CASE NO.: SA 8/99

IN THE SUPREME COURT OF NAMIBIA

In the matter between

THE CHAIRPERSON OF THE IMMIGRATION SELECTION BOARD
APPELLANT

And

ERNA ELIZABETH FRANK **FIRST**

RESPONDENT

ELIZABETH KHAXAS **SECOND**

RESPONDENT

CORAM: Strydom, C.J.; Teek, A.J.A. *et* O'Linn, A.J.A.

HEARD ON: 09 - 10/10/2000

DELIVERED ON: 05/03/2001

APPEAL JUDGMENT

STRYDOM, C.J.: This is an appeal against orders made by a Judge of the High Court of Namibia whereby -

"(a) The decision of the Immigration Selection Board of 29th July 1997 refusing a permanent residence permit to Erna Elizabeth Frank is reviewed and set aside.

(b) The Immigration Selection Board is directed to authorise the issue to Erna Elizabeth Frank a permanent residence permit within thirty days of date of the order of this Honourable Court.

(c) There is no order as to costs."

By agreement between the parties the appeal was brought directly to this Court in terms of section 18(2)(a)(ii)(aa) of the High Court Act, Act No. 16 of 1990.

Before setting out the background history and facts of the case mention must be made of the fact that the appellant did not file the record of appeal timeously with the result that in terms of Supreme Court Rule 5(5) the appeal is deemed to have lapsed. Application for condonation of this failure was made by the appellant which is opposed by the respondents.

Mr. Oosthuizen, instructed by the Government Attorney, appeared for the appellant and Ms. Conradie, for the Legal Assistance Centre, appeared for the respondents. Neither Counsel appeared for the parties in the Court *a quo*. Because the merits of the appeal is also of importance for the application of condonation and re-instatement of the appeal, Counsel were allowed to address us simultaneously on both issues.

The background history of this matter is as follows. In the Court below the respondents were the first and second applicants who launched a review application against the appellant, then the respondent, for the relief set out herein before, as well as some alternative relief which is not relevant to the

present proceedings. For the sake of convenience I shall refer to the parties as they appeared before us, namely as the appellant and the first and second respondents.

In her founding affidavit the first respondent stated that she was a German national. During 1982, and whilst still a student at the University of Bremen, the first respondent joined the Anti-Apartheid Movement and assisted members of SWAPO as a translator and interpreter at political meetings and rallies. She obtained a Bachelor of Arts degree and a Diploma of Education at the La Trobe University, Melbourne, Australia, during 1976 and 1977 respectively.

Thereafter first respondent moved to Bonn, Germany, where she taught English to development workers and German to Turkish immigrants. In 1982 she started a four year course known as the Erstes Staatsexamen fur Lehramt at the Bremen University. This she completed in 1990. First respondent started working for the Centre for African Studies/Namibia Project during March 1988 at the University of Bremen.

During 1990 first respondent visited Namibia. During 1991 she applied for the first time for a temporary work permit. Since then these employment permits have been renewed regularly. In October 1995 first respondent applied for the first time for a permanent residence permit. During June 1996 she was informed by the Ministry of Home Affairs that this application was unsuccessful.

First respondent re-applied for a permanent residence permit during June 1997. Together with this application a letter was sent by her legal representatives. In this letter the appellant Board was requested to allow first respondent to appear before the Board to answer any queries they may have or to deal with any information which may adversely affect the application or to supplement further information if required by the Board. Attached to this letter were various communications supporting the application of the first respondent. In this regard there were letters *inter alia* from the Minister of Finance and permanent secretaries of two Ministries.

By letter dated 30 July 1997, the first respondent was again informed that her application for a permanent residence permit had been unsuccessful. No reasons for this decision were given by the appellant.

During the period of her stay in Namibia, first respondent worked as a senior researcher and later as Deputy Director of the Centre for Applied Social Sciences (CASS). Since October 1997, she has worked for CASS as a consultant.

In the letter by her legal representative, which accompanied the 1997 application for permanent residence, the relationship between the first and second respondents was set out. In her founding affidavit first respondent stated that she has had a relationship with the second respondent, Elizabeth Khaxas, since 1990. She pointed out that her sexual orientation was lesbian and that if it was legally possible to marry she and second respondent would have done so. First respondent furthermore set out the extent of her

relationship with the second respondent and the latter's son Ricky Martin. Because of certain statements by, *inter alia*, the President and other members of Government, the first respondent has expressed the fear that her lesbian relationship with the second respondent may have been the reason why her application for a permanent residence permit has been rejected.

First respondent further pointed out that if her relationship with a Namibian citizen was a heterosexual one, she could have married and would have been able to reside in Namibia or apply for citizenship in terms of Article 4(3)(a) of the Namibian Constitution. She said that the appellant did not take this factor into account and therefore violated her right to equality and freedom from discrimination guaranteed by Article 10, her right to privacy guaranteed by Article 13(1) and protection of the family guaranteed by Article 14 of the Constitution.

In conclusion the Court *a quo* was asked to review the decision of the appellant in terms of the common law and Article 18 of the Constitution on the following grounds:

1. That there was no evidence, alternatively no reasonable evidence to justify the decision;

2. That she, in all the circumstances, had a legitimate expectation that she would be informed of all information in possession of the appellant, particularly adverse information, and also that

she would be given an opportunity to deal with such information;

3. That the appellant failed to apply the principles of natural justice, particularly that of *audi alteram partem*;

4. That the appellant failed to take into account relevant factors and considerations, such as her long period of residence in Namibia, her long-term relationship with a Namibian citizen and her qualifications, skills and work experience; and

5. That the appellant failed to give any reasons for its decision.

At this stage mention must be made of the application whereby the second respondent was joined in the proceedings. In her founding affidavit second respondent confirmed the relationship between herself and first respondent. She further stated that the decision by the appellant infringed her constitutional rights guaranteed by Articles 10, 13(1), 14(1) and (3), 21(1)(g) and 21(1)(i).

One Simwanza Simenda acted as chairperson of the appellant Board when the application for a permanent residence permit by the first respondent was considered and rejected.

Regarding the requests made by first respondent through her legal representative to appear in person before the appellant, it was stated by appellant that first respondent's application was complete and fully

motivated and that there was therefor no necessity for the appellant to call upon her to appear. The members of appellant also had no specific queries for the first respondent. There was further no specific information before the appellant which adversely affected the application and neither was it necessary to supplement the application with further information.

Regarding the qualifications, skills and experience of the first respondent, the appellant stated that it took these into consideration and came to the conclusion that the University of Namibia had graduates qualified in first respondent's field of expertise and that employment must be found for them. This process is continuing, and more and more Namibians who can perform the work first respondent is involved in are being trained. Moreover, numerous volunteers who serve as inservice trainers and research officers at different levels are coming into Namibia on temporary permits.

Furthermore even if there is at this stage a shortage of persons with the qualifications, skills and experience of the first respondent, the appellant cannot ignore the fact that the labour market is limited and that employment must be found for Namibian citizens who will obtain similar qualifications, skills and experience over the next few years.

Regarding the fact that the first respondent is a lesbian, the appellant denied that this played any role in the decision taken by it. It is stated that the first respondent's sexual preference was considered to be a private matter having no bearing on her application for a permanent residence permit.

The appellant furthermore denied that the first respondent could have a legitimate expectation as alleged by her and further denied that it failed to apply the principles of natural justice and stated that it took into account all information relevant to the first respondent's application. The appellant admitted its failure to give reasons for its decision but denied that it was in law obliged to do so.

Appellant also agreed as to the effect of Article 4(3)(a) of the Constitution and stated that the present relationship of the first respondent with the second respondent was not recognised in law and was also not covered by sec. 26(3)(g) of the Immigration Control Act.

In her reply, first respondent denied that there were sufficient persons with her qualifications, skill and experience in Namibia and pointed out that the record clearly showed that appellant did not rely on any facts or data which could justify such a finding. First respondent also pointed out that the appellant misdirected itself by equating graduates with persons with experience such as herself and stated that a university graduate cannot start training teachers, developing syllabi and textbooks without first gaining practical teaching experience.

This then was the background history and facts put before the Court *a quo* on basis of which that Court set aside decision of the appellant and ordered it to grant to first respondent a permanent residence permit.

In regard to the application for condonation and re-instatement of the appeal, affidavits were filed by Mr. Taapopi for the appellant and Mr. Asino of the Government Attorney's Office. Mr. Taapopi stated that he was informed that an appeal was duly noted on 22 July 1999. He was waiting to be informed of the date of appeal but was under the impression that the Court roll was full and did not expect the appeal to be argued in the near future. He was then informed that the record of appeal was not filed in terms of the Rules of Court. He said he did not know the procedures required to prosecute an appeal and was unaware that the legal practitioner had not complied therewith.

Mr. Taapopi referred to the complicated constitutional issues involved in the case and the necessity to have an authoritative judgment on the issues which will also serve as a guideline to the appellant in future. He further stated that the appellant recognised the fact that the respondents have a right to prompt adjudication of the matter and stated that the appellant had no intention of delaying the matter for the purpose of frustrating the administration of justice. In order to obviate the potential personal harm occasioned by the late filing of the record, the Immigration Selection Board had renewed first respondent's employment permit for a period of 1 year so that she might earn a living while the Court decided this matter.

Mr. Asino stated that after the appeal was noted he neglected to lodge the record within the period required by the Rules. He humbly apologised and stated that he could offer no excuse for his neglect. He said that he knew that it was his responsibility to assure that all the procedures were followed

and all documents were filed timeously and that he had failed to do so. He added however that his dereliction was not intentional.

Mr. Asino further explained that he was alerted to the fact that he failed to lodge a record by the legal practitioner of the respondents. This was by letter dated 9 February 2000. He then met with the respondents' legal practitioner in order to obtain the latter's consent to the late filing. This was refused and he was informed that he should apply for condonation. The legal practitioner however indicated that he would consult first respondent to find out whether she would object to the late filing of the record. Finally, on the 7th March 2000, he was informed by first respondent's legal practitioner that she was not willing to give such consent. He thereupon prepared the record and the application for condonation which were then filed.

In her answering affidavit to the application for condonation by appellant, first respondent informed the Court that no employment permit was issued to her notwithstanding the allegation made in this regard by Mr. Taapopi. She further informed the Court that her employment permit expired at the end of September 1999. Although she had applied for a renewal during September 1999, no employment permit was issued to her. Repeated enquiries addressed to the Ministry of Home Affairs met with no success. During February 2000 she was informed by an employee of the Ministry that her application was now in the hands of the Government Attorney. Since then she has heard nothing further.

Mr. Light, who then represented the respondents, also filed an affidavit in opposition to the application for condonation. He said that when it became apparent that appellant did not take any further steps to prosecute the appeal, he addressed a facsimile dated 9 February 2000 to appellant's legal practitioners. This was sent on 10 February 2000. A copy of the facsimile and confirmation are annexed to the affidavit. Therein reference is made to the relevant Rule of Court and the fact that the appeal was deemed to have been withdrawn. The appellant was called upon to comply with the High Court order and to issue a permanent residence permit within 30 days. Counsel said nothing further happened and on 17 February 2000 he phoned Mr. Asino. The latter confirmed that he had received the fax and wanted to know whether the respondent's would be prepared to not oppose the application for condonation, if they gave the first respondent an employment permit. Light said that he refused and told Mr. Asino that they would have to bring an application and that respondents would then have to consider their position. Mr. Light said that he made a note of this telephone conversation contemporaneously or shortly thereafter. The note is annexed to the affidavit. Mr. Light denied the impression created by Mr. Asino that the latter contacted him or met with him after he had received the facsimile.

Mr. Light further stated that prior to the telephone conversation, he had already discussed the issue with first respondent, who instructed him not to consent to the late filing of the record or to the application for condonation but to hold this over to see whether there was any merit in the application.

On the 7th March 2000 Mr. Light sent a further facsimile to Mr. Asino reiterating his previous request to issue a permanent residence permit to

the first respondent. On this occasion there was reaction from Mr. Asino who again wanted them to agree, Mr. Light was not quite sure to what, but Asino was again informed that they would not agree not to oppose the application for condonation.

Mr. Light categorically denied what he termed "(the) extremely vague assertion in paragraph 7 of his affidavit that he met me at some unidentified place on some unspecified date". Mr. Light consequently denied that he indicated to Mr. Asino that he would consult first respondent to see if she would object to the late filing of the record and he denied the allegation by Mr. Asino that he was only informed on 7 March 2000 that first respondent would not consent to such an agreement.

No replying affidavits were filed by the appellant.

The chronological sequence of events concerning the prosecution of this appeal are the following. A written judgment was handed down by the Court *a quo* on 24 June 1999. Notice of appeal, together with an agreement in terms of section 18(2)(a)(ii)(aa) of Act No. 16 of 1990 to appeal directly to this Court, was filed on 22 July 1999. The record of proceedings was lodged, according to first respondent, on 9 March 2000 and an application for condonation for the late filing of the record and re-instatement of the appeal was filed on 14 March 2000. The appeal was heard on 9 October 2000. The requirement for the lodging of the record is set out in Rule 5(5) of the Rules of this Court, which provides as follows:

> "5(5) After an appeal has been noted in a civil case the appellant shall subject to any special directions issued by the Chief Justice -

> (a) .....
>
> (b) in all other cases within three months of the date of the judgment or order appealed against or, in cases where leave to appeal is required, within three months after an order granting such leave;
>
> (c) within such further period as may be agreed to in writing by the respondent,
>
> lodge with the registrar four copies of the record of the proceedings in the court appealed from, and deliver such number of copies to the respondent as may be considered necessary ..."

Discussing the effect of the non-compliance with AD Rule 5(4) of South Africa, which is in all material respects similar to our rule 5(5), Vivier, J.A., in the case of *Court v Standard Bank of S.A. Ltd.; Court v Bester NO and Others,* 1995(3) SA 123(AD) at 139 F - I, came to the conclusion that such failure results in the appeal lapsing and that it was necessary to apply for condonation to revive it. This in my opinion is also the effect of a failure to comply with Supreme Court Rule 5(5).

At the latest the record of the proceedings in this matter should have been lodged by 24 September 1999. Instead it was lodged some five and a half months later and that only after the legal representative of the appellant was alerted to the non-compliance with the Rule by the representative of the respondents.

Both counsel referred the Court to the case of *Federated Employers Fire and General Insurance Co. Ltd. and Another v McKenzie*, 1969(3) SA 360(A) where the following was said by Holmes, J.A. at p.362G - 363 A, namely:

> "In considering petitions for condonation under Rule 13, the factors usually weighed by the Court include the degree of non-

> compliance, the explanation therefore, the importance of the case, the prospects of success, the respondents interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice; see *Meintjies v H.D. Combrinck (Edms.) Bpk.,* 1961(1) SA 262 (AD) at p. 264 A - B; *Melane v Santam Ins. Co. Ltd.,* 1962(4) SA 531 (AD); and *Kgobane's* case, *supra*. The cogency of any such factor will vary according to the circumstances, including the particular Rule infringed. Thus, a badly prepared record - Rule 5(7) to (10) - involves both the convenience of the Court and the standard of its proceedings in the administration of justice. A belated appeal against a criminal conviction Rule 5(5) - may keenly affect the public interest in the matter of the law's delays. On the other hand the late filing of the record in a civil case more closely concerns the respondent, who is allowed to extend the time under Rule 5(4)(c)."

Mr. Oosthuizen relied strongly on the importance of the case in his bid to get condonation. In this regard he referred to the necessity to have an authoritative interpretation of the Aliens Control Act and more particularly sec. 26 thereof. Counsel also dealt with various Articles of the constitution although in his reply Mr. Oosthuizen submitted that because of a concession made by Mr. Light in the Court *a quo* the Court could not deal with this issue.

Ms. Conradie, although she conceded that the case was important, submitted that a reading of cases in the Supreme Court of Appeal in South Africa shows a tendency to refuse condonation where there has been a flagrant non-observance of the Rules. She further submitted that no explanation was given by Mr. Asino for his failure to file the record on time. Counsel further referred to the respondents' interest in a final judgment and urged the Court to refuse condonation.

A reading of the cases of the Supreme Court of Appeal shows in my opinion more than a tendency to follow a hard line. These cases show that a

flagrant non-observance of the Rules of Court coupled with an unsatisfactory explanation for the non-observance of the Rules and delays more often than not ended in a refusal of condonation. In certain instances the Court declined to consider the merits of a particular case even though it was of the opinion that there was substance in the appeal. (See, *inter alia*, *Moraliswani v Mamili*, 1989(4) SA (AD); *Rennie v Kamby Farms (Pty) Ltd.,* 1989(2) SA 124 (A); *Ferreira v Ntshingila*, 1990(4) SA 271 (AD); *Southern Cape Car Rentals cc t/a Budget Rent a Car v Braun*, 1998(4) SA 1192 (SCA); *Darries v Sheriff, Magistrate's Court, Wynberg, and Another*, 1998(3) SA 34 9SCA) and *Blumenthal and Another v Thomson NO and Another*, 1994(2) SA 118 (AD).

A reading of cases of the High Court of Namibia shows that the situation is not different from that in South Africa and the Court has refused condonation or relief in similar circumstances or issued warnings where there was non-compliance with the Rules. (See *S v Wellington*, 1991(1) SACR 144; *Maia v Total Namibia (Pty) Ltd.,* 1992(2) SA 352, 1998 NR 303; *Swanepoel v Marais and Others*, 1992 NR 1; *S v Gey van Pittius and Another*, 1990 NR 35; *Adriaans v McNamara*, 1993 NR 188; *Xoagub v Shipena*, 1993 NR 215; *S v Nakapela and Another*, 1997 NR 184; *Johnston v Indigo Sky Gems (Pty) Ltd.,* 1997 NR 239; *Mutjavikua v Mutual Federal Insurance Co. Ltd.,* 1998 NR 57 and *Meridien Financial Service Pty Ltd. V Ark Trading*, 1998 NR 74.)

Although the above Namibian cases deal with the rules of the High Court there was no reason to accept that this Court would apply different principles or would be more accommodating.

Many of the above cases also show that "there is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this Court". (*Saloojee & Another v Minister of Community Development*, 1965(2) 135 (AD) at 141 C - D.) See further *P.E. Bosman Transport Works Committee and Others v Piet Bosman Transport (Pty) Ltd.,* 1980(4) SA 794 (AD).

A legal practitioner who fails to comply with the Rules of Court must give a full and satisfactory explanation for the non-observance of the Rules and any delays that might have occurred. Furthermore a legal practitioner should also as soon as he or she realises that a breach of the Rules has occurred, prepare and file an application for condonation. This presupposes that the legal practitioner knows the rules and would know when non-observance thereof occurred. Lack of knowledge due to ignorance of the Rules and failure to inform him or herself of the provisions of the Rules can hardly serve as an explanation for failure to apply timeously.

