IN THE SUPREME COURT OF NAMIBIA

In the matter between

ELVIS KAUESA APPELLANT

and

This appeal concerns the constitutionality of Regulation 58(32) published under Government Notice Number R203 in Government Gazette 791 of 14 February 1964 and deemed to have been made under the Police Act 1990. The appellant is a warrant officer in the Namibian Police Force. He first joined the South West

African Police Force in June 1983. The first respondent is the Minister of Home Affairs. The second respondent is the Inspector-General of the Namibian Police and the third respondent is the Deputy-Commissioner.

After hearing evidence from counsel we made the following order:

"(1) The appeal is upheld.

2) It is declared that Regulation 58(32) published under Government Notice Number R2 03 in Government Gazette 791, dated 14 February 1964 is invalid and without force and effect in law.

3) The Respondent is directed to pay the disbursements of the Appellant both in this Court and in the Court a quo.

4) The reasons for this order will be lodged on a date to be arranged.

These are our reasons:

Briefly the facts are as follows:

The appellant, who claims to have been elected in 1991 chairman of the Namibian Police Promotions Committee whose

function was to look into the conditions of employment of the Police with a view.to redressing the racial and gender imbalances in the composition and structure of the Police Force, was charged with misconduct in terms of Regulation 58(32) of the Police Force.

The respondents deny that the appellant was elected chairman of the Namibian Police Promotions Committee and deny the existence of the Committee. However, the appellant said his Committee was formed to promote affirmative action enshrined in Article 23 of the Namibian Constitution (the Constitution). whether the Committee exists or not is not material to this appeal. Affirmative action is enshrined in Article 23 of the Constitution.

It reads as follows:

> "(1) 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.
>
> (2) Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social,

> economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service.
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> (3) In the enactment of legislation and the application of any policies and practices contemplated by Sub-Article (2) hereof, it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation.

The appellant was on 22 December 1991 a member of a panel under the aegis of the Namibian Broadcasting Corporation. The subject of the discussion was affirmative action and the restructuring of the Police Force, The Public Service and other such institutions. As a result of what the appellant said during the panel discussions he was charged with contravening Regulation 58(32) published under Government Notice 719 dated 14 February 1964 as amended. "In that at Windhoek, on 2 2 December 1991 he wrongfully and unlawfully commented unfavourably in public upon the administration of the Force by saying the following on a TV programme 'Spotlight' broadcast(ed) by the NBC."

> "The command structure of the Namibian Police force is determined to undermine the Government's policy of national reconciliation and if possible to cripple the government through corruptions and other irregularities. We have only one group of people, the whites, who are occupying the positions of command and this seniority and the

> seniority facilitate corruption and abuse of power. If I may recall the high treason case of KLEYNHANS and his group of white terrorists, then I mean police sort of supplied them with weapons and ammunition, because no-one of the commanding officers or the commanders of the unit that suffered the loss or armoury were held responsible or at least charged with acts of negligence or collaboration. The circumstances surrounding the case were very suspicious and that is the hangover of the Namibian Police executive I referred to. We are sitting with wrong people in wrong positions."

The hearing of these charges was set down for 2 March 1993. Appellant's attorneys applied for postponement of the hearing pending the hearing of an application filed by the appellant in the High Court challenging the constitutionality of Regulation 58(32) v*is-a-vis* Article 21 of the Constitution.

The application was heard on 14 - 16 March 1994 by a full bench of the High Court. The Court a *quo* found:

> "(a) that the Regulation complies with the provisions of Article 21(2) of the Namibian Constitution in that it:
>
> (i) imposes reasonable restrictions on the exercise of the rights and freedoms contained in Sub-Article (1) of Article 21, including on the freedom of speech and expression;
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> (ii) the restrictions are necessary in a democratic society; and

(iii) are required in the interest of sovereignty and integrity of Namibia, national security and public order.

(b) ...

(c) In the alternative, in the light of my conditional assumption of the applicability of the doctrine of overbreadth as set out supra. I find:

(i) the regulation is not overbroad; alternatively,

(ii) it is not substantially overbroad;

(iii) it is not unconstitutional."

The application was dismissed with costs.

The appellant now appeals to this Court against the whole judgment of the Court a quo which is reported at 1995(1) SA 51 (NmHC).

The subject of free speech is a wide and rumbling one. Many things have been said and written about the right to freedom of speech and expression. We understand why the learned Judge a quo who wrote the judgment for the Court carried out an enormous amount of research and produced

such a lengthy judgment. We appreciate the hard work put into it.

