kentridge drew our attention to Article 25(1) of the Constitution which provides inter alia that Parliament shall not make any law which abolishes or abridges the fundamental rights and freedoms conferred by Chapter 3 and "any law or action in contravention thereof shall to the extent of the contravention be invalid". I do not think that this Article in itself resolves the problem raised by Mr. Hodes. It is perfectly true that a law which includes a part which contravenes Chapter 3 of the Constitution is only invalid to the extent to which it does so, but if the parts which do not constitute such a contravention are not properly severable from the parts that do, the whole provision may be struck down.

From the analysis which I made previously it is clear however, that the Act consists of three separate objectives set out in different parts. The first objective is to "repudiate" the acts of the previous administration which in terms of Article 140(3) were otherwise attributable to the Government of Namibia or its corresponding officials. That objective is attained by Section 2(1) and is clearly separable from the second objective which was to set out certain statutory consequences following upon such repudiation and the machinery to secure the return of the assets which the First Respondent had acquired from the previous Administration. This second objective was sought to

be attained by Section 2(2) and Section 3 of the Act. The third objective was incidental to these objectives and was sought to be attained by Sections 1, 4, 5, 6 and 7.

In my view therefore Section 2(1) represents a substantive act of repudiation, which is conceptually and linguistically clearly distinct from Section 2(2) and the other sections of the Act which seek to define the statutory consequences following upon such a repudiation and the machinery for the purposes of obtaining a return of the assets which the First Respondent had acquired before the independence of Namibia. I therefore see no reasons why Section 2(1) cannot properly be separated from Section 2(2) or any of the other Sections which follow thereupon. I am fortified in this view by the long title to the Act which states that it is an Act

> "to provide for the repudiation of certain actions done under laws in force prior to the date of independence of Namibia by the Government or a Minister or other official of the Republic of South Africa pursuant to Article 140(3) of the Namibian Constitution; and to provide for matters incidental thereto."

The long title of the Act as distinct from the marginal notes, form part of the Act, and can in these circumstances be properly considered in ascertaining the proper intention of Parliament (Chotabahi v Union Government and Another, 1911 AD 13 at 24; Durban Corporation v Estate Whittaker, 1919 AD 195 at 201 - 2; Fielden v Morlev Corporation, (1899) 1 Ch. 1 at 4.

There appears to be nothing in the scheme of the Act, its

language, or the authorities relied upon by the Respondent, which compels me to the conclusion that Parliament would not have wanted to enact the "repudiation" contained in Section 2(1) of the Act if it was aware that the Courts might declare invalid, in their present form, those provisions which seek to declare as null and void the agreements in terms of which the First Respondent obtained its assets from the previous Administration or if it was aware that the machinery which it sought to create in terms of Section 3 of the Act to recover these assets was unenforceable in law.

It was argued that there would be no purpose in a substantive Act of repudiation by itself without the consequence and machinery set out in Section 2(2) and Section 3. There are two answers to that submission. In the first place there may very well be reason for a Parliament operating in free and independent Namibia to wish to repudiate a fiction in terms of which an Act of the previous Administration, to which it might have the most fundamental objections, continues to be attributed to it. Secondly it is certainly not self-evident that the Act of repudiation in Section 2(1) by itself and without Section 2(2) or Section 3 would have no consequences for any of the parties. There may be very important consequences flowing from such an Act of repudiation. In view of the fact that there might possibly be further litigation between the parties in this matter, following upon this judgment, it is neither necessary nor desirable for me to deal at this stage with what these consequences might precisely be,

in the absence of full argument by or on behalf of the parties affected thereby.

Mr. Hodes relied strongly on the fact that Section 2(1) of the Act is expressly stated in the sub-section to be "subject to the provisions of sub-section 2". It was contended that this phrase made Section 2(1) effectively inseparable from Section 2(2).

Clearly there is no difficulty in the linguistic treatment of Section 2(1) so as to delete the words "subject to the provisions of sub-section 2" and to leave the rest of Section 2(1) intact. The objection to separating the two sub-sections would therefore have force if the phrase "subject to the provisions of sub-section 2" were to be interpreted as a pre-condition so that Section 2(1) would not be operative unless the relevant transactions or agreements, were in terms of Section 2(2) declared to be null and void.