In the present instance, I must agree with Ms. Conradie that no explanation was placed before the Court concerning the non-observance of Rule 5. All that the affidavit contains is an admission that the legal practitioner was negligent. This was no news to the Court. In the absence of any explanation it followed that the cause for the failure was neglect on the part of the legal practitioner. But that still did not explain why the legal practitioner neglected to comply with the Rules of Court. In the absence of even an attempt to explain such neglect the only conclusion to which this

Court can come, is that after the notice of appeal was filed, the whole matter was allowed to sink into oblivion. Why this was allowed to happen is unknown. There is further no indication in the affidavit as to when the instruction was given for the preparation of the record. In fact the legal practitioner's affidavit does not even inform the Court when the record was lodged. This information only emerged from the first respondent's answering affidavit to the application. What we do know is that the legal practitioner said that after, according to him, he was informed, on 7 March, that the first respondent was not willing to give her consent, the record was prepared and lodged, and only then an application was prepared for condonation. From this the only conclusion that can be drawn is that this only happened after the legal practitioner was alerted to this problem by Mr. Light on 10 February.

There is also no explanation what the cause was of the delay after 10 February and until the record was lodged. Seemingly nothing happened until Mr. Light contacted Mr. Asino telephonically on the 17th. An attempt was then made to get the respondents not to oppose an application for condonation. Again nothing happened thereafter until a second fax was sent by Mr. Light on the 6th March, whereafter a second attempt was made to get respondents to agree to not oppose an application for condonation. Mr. Taapopi's statement in his affidavit that he was away on an official trip from 7 to 11 March and could therefore not depose to his founding affidavit shows that the legal practitioner was only now jolted into action.

One asks oneself how it is possible that such a situation can arise. I would think that it is elementary that when one appeals that it has now become

necessary to prepare and lodge the record of the proceedings. How else will the Court of appeal be able to deal with the matter? Rule of Court 5(5) is very clear and explicit as to what the duties of an appellant are concerning the lodging of the record and if the legal practitioner was unsure as to what to do, a mere glance at the Rule would have told him all that he needed to know. This, evidently, did not happen and the matter was left to take care of itself.

A further aspect which is relevant to the application for condonation is Mr. Taapopi's statement in pa. 10 of his founding affidavit namely: "...the Immigration Selection Board has renewed her (first respondent's) employment permit for a period of 1 year so that she may earn a living while this Honourable Court decides the matter". This statement was obviously made to convince the Court that the delay which occurred by the late lodging of the record was not done to frustrate the administration of justice and to counter any potential harm for the first respondent which may have been occasioned thereby. This is said in so many words by Mr. Taapopi.

However, shortly before the appeal was due to be heard, an affidavit was filed by the first respondent in which she stated that notwithstanding the assurance by Mr. Taapopi she was not issued with an employment permit. She also set out in the affidavit her attempts and that of her legal representative to follow up the statement made by Mr. Taapopi. To this extent they also called upon the assistance of Mr. Asino. By now the first respondent's own attempts to secure an employment permit had grinded to a halt. It seems that the statement by Mr. Taapopi blew new life into the

attempts of the first respondent and her legal practitioner to get the permit issued. They were unsuccessful.

When the matter was argued we asked Mr. Oosthuizen what the position was and we were informed that an employment permit was not granted to the first respondent. As the statement by Mr. Taapopi was obviously made to support the application for condonation and to convince the Court that any potential harm caused to the first respondent by the delay was countered by the issue of a further employment permit for a year, we asked for an explanation and allowed the parties to file further affidavits on this aspect. These have been done.

In his affidavit Mr. Taapopi stated that the Immigration Selection Board, against his advice, refused to grant a work permit to first respondent and that he as an individual was therefore not able to make good his undertaking. The reasons given for the refusal were that first respondent had stopped working for CASS and now wanted to be self-employed.

The deponent further submitted that the failure to issue a permit did not prejudice her as she continued to work and also understood that she could not be interfered with as long as her case was still pending in this Court. Finally it was submitted that the first respondent was not prejudiced by the failure of the Board to issue a permit as was undertaken by Mr. Taapopi in his affidavit. First respondent admitted that she worked but said that it was on an *ad hoc* basis as she was afraid to take a full time work without having a permit. She also admitted that she was not hindered by the appellant and said that she also assisted at the offices of Sister Namibia but this was

mostly voluntary work. During this period, and when it was necessary, she was financially supported by her parents and the second respondent.

However, the issue is not whether, objectively speaking, the reasons for the refusal of an employment permit were good or not good. What concerns me in this application is the obvious conflict between what was stated by Mr. Taapopi in par. 10 of his application for condonation and what has now came to light in the supplementary affidavit and, as he put it, prevented him from honouring his undertaking given in his application for condonation. However what was set out in par. 10 of the application for condonation was not an undertaking to arrange for an employment permit but was a statement of fact that a permit was indeed granted, and this allegation was made with a specific purpose to assist the appellant in its application. Nothing can be clearer than the words "...the Immigration Selection Board has renewed her employment permit for a period of 1 year so that she may earn a living while this Honourable Court decides the matter". What is more, no attempt was ever made to put the correct facts before the Court until the Court insisted on an explanation. Not even after the first respondent had joined issue thereon. Also in regard to the short affidavit of Mr. Asino, the impressions created changed substantially and notwithstanding the fact that Mr. Light's affidavit was in direct conflict with that of Mr. Asino on various issues it was thought, so it seems, advisable not to reply thereto.

So far I have dealt only with the non-compliance with the Rules of Court and as I have tried to do, show that there was no explanation whatsoever put forward justifying or attempting to justify such non-compliance. I have also

tried to show that the explanation, as far as it goes, did not set out fully what the circumstances were and that the appellant and its legal practitioner were not always frank with the Court.

Nevertheless I am of the opinion that this is not an instance where the Court should decide the application without having regard also to the merits of the appeal in relation to the other factors which were mentioned.

Two further factors, mentioned by Holmes, J.A., in *Federated Employers Fire & General Insurance Co. Ltd.*-case, *supra*, are the importance of the case and the interest of the respondents in the finality of the judgement. As was pointed out by Vivier, J.A., in *Court v Standard Bank of SA Ltd; Court v Bester, NO and Others*, 1995(3) SA 123 (AD) the latter factor militates against the granting of the indulgence (p.127C). See also *Mbutuma v Xhosa Development Corporation Ltd.,* 1978(1) SA 681(A) at 686F - 687A. In this case the Court approved of what was stated by Solomon, J.A., in *Cairns Executors v Gaarn*, 1912 AD 181 at 193, namely:

> "When a party has obtained a judgement in his favour and the time by law for appealing has lapsed, he is in a very strong position, and he should not be disturbed except under very special circumstances".

In the present instance, although the appeal was timeously noted, it lapsed due to the fact that no record was lodged and that up to the 17th February 2000, a period of almost five months, there was no indication whatsoever that appellant intended to continue with the appeal.

Concerning the Constitutional issues raised by the respondents in their founding affidavits, regard must be had to the following excerpt from the judgement of the Court *a quo.*

Dealing with the issue of the respondents' lesbian relationship Levy, A.J., stated as follows at p. 322 of his judgement:

> "In the opposing affidavit concerning the applicants' lesbian relationship, Mr. Simenda says:
>
> > '...the fact that the applicant is a lesbian played no role whatsoever in the decision taken by the Board, I also deny the unfounded and unsubstantiated allegation that the Board might have been influenced in the manner suggested herein. The Applicants' sexual preference was considered to be a private matter having no bearing on the Applicants' application.'
>
> When Mr. Light on behalf of applicants addressed this Court, he said that in the light of this categorical statement the applicant's sexual orientation was no longer an issue in these proceedings."

This statement by Mr. Light is difficult to reconcile with an intention to raise the constitutional issues. One would have thought that this statement by Mr. Simenda would have strengthened Mr. Light's argument that in terms of the Constitution it was wrong for appellant to regard the lesbian relationship as neutral. What is more, after referring to what was said in this regard by Mr. Light the Court *a quo* did not rely for its judgement in respondents' favour on any of the constitutional issues raised in the application concerning the lesbian relationship. The Court *a quo* referred to certain articles of the Constitution, namely Articles 10, 16 and 21(1)(e), but this referred to the forming of a universal partnership and the protection of property and freedom of association.

There is also no indication that because the Court *a quo* came to its conclusion on different grounds it did not find it necessary to deal with the Constitutional issues. In my opinion it would have said so if that was the case.

This situation creates an uncertainty as to whether the constitutional issue was before the Court *a quo* and whether Mr. Light, when he made his statement in that Court, did not abandon that issue. Because also of the conclusion to which I have come, and certain concessions made by Mr. Oosthuizen, it is wise not to deal with this issue at this stage.

As far as the prospects of success on appeal are concerned, these are greatly influenced by two concessions made by Counsel for the appellant, namely that Article 18 of the Constitution applied to the proceedings whereby appellant refused to grant to first respondent a permanent residence permit. Secondly that from the reasons supplied by appellant, it is clear that the Board came to their conclusion on an issue which was not canvassed by the first respondent and in regard of which she should have been informed by the Board and given an opportunity to deal with. Counsel's concession amounts thereto that the order of the Court *a quo* whereby it set aside the decision of the appellant in refusing to grant to the first respondent a permanent residence permit was correct albeit for other reasons than those stated by that Court. Counsel however submitted that the Court *a quo* was nevertheless wrong in directing the appellant to issue such permit and should have referred the matter back to the Board. Counsel therefore submitted that this Court should set aside paragraph (b)

of the order of the Court *a quo* and refer the matter back to the appellant Board.

Concerning the first concession made by Mr. Oosthuizen I am of the opinion that there cannot be any doubt that Article 18 of the Constitution applies. This was also the finding of the Court *a quo.* This Article provides as follows:

> "18 Administrative Justice
>
> Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal."

Article 18 is part of Chapter 3 of the Constitution which deals with Fundamental human rights and freedoms. The provisions of the Chapter clearly distinguishes which of these provisions apply to citizens only (e.g. Art. 17), and which to non-citizens (e.g. Art. 11(4) and (5)). Where such distinction is not drawn, e.g. where the Article refers to persons or all persons, it includes in my opinion citizens as well as non-citizens. The Article draws no distinction between *quasi* judicial and administrative acts and administrative justice whether *quasi* judicial or administrative in nature "requires not only reasonable and fair decisions, based on reasonable grounds, but inherent in that requirement fair procedures which are transparent" (*Aonin Fishing v Minister of Fisheries and Marine Resources*, 1998 NR 147 (HC).) Article 18 further entrenches the common law pertaining to administrative justice and in so far as it is not in conflict with the Constitution.

Concerning fair procedure, I am of the opinion that it is not now the time to determine *numerus clausus* of rules and that this part of the law should be allowed to develop as the present case is to my knowledge the first one where Article 18 has pertinently required the attention of the Supreme Court. For purposes of this case it is enough to say that at the very least the rules of natural justice apply such as the *audi alteram partem* rule and not to be the judge in your own cause etc.

For the above reasons I am satisfied that the concession made by Mr. Oosthuizen, namely that Article 18 of the Constitution applied to the proceedings whereby the appellant refused to issue to first respondent a permanent residence permit, was correct. The right of the first respondent to be treated fairly and reasonably is therefore not based on a legitimate expectation but on the Constitution itself.

In order to determine the cogency of the second concession made by counsel for the appellant, it is necessary to consider the relevant provisions of the Immigration Control Act to determine *inter alia*, what requirements were imposed by any relevant legislation on the appellant Board in the exercise of their discretion (Art. 18).

The appellant is constituted in terms of sec. 25 of the Act and is required to consider applications for permanent residence permits subject to the provisions of section 26 of the Act.

Sec. 26 of the Immigration Control Act, Act No. 7 of 1993 (the Act), provides as follows:

"26(1)(a) An application for a permanent residence permit shall be made on a prescribed form and shall be submitted to the Chief of Immigration.

(b) Different forms may, for the purpose of paragraph (a), be prescribed for different categories of persons.

(2) Subject to the provisions of subsection (7), the Chief of Immigration shall submit every application received by him or her to the Board together with such information relating to the applicant as he or she may have obtained and shall furnish such further information to the Board as it may require in connection with such applicant.

(3) The Board may authorize the issue of a permit to enter and to be in Namibia for the purpose of permanent residence therein to the applicant and make the authorization subject to any condition the Board may deem appropriate: Provided that the Board shall not authorize the issue of such a permit unless the applicant satisfies the Board that -

(a) he or she is of good character; and

(b) he or she will within a reasonable time after entry into Namibia assimilate with the inhabitants of Namibia and be a desirable inhabitant of Namibia; and

(c) he or she is not likely to be harmful to the welfare of Namibia; and

(d) he or she has sufficient means or is likely to earn sufficient means to maintain himself or herself and his or her spouse and dependent children (if any), or he or she has such qualifications, education and training or experience as are likely to render him or her efficient in the employment, business, profession or occupation he or she intends to pursue in Namibia, and

(e) he or she does not and is not likely to pursue any employment, business, profession or occupation in which a sufficient number of persons are already engaged in Namibia to meet the requirements of the inhabitants of Namibia; and

(f) the issue to him or her of a permanent residence permit would not be in conflict with the other provisions of this Act or any other law; or

(g) he or she is the spouse or dependent child, or a destitute, aged or infirm parent of a person permanently resident in Namibia who is able and undertakes in writing to maintain him or her.

(4) When the Board has authorized the issue of a permanent residence permit, the Chief of Immigration shall issue such permit in the prescribed form to the applicant."

Sub-sec. (5) of sec. 26 deals with the lapsing of a permanent residence permit and sub-sec. (6) allows a person who is in Namibia on an employment permit, student's permit or visitor's entry permit to be issued with a permanent residence permit whilst such persons are in Namibia. Sub-sec. (7) regulates the period or other circumstances after which re-application can be made after the Board had rejected an application for a permanent residence permit.

Section 26 makes it clear that the appellant does not have an absolute discretion. Sub-sec. (3)(a), (b), (c), (d), (e) and (f) contain certain requirements which an applicant for a permanent residence permit must satisfy the appellant before a permit may be issued. If the Board is not so satisfied it has no choice but to refuse the application.

In dealing with sec. 26 the Court *a quo* went one step further. It concluded that where an applicant for a permanent residence permit satisfies the Board as aforesaid the Board is obliged to grant the permit. At p. 326 of the judgement the Court *a quo,* referring to the affidavit of Mr. Simenda, found as follows:

"I firstly draw attention to paragraph 9.2 of his affidavit where he says:

'9.2 There was also no specific information before the Board that adversely affected the Applicant's application.'

> From this it is apparent that there were no grounds whatsoever for refusing the applicant. This statement of Mr. Simenda is sufficient to justify this court setting aside the Board's decision without any further ado."

The Court *a quo* then dealt with the reasons given by the appellant for refusing to grant the permit set out in par. 10.1, and 10.2 of Simenda's affidavit. In par. 10.2 the appellant stated that even if there was at present a shortage of persons with the qualifications, skills and experience of the first respondent the appellant took into account that more and more Namibian citizens will in the years to come acquire the necessary qualifications etc. and that these citizens will have to be accommodated in the limited labour market of Namibia.

Dealing with this statement the learned Judge *a quo* found that the appellant, in refusing the application for a permanent residence permit believed that it was acting in terms of section 26(3)(e) of the Act whereas sec. 26(3)(e) only refers to persons already engaged in Namibia in any employment, business, profession or occupation. Therefore the appellant could not take into consideration what the position may be in the future.

I find myself unable to agree with this interpretation of sec. 26. There is in my opinion no indication in the section itself which would limit the exercise of a discretion by the appellant to the absence of the requirements set out in sub-section (3)(a) - (f). In such an instance the appellant would normally exercise no discretion at all. All that would be required of it, is to determine in each instance whether the requirements set out in sub-section (3)(a) - (f) were complied with or not. If they were complied with, the Board is obliged

to issue a permit. If they were not complied with, the Board is obliged to refuse a permit.

Furthermore the fact that sub-section (3) begins with the words "the Board may authorize the issue of a permit ..." (my emphasis) is clear indication that the appellant has a wide discretion once the circumscribed part, set out in sub-section (3)(a) to (f), has been satisfied. This interpretation also conforms with the other provisions of the Act. See in this regard sec. 24 of the Act which prohibits the entry or residence in Namibia of non-citizens, with a view to permanent residence unless such person is in possession of a permanent residence permit. Also in regard to temporary residence no person is allowed to enter or reside in Namibia without being in possession of an employment permit, issued in terms of section 27, or a student's permit, issued in terms of section 28, or a visitor's entry permit, issued in terms of section 29. See further in general sections 6, 7, 8, 9, 10, 11 and 12 of the Act. There is also authority for the principle that a foreign national cannot claim permanent residence as of right and that the State has an exclusive discretion as to whether it would allow such nationals in its territory. See *Everett v Minister of Interior*, 1981(2) SA 453 at 456 D - 457 E; *Naiderov v Minister of Home Affairs and Others*, 1995(7) BCLR 891 (T) at 901; *Xu v Minister van Binnelandse Sake*, 1995(1) SA 185 (TPA) at 187 G - 188 E. See also *Foulds v Minister of Home Affairs and Others*, 1996(4) SA 137 (WLD). However, as far as Namibia is concerned, this principle is subject to the provisions of Article 18 of the Constitution and as long as the Board acts fairly and reasonably and in accordance with a fair procedure there is no basis for interference by a Court of Law. I therefore agree with the submissions made by Mr. Oosthuizen that the appellant, once satisfied

that the requirements set out in section 26(3)(a) - (f) were complied with, could consider other relevant factors provided of course, that they have done so where necessary, in compliance with Article 18 of the Constitution.

However, this is not the end of the matter. In her argument Ms. Conradie submitted that the appellant did not comply with the *audi alteram partem* rule and did not give the first respondent an opportunity to address the issue of qualified and experienced staff who could provide the services which first respondent was able and willing to render. Counsel further pointed out that it was clear from the record filed by the appellant as well as the affidavits filed by it that there was not a scrap of evidence concerning these issues before the appellant Board.

At one stage Mr. Oosthuizen submitted that the respondents should have cross-appealed if they now want to rely on non-compliance by appellant with the *audi alteram partem* rule. This seems to me to be incorrect as the respondents would be entitled to argue that the appeal could also not succeed because of such non-compliance. See *Mufamadi and Others v Dorbyl Finance (Pty) Ltd.,* 1996(1) SA 799 (AD) at 803 G - H.

The first respondent's right to be treated fairly and in accordance with a fair procedure, placed the appellant under a duty to apply the *audi alteram partem* rule. This rule embodies various principles, the application of which is flexible depending on the circumstances of each case and the statutory requirements for the exercise of a particular discretion. (See *Baxter: Administrative Law* p. 535 ff and *Wiechers: Administrative Law* p. 208 ff.)

In the context of the Act, the process for the application of a permit was set in motion by the submission of a written application by the first respondent. If on such information before it, the application is not granted, and provided the Board acted reasonably, that would be the end of the matter. However, there may well be instances where the Board acts on information they are privy to or information given to them by the Chief of Immigration (see sec. 26(2)). If such information is potentially prejudicial to an applicant, it must be communicated to him or her in order to enable such person to deal therewith and to rebut it if possible. (See *Loxton v Kendhardt Liquor Licensing Board*, 1942 AD 275 and *Administrator SWA v Jooste Lithicum Myne (Edms) Bpk,* 1955(1) SA 557(A). However, where an applicant should reasonably have foreseen that prejudicial information or facts would reach the appellant, he or she is duty bound to disclose such information. (See Wiechers *op. cit.* P. 212.)