Our attention was, however, drawn by counsel who appeared before us to the fact that the Court a quo made several findings in relation to which counsel who appeared in the Court a quo expressly disclaimed reliance. In this regard they pointed out that they did not .rely on onus and yet the Court a quo found that it was up to the appellant to persuade the Court that the restriction on the fundamental right was not a permissible one. The Court a quo also found that appellant's speech constituted delictual as well as criminal defamation; and was in breach of other persons[1] fundamental rights to dignity, equality and non-discrimination and, prima facie it was in breach of Section 11 of the Racial Discrimination Prohibition Act, 1991, and further that the power to restrict a fundamental right as contemplated in Article 21(2) of the Namibian Constitution should not be narrowly interpreted.

Counsel also pointed out that the Court a quo raised several aspects in its judgment which were not advanced by either counsel in the Court a quo or canvassed by them. In relation to these Counsel said they were not heard. These were:

(a) the question of non-joinder of officers in the command structure of the Namibian Police Force;

(b) the threatened infringement of appellant's right to a fair trial. In this regard O'Linn, J. said at 58 J of Kauesa v Minister of Home Affairs & Others, supra:

> "I will assume for the purpose of this application, even though there is no express reliance on the fundamental right to a fair trial, that the applicant relies by implication, also on a threatened infringement of the fundamental right to a fair trial on the basis that a trial is pending wherein he is charged under a regulation which is unconstitutional, in that it infringes his freedom of speech;"

c) the application of affirmative action policies in Public Service employment; and

d) the constitutionality of certain provisions of the Racial Discrimination Prohibition Amendment Act, 1992.

Mr. Gauntlett, for the respondents, informed the Court that the constitutionality of section 11(1)(b) of the Racial Discrimination Prohibition Act, 1991, was to be determined on 25 April 1995 in State v Gorelick N.O. and Others. He submitted that that matter was not directly material to the outcome of the instant case and that it was inappropriate for the issue of constitutionality to be determined on a "prima facie" basis. We agree with him.

The above matters are not crucial to the determination of

this appeal. They are, however, .important because a frequent departure from counsel's, more correctly the litigants' case, may be wrongly interpreted by those who seek justice in our courts of law. It is the litigants who must be heard and not the judicial officer.

It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants neither in evidence nor oral or written submissions. Now and again a judge comes across a point not argued before him by counsel but which he thinks material to the resolution of the case. It is his duty in such a circumstance to inform counsel on both sides and to invite them to submit arguments either for or against the judge's point. It is undesirable for a Court to deliver a judgment with a substantial portion containing issues never canvassed or relied on by counsel.

To produce a wide-ranging judgment dealing with matters not only extraneous and unnecessary to the decision but which have not been argued is an exercise full of potential pitfalls and the judgment of the Court a quo has placed this Court in a difficult position. Are we to consider every opinion expressed in the judgment however unnecessary it was to the decision and say whether it accords with our own? Or can we leave such matters well alone until such time as they become necessary to decide and are fully argued? In our view, the latter course is

the proper one to take and in doing so we emphasise that it must not be thought that this Court in any way approves or endorses the many obiter opinions expressed in the judgment of the Court a- quo.

Before leaving this aspect of the appeal we consider it appropriate to refer to what was said by Bhagwati, J. (as he then was) in M.M. Pathak v Union (1978) 3 S.C.R. 334 in relation to the practise of the Supreme Court of India:

> "It is the settled practice of this Court to decide no more than what is absolutely necessary for the decision of a case."

We respectfully endorse those words, particularly when applied to constitutional issues, and commend such a salutary practice to the Courts of this country. Constitutional law in particular should be developed cautiously, judiciously and pragmatically if it is to withstand the test of time.

It is proper to remember that when construing a provision in a Constitution the words used should carry their ordinary meaning and content. To read into them extraneous meanings through comparing their meaning to words used in an ordinary Act of Parliament such as the Racial Discrimination Prohibition Act results in the distortion of the meaning, in our respectful view, of Article 21(1)(a) and (2) of the Constitution.

Article 21(1)(a) and (2) read:

"(1) All persons shall have the right to:

a) freedom of speech and expression, which shall include freedom of the press and other media;

b) freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning;

c) freedom to practise any religion and to manifest such practice;

d) assemble peaceably and without arms;

e) freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties;

f) withhold their labour without being exposed to criminal penalties;

g) move freely throughout Namibia;

(h) reside and settle in any part of Namibia;

(i) leave and return to Namibia;

(j) practise any profession, or carry on any occupation, trade or business.

(2) The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

What approach then should be adopted in interpreting Art. 21(2)? Mr. Smuts, for the appellant, submitted that in

interpreting the restrictions, embodied in Sub-Article

(2), to the general right in Art. 21(1) (a) the approach to be adopted was that the exceptions in Art. 21(2) are to be restrictively interpreted so that they are not applied to suppress the freedom guaranteed in Art. 21(1) that is the right to freedom of speech and expression. The restrictions should be applied only in so far as it is necessary for the specific purposes contemplated by the restrictions. This is the approach followed by the. Canadian Courts in construing section 1 of the Canadian Charter on the right of freedom of speech.