It would be artificial and contrived to give to the phrase "subject to the provisions of sub-section 2" the meaning of a precondition. I do not think it properly bears that meaning. It is unnecessary to decide what it does mean but it probably represents a not very elegant or crisp effort by the legislature to make clear that the use of the words "sale", "donation", "lease", or "loan", in sub-section (1) was not intended to mean that there had been a <u>proper</u> "sale", "lease", or "loan", from the previous Administration to the First

Respondent; and that all these transactions were in fact to be regarded as null and void as provided in Section 2(2).

Whatever be the real reasons of the insertion of the phrase "subject to the provisions of sub-section 2" in Section 2(1), I am satisfied however, that it is not intended to be a precondition for the operation of Section 2(1) and is therefore severable from Section 2(2).

It was also contended that because Section 2(2) of the Act started with the phrase "for the purposes of sub-section (1)", this rendered it inseparable from Section 2(1). I think that submission is without substance. The phrase simply means that following upon the repudiation contained in Section 2(1) the transactions or agreements referred to in Section 2(1) are declared null and void and any obligation of the Government of Namibia or its officials was consequentially terminated.

It follows that Section 2(1) of the Act does not need to be struck down on the basis of the argument premised on invisibility.

There is also no suggestion that the purely formal provisions of Section 1 of the Act dealing with definitions and the administrative provisions contained in Section 7 need to be struck out. They are clearly separable.

Costs.

The Court a quo made the following order:

> (The present Respondents being the Applicants before it and the present Appellants being the Respondents before it.)
>
> "(a) The State Repudiation (Cultura 2000) Act, 1991 as promulgated in Government Gazette No. 334 on 31 December 1991 is declared unconstitutional, null and void.
>
> y) The First and Second Respondents shall pay the Applicants' costs excluding the final day of the hearing.
>
> z) The First and Second Respondents shall pay the Applicants' costs of opposition to the filing of the affidavit of B.A. Liebenberg.
>
> aa) Costs of two counsel only allowed."

The Appellants thereafter noted its appeal against the whole of this order and persisted with that attitude until the 26th February 1993 when its attorneys wrote as follows to the Registrar and to the attorneys for the Respondents:

> "... To assist their Lordships in their consideration of the record we wish to advise at this stage already that the appeal will be prosecuted on behalf of the Government of Namibia on a limited basis. It will namely be contended that the High Court erred in holding (vol. 5, p. 414 (judgment)) that article 140(3) is confined to obligations as yet unfulfilled.
>
> It follows that the appeal will relate only to the finding of the High Court that subsection (1) of section 2 of the Cultura 2000 Repudiation Act is unconstitutional.
>
> For the rest, the Supreme Court will be asked - as the High Court was asked in the alternative in the

> opposing affidavit, in the Heads of Argument filed before it by the Government of Namibia, and in the oral argument delivered on its behalf - to apply article 25(a) of the Constitution, and to send the statute back ■ to parliament for revision. The Government shall not of course take any steps to enforce the Act in the meantime.
>
> We are addressing a copy of this letter to the respondent's attorneys in order to ascertain whether (subject to questions of costs being satisfactorily resolved) they propose to oppose the substantive relief now being sought in the appeal on the aforesaid restricted basis.
>
> In the event of such restricted relief not being opposed, we shall advise you immediately."

The response which this letter elicited was as follows on the 3rd March 1993:

> "In order to enable us to consider your proposal and to advise our client we shall appreciate it, if you could clarify whether your said letter is to be understood that you do not intend to prosecute the Appeal on any other grounds, and for purposes of the Appeal abandon such grounds."

The reaction on behalf of the Appellants was that the original letter spoke for itself, that the Notice of Appeal was directed against the whole judgment and order of the Court without containing any "grounds of appeal" and that it was accordingly not possible "specifically (to) indicate which grounds are thus abandoned".

The matter was not pursued satisfactorily by either side and in the result the appeal came to be argued on the basis which I have previously fully described.

What is clear to me however, is that until the 26th February

1993, the Appellants were still persisting with the submission that all the provisions of the Act were indeed constitutional. In the result they were wrong in that attitude, because they had to eventually concede both in the letter of 2 6th February 1993 and during argument that the appeal against that part of the Court's finding which declared that Section 2(2) and Section 3 of the Act were unconstitutional, was not being pursued. (Although no express reference was made to the uncontroversial and ancillary machinery in Sections 1 and 7, the constitutionality of these ancillary Sections was never really an issue between the parties, the real dispute having centred on Sections 2(1), 2(2) and 3 of the Act.)