In the absence of any prescription by the Act, the appellant is at liberty to determine its own procedure, provided of course that it is fair and does not defeat the purpose of the Act. (Baxter, *op. cit.* P. 545). Consequently the Board need not in each instance give an applicant an oral hearing, but may give an applicant an opportunity to deal with the matter in writing.

Furthermore, it seems to me that it is implicit in the provisions of Article 18 of the Constitution that an administrative organ exercising a discretion is obliged to give reasons for its decision. There can be little hope for transparency if an administrative organ is allowed to keep the reasons for its decision secret. The Article requires administrative bodies and officials to act fairly and reasonably. Whether these requirements were complied with

can, more often than not, only be determined once reasons have been provided. This also bears relation to the specific right accorded by Articles 18 to persons to seek redress before a competent Court or Tribunal where they are aggrieved by the exercise of such acts or decisions. Article 18 is part of the Constitution's Chapter on fundamental rights and freedoms and should be interpreted "... broadly, liberally and purposively..." to give to the article a construction which is "... most beneficial to the widest possible amplitude". (*Government of the Republic of Namibia v Cultura 2000,* 1993 NR 328 at 340 B - D.) There is therefore no basis to interpret the Article in such a way that those who want to redress administrative unfairness and unreasonableness should start off on an unfair basis because the administrative organ refuses to divulge reasons for its decision. Where there is a legitimate reason for refusing, such as State security, that option would still be open.

Although appellant initially refused to give reasons for its decision, such reasons were later set out in the affidavit of Mr. Simenda. These were that many Namibians graduated and will continue to graduate with the same qualifications and expertise as that of the first respondent and that employment must be found for them. Also many volunteers on temporary permits are in Namibia as in-service trainers and research officers. Secondly it is stated that even if it can be said that at present there is a shortage of persons with the qualifications, skills and experience of the first respondent then the Board took into account that more and more Namibians will qualify for such employment in the next few years and they must be accommodated.

The second reason given very much qualifies the veracity of the first one. It is clear that the Board's considerations were based on assumptions made by it rather than factual evidence and that it was expressing what policies it was applying under the circumstances. There can be no doubt that the application of the first respondent was prejudicially affected by a policy that was operating against her based on assumptions, both of which she was unaware of. (See *Lukral Investments. v Rent Control Board, Pretoria*, 1969(1) SA 496 (T) at 509 - 510 and *Moleko v Bantu Affairs Administration Board (Vaal Triangle Area),* 1975(4) SA 918(T) at 925 - 926.) It may have been perfectly in order for the appellant to have a policy in regard to the granting of permanent residence permits and that it was fair and reasonable to apply it in the present instance. However, before it could do so, it had to inform the first respondent what it considered doing in this regard and to give her an opportunity to deal with such issues. First respondent denied in her replying affidavit these assumptions made by the appellant. When the application was submitted first respondent, through her legal practitioner, offered to appear before the Board to deal with any information which may adversely reflects upon her application. This was in all probability anticipated because her 1996 application was turned down. (See annexure "EF6".) A perusal of the application form, prescribed for permanent residence, also showed that it contained nothing which would have alerted an applicant to the fact that the appellant would apply these policy considerations.

For the reasons set out above, I agree that the second concession made by Counsel for the appellant was also correctly made. It follows therefore that the Court *a quo* was correct in setting aside the decision taken by the

appellant on the 29th July 1997 and that in this regard the appeal before us cannot succeed. All that remains is Mr. Oosthuizen's submission that the Court should nevertheless set aside the direction given by the Court *a quo* and refer the matter back to the appellant so that they can reconsider the first respondent's application after complying with the *audi alteram partem* rule.

The Court *a quo* had a discretion whether to refer the matter back to appellant or to order the appellant to issue the permit. (See *W.C. Greyling & Erasmus (Pty) Ltd. V Johannesburg Local Road Transportation Board and Others*, 1982(4) SA 427 (AD) at 449 F- H.) (The reference to authority in South Africa in this regard is also apposite as in terms of Article 78(4) of our Constitution the Supreme and High Courts of Namibia retained inherent jurisdiction which vested in the Supreme Court of South West Africa immediately before independence.) Generally a Court would only exercise the discretion itself where there are exceptional circumstances present. (See the *W.C. Greyling*-case, *supra*.) Examples of instances where the Courts have exercised their jurisdiction not to refer a matter back include cases where there were long periods of delay, where the applicant would suffer prejudice or where it would be grossly unfair. (See the *Greyling*-case, *supra; Dawnlaan Beleggings (Edms) Bpk. v Johannesburg Stock Exchange (Edms) Bpk and Others,* 1983(3) SA 344 (WLD) at 369 G - H and *Local Road Transportation Board and another v Durban City Council and Another*, 1965(1) SA 586 (AD) at 598 D - 599.)

Although there may be some substance in Mr. Oosthuizen's submission that the Court *a quo* should have referred the matter back to the appellant Board

for reconsideration, also because one of the factors on which the Court based the exercise of its discretion was its interpretation of sec. 26 of the Act, I am not convinced that this is sufficient to tip the scales in favour of the appellant and that this Court should therefore grant the appellant condonation. As was pointed out by the Court *a quo* there was no legal impediment against the granting of the permit as the appellant was seemingly satisfied that the first respondent has complied with the provisions of sec. 26(3)(a) - (f) and that strong support from notable persons was expressed in favour of the granting of the permit. That this was so is also clear from the fact that at no stage did appellant rely on non-compliance by first respondent of the qualifications set out in sec. 26(3).

For a period of more than three years the respondent's residence in Namibia was in the balance and was clothed in a veil of uncertainty. To the extension of this period and to the uncertainty the legal representative of the appellant contributed significantly. The result of the delay, which is completely unexplained, had the effect that this appeal which could have been heard during the October 1999 session, was only heard a year later. This was rightly conceded by Mr. Oosthuizen. This was a review application where no other evidence necessitated time in the typing and preparing of a record for the Supreme Court. All that was necessary to be added to the already prepared record, which was before the Court *a quo*, was that Court's judgement, the grounds of appeal and the consent to appeal directly to this Court. This is further confirmed by the fact that when the legal representative of the appellant realised what was required of him he was able to prepare the record and file it within a period of two days, namely from the 7th to 9th of March. Because of the delay the matter could also not

be heard during the April 2000 session of this Court. Also the assurance which this Court was initially given that the appellant tried to alleviate the situation by issuing to the first respondent a temporary employment permit, in order to counter any possible prejudice to the first respondent, was later found not to have materialised.

Especially in a case such as the present, which involves the continued residence of the respondents, the possibility of a complete uprooting was always present, and there can be little doubt that this uncertainty must have caused anguish and hardship to the respondents which was further prolonged by the unwarranted delay caused by the failure to comply with the Rules of the Court. Such possibility was after all foreseen by the appellant.

In the present instance this Court is dealing with this issue in the context of an application for condonation where further considerations such as the interest of the respondents in the finality of the proceedings, is a most relevant factor. To require of the respondents, after a period of more than three years, to have to go through the same uncertainty and anguish and to face the risk of again making the same tiresome way through the Courts will constitute an injustice which this Court is not prepared to sanction. Although the delays which occurred were not always caused by the appellant the fact of the matter is that the non-compliance of the appellant's with their constitutional duties necessitated the institution of these proceedings.

Since September 1998 the first respondent was without an employer's permit which renders her stay in Namibia illegal and also affects her ability to do any work. Any further delay will only prejudice her further. For the above reasons it seems to me that the importance of the case must give way to the interest of the respondents in the finality of the case and the prejudice which a referral back to the Board will cause. All this coupled with the fact that the non-compliance with the Rules was flagrant and was not at all explained have convinced me that this is a case where the Court should refuse the appellant's application for condonation.

In the result the appellant's application for condonation is dismissed and the order of the Court *a quo* must be complied with within 30 days of delivery of this judgement.

(signed) STRYDOM, C.J.

O'LINN, A.J.A..: I have read the judgment of my brother Chief Justice Strydom. Although I agree in substance with many of the facts and findings of law set out in the judgment, I am unable to concur in the result.

In the circumstances it is not necessary for me to traverse all the facts relating to the history of the proceeding, the relevant facts relating to the application for condonation and the merits of the appeal.

I find it convenient to first summarize the main points of agreement and will as far as appropriate, quote the relevant passages or parts thereof as it appears in the aforesaid judgment.

SECTION A: POINTS OF AGREEMENT WITH THE JUDGMENT OF THE CHIEF JUSTICE

1. In applications by a litigant for condonation for non-compliance with rules of Court, "the factors usually weighed by the Court include the degree of non-compliance, the explanation for it, the importance of the case, the prospects of success, the respondent interest in the finality of the judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice. The cogency of any such factor will vary according to the circumstances, including the particular rule infringed.

   Furthermore, where the failure to comply with the rules is due to the negligence and/or incompetence of the litigant's legal representative,

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Federated Employers Fire and General Insurance Co. Ltd & An. v McKenzie, 1969(3) SA
360(A) at 362G - 363A.

there is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the rules of this Court."

2. Notwithstanding the unsatisfactory features of the explanation for the non-compliance by appellant's attorney, "this is not an instance where the Court should decide the application without having regard also to the merits of the appeal in relation to the other factors which were mentioned".

3. Article 18 of the Namibian Constitution relating to "administrative justice" is applicable to the case of the respondents. "At the very least the rules of natural justice apply such as the *audi alteram partem* rule".

3.1 In the context of the Immigration Control Act No. 7 of 1993, "the process for the application of a permit was set in motion by the submission of a written application ...

If on such information before it, the application is not granted, and provided the board acted reasonably, that would be the end of the matter. However, there may well be instances where the Board acts on information they are privy to or information given to them by the Chief of Immigration... If such information is potentially prejudicial to an applicant, it must be communicated to him or her in order to enable such

person to deal therewith and to rebut it if possible… However, where an applicant should reasonably have foreseen that prejudicial information or facts would reach the appellant, he or she is duty bound to disclose such information…

In the absence of any prescription by the Act, the appellant is at liberty to determine its own procedure, provided of course that it is fair and does not defeat the purpose of the Act… Consequently the board need not in each instance give applicant an oral hearing, but may give an applicant an opportunity to deal with the matter in writing."

3.2 It is implicit in Art. 18 that "an administrative organ exercising a discretion is obliged to give reasons for its decision." Where however, "there is a legitimate reason for refusing such as state security that option would still be open". It should be noted however, that such reasons, if not given prior to an application to a Court for a review of the administrative decision, must at least be given in the course of a review application.

4. "Section 26 (of the Immigration Control Act) makes it clear that the appellant does not have an absolute discretion. Sub-sections (3)(a), (b), (c), (d), (e) and (f) contain certain requirements on which an applicant for a permanent residence permit must satisfy the appellant before a permit may be issued. If the Board is not so satisfied, it has no choice but to refuse the application.

In dealing with section 26 the Court *a quo* went one step further. It concluded that where an applicant for a permanent residence permit satisfies the board as aforesaid, the board is obliged to grant the permit. I find myself unable to agree with this interpretation of section 26."

SECTION B: FURTHER ANALYSIS OF THE JUDGMENT OF THE COURT *A QUO*

It is convenient to pause here to deal further with the approach and findings of the Court *a quo* because that approach and those findings must of necessity weigh heavily in deciding whether or not the appellant has reasonable prospects of success on appeal.

As is evident from point 4, *supra,* the learned Judge *a quo* misinterpreted section 26 and as a consequence the whole basis of his decision fell away.

The following further misdirections need be mentioned:

(i) It is stated in the judgment: "During the period of her stay in Namibia, first respondent worked as a senior researcher and later as Deputy-Director of the Centre for Applied Social Sciences (CASS). Since October 1997, she has worked for CASS as a consultant."

It appears from affidavits filed by the parties at the request of the Court, that the contract of the 1st respondent with CASS “had expired in March 1997” and that after that date, she had only “provided a short-term research consultancy, which was also no longer in existence by 10th May 2000, according to a letter from CASS attached to an affidavit by Niilo Taapopi, the permanent secretary of appellant. The content of this letter was divulged by the first respondent herself in an undated letter to appellant after 10th May 2000. There is presently no dispute about the situation. It also appears from a letter from CASS contained in appellant’s record disclosed under Rule 53 dated 22/9/97, that first respondent was at that stage no longer an employee and the intention was to make use of her services on a consultancy basis, only “as the need arises in future”. When first respondent applied for the second time for a permanent residence permit in June 1997, she was no longer an employee of CASS and not the Deputy-Director of CASS.

In first respondent’s aforesaid application for permanent residence during June 1997, she quoted from a letter dated 25 March 1997 addressed to the Ministry of Home Affairs wherein she had referred to her employment with CASS, first as a senior researcher and then as “Deputy-

Director of CASS." Nowhere did she say that the employment as Deputy-Director had already terminated in March 1997. No wonder that Levy, A.J., who considered respondent's review application, assumed that the first applicant, the respondent herein, was at the time of her second application for a permanent residence permit, employed as the Deputy-Director of CASS and was so employed at all relevant times up to the date of that judgment. The learned Judge put it as follows: "She is the Deputy-Director of CASS and is responsible for staff training and office management".

The Court *a quo* consequently laboured under a misapprehension, caused primarily by the vague and misleading particulars provided by the first respondent in her application for a permanent residence permit which was reproduced in her application to Court for the review of the decision of first respondent.

The Review Court built further on this faulty base:

> "To suppose that volunteers with temporary permits or recent graduates from the University could rise to the position which first appellant has in a foreign sponsored organisation namely Deputy-Director or that students who have recently qualified from the University could do the work which first applicant as Deputy-Director is doing, is fatuous particularly in the light of the fact that there is no evidence whatsoever to support such an allegation. For the sake of completeness I repeat briefly what I have

> already said about the work first applicant is doing. As a Deputy-Director of CASS, she is responsible for staff training and office management."

The truth of the matter is that she was not holding the job of Deputy-Director since March 1997, more than two years before the hearing of the review application before Levy A.J. The question may be asked: How did CASS manage to function without first respondent?

The Court seems to make a third point in regard to CASS where it states: “This organization sponsored by foreign sources was certainly not the type of employment or occupation which section 26(3)(e) had in mind and in terms whereof respondent believed it was acting...”

It is a misdirection to suggest that because an organization such as CASS is “sponsored by foreign sources”, it will not employ Namibian graduates. There is no such evidence and no grounds whatever for such an assumption. It is common knowledge that donor organizations implement the Government's affirmative action policies.

(ii) The Court criticized the Board for allegedly having taken into consideration employment opportunities for Namibians. The judgment reads:

> "Further Mr. Simenda says in respect of these students who continue to graduate from the University, we have to find employment for them'.
> (See too the affidavit of Mr. Taapopi.) Finding employment for people is not one of the functions of respondent. Respondent is not a labour bureau. There is no such provision in the Act."

The Court in my respectful view, also erred in this regard. Although the Immigration Selection Board is not a labour bureau, it can certainly in the exercise of its general discretion, consider the interests of Namibian entrants into the labour market and not only those already qualified, but those in the process of qualifying. One must keep in mind that one of the functions of the Board in terms of sections 27 of the Immigration Control Act is to consider applications for employment permits and in the course of exercising that function, it must consider whether there is a sufficient number of persons, already engaged in that particular labour field. If in its opinion there is, then it is obliged to refuse the application. But over and above this duty, it may in the exercise of its discretion, as already indicated in regard to section 26, consider also the interest of those Namibians in the process of graduating and entering the labour field in the immediate or near future.

In the course of the Board's aforesaid function it of necessity and as part and parcel of its function,

considers employment opportunities for Namibians at the time when it considers an application for an employment or residence permit by an alien, as well as such opportunities in the immediate or near future. Obviously the consideration of the latter type of opportunities are not in the same category as the consideration of whether or not there are "a sufficient number of persons already engaged in Namibia to meet the requirements of Namibians". (My emphasis added.)

It is also necessary to emphasize that the function exercised by the Board under section 26(3)(e) as well as under section 27(2)(b), is tied to the objective of serving the inhabitants of Namibia and whether or not the application of an alien is granted is consequently measured not against the interest and requirements of an alien or immigrant, but against the requirements and interests of the inhabitants of Namibia.

(iii) The Court stated:

> "In his affidavit Mr. Taapopi referring to the lesbian relationship between the applicants, said that 'applicant's long terms relationship was not one recognized in a Court of Law and was therefore not able to assist' the first applicant's application.
>
> This too is an incorrect statement of the law. In *Isaacs v Isaacs*, 1949(1) SA 952(C) the learned Judge dealt with the position in common law where parties agree to put in common all there property both present and any they may acquire in future. From the common pool they pay their expenses incurred by either or both of them. They can

enter into this type of agreement by a specific undertaking verbal or in writing or they can do so tacitly. Such an agreement is known as a universal partnership.

A universal partnership concluded tacitly has frequently been recognized in our courts of law between a man and a woman living together as husband and wife but who have not been married by a marriage officer.

(See *Isaacs, supra,* and *Ally v Dinath,* 1984(2) SA 451 (TPD)).

Article 10 of the Constitution of Namibia provides:

'(1) All persons shall be equal before the law.

(2) No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.'

If therefore a man and a woman can tacitly conclude such a partnership because of the aforesaid equality provision in the Constitution and the provision against discrimination on the grounds of sex I have no hesitation in saying that the long terms relationship between applicants in so far as it is a universal partnership, is recognised by law. Should it be dissolved the court will divide the assets of the parties according to the laws of partnership.

Furthermore in terms of Article 16:

'(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable or movable property individually or in association with others and to bequeath their property to their heirs or legatees.' (My emphasis.)

This is exactly what applicants have done.

Finally Article 21(1)(e) provides *inter alia* that all persons have the right to freedom of association.

> In the circumstances the Chairperson was wrong when he said the long-terms relationship of applicants is not recognised in the law.
>
> Not only is this relationship recognised but respondents should have taken it into account when considering first applicant's application for permanent residence and this respondent admits it did not do."

It is necessary to make the following comments:

(a) As correctly pointed out by appellant in its application and by its counsel Mr. Oosthuizen in argument, the concept of “universal partnership” was never relied on by respondents and never raised in argument - not by counsel for the parties and not even *mero motu* by the Court. What the respondents relied on was their alleged “lesbian relationship”.

The Court however, did not deal with the impact the lesbian relationship should have had on the decision of the Board, because the Court understood respondent’s counsel to have conceded that the issue became irrelevant when Mr. Taapopi on behalf of the Immigration Board averred that the fact that the respondents were lesbians, was

regarded as a private matter and a neutral factor in regard to the application.

(b) It seems to me that if the respondents wished to rely on a so-called “universal partnership”, it was for them to raise it before the Board in the first place and at the latest in their review application. If they raised it, they would have had to prove its existence and its relevance to the application for a permanent residence permit. In my respectful view, it was a misdirection for the Judge to raise it *mero motu* for the first time in his judgment.