Section 1 of the Canadian Charter provides:

> "1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

In construing this section Dickson, C.J.C. said in Regina v Oakes, (1986) 26 DLR (4th) at 224 - 226.

> "It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, secondly, it states explicitly the exclusive justificatory criteria (outside of s. 3 3 of the Charter) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms rights and freedoms which are part of the supreme law of Canada. As Madam Justice Wilson stated in Re Singh and Minister of Employment & Immigration and 6 other appeals (1985), 17 D.L.R. (4th) 422 at p. 468, [1985] 1 S.C.R. 177 at p.

> 218, 58 N.R. l: f... it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the Charter•.
>
> A second contextual element of interpretation of s. 1 is provided by the words 'free and democratic society[1]. Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right of freedom must be shown, despite its effect, to be reasonable and demonstrably justified.
>
> The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realisation of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the Charter. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society."

Art. 21(1) (a) has limitations. The Court has to ask whether those limits are reasonable. The limitations are set out in Art. 21(2). Freedoms shall be exercised in accordance with the law of Namibia only if that law imposes reasonable restrictions on the exercise of the rights and freedoms entrenched in Art. 21(1)(a). The

restrictions must be necessary in a democratic society. Not only must they be necessary in a democratic society they must also be required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to commit an offence. Limitations are imposed in order that the rights enshrined in the Constitution should not interfere with the rights and freedoms of others and with Namibia.

Mr. Smuts submitted that these limitations must be reasonable. In this regard the principles of proportionality enunciated by the Indian Supreme Court, the European Court of Human Rights, the Canadian Courts and the United States Supreme Court are expressed in the Namibian Constitution by the requirement that such restrictions must be reasonable.

In R v Oakes (1986) 26 DLR (4th) 200 at 227; 24 CCC (3d) 321 at 348 Dickson C.J.C. said:

> "... once a sufficiently significant objective is recognised, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves 'a form of proportionality test': R v Big M. Drug Mart Ltd, supra. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational

> considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question: R v Big M. Drug Mart Ltd., supra. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance[1].
>
> With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."

The Court, in assessing the extent of the limitations to rights and freedoms, must be guided by the values and principles that are essential to a free and democratic society which respects the inherent dignity of the human person, equality, non-discrimination, social justice and other such values. "The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or

freedom must be shown, despite its effect, to be reasonable and demonstrably justified." Per Dickson C.J.C. in R. v Oakes. supra. at 225.

The great American Judge, Justice Brandies, described in moving language the value of freedom of expression. He describes the values which Namibian society centuries after the American revolution cherishes and died for. He wrote:

> "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; . . . they believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people... They recognised the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law - the argument of force in its worst form. Recognising the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."

See Whitney v California. 274 US 375 - 76 (1927) and Law and Justice - Democracy and Free speech by Lord Lester at

The Namibian Constitution in Article 22 recognises the importance of and the need to protect the essential content of rights. The legislation providing for limitations should "not be aimed at a particular individual and it should specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest".

The right to freedom of speech is found in the constitutions of many countries. It is internationally recognised. Many courts in many lands have interpreted human rights provisions pertaining to the right of freedom of speech. Both Mr. Smuts and Mr. Gauntlett invited us, in order to derive some assistance in the interpretation of Article 21(1) (a) and (2) of the Namibian Constitution, to have regard to the interpretation of similar provisions in international human rights instruments and their national constitutions. It is with this intention that we look at Article 19 of the Indian Constitution. We do so because it is similar in many respects to Article 21(1)(a) and (2). Article 19 reads:

> "19. Protection of certain rights regarding freedom of speech, etc. -
>
> (1) All citizens shall have the right -
>
> (a) to freedom of speech and expression; ...
>
> (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the

> State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence."

H.M.S. Seervai in his book Constitutional Law of India (3rd ed.) Vol. 1 at 481 para 10.16 says of Article 19:

> "Thus freedom of speech does not mean the freedom to say whatever one likes, but freedom of speech subject to the laws of libel, sedition, blasphemy and the like. ... In India, the well-recognised limitations on rights embodied in Art. 19(1)(a) to (g) are expressly incorporated in Art. 19(2) to (6) . The rights represent the claims of the individual, the limitations protect the claims of other individuals and claims of society or the State; to say that the rights are fundamental and the limitations are not is to destroy the balance which Art. 19 was designed to achieve. To say this is not to belittle those rights but only to say that the rights are not absolute and can be enjoyed only in an orderly society."