What is equally clear is that the Respondents in this Appeal also did not take the opportunity presented by the letter from the Appellants' attorneys effectively abandoning any defence of Section 2(2) and Section 3, by abandoning the judgment in its favour in so far as Section 2(1) was concerned (read with the ancillary and defining machinery in Sections 1, and 7) . What is also clear in my view is that the Appellants clearly had to persist with the appeal in so far as it involved the defence of Section 2(1) (read with the defining and ancillary Sections 1, and 7 to which I have referred) and that they have obtained substantial success by saving Section 2(1) from the attack which had successfully been made in the Court a quo. Ordinarily this would have justified an order of costs in favour of the Appellants but because, until the 26th February 1993 at least, they had persisted in other attacks which they

later abandoned, it would be fair to direct that the Respondents in this Appeal should only pay part of the costs of the Appellants on appeal.

As far as the costs in the Court a quo are concerned there is, in my view, no reason why I should interfere with the order of costs made by the Court a. quo. The present Respondents as the Applicants in the Court a quo were clearly obliged to go to Court to obtain relief, and the relief which they were entitled to, represents substantual success. Indeed the attack by the Appellants on some of, the relief which the Respondents as the Appellants rightly obtained, in the Court a quo was eventually abandoned by them.

Relief on Appeal.

The real argument before us was concentrated on the constitutional validity of Section 2(1) of the Act (read with Sections 1 and 7) . The Appellants contended that it was constitutional. The Respondents submitted it was not. In my view the Appellants were correct.

As far as Sections 1 and 7 were concerned there was no real dispute. These are simply defining an administrative Section necessary to give meaning and effect to Section 2(1) and there is no reason why they cannot continue to be read and operate with Section 2(1) which I have held to be valid.

No appeal in respect of Sections 4, 5 and 6 was pursued and no

argument addressed in respect thereof. We are not therefore called upon to deal with their constitutionality.

Article 25(1)(a) provides that:

> "(a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid."

The consequence of the conclusions to which I have come is that the order of the Court a quo declaring the whole of the Act unconstitutional has to be set aside.

There is little point in referring back to Parliament for possible correction the Sections of the Act which were declared unconstitutional by the Court a quo and in respect of which the Appellants did not pursue any appeal. The cleanest and neatest course would be for Parliament to consider the enactment of any new legislation, if it is so advised, in the light of the findings and the reasoning in this judgment.

In view of the fact that there may possibly be further litigation between the parties in this matter I wish to make two things clear. Firstly, this Court expresses no view as to whether or not Section .2(2) and Section (3) are indeed

unconstitutional. Their constitutionality was not an issue before us because the Appellant abandoned their appeal in this regard. It also follows that I express no conclusions on the submission by Mr. Kentridge that Section 2(2) and Section 3 are unconstitutional because they purport to determine "civil rights and obligations" alleged in contravention of Article 12 of the Constitution or on the submission of Mr. Hodes that they are unconstitutional because they constitute a breach of fundamental rights and freedoms guaranteed by Chapter 3. Secondly, I express no views as to what the detailed legal consequences of the repudiation set out in Section 2(1) are for the Respondents. That also was not an issue which we were required to determine in this appeal.

Order.

In the results I make the following order:

1. The appeal of the Appellant is upheld and the order made by the Court a quo is set aside and substituted by the following:

"(a) Save for Section 2(1) (read with Sections 1 and 7) the "State Repudiation Cultura 2000 Act 32 of 1991" is declared null and void.

bb) The First Respondent (The Government of the Republic of Namibia) and the Second Respondent shall pay the costs of the Applicants (Cultura 2000 and J.J. Brand) but excluding the final day of the hearing.

cc) The Respondents. aforesaid shall pay the Applicants costs of opposition to the filing of the affidavit of B.A. Liebenberg.

(d) The costs directed in terms hereof shall include the costs consequent upon the employment of two Counsel."

2. The Respondents in this appeal are directed to pay two thirds of the costs of the Appellants on appeal such costs to include the costs consequent upon the employment of two Counsel.

I. MAHOMED
CHIEF JUSTICE OF THE
REPUBLIC OF NAMIBIA

I agree.

E. DUMBUTSHENA, A.J.A.

I agree.

F. CHOMBA, A.J.A.

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Instructed by: Government Attorneys

FOR THE RESPONDENTS: Adv. P.B. Hodes, S.C.
Adv. J.D.G. Maritz
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