Furthermore even if such a partnership was proved and relied upon by respondents the failure to regard it as a factor relevant to the application and to give it any weight in favour of respondent’s application, would have been a matter falling within the discretion of the appellant Board.

(c) The Court’s criticism that Taapopi made “a wrong statement of the law” when he said in his affidavit that “applicants’ long term relationship was not one recognized in a

Court of Law and was therefore not able to assist the respondents", was not wrong in the sense that the Courts in Namibia had never in the past recognized a lesbian relationship as a factor in favour of a lesbian alien applying for permanent residence in Namibia *inter alia* on the ground of her lesbian relationship with a Namibian citizen. Taapopi obviously also had in mind that the Immigration Control Act under which his Board exercised its jurisdiction gave a special status and exemption to a spouse of a Namibian citizen recognized by virtue of a marriage according to Namibian law - but did not recognize a "partner" in a lesbian relationship as a "spouse" for the purpose of that law. And in that regard, no Court in Namibia had up to now declared any provision of the Immigration Act unconstitutional.

The Court's attitude that the lesbian relationship which was placed before the Court became irrelevant because counsel for applicants allegedly conceded that, is difficult to reconcile with the attitude that a

universal partnership not even mentioned by any of the parties, is relevant.

(d) I find it difficult to see the relevance of Art. 10, 16(1) and 21(1)(e) of the Namibian Constitution, dealing respectively with equality before the law, the right to acquire property in any part of Namibia and the right to freedom of association, applied to the argument based on a "universal partnership".

Art. 10 is certainly relevant to any argument as to whether or not a lesbian relationship should be treated on an equal basis with marriages sanctioned by statute law, but the Court was not dealing with that problem. As far as Article 16 and 21(1)(e) is concerned, these rights do not assist in deciding whether or not either a "lesbian relationship" or "a universal partnership" should be recognized by the Immigration Selection Board as a relevant factor in considering an application for permanent residence.

(e) The Court concluded:

> "Not only is this relationship recognized but respondents should have taken this into account when considering the application for permanent residence and this respondent admits it did not do."

The Board did not admit that it did not consider a "universal partnership". It also did not admit that it did not consider the alleged lesbian relationship. What it admitted was that it regarded the "lesbian relationship" as a private matter and regarded it as "neutral".

For the above reasons, the Court has in my respectful view, misdirected itself when it held that the Immigration Selection Board "should have taken it into account when considering first applicant's application for permanent residence."

(iv) The Court in its judgment refers to the letter of commendation by Mr. Wakolele, the then Permanent Secretary of the Ministry of Information and Broadcasting wherein Wakolele said that: "...Namibia has a serious shortfall of trained researchers and writers...". The Court then comments that: "This is a statement of fact from someone who can speak with authority on the subject of research. Respondent's reply constitutes generalities

and is obvious hearsay. An affidavit from the University may have been of assistance to respondent and respondent does not say why there is no affidavit. In any event the tenor of both paragraphs 10.1 and 10.2 is in respect of students researchers who will qualify in future whereas section 26(3)(e) specifically refers to people already engaged in the alleged activity."

The following points must be made:

(a) The Court thus required the Board to produce an affidavit from the University of Namibia to substantiate its viewpoints contained in an affidavit before Court, but accepted a mere letter by the Permanent Secretary of the Ministry of Information as "a statement of fact". Why? What Mr. Simenda said in this regard in his opposing affidavit is the following:

"10.1 The Board did in fact take into account that the Applicant's qualifications, skills and experience are no longer in short supply in this country. The University of Namibia has put out graduates in Applicant's field of expertise and we have to find employment for them. Even more

the said University and other institutions of higher learning continued to produce qualified people to perform the work that the Applicant is involved in. Moreover, numerous volunteers are coming into Namibia as inservice trainers and research officers at different levels. They are here on temporary permits. There is thus, at this point in time, no demand to attract immigrants with the Applicant's qualifications, skills or experience.

10.2 Even if it can be said that there is at present a shortage of persons with the qualifications, skills and experience of the Applicant the Board has also to take into the account that more and more Namibian citizens will obtain similar qualifications, expertise, skills and experience in the next few years and that these citizens will have to be accommodated in the limited labour market of the Republic of Namibia..."

"12. I deny the allegations contained herein and repeat that the Applicant's application was rejected because the Board was of the considered opinion that

> Namibian citizens must be given preference in the employment market and that there was no demand to attract immigrants with the qualifications, skills and experience of the Applicant. The Board was furthermore of the opinion that any short-term demand for such services could sufficiently be met by issuing work permits to persons duly qualified to do the work. For this very reason the Board recommended that the Applicant's work permit be extended for further period of 12 months."

Whether the Court meant that the Board had to obtain an affidavit from the University in order to properly evaluate the respondents' application or whether it meant that it had to supplement its affidavit of opposition with such an affidavit in the review proceedings, is not entirely clear.

There was however no justification for the Court on review to assume that Wakolele spoke with authority and that his letter of recommendation was a "statement of fact" on the issue.

If the Board’s statement is hearsay, on what basis can the statement of Mr. Wakolele be regarded as fact?

As far as the Mbumba letter of commendation is concerned there is nothing in that letter controverting the contents of par. 10 and 12 of the affidavit of Simenda. He did not say as Mr. Wakolele did, that: "Namibia has a serious shortfall of trainer researchers and writers" and he did not say that there is "not a sufficient number of persons already engaged in Namibia to meet the requirements of Namibians". Furthermore, none of Messrs. Wakolele and Mbumba controverted the second leg or alternative leg of the Board's case, i.e. the factor set out in par. 10.2 of the said affidavit namely that "the Board has also to take into account that more and more Namibian citizens will obtain similar qualifications, expertise and skills in the next few years and that these citizens will have to be accommodated in the limited labour market of the Republic of Namibia.

The Court itself in its above-quoted *dicta* did not controvert anything said in the aforesaid par. 10.2 but relied on its assumption that what was said in

the said paragraph was irrelevant, because section 26(3)(e) dealt with the present and did not allow the Board to go outside its parameters.

The Court's statement that the tenor of both par. 10.1 and 10.2 is in respect of student researchers who will qualify in future is also wrong. Par. 10.1 deals with graduates already put out and the continuing process. In addition it deals with volunteers "coming" into the Country. It then alleges that: "There is thus, at this point in time, no demand to attract immigrants with the applicant's qualifications, skills and experience". (My emphasis added.)

The Board, by the very nature of its duties and responsibilities, acquire in the course of time certain knowledge e.g. regarding the number of volunteers coming into Namibia through organizations rendering development aid to Namibia, and requiring temporary work permits for that purpose. It is also a notorious fact that there is a University of Namibia and various Technicons turning out people who acquire degrees and certificates. It is also not inconceivable that individual members of the Board has acquired certain knowledge through

their own training and/or experience. Furthermore, the Board is not a Court. The Board may certainly make use of hearsay, even hearsay in the form of a letter or statement by Mr. Wakolele or Mr. Mbumba. There is no doubt that the Board also had to consider the information and recommendations contained in such letters. It could not arbitrarily ignore it or reject it.

Administrative authorities are entitled to rely upon their own expertise and local knowledge in reaching decisions.[1]

It must also be obvious that such bodies can take notice of facts which are notorious. So e.g. the Board and a considerable percentage of the public, will know that Namibia has a university which has for years, prior to independence as well as thereafter, turned out graduates with BA degrees. Similarly it is general knowledge that there have been teachers training colleges before Namibian independence as well as thereafter, turning out qualified teachers; and technical colleges, turning out academically qualified persons in many fields. And as far as the allegations of Simenda in par. 10.2 of his affidavit

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[1] *Loxton v Kenhardt Liquor Licensing Board*, 1942 (AD) 275 at 291
Clairwood Motor Transport Co. Ltd. V Pillai & Ors, 1958(1) SA 245 NPD at 253G - 254A

is concerned, the assumption made about the "next few years" is certainly a reasonable assumption based on well-known and even notorious facts.

Furthermore administrative tribunals can rely on hearsay, to a much greater extent than Courts of law. But, in a case where such knowledge or hearsay could not reasonably be expected to be known to an applicant, the dictates of administrative justice may make it necessary to apprize the applicant for a work and/or residence permit of such knowledge or information to enable such applicant to controvert it.[2]

On the other hand it is trite law that administrative bodies, irrespective of whether their powers are "*quasi-judicial*" or "purely administrative", need not notify an applicant beforehand of every possible reason for coming to a particular conclusion.[3]

In regard to the letter of Mr. Mbumba, the Minister of Finance, in support of the application for permanent residence, the Court held that the

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[2] *Foulds v Minister of Home Affairs & Ors,* 1996(4) SA 137 WLD at 147 B - 149 F

[3] *Minister of the Interior & An v Sundaree Investments,* 1960(3) SA 348 at 3

Board "did not apply its collective mind to this information furnished by the Minister of Finance".

There was no allegation in the respondent's founding affidavit nor in the replying affidavit in the review application that the Board "had not applied its collective mind" to the supporting letter by Minister Mbumba. It may very well be that the Board did not apply its mind to the supporting letters of Messrs. Wakolele and Mbumba. But the applicants did not make such an allegation and did not prove such an allegation. It may be that the Board merely did not agree with Messrs. Wakolele and Mbumba and did not regard them as experts.

The onus to prove such allegations if made, is clearly on
the applicant in review proceedings.[4]

(v) The Court was clearly impressed by the assistance the applicant gave to "comrades from SWAPO" in the pre-independence period and as a member of

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[4] Rose-Innes, *Judicial Review of Administrative Tribunals in South Africa, p.* 30;
Herbstein & Van Winsen, *The Civil Practice of the Supreme Court of South Africa,* 4th ed., p. 944;
*Rajah & Rajah (Pty) Ltd. v Ventersdorp Municipality,*1961(4) SA 402 (AD), 407 D - 408 A.
Barnes v Port Elizabeth Liquor Licensing Board, 1948(1) SA 149 AD;
Jockey Club of SA & Ors v Feldman, 1942 (AD) 340.

the anti-apartheid movement. The Court further stated:

> "Despite a life-long dedication to the democratic cause of Namibia, its trials and tribulations, its struggles and its successes, the respondent repeatedly refused to grant first respondent permanent residence and refused to provide her with reasons for their decision."

It seems that the Court expected the Board to give the applicant more favourable or preferential treatment on account of the aforesaid patriotic credentials.

If the Board did so, it may have been accused by others of breaching the fundamental right to non-discrimination and equality before the law provided for in Art. 10 of the Namibian Constitution, so strongly relied on by applicant and her legal representatives in other respects - such as e.g. the fact of applicants' lesbian relationship.

But even if the aforesaid patriotic past was a relevant consideration for the Board, it would have been in the Boards discretion how to evaluate it and what weight to be given to it.

The question may also be asked whether it was a proper consideration for the Board in view of Art. 4(6) of the Namibian Constitution, section 6 of Namibian Citizenship Act 14 of 1990 and 35 of the Immigration Control Act.

Sub-Art. 6 of Article 4 of the Constitution provides that:

> "Nothing contained herein shall preclude Parliament from authorizing by law the conferment of Namibian citizenship upon any fit an proper person by virtue of any special skill or experience or commitment to or services rendered to the Namibian Nation either before or at any time after the date of independence."

Section 6(1) of Act No. 14 of 1990 provides: "When, in the opinion of the President, any person who is not a Namibian citizen has rendered any distinguished service to Namibia, the President may grant such person honorary citizenship of Namibia..." Section 35 of the Immigration Control Act, empowers the Minister to exempt any person or category of persons from the provisions of this part of the Act.

The respondent Frank may have, but has not, applied to the President for honorary citizenship and may still do so. Respondent may apply to the Minister for exemption but has not done so and may still do so.

The applicants have also failed to join the Minister as a party to the proceedings.

Although Article 4(6) of the Namibian Constitution, read with section 6 of the Citizenship Act and section 35 of the Immigration Control Act, provide for some relief or remedy to the respondents, the fact that these courses are open to them, militate to some extent against an argument that the respondent Board had a duty to consider such a factor in favour of the applicant Frank.

(vi) The Court did not argue that the Board had failed to apply the *audi alterem partem* rule in regard to adverse information or own knowledge or policy considerations of which the applicants may not have been aware. If it did, it would have been on solid ground.

Unfortunately it held:

> "The decision to refuse first applicant permanent residence was for reasons set out above motivated by several factors which should not have been taken into account while some relevant factors were not taken into account at all.
>
> For all these reasons the decision of the 29th July refusing first applicant permanent residence is reviewed and set aside."

I have shown above that the Court had erred in most of its findings regarding what had to be taken into account and what had not to be taken into account. The decision of the Board could therefore not be set aside on those grounds.

The Court also refused to refer the matter back to the Board for reconsideration because the Court had held that section 26(3) of the Immigration Control Act prevented the consideration by the Board of any factors other than those specified in paragraphs (a) - (e) of subsection 3 of section 26 and in regard to those paragraphs there was no evidence or information on which the Board could rely for refusing the permanent residence permit.

The first reason, as I have shown, was based on the wrong interpretation by the Court of section 26(3). The second reason was based on the

assumption that the Board had no facts, information or knowledge which could justify refusal because Mr. Simenda, chairperson of the Board, had stated in his replying affidavit. "There was also no specific information before the Board that adversely affected the applicant's application." (My emphasis added.) This was a wrong inference drawn from the quoted paragraph.

The above-quoted sentence from par. 9 of Mr. Simenda's statement appears in a paragraph in reply to paragraph 13 of respondent Frank's founding affidavit wherein she had stated:

> "The Board failed to respond in any way to my requests conveyed in the letter from my legal practitioners dated 3 June 1997 (Annexure EF6) ..."

The letter Annexure EF6 stated *inter alia*:

> "Our client is in particular prepared to appear personally before the Immigration Control Board to respond to any specific queries that members of the Board may have regarding her application. Our client would in any event wish to deal with any information that is in your possession that reflects adversely on her application, as well as supplement her application with any further information that may be required by the Immigration Selection Board..."
> (My emphasis added.)

Mr. Simenda's affidavit in the immediately following par. 10 and 12 sets out the alleged facts on which the Board relied and the reasons for its decision.

Paragraphs 10 and 12 can be reconciled with the sentence above-quoted relied on by the Court, by assuming that the Board made use of its own expertise and knowledge of relevant facts and followed policy principles and guidelines which it believed it was entitled to do in the proper exercise of its duties and responsibilities. This the Board was entitled to do as shown above.

What the Board was not entitled to do was to fail to apply the principles of administrative justice, in particular, the *audi alterem partem* rule.

The principles of administrative justice requires that in circumstances such as the present, the Board should have disclosed such facts, principles and policies to the applicants for the resident permit and allowed an opportunity, to respond thereto by letter or personal appearance before the Board or both. This the Board had failed to do.

It must be kept in mind that Namibia only became a sovereign independent country in March 1990 and the Immigration Control Act was enacted only in 1993. The result is that the whole of Namibia is undergoing a learning process. How the Namibian Constitution and the multiplicity of old and new laws must be interpreted and applied, remains a mystery to many and at best a difficult problem, not only to most people in Government and officials in the Administration, but even to legal representatives and presiding judicial officers in Courts of law.

This is even borne out by the difference between the approach of the Board, the Court *a quo* and the Supreme Court.

The Court *a quo* misdirected itself in regard to the interpretation and application of the law and applicable procedure. That Court should have set aside the decision of the Board, but for the reason that the Board had failed to apply the *audi alterem partem* rule properly. In the premises , the application should have been remitted to the Board for a rehearing, where the applicants are given the opportunity to respond to the contents

of the aforesaid paragraphs 10 and 12 of the Board's replying affidavit.

This was not a case where exceptional circumstances existed, e.g. where there were long periods of delay, where applicant would suffer grave prejudice or where it would otherwise be grossly unfair.[5]

By not referring the matter back to the Board for compliance with the *audi alterem partem* rule, the Court has prevented the Board to consider and impose, if deemed appropriate, conditions to the residence permit, should it decide to grant the permit. In that sense it has usurped the function of the Board created by Parliament for that purpose.

The aforesaid power, is part of the Board's wide powers in considering applications for permits. It provides that the Board may make authorization for a permit "subject to any condition the Board may deem appropriate".

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[5] *W.C. Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transport Board & Ors,* 1982(4) SA 427 (AD) 449 F - H;
Daconlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange (Edms) Bpk & Others, 1983(3) SA 344 (WLD) at 369 E - H;
Local Road Transportation Board & An v Durban City Council & An, 1965(1) SA 586 (AD) 598 D - 599.

The Court *a quo* did not comment on the merits of the arguments in regard to the applicant's lesbian relationship because it assumed that the legal representative of the applicants had abandoned the issue.

Apart from this issue with which I will deal in greater detail in due course, it follows from my analysis of the judgment of the Court *a quo*, that there is at least "reasonable prospects" of success on appeal to this Court.

SECTION C: MAIN POINTS OF DISAGREEMENT WITH THE JUDGMENT OF MY BROTHER STRYDOM, C.J.:

It is in this latter regard that my view begins to differ substantially from that of my brother Strydom, C.J.

In the latter judgment it is stated:

> "Although there may be substance in Mr. Oosthuizen's submission that the Court *a quo* should have referred the matter back to the appellant Board for reconsideration, also because one of the factors on which the Court based the exercise of its discretion was its interpretation of section 26 of the Act, I am not convinced that this is sufficient to tip the scales in favour of the appellant and that this Court should therefore grant the appellant condonation. As was pointed out by the Court *a quo* there was no legal impediment against the granting of the permit as the appellant was satisfied that the first appellant has complied with the provisions of section 26(3)(a) - (f) and that strong support from notable persons was expressed in favour of the granting of the permit."

I must make the following comment:

(i) Although not altogether clear, it seems that my brother found that there were reasonable prospects of success on appeal in that there was "some substance in Mr. Oosthuizen's submission that the Court *a quo* should have referred the matter back to the appellant Board for reconsideration". However, if it was meant that there are no reasonable prospects of success on appeal, then I differ profoundly.

(ii) The remark that "I am not convinced that this is sufficient to tip the scales in favour of the appellant...", I understand to refer to the tipping of scales against the gross-negligence of the appellant Board in not filing the record for the appeal within the three months allocated by the rules but only eight months after the judgment appealed against, causing the appeal to be heard a year later. In addition the position was aggravated by a wrong statement in the affidavit by the Board's attorney wherein the latter affirmed under oath that a work permit had been granted to

applicant Frank to mitigate some of her inconvenience due to the delay caused by the said attorney's negligence.

(iii) The statement "as was pointed out by the Court *a quo* there was no legal impediment against the granting of the permit as the appellant was satisfied that the first respondent has complied with the provisions of section 26(3)(a) - (f) and that strong support from notable persons was expressed in favour of the granting of the permit". (My emphasis added.)

Neither Mr. Simenda on behalf of the appellant, nor his counsel in argument before us has ever admitted that section 26(3)(a) - (f) had been complied with. Nor did they admit that there was therefore "no legal impediment against the granting of the permit".