On the question of reasonableness the Indian Supreme Court expressed itself as follows:

> "It is important in this context to bear in mind that the test of reasonableness, whereever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their

> own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable."

See Madras v V.G. Row (1952) SCR 597 at 607 Seervai op cit 482 and authorities referred to by him as having cited the above text with approval.

EUROPE:

The European Convention for the Protection of Human Rights and Fundamental Freedoms is a regional human rights instrument.

Section 10, although worded differently, is in many ways similar to Article 21(1) (a) and (2). It provides as follows:

> "10(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or

> penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The European Court of Human Rights' approach to the interpretation of Article 10 is that Sub-Article (1) protects the freedom entrenched in the Sub-Article while Sub-Article (2) is a restriction to the freedom in Sub-Article (1) but that that restriction must be narrowly or strictly interpreted. This is perhaps different from the approach of other Courts, the European Court holds that in interpreting Article 10 no criteria other than those mentioned in Sub-Article (2) of Article 10 may form the basis of any restriction on the protected right. And of the sections from other countries dealing with freedom of speech and expression which we have considered it is only Article 10(2) which like Article 21(2) of the Namibian Constitution which says restrictions must be "necessary in a democratic society".

The Namibian Constitution requires in Article 22 that legislation prescribing limitations to any fundamental rights shall not be aimed at a particular individual and it requires that such legislation shall be specific and identify the Article or Articles on which authority to enact such limitation is claimed. Article 22 provides:

> "22. Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:
>
> a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;
>
> b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest."

See also Rights and Constitutionalism: The New South African Order: Edited by Van Wyk, Dugard, De Villiers and Davis at 650.

Does Regulation 58(32) specify the ascertainable extent of the limitations it imposes? It does not. All comments which are unfavourable to the administration of the Force restrict the exercise of a right or freedom. Any comment in public, which is unfavourable, about any Government Department equally restricts the exercise of a right or freedom. There is no ascertainable extent of the limitation. Although one is aware that the restriction was generally imposed because it is necessary in a democratic society, it is required in the interest of the sovereignty and integrity of Namibia, national security and public order, the interest of the appellant in the enjoyment of his right to freedom of speech must be balanced with the State's interest in maintaining restrictions for purposes mentioned above.

In both the Court a quo and in this Court the respondents did not contend that it was incumbent upon the applicant to show that the statutory provision was not a permissible restriction. In fact the onus of proving that a limit or restriction on a right or freedom guaranteed by the Bill of Rights is on the party that alleges that there is a limit or restriction to the right or freedom. See Regina v Oakes. (1986) , 26 DLR (4th) 200 at 225; Oozeleni v Minister of Law and Order & Another. 1994(3) SA 625 (ECD) at 640F; Edwards Books & Art Ltd v R. (1987), 35 DLR at 4; Park-Ross and Another v Director. Office for Serious Economic Offences. 1995(2) SA 148 (CPD) AT 162 C.

Mr. Gauntlett argued that the respondents did not seek to support the approach of the Court a quo which was that where there is an infringement of a fundamental right "the freedom must be restrictively interpreted". (See Kauesa. (supra) . at 107 D of the judgment.) Furthermore the respondents did not believe that lengthy dealings with the evidence as was the case in this matter was very material.

We agree with Mr. Gauntlett that the central issue in this appeal is whether it can be said that Regulation 58(32) constitutes a permissible restriction on the right to freedom of speech of a serving member of the Namibian Police such as the appellant against performance of his public duties and functions and the composition of the Namibia Police as a disciplined force.

The appellant contends that Regulation 58(32) is impermissible for various reasons. It does not meet the fact that rights represent the claims of individuals and the claims of the Namibian Society or the State. The Regulation constitutes an impermissible restriction on appellant's rights to free speech. Mr. Smuts argued that because it proscribes unfavourable comments "in public upon the administration of the Force or any other Government Department" it is not a reasonable restraint on the exercise of the right to free speech. It is not necessary in a democratic society and it is not required in the interests of sovereignty and integrity, national security, decency or morality.

What is important is that limitations to the right of speech must be both reasonable and necessary. This is why a stricter interpretation of the restrictions is required with respect to this particular limitation. It is important that Courts should be strict in interpreting limitations to rights so that individuals are not unnecessarily deprived of the enjoyment of their rights.

We have dealt with the judgment of Dickson, D J C in Oakes, supra. We need not repeat what he said on reasonableness and proportionality.

It is important, however, to find out whether the limitation in this case is rationally connected with its

objective. We think not. We are of the view that Regulation 58(32) is arbitrary and unfair. Its objective is obscured by its overly breadth. It cannot easily be identified. Because of that it seems to us that there is no rational connection between the restriction and the objective. The limitation is not proportional to the objective so it does not attain the particular effect which is justified by a 'sufficiently important objective[1]. See Rights and Constitutionalism, supra, and the authorities cited at 649.