Even the Court *a quo* did not say or suggest that the Board "was satisfied that the first respondent has complied with the provisions of section 26(3)(a) - (f).

The Court *a quo* came to the conclusion that there was no "impediment", but as I have tried to show, that conclusion was

itself based on a wrong interpretation of the section and wrong reasons.

As far as the "strong support from notable persons" is concerned, the undated letter of recommendation of Minister Mbumba, does not allege that there are not "a sufficient number of persons already engaged in Namibia to meet the requirements of the inhabitants of Namibia...". Consequently that letter does not controvert the allegations made by Mr. Simenda in paragraphs 10.1, 10.2 and 12 of his affidavit on behalf of the Board.

(iv) It seems to me that as far as the Chief Justice is concerned, even if there were reasonable prospects of success on appeal, such factor is overshadowed by the grossness of the negligence of appellant's attorney in not having prepared and submitted the appeal record within the three months provided for such action in the Rules of the Supreme Court. Instead appellant attorney only submitted the appeal record on 9th March 2000 whereas the deadline for its submission was 24th September 1999. This according to my brother's judgment, meant that the appeal

was heard one year later than it could have been heard.

I agree that the attorney for appellant, Mr. Asino, was grossly negligent, but do not agree that this negligence justifies penalising the appellant Board to the extent that condonation for the late filing of the record is refused, notwithstanding reasonable prospects of success on appeal and the importance of the case, particularly the importance to all the parties of an authoritative decision on the issues raised.

I wish to stress the following points:

(a) The appellant Board did take the necessary steps to note an appeal and to attempt to get an authoritative decision by negotiating with respondents on agreeing to have the appeal decided by this Court, without first appealing to the full Bench of the High Court.

The appeal was duly noted on 22 July 1999.

(b) No case can be made out of negligence on the part of the appellant Board, but only on the part of the government attorney. Although the negligence of a legal representative can be imputed to his principal, this should only be done

in exceptional cases where some blame can fairly be attributed to the principal e.g. where such principal did not take reasonable steps to keep abreast of developments regarding the progress of the appeal.

The Courts are reluctant to penalise a litigant for the conduct of a legal practitioner.[6]

(c) I do not agree with respect with the statement that the default was "completely unexplained" or "was not explained at all".

Mr. Taapopi, the chairperson of the Board, stated in his supporting affidavit:

> "After consultations with the appellant's legal practitioners and the Honourable Attorney-General, I instructed that the judgment of the High Court be appealed against. …
>
> I am informed that a notice of appeal, a copy of which is annexed hereto and marked Annexure 'C' was duly filed herein on 22 July 1999. …

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6 *Regal v African Superslate (Pty) Ltd,* 1962(3) SA 18(AD) at 23C - D.

Having been informed that the said notice of appeal had been filed, I was waiting to be informed of the date on which the appeal would be argued. I did not expect the appeal to be argued in the near future, since I was under the impression that the Court rolls are quite full. ...

However, I have now been informed that the appellant's legal practitioner, Mr. Asino, did not file the record of appeal within the period required by the rules of this Honourable Court and that in terms of the said rules, the appeal is deemed to have lapsed. I refer in this regard to Mr. Asino's affidavit annexed hereto marked 'B'. Since I am not familiar with the procedures required to prosecute an appeal, I was previously unaware that my legal practitioner had not complied with them...

I humbly request the Honourable Court to condone the late filing of the record

> of appeal. I submit that the subject matter of this appeal involves complicated constitutional issues and that it is of the utmost importance for the appellant and also in the interest of justice that an authoritative judgment on those issues be obtained which will also serve as a guideline to the appellant in future..."

It is clear from the above that the appellant at all relevant times intended to appeal and instructed the Government-Attorney to take the necessary steps. The Board certainly had reason to assume that the Government Attorney would have the necessary expertise to take the necessary procedural steps.

There can therefor be no doubt that the appellant at no stage wished the appeal to lapse. Even the attorney, Mr. Asino, did provide an explanation, even though the explanation put his competence and dedication in a very bad light. He stated in his affidavit:

> "Despite the appellant's desire to shorten the appeal process, I

regrettably neglected to file the record within the three-months time period required by the Rules of this Honourable Court…

I hereby humbly apologize to the Honourable Court for failure to file the record within the stipulated period and can offer no excuse for my neglect. I know that is my responsibility to assure that all procedures are followed and all the documents are filed timeously and I have failed to do so. I can only add that my dereliction was unintentional.

I wish to inform the Court that I had informed the appellant that a notice of appeal had been filed and that I had given him no reason to believe that the requisite appeal procedures were not being followed. The responsibility for the failure to file the record timeously lies with me alone. For this reason, and for the reasons set forth in the founding affidavit, I humbly pray that this Court do not penalize

> appellant for my failure not to comply with the rules, but instead in the interest of justice to permit the appeal to proceed."

What more could this attorney say. He says that he was negligent and takes the blame without trying to make all sorts of excuses.

I have previously in this judgment explained the adjustments required after Namibian independence in 1990. The Courts have to live with these new realities. We all have to share in the new learning process and have to be patient and understanding in order to ensure that justice is done.

In the circumstances it is wrong, in my respectful view, to say that there is no explanation at all for the default and to use that together with the admitted gross negligence of an attorney, against a litigant, as justification for refusing to decide important issues of public interest on the merits.

(v) Much has been made of time lapse of more than three (3) years between the refusal of the permanent residence permit on 29th July

1997 and the hearing of the Board's application for condonation and appeal at the October 2000 session of this Court and the prejudice to the respondent because of that. It is said that "to the extension of this period the legal representative of the appellant contributed significantly". It is also stated that because of the negligence of the said representative "this appeal which could have been heard during the October 1999 session, was only heard a year later". I disagree with this apportionment of blame and must point out:

(a) It is common cause that the appellant had until 24 September 1999 to submit the appeal record.

If the appellant did so on or shortly before 24th September 1999, it would have been too late to place the matter on the roll of the Supreme Court for the session of the Court from 1 October - 5 October 1999. The earliest date for the hearing of the application for condonation was therefore during the April 2000 session.

If the parties cooperated, the application for condonation may still have been heard during the April 1999 session, particularly if the Court's indulgence was sought by the parties on the basis that the matter was urgent.

But even if the only practical date for a hearing was during the October 2000 session, the appellant's attorney could only be held responsible for a 6 months delay and not a year.

(b) During the period between judgment of the Court *a quo* on 24/06/1999 and 24 September 1999, the parties agreed, on the initiative of the appellant, to proceed directly to the Supreme Court.

(c) The attorney for the respondents, Mr. Light, did not at any stage alert appellant's attorney that he had not submitted the record as required by the Rules except on 10th February 2000, approximately seven months after the judgment and five months after the deadline for the submission of the record, when Light send a facsimile to appellant's legal practitioners, claiming the issue of the permanent residence permit in accordance with the order of the High Court of 24th June 1999.

Negotiations then followed wherein appellant's attorney attempted to obtain the cooperation of respondents and their attorneys not to oppose an application for condonation.

The attorneys for appellant and respondents are not completely *ad idem* in regard to the details of the negotiation but suffice to say, there were negotiations and these negotiations failed. When it became evident to appellant's attorney that respondents consent to an unopposed application for condonation could not be obtained, he filed the record on 9th March 2000 and the application for condonation and the reinstatement of the appeal on 14th March 2000.

(d) The decision of the appellant Board was given already on 29th July 1997. But the first respondent Frank, only filed a review application in the High Court for the review of that decision on 13th February 1998, more than six (6) months after the date of the Board's decision.

No explanation has been offered for this delay on the side of the respondent.

(e) Then on 3rd April 1998, a default judgment was wrongly granted on the application of first respondent.

Application then had to be made for the setting aside of the default judgment. Application for the setting aside was launched on 30th April 1998. The application for setting aside was not opposed by respondent. The default judgment was then set aside on 3 July 1998.

(f) Respondents only completed their review application by applying on 7 May 1999 for the joinder of Elizabeth Khaxas as 2nd applicant - approximately one (1) year and three (3) months after launching the review proceedings.

(g) The more than "three (3) years of uncertainty" is mainly due to the fact that respondent took the decision of appellant Board on review and this led to a decision in their favour in the High Court and an appeal and application for condonation to the Supreme Court.

The appellant Board has no control over the fact that the Supreme Court has only three sessions a year.

Consequently in my respectful view, only 6 months of the whole period can be attributed to the negligence of the appellant's attorney.

(vi) I agree with the critical remarks by the Honourable Chief Justice regarding Mr. Taapopi's statement in his affidavit dated 14/3/2000 in support of the application for condonation that "the Immigration Selection Board has renewed her (first respondent's) employment permit for a period of one (1) year so that she may earn a living while this Honourable Court decides the matter". This statement was denied by first respondent in her replying affidavit. As a consequence, this Court asked appellant's counsel for an explanation during oral argument and when it was confirmed that the permit was never issued, this Court requested an explanation on affidavit. In response another affidavit was filed by Mr. Taapopi where the failure to issue the

> permit was explained and justified. Part of the explanation was that the Board, unfortunately "did not follow my undertaking in my founding affidavit in the application for condonation". Mr. Taapopi is also Chairperson of the appellant board.

Mr. Taapopi missed the point altogether. In his supporting affidavit he did not "undertake" to have the permit issued, but represented to the Court that it had been issued.

He had thus misrepresented the position to this Court in his aforesaid supporting affidavit and for this misrepresentation there is no explanation.

If this misrepresentation was deliberate, it would have amounted to contempt of court and/or perjury. Unfortunately this Court only viewed the complete set of affidavits relating to this issue after the oral hearing and did not give the parties and Mr. Oosthuizen on behalf of the appellant Board the opportunity to deal with the Court's concern relating to this apparent misrepresentation.

As there was no prejudice to the respondents, the Court did not think it necessary to reconvene the Court to pursue the matter.

It may be that the aforesaid representation was negligently made in the belief at the time that it will be honoured. I cannot believe that Mr. Taapopi could think that this misrepresentation will not be discovered in view of the known participation of the first respondent and her legal representatives in the proceedings. Nothing could therefore be achieved by a deliberate misrepresentation.

In the circumstances I do not think it justified to regard the said misrepresentation as deliberate or intentional but nevertheless it is justified to regard it as a serious blemish on the manner in which the chairman of the Board, its members and the Government Attorney on their behalf, conduct their official business.

I also take into consideration that the respondents were not prejudiced by this particular misrepresentation.

It is necessary to point out in this regard that the first respondent also made a serious misrepresentation to the Board and also to the Court *a quo*, by failing to disclose that she was at the time of her application to the Board and her review application to the Court, no longer employed as a Deputy Director of CASS. This clearly misled the review Judge, who continuously relied on first respondent's position with CASS.

In the circumstances I do not regard this incident as a reason or even as one of the reasons for refusing to return the respondent's application to the appellant Board for reconsideration with the specific instruction to apply the *audi alterem partem* rule in regard to the aforesaid paragraphs 10.1, 10.2 and 12 of the replying affidavit of Mr. Simenda, a member of the appellant Board.

(vii) I have already pointed out *supra* that by not referring the matter back to the Board, the Court will in effect nullify the provision that even where the Board grants an application, it can impose any condition "the Board may deem appropriate".

(viii) The Chief Justice accepts in his judgment that the Board would have been entitled to refuse the application on the grounds stated in the above-stated paragraph 10.2 of Mr. Simenda's affidavit provided it has complied with the *audi alterem partem* rule. By allowing the order of the Court *a quo* to stand however, this Court will prevent the Board from giving effect to that consideration after applying the *audi alterem partem* rule. If this Court now substitutes its opinion for that of the Board, it would do so regardless of whether the points made by the Board in paragraph 10.1, 10.2 and 12 are in fact well-founded or not. Furthermore, the Court will take the summary course without being in possession of the information which the Board may have available and without being in a position to consider

whether or not conditions should be attached to the granting of the permit.

(ix) It is true that the respondents have lived in a state of uncertainty for three (3) years or more, but this is inherent in a situation where the one party is a citizen of another country and wishes to acquire permanent residence status, *inter alia* because she wants to legitimize and pursue a relationship, in this case a lesbian relationship, which up to the present has not been legitimized as such by the laws of Namibia and consequently not recognized by the authorities.

An issue such as the "lesbian relationship" relied on by respondents, is a very controversial issue in Namibia as in all or most of Africa and whether it should be recognized and if so to what extent, is a grave and complicated humanitarian, cultural, moral and most important, constitutional issue which must of necessity take time to resolve.

It would seem in all fairness that most of respondents' "uncertainty" and agony is caused by the non-recognition of their lesbian relationship.

In this respect it is necessary to keep in mind that none of the respondents are refugees fleeing from persecution or oppression. First respondent is a citizen of Germany, which country is generally regarded as democratic and civilized and

> probably tolerant to lesbians. That remains her home country available as such until she changes her citizenship by her own choice. Second appellant is a Namibian citizen, born and bred in Namibia where her child was born from a heterogeneous relationship. This home remains available to her and her child until she changes her citizenship by her own choice.
>
> The Court *a quo* did not deal with the issue of the "lesbian relationship" and its impact on the application for permanent residence. The Chief Justice does not deal with this issue either. How then will the uncertainty and the anguish of the respondents be removed by following the course suggested?

Although this Court, as well as the High Court, undoubtedly has wide powers to set aside the decisions of administrative tribunals and even to substitute its own decision on the merits for that of such a tribunal in appropriate circumstances, the present case is not one where the substitution of our decision for that of the Board is justified. In my respectful view, that would amount to usurping the function of the Board, entrusted to it by the Legislature of a sovereign country.

For the reasons set out above, I am of the view that there is considerable merit in the appellant's appeal. That being so, the negligence of the legal representative of the appellants should not prevent the order of the Court *a quo* to be amended by returning the application of applicants/ respondents to the Board for

reconsideration, unless the issue of the lesbian relationship justifies a different order.[7]

What remains therefore, is to deal with the issue of the respondents' lesbian relationship and its impact on the applicant's application for a permanent residence permit and the appropriate order to be made by this Court.

SECTION D: THE ISSUE OF RESPONDENTS' LESBIAN RELATIONSHIP AND ALLEGED BREACH OF THEIR FUNDAMENTAL RIGHTS

The Court *a quo* as indicated *supra*, did not directly deal with the issue raised by respondents because it understood the respondents' counsel to have conceded that the issue of the lesbian relationship became irrelevant when Mr. Taapopi on behalf of the Board stated that the "lesbian relationship" was regarded as neutral and played no role in its decision.

In argument before this Court, Ms. Conradie, who appeared before us for respondents, submitted that the Court *a quo* misunderstood the attitude of Mr. Light, who appeared for respondents in the Court *a quo*. Ms Conradie proceeded to argue that the issue of the "lesbian relationship" had to be considered and decided upon by this Court, unless the appellant's application for condonation is rejected on other grounds, making it unnecessary to consider and decide the issue of the lesbian relationship and particularly its impact on the application by first respondent for a permanent residence permit.

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[7] *Civil Practice of the Supreme Court of South Africa* by Van Wyk *et al*, 4th ed. at 901.

In the first respondent's first application to the Board for permanent residence in 1996 there was no mention of the lesbian relationship.

In the second application of 25th March 1997, first respondent stated:

> "Since 1990 I have lived together in Windhoek with my life partner, Elizabeth Khaxas, and her son Ricky Khaxab. We are living together as a family and I have taken on parental responsibilities for Ricky. Although Ms. Khaxas and I cannot officially marry we have committed ourselves to each other and wish to share the rest of our lives together in Namibia ..."

A letter of support from Elizabeth Khaxas broadly affirming and supporting the application was attached.

When the application was refused, the following allegations were made in the application to the Court for the review of the Board's decision in regard to the respondents' lesbian relationship:

> "17. I will be severely prejudiced should I be required to leave Namibia. I have made my life in Namibia. I reside here with my life partner and her son who are both Namibian citizens. My present residence in Namibia is uncertain, because I could be refused an employment permit at any time in the future. In that event, Elizabeth and her son would then have to try and live with me in another country. This would mean that I would have to leave my

home and Elizabeth and Ricky would have to leave the country of their birth and nationality. I do not know where we would go or which country would admit us as a family. I respectfully submit that the Immigration Selection Board failed to take this relevant factor into account.

18. If I was involved in a heterosexual relationship with a Namibian citizen we would have been able to marry and I would have been able to reside in Namibia and apply for Namibian citizenship in terms of Article 4(3)(aa) of the Constitution. This is not possible because of our sexual orientation. I therefore respectfully submit that the Immigration Selection Board has failed to take this relevant factor into account, or to give it sufficient weight. I respectfully submit that its decision for these reasons has violated my rights to equality and freedom from discrimination guaranteed in article 10, privacy guaranteed in article 13(1) and the protection of the family guaranteed in article 14 of the Constitution."

It must be noted that neither first respondent in her 1977 application to the Board, nor 2nd respondent in her letter of support, had alleged that they rely on any fundamental right in support of first respondent's application.

The Board consequently was not alerted to any specific fundamental rights on which first respondent and Khaxas relied and no issue was made at the time of fundamental human rights. It was also not then or even in the review application claimed that the applicant Frank was the spouse of

Khaxas in terms of section 26(3)(g) and therefore entitled to be granted a permanent residence permit.

Had the first respondent then claimed that they relied on the fundamental right to equality, non-discrimination, family, dignity and privacy, the Board may have given these matters more attention and at least take a stand on these issues.

I must emphasize at the outset that the argument before us on behalf of respondents was not that the Board had infringed their fundamental rights as individuals in that it had e.g. failed to deal with them on a basis equal to other unmarried heterosexual individuals. The argument was that the Board had failed to accord their lesbian relationship equal status and privilege with that accorded men and women who are legally married and by this failure, the Board had violated their fundamental right to equality and non-discrimination and their fundamental rights to live as a family and to privacy and freedom of movement.

Before I deal with the specific submissions on behalf of respondents in regard to the alleged infringement of their fundamental rights and freedoms, it is apposite to first deal with the general approach of the Court in regard to claims that a litigant's fundamental human rights have been infringed.

1. THE NECESSARY PARTIES

A litigant approaching the Court claiming a remedy for an alleged infringement of a fundamental right or freedom, must ensure that the necessary parties are before Court.

The joinder of all the necessary parties is a principle of procedure in the Courts of law which can rightly be described as trite law.[8]

But this principle has added significance where, as in the instant case an applicant relies on Art. 5 of the Namibian Constitution, read with Article 25(1)(a) and (b) and where the remedy or part thereof may be that the Court would order Parliament, or any subordinate legislative authority or the Executive and agencies of Government, to remedy the particular defect within a specified period.

So e.g. a Court will decline to make an order against the Minister of Home Affairs, if such Minister is not a party to the proceedings. Similarly, the Court should not declare a law of parliament unconstitutional and/or to be amended, unless at least the State or the Government is represented in Court, at least by a Minister, whose Ministry is directly affected.[9]

2. THE BURDEN OF PROOF WHEN A PERSON ALLEGES AN INFRINGEMENT OF A FUNDAMENTAL RIGHT OR FREEDOM

[8] *The Civil Practice of the Supreme Court of South Africa* by Van Winson *et al*, 4th ed, at 170, 176
Collin v Toffie, 1944 AD 45; *Fourie v Lombard*, 1966(3) SA 155 (O)

[9] Compare the cases of:
National Coalition for Gay & Lesbian Equality & Ors. v Minister of Home Affairs & Ors., 1999(3) SA 173 (CPD)
National Coalition for Gay and Lesbian Equality v Minister of Justice & Others, 1999(1) SA 6 (CC)

I proceed from the position that there is an important resemblance between the burden of proof in the case of fundamental rights compared with fundamental freedoms, but also an important difference.

The Namibian Constitution makes a distinction between the fundamental rights contained in Articles 6 - 20 and the freedoms (or rights to freedoms) enumerated in Art. 21(1).

In regard to the aforesaid freedoms there is a general qualification contained in sub-article (2) of Art 21 which provides that the freedoms must be exercised subject to the laws of Namibia, but places limitations on the laws to which the freedoms are subject.

The South African Constitution, both the interim Constitution of 1993 and the final Constitution of 1996 contained in the Constitution of the Republic of South Africa Act No. 108 of 1996, makes no distinction between fundamental rights and freedoms as is the position in Namibia. The general qualification clause in the South African Act applies to both fundamental rights and freedoms.

The resemblance in regard to fundamental rights and freedoms in terms of the Namibian Constitution is this:

> In both cases, whether we are dealing with a fundamental right or freedom, the applicant will have the burden to allege and prove that a specific fundamental right or freedom has been infringed. This will

necessitate that the applicant must also satisfy the Court in regard to the meaning, content and ambit of the particular right or freedom.[10]

In regard to fundamental rights, the burden of proof remains throughout on the applicant to prove that a fundamental right has been infringed at least in regard to all those fundamental rights where no express qualification or exception is provided for in the wording of the fundamental rights such as in Articles 6 - 12, 14 and 18. Where an express qualification or exception is provided for as in Articles 13, 17(1), 20(3) and 20(4), the burden of proof may shift as in the case of the fundamental freedoms. But this question has not been argued and need not be decided in this case.

The position in regard to the burden of proof in cases of alleged infringements of fundamental human rights is the same in Zimbabwe where the Chief Justice said:

> "I consider that the burden of proof that a fundamental right of whatever nature has been breached is on him who assert it."[11]

In the case of the fundamental freedoms provided for in Art. 21(1) of the Namibian Constitution, the initial burden is on the person alleging an infringement to prove the infringement and as part thereof, satisfy

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[10] *Namunjepo & Ors v Commanding Officer, Windhoek Prison & A*, 2000(6) BCLR 671 (NmS) 671 at 677 J - 678 C and 678 I - J and the decisions referred to therein.
S v Namundjebo, NmHC, May 1998, unreported, p 47 - 49.
S v Vries, 1996(2) SACR 638 (Nm) at 663d - 667i
Kauesa v Minister of Home Affairs & Ors, 1996(4) SA 965 (NmS) at 979J - 980C.

[11] *Catholic Commission for Justice and Peace v Attorney-General, Zimbabwe*, 1993(2) SACR432 (ZS) at 440 I.
S v Van den Berg, 1995(4) BCLR 479 (Nm) at 497 B.

the Court in regard to the meaning, content and ambit of the fundamental freedom.

This initial onus corresponds to the "initial onus" referred to by Chaskalson, P, in the decision of the South African Constitutional Court in *State v Makwanyane and Another* [12].

Once the initial burden is discharged, the burden then shifts to the party contending that the law, regulation, or act in question, providing the exception or qualification, falls within the reasonable restrictions on the freedom provided for in Sub-article (2) of Art. 21.

3. THE MEANING, CONTENT AND AMBIT OF A FUNDAMENTAL RIGHT OR FREEDOM

3.1 The significance of the wording

In my respectful view, the starting point in interpreting and applying a constitution, and establishing the meaning, content and ambit of a particular fundamental right, or freedom, must be sought in the words used and their plain meaning. This principle is endorsed by *Seervai* in his authoritative work "*Constitutional Law of India*" where he quotes with approval from the "*Central Provinces case* (1939) FCR 18 at 38:

> "...for in the last analysis the decision must depend upon the words of the Constitution which the Court is interpreting and since no two constitutions are in identical terms, it is extremely unsafe to assume that a decision on

[12] *State v Makwanyane and Another,* 1995(3) SA 391 (CC) at 410 B - 435 D - 436 A.

> one of them can be applied without qualification to another. This may be so even when the words or expressions are the same in both cases, for a word or phrase may take a colour from its content and bear different senses altogether."[13]

But I am mindful of the dictum of this Court in the *Namunjepo*-decision where the learned Chief Justice Strydom said:

> "A court interpreting a Constitution will give such words, especially the words expressing fundamental rights and freedoms, the widest possible meaning so as to protect the greatest number of rights..."

The "widest possible meaning" however, means no more than what Kentridge, J.A. said in the case of *Attorney-General v Moagi.*[14]

He declared: "... a Constitution such as the Constitution of Botswana, embodying fundamental rights, should as far as its language permits be given a broad construction...".

And as Friedman, J. comments in *Nyamkazi v President of Bophuthatswana*, "this is in my view the golden mean between the two approaches" meaning the approaches of the "positivist" and "libertarian" schools. (My emphasis added.)

I am also mindful of the many Namibian decisions where the basic approach in interpreting a constitution has been expressed in poetic

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13 Seervai *Constitutional Law of India,* 3rd ed. at 104
S v Van den Berg, 1995(4) BCLR 479 Nm at 496 B - D

14 *Attorney-General v Moagi,* 1982(2) Botswana LR 124 at 184 - 5
1992(4) SA 540 BGD at 566 J - 567 A

and stirring language. So e.g. it was said in *Government of the Republic of Namibia v Cultura 2000,* :[15]

> "It must be broadly, liberally and purposively 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."
> (My emphasis added.)

But as pointed out by Seervai, citing what was said by Gwyer, C.J.,

> "… a broad and liberal spirit should inspire those whose duty it is to interpret the constitution, but I do not imply by this that they are free to stretch and pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purposes of supplying omissions or correcting supposed errors. A Federal Court may rightly reflect that a Constitution of Government is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat.*"
> (My emphasis added.)

This dictum was quoted by this Court, apparently with approval, in the decision of *Minister of Defence, Namibia v Mwandingi*.[16]

In the aforesaid decision, this Court also relied *inter alia* on a dictum by Lord Wilberforce in *Minster of Home Affairs & An v Fisher & An*, wherein the learned Law Lord had said:

> "A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement

[15] *Government of the Republic of Namibia v Cultura 2000* 1994(1) SA 407 (NmSC) at 418 F - G

[16] *Minister of Defence, Namibia v Mwandingi* 1992(2) SA 355 (NmS) at 362 E.

> in a Court of Law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition of the character and origin of the instrument, and to be guided by giving full recognition and effect to those fundamental rights and freedoms with a statement of which the constitution commences..."
> (My emphasis added.)

Kentridge, A.J., who wrote the unanimous judgment of the South African Constitutional Court in the *State v Zuma*, quoted with approval the following passage from a judgment of Dickson, J., (later Chief Justice of Canada) in the decision *R v Big M. Drug Mart Ltd:*

> "The meaning of a right of freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view this analysis is to be undertaken, and the purpose of the rights or freedom in question is to be sought by reference to the character and larger objects of the charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concept enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be ... a generous rather than legalistic one, aimed at fulfilling the purpose of a guarantee and the securing for individuals the full benefit of the Charter's protection."[17]

Kentridge, A.J., also pointed out in *S v Zuma & Ors* that "it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean..."[18]

In the same decision, Kentridge said:

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17 *R v Zuma & Ors,* 1995(2) SA 642 CC, at 651 F - G
18 IBID, at 363 F - I

> "Both Lord Wilberforce and Dickson, J., later Chief Justice, of Canada, had emphasised that regard must be had to the legal history, traditions and usages of the country concerned, if the purposes of its constitution must be fully understood. This must be right."[19]
> (My emphasis added.)

The dictum was again approved by the Constitutional Court in *State v Makwanyane and Another* although Chaskalson, P., in his judgment added:

> "Without seeking in any way to qualify anything that was said in the *Zuma*'s case, I need say no more in this judgment than that s 11(2) of the Constitution must not be construed in isolation, but in its context, which includes the history and background to the adoption of the Constitution, other provision of the Constitution itself and, in particular, the provisions of chap 3 of which it is part. It must also be construed in a way which secures for 'individuals the full measure' of its protection.[20]

It was also pointed out in the latter decision that background material, such as the reports of technical committees which advised the Multi-party negotiating process, could provide a context for the interpretation of the Constitution.[21]

In my respectful view, in Namibia, the 1982 Constitutional Principles validated by international agreement and resolutions of the Security Council will qualify as such background material as well as the deliberations of the technical committees and the elected Constitutional Assembly itself.[22]

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[19] *R v Zuma & Ors,* 1995(2) SA 642 CC, at 651 F - G

[20] *State v Makwanyane,* 1995(3) SA 391 AT 403G - 404A

[21] IBID, 404F - 407E.
Constitutional Law of South Africa, Chaskelson *et al*, 11 - 18 and 11 - 17

[22] *State v Heita & An, 1992 NR 403 HC, at 405H - 406G*

It follows from the above that when a Court interprets and applies a constitution and adheres to the principles and guidelines above-stated, a "purposive" interpretation also requires that a Court has regard to "the legal history, traditions and usages of the country concerned, if the purposes of its constitution must be fully understood".

To sum up: The guideline that a constitution must be interpreted "broadly, liberally and purposively", is no license for constitutional flights of fancy. It is anchored in the provisions of the Namibian Constitution, the language of its provisions, the reality of its legal history, and the traditions, usages norms, values and ideals of the Namibian people. The Namibian reality is that these traditions, usages, norms, values and ideals are not always "liberal" and may be "conservative" or a mixture of the two. But whether or not they are "liberal", "conservative" or a "mixture of the two, does not detract from the need to bring this reality into the equation when interpreting and applying the Namibian Constitution.

3.2 The value judgment

This Court has recently, after a comprehensive review of decisions in Namibian Courts since independence, held that the "general consensus of these judgments is that in order to determine whether there is an infringement of Art. 8(2)(b) involves a value judgment based on the current values of the Namibian people".

The Court went on to say:

> "… That, in my opinion, presupposes that such exercise is undertaken to give content and meaning to the words used in the Article. Once this is done there is no basis on which the legislation which is in conflict therewith can be found to be constitutional and in that sense all agreed that the Article is absolute. Lastly it was accepted in all these cases that the people of Namibia share basic values with all civilized countries and for that reason it is useful and important to look at interpretations of other jurisdictions although the determining factor remains the values expressed by the Namibian people as reflected, *inter alia,* in its various institutions."[23]

I must make the following comments:

(i) Although this Court in *Namunjepo* did not expressly state that it accepts the aforesaid "consensus" as the binding case law in Namibia in a matter of this nature, I assume that it did.

(ii) I understand the explanation regarding the "absolute" character of the article to be that the article is only "absolute" in the sense that there is no clause of general qualification or exception applicable to it as is the position in the case of the "freedoms" and also no specific qualification or exception contained in the article itself or in any other part of the Namibian Constitution. The terminology in Article 8 does not define the fundamental right precisely. For that reason the true meaning, content and ambit must thus be ascertained *inter alia* by reference to the current values of Namibians as found in

[23] *Namunjepo & Ors v Commanding Officer, Windhoek Prison & An.,* 2000(6) BCLR, 671 NmS, 678 F - I

the Namibian Constitution as well as Namibian institutions.[24] Whether or not an act or omission constitutionally violates the provision, is mostly a question of degree and proportionality.

(iii) This Court also referred in this regard to the summary of the law regarding such value judgment as contained in *State v Tcoeib* and I assume that summary of the law to have been acceptable to this Court.

The summary contains the principles and guidelines which I believe are applicable whenever the Court must make a value judgment in regard to fundamental rights and/or freedoms which are not clearly defined as is the case in Articles 7, 8, 10, 13 and 14.

It reads as follows:

> "(a) When the Court must decide whether or not a law providing for a particular punishment is cruel, inhuman or degrading and thus in conflict with article 8 of the Namibian Constitution and whether such law and such punishment is therefore unconstitutional and forbidden, the Court must have regard to the 'contemporary norms, aspirations, expectations, sensitivities, moral standards, relevant established beliefs, social conditions, experiences and perceptions of the Namibian people as expressed in their national institutions and Constitution', as well as the consensus of values or 'emerging consensus of values' in the 'civilised international community'.

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[24] *Ex Parte Attorney-General: In re corporal Punishment,* 1991(3) SA 76 (NmS)

(b) The resultant value judgment which the Court must make, must be objectively articulated and identified, regard being had to the aforesaid norms, etc., of the Namibian people and the aforesaid consensus of values in the international community.

(c) Whilst it is extremely instructive and useful to refer to, and analyse, decisions by other Courts such as the International Court of Human Rights, or the Supreme Court of Zimbabwe or the United States of America, the one major and basic consideration in arriving at a decision involves an enquiry into the contemporary norms, aspirations, expectations, sensitivities, moral standards, relevant established beliefs, social conditions, experiences and perceptions of the Namibian people.

(d) In order to make an objective value judgment, an enquiry of some sort is required, which must at least comply with the mandatory provisions of the Supreme Court Act and the High Court Act as well as with the elementary requirements for a judicial tribunal in deciding issues of fact and law in any proceeding" (at 286j - 287d)."[25]

(e)

An example of a provision for a fundamental right which is indeed "absolute" and where no value judgment is brought into the equation is that part of Article 6 which reads as follows:

> "... No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No execution shall take place in Namibia."

(iv) The "institutions" referred to were also described in the decision of the High Court in *State v Tcoeib, supra.* The *Shorter*

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[25] *Namunjepo case, supra,* at p. 676E - I.

Oxford English Dictionary was referred to wherein the following definition appears:

> "an established law, custom, usage, practice, organization or other element in the political and social life of the people; a well-established or familiar practice or object; an establishment, organization or association, instituted for the promotion of some object, especially one of public utility, religion, charitable, educational, etc."

The Namibian parliament, courts, tribal authorities, common law, statute law and tribal law, political parties, news media, trade unions, established Namibian churches and other relevant community-based organizations can be regarded as institutions for the purposes hereof.[26]

In this Court's judgment in *S v Namunjepo*, it was also accepted that "Parliament, being the chosen representatives of the people of Namibia, is one of the most important institutions to express the current day values of the people.".

(v) The value judgment, as stated in S v Vries, "can vary from time to time but which is one not arbitrarily arrived at but which must be judicially arrived at by way of an attempt to give content to the value judgment by referral to the prevailing norms which may or may not coincide with the norms of any particular judge. As was pointed out in *Coker v Georgia* 433 US 584 (1977) at 592 these judgments:

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[26] Compare: *S v Tcoeib,* 1993(1) SACR 274 Nm at 284 d - e

> 'should not be, or appear to be, merely the subjective views of individual justices; judgment should be informed by objective factors to the maximum possible extent.'"[27]

(vi) The objective factors can be derived from sources which include, but is not limited to: the Namibian Constitution; all the "institutions" of Namibia as defined, *supra,* including: debates in parliament and in regional statutory bodies and legislation passed by parliament; judicial or other commissions; public opinion as established in properly conducted opinion polls; evidence placed before Courts of law and judgments of Court; referenda; publications by experts.

The relevance and importance of public opinion in establishing the current or contemporary values of Namibians when the Court makes its value judgment, has been discussed in various decisions, including the decision in *State v Vries*, referred to *supra*. To avoid any misunderstanding, I reiterate what I said in *State v Vries* in this regard:

> "In my respectful view the value of public opinion will differ from case to case, from fundamental right to fundamental right and from issue to issue. In some cases public opinion should receive very little weight, in others it should receive considerable weight. It is not a question of substituting public opinion for that of the Court. It is the Courts that will always evaluate the public opinion. The Court will decide whether the purported public opinion is an informed opinion based on reason and true facts; whether it is artificially induced or instigated by agitators seeking a political power base; whether it constitutes a mere 'amorphous ebb and flow of public opinion' or whether it points to a permanent trend, a change in the structure and

[27] S v Vries, 1996(2) SACR 638 (Nm) at 641 c - d

> culture of society... The Court therefore is not deprived of its role to take the final decision whether or not public opinion, as in the case of other sources, constitutes objective evidence of community values..."[28]

The methods of which a Court can avail itself to obtain the necessary facts for the purpose of the enquiry, includes, but is not limited to: taking judicial notice of notorious facts; testimony in *viva voce* form before the Court deciding the issue; facts placed before the Court by the interested parties as common cause; the compilation of special dossiers compiled by a referee in accordance with the provisions of Article 87(c) read with Article 79(2) of the Namibian Constitution and sections 15 and 20 of the Supreme Court Act and Rule 6(5)(b) of the Rules of the Supreme Court and Rule 33 of the High Court Rules[29].

(vii) The footnote by the Supreme court in *State v Tcoeib* to the effect "that no evidential enquiry is necessary", does not deny that an enquiry by the Court is necessary. Furthermore, it does not necessarily mean that an "evidential" enquiry will not be appropriate or useful on occasion.[30]

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[28] *State v Vries,* IBID, 658.

[29] See *Namunjepo & Ors v Commanding Officer, Windhoek Prison & An,* Nm, May 1998, unreported, p. 43 - 44. See also the Supreme Court judgment, *supra*, 678 H.

[30] *S v Tcoeib*, the Supreme Court judgment, *supra*, at 398 I, footnote 11. *Namunjepo & Ors v Commanding Officer, Windhoek Prison & An,* the Supreme Court Case, *supra,* at 680 G

At any event, the opinion voiced in the said footnote appears to be an obiter opinion and consequently need not be followed by this Court.

In my respectful view, it should not be followed if it is construed to mean that an "evidential" enquiry is impermissible. I say this for the following reasons: no reasons whatever were given for the remark; it is not clear what was meant by the remark; the point was not raised at the hearing of the appeal and no argument was addressed to the Court on this point.

If an evidential enquiry is held to be impermissible, such finding will make nonsense of the principle that consideration must be given to the "contemporary norms, aspirations, expectations, sensitivities, moral standards, relevant established beliefs, social conditions, experiences and perceptions of the Namibia people as expressed in their national institutions and constitution".

Berker, C.J., in his separate but concurring judgment in *Ex Parte Attorney General, Namibia: In re: Corporal Punishment by Organs of State,* 1991(3) SA 76 Nm, stated that

> "the one major and basic consideration in arriving at a decision involves an enquiry into the generally held norms, approaches, moral standards, aspirations and a host of other established beliefs of the people of Namibia".[31]

[31] 1991(3) SA 76, quoted in *S v Vries*, 1996(2) SACR, 638 (Nm) at 651g - 652a

I cannot imagine that Berker ever meant that an evidential enquiry is excluded.