It is important to bear this in mind: Sub-Article (1) of Article 21 protects freedom of speech and expression and Sub-Article (2) creates a restriction purposely enacted to sooth the relationships between those exercising their constitutionally protected rights and those who also have their own rights to enjoy. This is why the restrictions applied to rights and freedoms are to be restrictively interpreted in order to ensure that the exceptions are not unnecessarily used to suppress the right to freedom guaranteed in Article 21(1)(a). A restrictive interpretation of the exceptions or restrictions makes it possible for the exceptions to be used for the purposes contemplated in Article 21(2). In our view the restriction should be reconcilable with the freedom of speech protected by Article 21(1)(a).

[1] See The Sunday Times v The United Kingdom, 1979(2), EHRR 245 at 276.

Mr. Gauntlett conceded that Regulation 58(32) related to speech protected in terms of Article 21(1)(a). He submitted, however, that the Regulation contains a permissible restriction of such rights as allowed and contemplated by Article 21(2) of the Constitution. Article 21(2) imposes a reasonable restriction on the exercise of the freedom, is necessary in a democratic society and is required in the interests of the sovereignty and integrity of Namibia, national security and public order.

The question at issue is whether Regulation 58(32) in its attempt to impose restrictions falls within the ambit of Article 21(2) of the Constitution. Regulation 58(32) provides:

> "58 A member shall be guilty of an offence and may be dealt with in accordance with the provisions of chapter 11 of the Act and these Regulations if he -
>
> (32) comments unfavourably in public upon the administration of the Force or any other Government department."

What among other things did appellant say during the television discussion on affirmative action? It is interesting to note that the Police Administration was represented by Inspector Sean Geyser, who was described as a police spokesman, and there were other participants. We reproduce below what the Court a quo described as the appellant's version of what he and others said:

"Narrator: Meanwhile, the chairman of the Namibian police promotions committee, warrant officer Elvis Kauesa, expressed his views on behalf of the majority of black police members.

Kauesa: In fact, the Ministry or at least the Government should not only consider the positions of or challenge police officers with foreign nationalities, but it should also reconsider the appointment of General Piet Fouche as the Inspector-General of the police and other white senior officers in the command structure. the appointment of the current Inspector-General, General Piet Fouche, has always been an obstacle to achieving the goals and aims of the national police force of Namibia, namely to create opportunities for all Namibians in development, to serve as Government's instrument for the implementation of policy of national reconciliation and the compliance of the constitutional instructions, instructions of affirmative action to redress the existing imbalances.

Narrator: According to the police spokesman, Inspector Sean Geyser, all policemen who are not Namibians have applied for citizenship and are still waiting for a response from the Government.

Geyser: At this point in time we have no foreigners in the police force. We have members whose applications are still pending and we are awaiting the decision of the Ministry on that. Foreigners are to be contracted to a force. We have no contracted people to the police force as such. Circulars were sent out, directives from Head Office telling all members of the police that weren't, that didn't qualify for citizenship by birth or marriage to make sure that their applications were submitted to become Namibian citizens.

Narrator: Kauesa said that the police had been ineffective to maintain security, law and order in the country because of the white dominated structure.

Kauesa: As you are asking my opinion, which I believe is also the opinion of the majority of the black members of the Namibian police, the command structure of the Namibian police force is determined to undermine the government's policy of national reconciliation and if possible to cripple the Government through corruption and other irregularities. We have only one group of people, the whites, who are occupying the positions of

> command and this seniority and the seniority facilitate corruption and abuse of power. If I may recall the high treason case of Kleynhans and his group of white terrorists, then I mean police sort of supplied them with weapons and ammunition, because no one of the commanding officers or the commanders of the unit that suffered the loss of armoury were held responsible or at least charged with acts of negligence or collaboration. The circumstances surrounding the case were very suspicious and that is the "hangover of the Namibian Police executive I referred to. We are sitting with wrong people in wrong positions."

It may be that some of the things appellant uttered were offensive to white senior officers in the Police command structure, but the important thing to remember is that this was a television panel discussion on the subject of affirmative action in the Police Force. And more importantly the practice of racial discrimination and the ideology of apartheid are expressly prohibited by Article 23(1) of the Constitution. These are subjects of great concern to Namibia. Besides, Article 23(2) protects the practice of affirmative action.

In this case would it be just and fair to deny the appellant protection in terms of Article 21(1)(a) because some of the words he used in his contributions were insulting or defamatory or constituted a serious criminal offence such as contravention of s. 11(1)(b) of the Racial Discrimination Prohibition Act of 1991 as the learned Judge a quo pointed out at 58H of the judgment.

It appears to us that the right to freedom of speech and expression cannot be frustrated by mere indiscretions of a

speaker. It is important to find out whether the speech fulfils the purpose for which the right to freedom of speech was enacted.

> '•Freedom of expression constitutes one of the essential foundations of ... society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10(2), it is applicable not only to 'information' or 'ideas• that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every •formality[1], 'condition', 'restriction[1] or •penalty' imposed in this sphere must be proportionate to the legitimate aim pursued."

See Handvside v The United Kingdom. [1976] 1 EHRR 737 at 754 and The Sunday Times v The United Kingdom. [1979] 2 EHRR 245 at 280.

In the context of Namibia freedom of speech is essential to the evolutionary process set up at the time of independence in order to rid the country of apartheid and its attendant consequences. In order to live in and maintain a democratic state the citizens must be free to speak, criticise and praise where praise is due. Muted silence is not an ingredient of democracy because the exchange of ideas is essential to the development of democracy.

UNITED STATES OF AMERICA

Although the First Amendment to the American Constitution is differently worded and does not have limitations to the freedom of speech there has grown over the years rich free speech jurisdiction which can only be useful to new and emerging democracies.

The First Amendment to the United States Constitution protects freedom of speech. It states:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or of the right of the people peaceably to assembly, and to petition the government for a redress of grievances."

The First Amendment does not have exceptions or restrictions. The freedom of speech is expressed as an absolute right. The courts have, however prescribed limits within which freedom of speech is to be exercised. In the First Amendment unrestricted freedom of speech enjoys a high degree of protection. American Courts have over the years held that freedom of speech is not an absolute right. They have identified certain well-defined and limited classes of speech such as obscene or libelous speech or knowingly making false statements and others which are not constitutionally protected because, as Mr. Smuts put it, "any slight social value they may have is clearly outweighed by countervailing social interests in order and

morality". In Roth v United States, (1957) 354 US 476 at 484-5 Brennan, J. who delivered the opinion of the Court remarked:

> "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all the 48 States and in the 2 0 obscenity laws enacted by the Congress from 1842 to 1956 ... 'These include the lewd and obscene ... It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality...• "

See also Chaplinskv v State of New Hampshire, (1942) 315 US

We agree with Mr. Gauntlett that the criteria developed by the United States Supreme Court to limit the free exercise of the right to free speech does not correspond to and is narrower in its operation than restrictions authorised in more modern Constitutions. And what, is more, the criteria used in The United States are dependent on the wisdom or otherwise of judges. "At the outset it is imperative to bear in mind that there are fundamental structural differences between our Charter and the American Constitution, and that, most importantly, the latter has no provision which corresponds to s. 1 of the Canadian Charter." See R v Zundel, (1987) 35 D.L.R. (4th) 338 at 360.

The First Amendment also differs from Article 21(1)(a) and (2) of the Namibian Constitution in that Sub-Article (2) contains limitations to the exercise of the right to freedom of speech and expression enshrined in Sub-Article (1) . The American Courts have gone further by extending the protection of the First Amendment to expressive conduct such as "symbolic speech", for example, the desecration of a flag, see Spence v Washington. (1974), 418 U.S. 405.

In Namibia the Court, in the exercise of its discretion, is not confined to the restrictions in Article 21(2) or to whether the limits to be interfered with were imposed because of the subject matter which falls within a certain category such as obscene speech. "...the Court has to be satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it." See the Sunday Times case, supra, at 281.

The appellant, as we understand the passage of his contribution cited above, was critical of the lack of progress towards the attainment of equality through affirmative action in the Namibian Police.

The television panel discussion was an exercise in the free exchange of ideas which establishes the truth. And truth is an essential component of democracy.

To offend Regulation 58(32) a police officer must make comments in public which are unfavourable to the administration of the Force or any other Government Department.

The Concise Oxford Dictionary, 7th Ed, at 188 defines "Comment" n explanatory note; remark; criticism v.i. write explanatory notes; make (esp unfavourable) remarks.

But a comment based on truth can be unfavourable to the administration of the Force just as a very critical comment can be. It appears that it was the intention of the legislature to punish a police officer who makes remarks in public which may be true or false as long as they were unfavourable.

The sub-regulation (32) casts too wide a net in its attempt to prevent police officers from commenting unfavourably in public on the administration of the Force or any government department in order for the Force to maintain discipline. Everyone is agreed that the Police Force needs discipline in order to promote efficiency. A disciplined Force will carry out its duties efficiently. But Namibia is a democracy in which police officers have as much right to freedom of speech and expression as the citizenry. They, like any other citizens, should not be relegated to a watered down version of the right to freedom of speech and expression. Their right to enter into debate in which, as

in the instant case, matters of great concern to Namibia and the Namibian public are discussed is as valid as the right of other citizens.