One wonders how the dynamic nature of the values and the changes inherent therein, underlined by both Mahomed, A.J.,as he then was, and Berker, C.J., can be established, if an evidential enquiry is not permissible at all.[32]

In most cases the sources and means enumerated herein *supra*, other than an "evidential enquiry" may suffice, but in some instances an "evidential enquiry" may be the only appropriate way to achieve the purpose of establishing the contemporary norms and values etc.

If the Court then refuses or fails to launch an evidential enquiry, it will fall into the trap of substituting its own subjective views for an objective standard and method. The requirement to consider the Namibian norms and values will then become a mere cliché to which mere lip service is paid.

This will be a travesty of justice, particularly if at the same time, the Courts refer to and rely primarily on the alleged contemporary norms in the USA and Europe.

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[32] *S v Vries,* 1996(2) SACR, 638 (Nm) at 652d - 653a, 655b - 659I *Namunjepo & Ors v Commanding Officer Windhoek Prison & An.* the Supreme Court decision referred to, *supra*, at p. 680 G - J.

(viii) It follows from the above that what was said in the decisions regarding the interpretation and application of Art. 8 of the Namibian Constitution applies *mutatis mutandis* to the interpretation of all those articles which are not clearly defined and which are relative and not "absolute" in that sense. In the result the question to be answered in each case where the Court has to make a value judgment, is whether or not the alleged infringement "constitutionally" violates the fundamental right or freedom and is therefore "constitutionally impermissible".

3.3 The important difference between the provisions in the South African Constitution and the Namibian Constitution relating to the role of the Courts and other tribunals or forums in interpreting and giving effect to the Constitution:

Art. 39(1) and (2) of the South African Constitution states:

(1) When interpreting the Bill of Rights, a Court, tribunal or forum -

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

(b) must consider international law; and

(c) may consider foreign law.

(2) When interpreting any legislation, and when developing the common law or customary law or legislation, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights..."
(My emphasis added.)

It must be noted that the duty is not only placed on Courts but also on tribunals or forums.

And it is envisaged, so it seems, that all of these institutions will engage in interpreting the Bill of Rights and develop the common law or customary law and legislation. When they interpret the Bill of Rights, they must all "promote the values which underlie an open and democratic society based on human dignity, equality and freedom".

The provision in the South African Constitution leaves no room for the positivist school of thinking in the interpretation and application of the constitution and not even room for a "golden mean" between the "positivist" and "libertarian" schools as expressed by Friedman, J. in *Nyamkazi v President of Bophuthatswana*, referred to *supra*.

It seems to me that in Namibia, the "golden mean" should not be crossed.

In South Africa, the judicial authority is stated in Art. 165 to vest exclusively in the Courts but as I have pointed out Art. 39 vests wide

powers, not only in the Courts, but in "tribunals" or "forums" which appear to have "judicial" powers when "interpreting" the "Bill of Rights".

In regard to the judicial authority, the Namibian Constitution is ambiguous. The judicial authority is vested in the Namibian Courts by Article 78(1). But 78(2) makes their independence subject to the Constitution and the law. Although Art. 78(2) provides that the Cabinet or Legislature or any other person may not interfere with the Courts in the exercise of their judicial functions, Art. 81 provides that a decision of the Supreme Court is no longer binding if reversed by its own later decision or if contradicted by an Act of Parliament. This means, so it would appear, that Parliament is not only the directly elected representative of the people of Namibia, but also some sort of High Court of Parliament which in an exceptional case, may contradict the Supreme Court, provided of course that it acts in terms of the letter and spirit of the Namibian Constitution, including all the provisions of Chapter 3 relating to fundamental human rights.

Although there can be no doubt of the power of the Namibian High Court and Supreme Court to declare any statute, or part thereof, unconstitutional in terms of Article 5, it seems that Parliament has the last say.[33] Furthermore, as acknowledged in this Court's decision in *Namunjepo and Others,* Parliament is one of the most important institutions to express the present day values of the Namibian people.

[33]See the decision of the Full Bench of the High Court in *Namunjepo & Ors v The State,* June 1998, unreported

Much has been said in the decisions referred to regarding democratic values, but it should not be forgotten that perhaps one of the most important democratic values enshrined in the Namibian Constitution is that contained in Article 1(2) which reads:

> "All power shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State."[34]

It follows from the above that the Namibian Courts are in a much weaker position than their counterparts in South Africa particularly in regard to "developing the common law or customary law or legislation".

It is also significant that Art. 39 of the South African Constitution provides for the Courts, tribunals or forums to consider international law and foreign law, but nothing is said about its own contemporary values, norms, aspirations, expectations and sensitivities as embodied in its institutions, other than the constitution.

At least the Namibian courts have from the very beginning determined that in interpreting and applying the fundamental rights in Namibia, the value judgment that it has to make must take cognisance in the first place of the traditions, values, aspirations, expectations and sensitivities of the people of Namibia.

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[34]The High Court decision in the *Namunjepo* case, unreported, July 1998, points 8, pp. 29/37

There can be no doubt about the need to apply this principle of interpretation in Namibia. A refusal or failure to do so, would strengthen the perception that the Courts are imposing foreign values on the Namibian people. This will bring the Courts as well as the Constitution into disrepute and undermine the positive role it has played in the past and must continue to play in the future in regard to the maintenance and development of democratic values and fundamental human rights.

One of the problems in Namibia to date has been to apply this principle in practice.

I conclude this part by quoting from a comment by Justice White in the American case of *Bowers, Attorney-General of Georgia v Hardwich et al* referred to in the recent majority decision of the Zimbabwe supreme Court in *S v Banana:*

> "The court is most vulnerable and come nearest to illegitimacy when it deals with Judge-made constitutional law having little or no cognisable roots in the language or design of the constitution."[35]

4. THE CASE MADE BY THE RESPONDENTS ON THE ALLEGED INFRINGEMENT OF THEIR BASIC HUMAN RIGHTS AND FREEDOMS:

4.1 Infringement of rights to family life:

Although the respondents alleged that they are lesbians in that "they are emotionally and sexually attracted to women", they did not allege

[35] *S v Banana,* 2000(2) SACR 1 (ZSC) at 49H

that they are "spouses" and that the board should have acted in terms of section 26(1)(g) to grant a permit to first respondent. This subsection of the Immigration Control Act provides that the board may grant a permanent residence permit on the ground that "he or she is the spouse … of a person permanently resident in Namibia…"

They admit that they are not married and that they cannot marry in terms of the law although they would have married if the law provided for such marriage.

They also do not ask for any particular law or part of such law to be declared unconstitutional. In any case they have not joined the State or Government as a party by e.g. joining the Minister of Home Affairs as a party.

What we have then is a complaint that the Immigration Selection Board should have given them equivalent status to that of spouses in a lawful marriage and as members of a family.

However, it must be pointed out at the outset that this Court has declared in the recent judgment in *Myburg v The Commercial Bank of Namibia* that pre-independence statutes remain in force until declared unconstitutional by a Court of Law. As far as the common law is concerned, any provision of the common law in conflict with the Namibian Constitution, is *ipso jure* invalid as from the date of entering into force of the Namibian Constitution and any declaration by the Court to this effect, merely confirms this position. However in regard

to post-independence statutes or government actions which "abolishes or abridges the fundamental rights or freedoms" conferred by Chapter 3, the position is slightly more complicated for the following reason: The first part of Art. 25 provides that although any such law or action is invalid to the extent of the contravention, "a competent Court may, instead of declaring such law or action invalid, shall have the power and the discretion in an appropriate case to allow Parliament or any subordinate legislative authority, and the Executive and 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 that 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 is the shorter, such impugned law or action shall be deemed to be valid."

The pre-independence statutes regarding the legislation and recognition of marriage such as the Marriage Act 25 of 1961 will consequently remain the law in force until a declaration of unconstitutionality.[36]

The Board would consequently have been within its legal rights to regard marriages as those recognized in the aforesaid pre-independence laws.

As far as the Namibian Constitution itself is concerned, the marriages which in terms of Article 4(3) qualify a spouse of a citizen for

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[36] *Myburgh v The Commercial Bank of Namibia*, NmS, 28/12/2000, not reported.

citizenship, is clearly a marriage between a man and woman, that is a heterosexual marriage, not a homosexual marriage or relationship.

For this purpose a marriage under customary law is deemed to be a marriage, provided that Parliament may enact legislation to "define the requirements that need to be satisfied".

Although homosexual relationships must have been known to the representatives of the Namibian nation and their legal representatives when they agreed on the terms of the Namibian Constitution, no provision was made for the recognition of such a relationship as equivalent to marriage or at all. If follows that it was never contemplated or intended to place a homosexual relationship on an equal basis with a heterosexual marital relationship.

The reference to "spouse" in sub-article (3)(a)(bb) of Article 4 also clearly refers to the spouse in a heterosexual marriage.

The concession was thus correctly made by counsel for respondents to the effect that not only can they not legally marry, but that first respondent cannot claim citizenship under Art. 4(3) of the Namibian Constitution.

It follows then that when Namibia's Parliament enacted the Immigration Control Act in 1993, it used the word "spouse" in

subsection 3(g) of section 26, in the same sense as it is used in the Namibian Constitution.

In South Africa a similar expression in the Aliens Control Act was regarded as connoting a married person, not partners in same-sex relations.[37]

In regard to Article 14, Counsel for respondents conceded that while Article 14(1) of the Namibian Constitution only refers to heterosexual marriages, sub-article (3) is not limited to such a family. I do not agree.

In regard to the protection of the "family", the Namibian Constitution in sub-article (3) of Article 14 of the said Constitution, provides for the protection of the family as a fundamental right in regard to which the duty to protect is laid upon Society and the State. But the "family" is described as the "natural" and "fundamental" group unit of society. It was clearly not contemplated that a homosexual relationship could be regarded as "the natural group unit" and/or the "fundamental group unit".

Sub-article (1) and (2) of Article 14 make it even clearer what is meant by "family". It says: "Men and women of full age, without any limitation as to race, colour, ethnic origin, nationality, religion, creed or social or economic status, shall have the right to marry and found

[37] *Natural Coalition for Gay and Lesbian Equality & Ors v Minister of Home Affairs and Ors,* 2000(2) SA 1 (CC) at 20 E - 21 C.

a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution".

The marriage is between men and women - not men and men and women and women.

> "(2) Marriage shall be entered into only with the free and full consent of the intending spouses."

The word "spouses" are clearly used in the same sense and context as in 4(3)(a)(bb) of the Constitution.

In the recent decision of this Court in *Myburgh v Commercial Bank,* the Court also dealt with Art. 14. It was assumed that the Article dealt with marriage between men and women. Art. 14 clearly does not create a new type of family. The protection extended is to the "natural and fundamental group unit of society as known at the time as an institution of Namibian society.

The homosexual relationship, whether between men and men and women and women, clearly fall outside the scope and intent of Article 14.

The African Charter on Human and Peoples' Rights which was adopted by the African Heads of State and Government in Nairobi, Kenya, on 27th June 1981 and which entered into force on 21st October 1986 in accordance with Art. 63 of the Charter, provides in Article 17.3 that:

> "the promotion and protection of morals and traditional values recognized by the community shall be the duty of the State."

Art. 18 provides:

> "18. 1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and morals.
>
> 2. The State shall have the duty to assist the family, which is the custodian of morals and traditional values recognized by the community..."
> (My emphasis added.)

It must be noticed that the wording in 18.1 is almost identical to that used in Art. 14.3 of the Namibian Constitution.

Our Art. 14 is also similar to Art. 16 of the United Nations Universal Declaration of Human Rights. And as the writer Heinze concedes in his book - Art. 16 "clearly refers to the heterosexual paradigm".[38]

The International Covenant on Civil and Political rights also relied on by respondents' counsel, has almost identical provisions in its Article 23 in regard to the "family" than the Namibian Constitution in its Art. 14. The only difference is that the sequence of the sub-paragraphs have been changed in the Namibian Constitution.

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[38] Heinze, *Sexual Orientation: A Human Right,* Chapter 2, p. 34, 39 last par.

As pointed out in this Court's decision in *Namunjepo & Others v Commanding Officer, Windhoek Prison & Others,* the Namibian Parliament on 28/11/1994 acceded to this Covenant.[39]

It should be noted in passing that this Covenant in its Articles dealing with the prohibition on discrimination, specifies "sex" as one of the grounds on which discrimination is prohibited but not "sexual orientation".

Art. 14.3 of the Namibian Constitution apparently gave effect to or was influenced by Art. 16 of the said Charter, Art. 18.1 of the African Charter and Art. 23 of the International Covenant on Civil and Political Rights.

Counsel for respondents referred us to some decisions in American and European Courts.

The majority decision in *Braschi v Stahl Associates Company,* (1989) 74 NY 2d 201, relied on, was not a decision interpreting the American Constitution but New York City Rent and Eviction Regulations. It dealt with American society, not African or Namibian society and stressed repeatedly that the Court dealt with the item "in the context of eviction".

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[39] The *Namunjepo* decision, *supra,* 682.

The Court cannot interpret the Articles of the Namibian constitution by comparing it with Regulations for rent and eviction purposes in the U.S.A.

The House of Lords decision in *Fitzpatric v Sterling Housing Association Ltd.* (1999) 4 All ER 705 (HL) relied on by counsel, again dealt with the term "family" as used in the Rents Act.

For the same reason as stated in regard to the *Braschi*'s decision it is not very helpful to decide what was meant by the term "family" in the Namibian Constitution.

Counsel further contended that respondents and second respondent's minor son constitutes a family for the purposes of Article 14(3).

The minor son, is not born of a marriage between respondents. He has not even been adopted by first respondent. The claimed benefits to the son of second respondent may even be diminished by the confusion created by a son, born from a heterosexual relationship, forced to adapt to and grow up in a homosexual "family" where he would possibly not be certain who takes the role of father and who of mother; who is the "spouse" and how do the "spouses" give effect to their sexual relationship in regard to sexual satisfaction. No evidence has been produced by respondents as to the emotional and psychological effect on the child nor has any material benefit to the child been indicated by having first respondent as his appointed guardian. In so far as it is suggested that to grant a permanent

residence permit to the first respondent is in the interests also of the child of second respondent, the following remarks may be apposite. The Namibian Constitution in its Art. 15, the African Charter in its Art. 18(3), the International Covenant on Civil and Political Rights in its Article 24, all require measures by the State for the protection of the child. Whether or not the interest of the minor child of Khaxas is protected by being raised within this lesbian partnership, is a debatable and controversial issue which was not debated before this Court and need not be decided in this case. What is clear however, is that the "family" unit relied on by respondents, is not the "natural and fundamental group unit" referred to in Art. 14(3) of the Namibian Constitution. Furthermore, a lesbian relationship has never been recognized as a Namibian "institution" in the sense that the word has been used in judgments of the Courts relating to value judgments which the Courts must make. It is altogether a different concept than the marriage institution with its laws, rules objectives and traditions.

The "family institution" of the African Charter, the United Nations Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Namibian Constitution, envisages a formal relationship between male and female, where sexual intercourse between them in the family context is the method to procreate offspring and thus ensure the perpetuation and survival of the nation and the human race.

In my respectful view the respondents claim that their rights to family life has been infringed, must be rejected.

4.2 The respondent's right to privacy:

Respondents rely on Art. 13.1 of the Namibian Constitution which reads:

> "No persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others."

How the fact that the appellant Board refused first respondent's application for a permit, considering that first respondent is an alien with no existing right to residence, can amount to interference with both respondents' right to "the privacy of their homes, correspondence and communications" is difficult to imagine.

Next counsel for respondents' claim a breach of Art. 17 of the International Covenant on Civil and Political Rights which provides:

> "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks."

Again, I fail to see the relevance of this provision.

After all, the Namibian Constitution is the Supreme Law in terms of the Namibian Constitution and there is nothing in the Constitution or even in the said covenant justifying the claim of respondents of the infringement of either Art. 13(1) of the Namibian Constitution or Art. 17 of the said covenant. There seems to be no causal connection or rational connection between the refusal of an alien's residence permit and the said Articles.

4.3 The second respondent's right to reside and settle in any part of Namibia and to leave and return to Namibia

Respondents rely on the fundamental freedom contained in Article 21(1)(h) and Article 21(1)(I) of the Constitution.

Art. 21(1)(h) and (i) provide as follows:

> "All persons shall have the right to:
> (h) reside and settle in any part of Namibia;
> (i) leave and return to Namibia."

First respondent, as an alien, do not have such a right. Even though the introduction to (h) and (i) appear to grant such a right, it must be clear that the said right is subject to the law of Namibia, which does not allow such a right. And as far as second respondent is concerned, her right is not infringed.

Counsel submitted:

> "She is in effect given the Hobsons choice - remain in Namibia, without your life partner or leave Namibia with your life partner, for an uncertain future, not knowing which country will admit you and your son, as residents."

Nobody ordered second respondent to leave Namibia. If she leaves, she may return. But of course, if she renounces or waives her right by becoming a citizen of another country, she is the cause of her own harm if any and not the Namibian authorities.

I have already indicated earlier in this judgment that the agony and anxiety claimed by respondents is exaggerated. Surely, if all the claims regarding the countries that do not discriminate on the basis of sexual orientation are true, then second respondent will at least have no difficulty to qualify in Germany, the home country of first respondent, for residence and even citizenship as of right.

Counsel for respondents again referred to several decisions beginning with the Zimbabwean Courts. She says that these cases laid down the right of the citizen to reside permanently in Zimbabwe, but to do so with one's spouse, even if the latter is a foreigner. The problem for counsel for respondents is that the right which extends to the spouse, is the spouse in a recognized marital relationship not a "partner in a homosexual relationship".

The South African case relied on namely *Patel and Another v Minister of Home Affairs and Another,* 2000(2) SA 343 which allegedly followed

the Zimbabwean decisions, again dealt with the case where the spouse was a south African citizen married to an alien.

The same principle does indeed apply under the Namibian Constitution where Article 4(3) provides for the right to citizenship of such a spouse and section 26(3)(g) which provide that permanent residence may be granted to such a spouse.

Counsel then referred to the South African decision in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others,* 2000(2) SA 1 (CC) where Ackermann, J. referred to the Zimbabwean decision in regard to freedom of movement of the resident spouse as affected by the refusal to grant a foreign spouse residence rights.

Although the Court referred obiter also to the decisions of the Zimbabwean Courts regarding foreign spouses, it did not decide the case before it on that ground.

In my respectful view the alleged infringement of the freedom of movement of respondents is farfetched and a grasping at straws.

4.4 The infringement of the fundamental rights to equality and non-discrimination:

In this regard respondents' counsel has again leaned heavily on decisions of South African Courts, particularly the Constitutional Court.

The South African Constitutional Court in its above-mentioned decision found that the South African Aliens Act did not extend its protection of spouses to same-sex life partnerships and as such it infringed on the fundamental right to equality and the right to dignity of permanent residents in the Republic being in permanent same-sex life partnerships with foreign nationals. The Court found *inter alia* that the omission in section 25(2) of the Aliens Control Act, after the word "spouse", of the words "or partner in a permanent same-sex life partnership" is unconstitutional, because it was in conflict with provisions of the Constitution relating to non-discrimination on the basis of "sexual orientation" in section 9 of the Constitution and the protection of dignity in Art. 10 of the South African Constitution. The Court accordingly ordered that the said section 25(5), is to be read as though the following words appear therein after the word "spouse": "or partner in a permanent same-sex life partnership".