It is important in this appeal to focus attention on the subject matter of the panel discussion and the democratic manner in which it was conducted and the representative composition of the panel. That the appellant in the course of the exchange of views and ideas made some unfortunate remarks is not the matter at issue. The importance of the subject matter was, in our opinion, overwhelming. It would be wrong for any Court to deprive appellant of his right of free speech and his protection under Article 21(1)(a).

In determining his right to free speech the Court must arrive at a balance between his interests as a citizen in commenting upon the lack of affirmative action in the Force and the interests of the Force in the maintenance of discipline, efficiency and obedience. See also Pickering v Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed. 2d 811 p. 1687. Connick v Myers, 461 U.S. 146, cited as 103 S.Ct. 1684 at p. 1685.

In assessing whether appellant's comments addressed a matter of public concern the Court has to consider the form, context and content of the comments and find out whether it can come to the conclusion that the comments were made on a matter of public concern.

See Rankin v McPerson. (1989) 483 U.S. 378, 97 L.Ed. 2d 315;

Connick v Mvers (1983) 461 U.S. 238;

Pickering v Board of Education. (1968) 391 U.S. 563;

Brvson v Wavross, (1989) 888 F 2d 15623 (11th) Cir, at 1565 - 1567.

In Rankin v McPerson. supra, Marshall, J, who delivered the opinion of the Court said at 326 - 327:

> "The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern '[D]ebate on public issues should be uninhibited, robust, and wideopen, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.• New York Times Co. v Sullivan. 376 US 254, 270, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2D 1412 (1964); See also Bond v Floyd. 385 US 116, 136, 17 L Ed 2d 235, 87 S Ct 339 (1966): 'Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticising public policy and the implementation of it must be similarly protected.'
>
> Because McPherson's statement addressed a matter of public concern, Pickering next requires that we balance McPherson's interest in making her statement against 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' 391 US, at 568, 20 L Ed 2d 811, 88 S Ct 1731. The State bears a burden of justifying the discharge on legitimate grounds. Connick, 461 US, at 150, 75 L Ed 2d 708, 103 S Ct 1684.
>
> In performing the balancing, the statement will not be considered in a vacuum; the manner, time and place of the employee's expression are relevant, as is the context in which the dispute arose. See id., at 152 - 153, 75 L Ed 2d 708, 103 S Ct 1684; Givhan v Western Line Consolidated School Dist., 439 US 410, 415, n 4, 58 L Ed 2d 619, 99 S Ct 693 (1979) ."

In the instant case the following circumstances must be considered by the Court: There was a discussion on television. A number of people including the appellant and a police spokesman participated in the discussion. The subject matter was affirmative action and the advancement of disadvantaged sections of the community, the lack or otherwise of equality and reconciliation.

It must be common cause that the content of the debate or exchange of ideas was a matter of public concern. The exchange of ideas that took place is the very essence of democracy. The statements uttered by appellant cannot be considered "in a vacuum". All the above factors must be considered and assessed having regard to the right to freedom of speech protected by Article 21(1)(a) and the restrictions in Sub-Article (2) .

The respondents do not dispute the right of appellant to freedom of speech and expression. They at first said but he entered into a contract which had as one of its conditions of employment sub-regulation (32) of regulation 58. He could not now opt out of it. He knew he could not comment unfavourably in public upon the administration of the Force or any government department. However Mr. Gauntlett indicated in his oral submissions that respondents were no longer pressing the argument on contract because there were difficulties. He abandoned it. It was the right thing to do.

Respondents rely on what Mr. Gauntlett called a dual route approach, a two pronged attack. First he argued that there was regulation 58(32) which controls appellant's freedom of speech. He cannot comment unfavourably in public on the administration of the Force or any other Government department. Of course there are difficulties in that "prong". Mr. Gauntlett appreciated the difficulties and acknowledged them. He identified the difficulties and remarked "What happens to a policeman or a policewoman who is a ratepayer who complains in public about open ditches or the poor state of education for his or her children". That is the nub. He or she might be attending a meeting of tax payers complaining about the poor state of affairs in the tax department and as an inevitable consequence the high taxes he or she pays and the millions of dollars of tax payers' money wasted because of inefficiency. Mr Gauntlett said the regulation was too wide. Would it be fair for the police officer to lose the freedom of speech under these circumstances? Because it is difficult to justify Regulation 58(32) as a limitation to the freedom of speech Mr. Gauntlett did not spent much time arguing the impossible. He submitted that the phrase "comment unfavourably in public upon the administration of the Force or any other Government department" should be severed. The good part should be severed from the bad. He urged the Court to sever what he with difficulty regarded as the good part which is: "comments unfavourably upon the administration of the Force" from "any other Government

department". In proper cases severability is used by Courts to separate a valid provision of an Act from an invalid one. See Government of the Republic of Namibia v Cultura 2000. 1994(1) SA 407 (Nm SC) at 424 - 426.

Even if the Court were to agree to sever the phrase as suggested by Mr. Gauntlett would it remove the difficulties facing the respondents? Respondents are aware that the part they wish to retain: "Comment unfavourably in public upon the administration of the Force" is itself vague and overbroad. A police officer might comment in public about a true state of affairs. He might say in public there are too many police officers in urban areas and very few in rural areas. There must be a change in preferences. The administration might regard that as an unfavourable comment. It matters not whether the comment which is unfavourable is true or false. The officer will be visited with criminal sanctions as long as the administration thinks the comments are unfavourable.

Mr. Gauntlett moved on to the second section of the dual route. He invited the Court to read down the phrase "comment in public upon the administration of the Force".

Regulation 58(32) is not designed, whatever part is accepted, to infringe freedom of speech and expression as little as is reasonably possible in order to achieve its purpose. It is over-inclusive in the range of unfavourable comments which are prohibited".

The range of comments forbidden is too wide. The officers are uncertain as to which comment made in public would be unfavourable and fall within the ambit of the regulation.

Mr. Gauntlett, however, argued that there was a remedy. He asked the court to read down the phrase. His solution is: amputate the phrase as suggested above and preserve the protectable core by inserting after the word force the following: "in a manner calculated to prejudice discipline within the force". Respondents are inviting the Court to legislate, that is, to perform the constitutional function of the legislature. Reading down may provide an easy solution to respondents' acknowledged difficulties. It may be in suitable cases a lesser intrusion into the work of the legislature. It must be remembered, however, that legislating is the constitutional domain of Parliament. The Court's constitutional duty is to strike down legislation inconsistent with provisions of the Constitution and leave the legislature to amend or repeal where the Court has struck down the offending legislation. The lesser the judicial branch of Government intrudes into the domain of Parliament the better for the functioning of democracy.

Regulation 58(32) is invalid in many ways. It would be futile for the Court to try and guess the intention of the lawgiver. It is best left to the lawgiver.

> "In the final analysis, a law that is invalid in so many of its applications will, as a result of wholesale reading down, bear little resemblance to the law that Parliament passed and a strong inference arises that it is invalid as a whole. In these circumstances it is preferable to strike out the section to the extent of its inconsistency with s. 2(b). To maintain a section that is so riddled with infirmity would not uphold the values of the Charter and would constitute a greater intrusion on the role of Parliament. In my opinion, it is Parliament that should determine how the section should be redrafted and not the court. Apart from the impracticality of a determination of the constitutionality of the section on a case-by-case basis, Parliament will have available to it information and expertise that is not available to the court."

See Osborne v Canada (Treasury Board) and (1991) 82 DLR (4th) 321 at 347.

Wilson, J. said at 325 when concurring with the reasons for judgment given by Sopinka, J:

> "I do not share his views, however, as to the recourse open to the court once it has found that the impugned legislation on its proper interpretation is over-inclusive, infringes on a Canadian Charter of Rights and Freedoms right, and cannot be justified as a reasonable limit under s. 1. Once these findings have been made I believe that the court has no alternative but to strike the legislation down or, if the unconstitutional aspects are severable, to strike it down to the extent of its inconsistency with the Constitution. I do not believe that it is open to the court in these circumstances to create exemptions to the legislation (which, in my view, presupposes its constitutional validity) and grant individual remedies under s. 24(1). In other words, it is not, in my opinion, open to the court to cure over-inclusiveness on a case-by-case basis leaving the legislation in its pristine over-inclusive form outstanding on the books."

For the reasons given above we declared Regulation 58(32) published under Government Notice R203 in Government

Gazette 791, dated 14 February 1964 invalid and without force and effect in law. We did so in the knowledge that the mandate of this Court was to strike down legislation inconsistent with the Constitution.

In an appropriate case, if the Court in its discretion believes that it is proper to allow Parliament or any other government agencies to correct a defect in any law it shall do so in terms of Article 25(1)(a) of the Constitution. Article 25(1)(a) reads:

> "(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."

Regulation 58(32) is in our view inconsistent with Article 21(1) and (2) of the Constitution and we do not consider this to be a proper case to exercise the discretionary power conferred by Article 25(1)(a).

We need not repeat the order we made above. What remains is to thank counsel for the able manner in which arguments were presented and the hard work which went into the preparation of their heads of argument.

DUMBUTSHENA, A J A

I agree.

MAHOMED, C J

I agree.

HANNAH, J

ON BEHALF OF THE APPLICANT: ADV. D.F. SMUTS
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ON BEHALF OF THE RESPONDENTS: ADV. J.J. GAUNTLETT, S.C.
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