It was further ordered that this order "come into effect from the moment of the making of this order".

Although the Minister of Home Affairs was joined as a party to the proceedings, the said Minister failed to file opposing affidavits in accordance with the rules and the application for leave for the late

filing of such affidavits was dismissed in the Court *a quo* and the dismissal was confirmed on appeal to the Constitutional Court.

Notwithstanding the fact that the Minister was not allowed to file opposing affidavits late, the Court did not refer the matter back to the Ministry or to Parliament. It took a short cut and summary course and in fact legislated for Parliament by not only telling Parliament what should have been in its law, but putting the alleged missing part into the law without further ado.

This decision followed on a prior decision by the South African Constitutional Court in which the law providing that Sodomy is a crime, was declared unconstitutional on the ground that it infringed the fundamental rights prohibiting discrimination on the ground of "sexual orientation" and the infringement of a person's dignity.

Article 9(3) of the South African Constitution provides that: "The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture language and birth".

Whereas the word "sex" can be defined as "being male or female", or "males or females as a group", "sexual orientation" could encompass in theory "any sexual attraction of anyone towards anyone or anything".[40]

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[40] *Oxford Advanced Learners Dictionary.*
Heinze: *Sexual Orientation: A Human Right,* p. 46 and 60 et seq.

The prohibition against discrimination on the grounds of sexual orientation is so wide, that a case may even be made out for decriminalizing the crime of bestiality, particularly, when done in private.

Art. 10 of the Namibian Constitution reads:

> "(1) All persons shall be equal before the law.
>
> (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed, or social or economic status."

In Namibia, as in Zimbabwe, the Constitution does not expressly prohibit discrimination on the grounds of "sexual orientation".

If Namibia had the same provision in the Constitution relating to sexual orientation and no provisions such as Article 14 relating to the duty to protect the natural and fundamental group unit of society and also no provision equivalent to Art. 4(3), the result would probably have been the same as in South Africa.

Ackermann, J., pointed out in the South African decision that in recent years there has been a notable and significant development in the statute law of South Africa in the extent to which the Legislature had given express or implied recognition to same-sex partnerships. He says:

> "A range of statutory provisions have included such unions within their ambit. While this legislative trend is significant in evincing Parliament's commitment to equality on the ground of sexual orientation, there is still no appropriate recognition in our law of the same-sex life partnership to meet the legal and other needs of its partners."
> (My emphasis added.)

It is significant that the aforesaid "legislative trend" flows from the provision in the South African Constitution prohibiting discrimination on the ground of "sexual orientation".

In Namibia as well as Zimbabwe, not only is there no such provision, but no such "legislative trend". In contrast, as alleged by the respondents, the President of Namibia as well as the Minister of Home Affairs, have expressed themselves repeatedly in public against the recognition and encouragement of homosexual relationships. As far as they are concerned, homosexual relationships should not be encouraged because that would be against the traditions and values of the Namibian people and would undermine those traditions and values. It is a notorious fact of which this Court can take judicial notice that when the issue was brought up in Parliament, nobody on the Government benches, which represent 77 percent of the Namibian electorate, made any comment to the contrary.

It is clear from the above that far from a "legislative trend" in Namibia, Namibian trends, contemporary opinions, norms and values tend in the opposite direction.

In Zimbabwe, the Zimbabwean Supreme Court has recently, in the case of *State v Banana*, refused to follow the South African decisions in this regard and has refused to decriminalize sodomy.

The opposition against the decriminalizing of sodomy in Namibia, is part and parcel of the Government resistance to promoting homosexuality. In Namibia, this Court had to date not considered the constitutionality of the crime of sodomy and there is consequently no decision decriminalizing the crime. The reason for the Courts not having considered the issue in Namibia is because unlike South Africa, the issue has not been pertinently and properly raised by litigants before Namibian Courts.

The Namibian Constitution corresponds to that of Zimbabwe in regard to the provision for equality and non-discrimination. The "social norms and values" in regard to sexual behaviour of Namibians appear to correspond more to that of Zimbabweans than to that in South Africa as reflected in judgments of the Constitutional Court of South Africa. Although the *Banana* decision dealt with the issue of whether or not it is unconstitutional to criminalize the crime of sodomy, many of the remarks by McNally, J.A., who wrote the majority judgment, are applicable, *mutatis mutandis*, to the issues to be decided in this case. He motivated the judgment as follows:

> "I do not agree that the provisions of the Constitution of Zimbabwe have the effect of decriminalizing consensual sexual intercourse per annum between adult males in private. For the sake of brevity I will use the phrase 'consensual sodomy' in this sense.

Let me begin by making certain general observations.

There seem to be three ways in which consensual sodomy has moved away from being regarded as criminal. In some countries, such as England and Wales, there was a gradual development of a more tolerant and understanding popular attitude towards such conduct. After widespread national debate, legislation was passed for the precise purpose of decriminalizing the conduct. This was the Sexual Offences Act of 1967.

In other countries, such as South Africa, a new Constitution made provision specifically outlawing discrimination on the grounds of sexual orientation. That Constitution was widely and publicly debated and accepted. The legislation and common-law provisions criminalizing consensual sodomy clearly fall away in the face of such explicit provision.

The third situation arose in jurisdictions such as Ireland and Northern Ireland, where the majority of the people, and the Courts, were disinclined to decriminalize the offence, but were overruled by a supra-national judicial authority - in their cases the European Court Of Human Rights. Thus, for example, the Irish Supreme Court (by a majority) held in Norris v The Attorney - General 1984 IR 36 that the laws against consensual sodomy were not inconsistent with the Irish Constitution, and in particular were not invidiously discriminatory nor an invasion of privacy. Then the European Court overturned that decision. And in Dudgeon v United Kingdom 1982 (4) EHRR 149 it is apparent that such acts were regarded in Northern Ireland as criminal (though not in recent times prosecuted) until the European Court intervened.

In the United States of America the position of the individual states is not uniform. In Bowers, Attorney General of Georgia v Hardwick 478 US 186, 106 S Ct 2841, the Federal Supreme Court, by a 5-4 majority, declined to invalidate the State of Georgia's sodomy statute on the ground, among others, that 'the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy'. It appears from the judgment that in 1986 there were 25 states in which consensual sodomy was a crime.

I am aware that the judgment has been criticised. I appreciate the intellectual force of that criticism. It does not follow that the judgment is wrong. There are always two points of view upon such basic issues. The fact remains that the present stand of perhaps the most senior court in the western world is that it is not unconstitutional to criminalise consensual sodomy. That stance remains in

force, despite the ruling in Romer v Evans 517 US 620 (1996), which did not overrule the earlier decision.

Historically, consensual sodomy, along with a number of other sexual activities which were regarded as immoral, were dealt with by the Ecclesiastical Courts. Such immoral activities included adultery and fornication, i.e. sex outside marriage. In 1533 the offences of sodomy and bestiality (collectively called buggery) were brought within the jurisdiction of the secular courts by King Henry VIII. Since then, and in very general terms, there has been a tendency in the western world to reverse that process. Adultery and fornication became sins rather than crimes. For those who drifted away from the churches the concept of sinfulness became less and less meaningful. Consensual sodomy has, in many but not all parts of the western world, joined that drift from crime to sin to acceptable conduct.

It is of some interest to note, courtesy of Milton's *SA Criminal Law and Procedure* vol. 2 3rd Ed at 250-1 that in pre - Christian Rome (and I would add, Greece) such conduct carried no social or moral opprobrium, whereas Hebraic and Germanic laws were strongly disapproving. See also footnote 6 to Justice Blackmun's dissenting judgment in *Bowers v Hardwick* (*supra*).

What then of Zimbabwe?

I would remark first that this case has not, from its very beginning, been treated as a constitutional test case. No evidence was led in the court a quo from psychiatrists, psychologists or other experts. No evidence was led to suggest that the customary laws of Zimbabwe are more akin to those of the Romans and Athenians than to the Germanic or Hebraic customs. I cannot therefore speak with authority on the customary law in this respect. I note, however, that Goldin and Gelfand's well-known book on Customary Law says, at 264, the following:

> '*Kurara nemumwe murume* (homosexuality) is called *huroyi*. This is considered extremely wicked but is rare.'

It seems to me that this is a relevant consideration, from two points of view. From the point of view of law reform, it cannot be said that public opinion has so changed and developed in Zimbabwe that the courts must yield to that new perception and declare the old law obsolete. Mr. Andersen expressly disavowed any such argument. The Chief Justice does not dispute this. His view, if I may presume to paraphrase it, is that the provisions of the Constitution, properly interpreted, compel one to the

conclusion that the criminalisation of consensual sodomy is actually contrary to those provisions.

From the point of view of constitutional interpretation, I think we must also be guided by Zimbabwe's conservatism in sexual matters. I have always agreed with the Chief Justice's view of constitutional interpretation, expressed for example in *Smyth v Ushewokunze* 1997 (2) ZLR 544 (S) at 553B - C, 1998 (2) BCLR 170 (ZS) at 177I - J that:

> 'what is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as to the letter of the provision; one that takes full account of changing conditions, social norms and values, so that the provision remains flexible enough to keep pace with and meet the newly emerging problems and challenges. The aim must be to be move away from formalism and make human rights provisions a practical reality for the people.'

In the particular circumstances of this case, I do not believe that the 'social norms and values' of Zimbabwe are pushing us to decriminalize consensual sodomy. Zimbabwe is, broadly speaking, a conservative society in matters of sexual behaviour. More conservative, say, than France or Sweden; less conservative than, say, Saudi Arabia. But, generally, more conservative than liberal.

I take that to be a relevant consideration in interpreting the Constitution in relation to matters of sexual freedom. Put differently, I do not believe that this Court, lacking the democratic credentials of a properly elected Parliament, should strain to place a sexually liberal interpretation on the Constitution of a country whose social norms and values in such matters tend to be conservative.

Against that background I turn to consider those provisions of the Declaration of Rights, namely ss 11 and 23, which might be thought to make it necessary for the Court to decriminalize consensual sodomy.

(a) Section 11 of the Constitution: the right to privacy

This section was quite significantly altered by the provisions of Act 14 of 1996, which came into effect on 6 December 1996. The section became in effect a preamble, and now says nothing at all about privacy.

Prior to 6 December 1996 the section did contain a passing reference to the fundamental right of every

person in Zimbabwe to 'protection for the privacy of his home'. But, in the context, this
provision is clearly a reference to the right, elaborated later in s 17, to protection from arbitrary search or entry. It has nothing whatever to do with whether or not consensual sodomy is a crime.

Count 1, which is the only count relating to consensual sodomy, relates to activities between 11 August 1995 and 31 December 1996. It extends over the currency of both versions of s 11. Neither version is relevant. I note that the privacy question was only faintly argued by Mr Andersen. Nor did the Chief Justice rely on s 11 in coming to his conclusion. I will not therefore dwell further upon it.

(b) Section 23 of the Constitution: protection from discrimination

This is the section upon which the Chief Justice relied in coming to the conclusion that the criminalisation of consensual sodomy was:

> (a) discriminatory on the ground of gender;
> (b) not reasonably justifiable in a democratic society.

I will not set out s 23 in full because it appears in the judgment of the Chief Justice.

I make first the obvious point, which was made by the Judge a quo, that the framers of the South African Constitution found it necessary to include 'sexual orientation' as well as 'gender' in the list of grounds on the basis of which discrimination is not permitted. Had our Constitution contained those words, there would have been no argument. But it does not.

Discrimination on the basis of gender means simply that women and men must be treated in such a way that neither is prejudiced on the grounds of his or her gender by being subjected to a condition, restriction or disability to which persons of the other gender are not made subject.

It is important to bear in mind that what is forbidden by s 23 is discrimination between men and women. Not between heterosexual men and homosexual men. That latter discrimination is prohibited only by a Constitution which proscribes discrimination on the grounds of sexual orientation, as does the South African Constitution…."

After dealing with some other points not particularly relevant to the issues in this case the learned judge in conclusion remarked:

> "Are we to say that 25 American states are not democratic societies? And, in any event, democratic states are in various stages of development. Some might say, in various stages of decadence. (I do not propose to become involved in that argument.)
>
> I do not believe that it is the function or right of this Court, undemocratically appointed as it is, to seek to modernise the social mores of the State or of society at large. As Justice White said in *Bowers v Hardwick (supra):*
>
> > 'The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.'"

It must be pointed out that although the sexual act between males has been criminalised in our common law as the crime of Sodomy, the sexual act between lesbian females has never been criminalized in South African and Namibian common law. The reason may have been that the lesbian relationship and the sexual act performed in such relationship never became so clearly defined and notorious as in the case of the homosexual relationship between men. However, the matter was not raised or argued before us. There is therefore no justification for dealing with this issue in great detail.

Art. 10 of the Namibian Constitution has recently been discussed and considered in the decision in *Müller v President of the Republic of Namibia and An*[41] and in the decision mentioned *supra* of *Myburgh v the Commercial Bank of Namibia* .

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[41] *Müller v President of the Republic of Namibia and An,* 2000(6) BCLR 655 (NmS)
Myburgh v the Commercial Bank of Namibia, unreported, dated 8/12/2000

In the *Müller* decision the decision in *Mwellie v Minister of Works, Transport and Communication & Another*[42] was referred to wherein the Court held:

> "Art. 10(1) ... is not absolute ... but it permits reasonable classifications which are rationally connected to a legitimate object and that the content of the right to equal protection take cognisance of 'intelligible differential and allows provision therefore ..."

The Court held that as far as Art. 10(2) is concerned, it prohibits discrimination on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status. Apart from the provisions of Art. 23, any classification made on the grounds enumerated by the sub-article will either be prohibited or subject to strict scrutiny.

This Court in *Müller's* case also emphasized the need to take cognisance of the differences in the constitutions when considering the relevance of and the weight to be given to decisions and rulings in other jurisdictions. The Court accepted that Art. 10.1 requires the Court to give content to the words "equal before the law" so as to give effect to the general acceptance that

> " ... in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without

[42] *Mwellie v Minister of Works, Transport and Communication & Another,* 1995(9) BCLR 1118 (NmH) at 1132 E - I

> classification which treat people which abound in everyday life in all democracies based en equality and freedom... In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State ... Accordingly, before it can be said that mere differentiation infringes s 10 it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it (see *Prinsloo's* case (*supra*) at 1024)."

The Court then concluded:

> "The approach of our courts towards article 10 of the Constitution should then be as follows -
>
> (a) Article 10(1)
> The questioned legislation would be unconstitutional if it allows for differentiation between people or categories of people and that differentiation is not based on a rational connection to a legitimate purpose (see *Mwellie's* case *(supra)* at 1132 E - H and *Harksen's* case (*supra*) page 54).
>
> (b) Article 10(2)
> The steps to be taken in regard to this sub-article are to determine-
>
> (i) whether there exists a differentiation between people or categories of people;
> (ii) whether such differentiation is based on one of the enumerated grounds set out in the sub-article;
> (iii) whether such differentiation amounts to discrimination against such people or categories of people; and
> (iv) once it is determined that the differentiation amounts to discrimination, it is unconstitutional unless it is covered by the provisions of Article 23 of the Constitution."

This Court further said:

> "Although the Namibian Constitution does not refer to unfair discrimination, I have no doubt that that is also the meaning that should be given to it."

The words of the writer and jurist Ramcharan in regard to the right to equality as dealt with in "The International Bill of Rights: The Covenant of Civil and Political Rights", are apposite. He says:

> "Equality it has sometimes been said, means equality for those equally situated and indeed, equal treatment for unequals, is itself a form of inequality."

Equality before the law for each person, does not mean equality before the law for each person's sexual relationships.

To put it another way: It is only unfair discrimination which is constitutionally impermissible, and which will infringe Art. 10 of the Namibian Constitution.

It follows that in considering whether or not the refusal of a permanent residence permit to the lesbian partner of a Namibian citizen infringes Art. 8 or 10 of the Namibian Constitution, such consideration must be done with due reference to the express provisions of Art. 4(3) and 14 of the Namibian Constitution.

4.5 <u>The violation of the respondents' fundamental right to dignity</u>

The respondents have not alleged in their review application to the High Court that the Board's decision had violated their fundamental

right to dignity. It is therefore not necessary to deal with the issue in this judgment.

Suffice to say that most of the argument put forward in this judgment will apply *mutatis mutandis* to any contention that the respondents' dignity has been violated.

The Namibian Parliament has, in the letter and spirit of Art. 5 of the Namibian Constitution read with the said express provisions of Art. 4 and 14 of the Constitution, enacted a law for the admission of aliens and applications for permanent residence. In this law, Parliament provided for a spouse, in a recognized marital relationship, to obtain permanent residence without having to comply with all the requirements which another applicant will have to satisfy.

In my view the failure to include in section 26(3)(g) of the Namibian Immigration Control Act an undefined, informal and unrecognized lesbian relationship with obligations different from that of marriage, may amount to "differentiation", but do not amount to "discrimination" at all.

In providing for a special dispensation for partners in recognized marriage institutions and or the protection of those institutions, Parliament has clearly given effect to Art. 14 of the Namibian Constitution and to similar provisions in the African Charter relating to the protection of the family, being the "natural and fundamental unit" of society. In this regard Parliament has also given effect to this

court's repeated admonitions that the Namibian Constitution must be interpreted and applied "purposively".

A Court requiring a "homosexual relationship" to be read into the provisions of the Constitution and or the Immigration Act would itself amount to a breach of the tenet of construction that a constitution must be interpreted "purposively".

In the light of the provisions of the Namibian Constitution and decisions of the Courts, I do not regard it as justified for a Namibian Court to effectively take over Parliament's function in this respect, by ordering a law of Parliament to be regarded as amended, by adding to the word "spouse" in section 26(3)(g) of the Namibian Immigration Control Act - the words : "or partner in a permanent same sex life partnership".

Counsel for the respondents has also referred to various other decisions and practices in other countries. I do not find it necessary, in the light of this already extensive judgment, to deal with all those decisions and practices. I must however point out, that even if I came to a different conclusion, it would nevertheless not have been justified to make an order as in the South African decision in *National Coalition for Lesbian Equality & An. v Minister of Justice and An.*, because no minister has been cited in the case before us. This is a typical case of non-joinder, where a necessary party has not been joined.

I must emphasize in conclusion: Nothing in this judgment justifies discrimination against homosexuals as individuals, or deprive them of the protection of other provisions of the Namibian Constitution. What I dealt with in this judgment is the alleged infringements of the Namibian Constitution in that section 26(3)(g) of the Namibian Immigration Control Act does not provide for homosexual partners on a basis equal to that of the spouses in recognized heterosexual marital relationships and the alleged failure of the Board to regard the applicants' lesbian relationship as a factor strengthening the first applicant's application for permanent residence.

In view of the fact that appellant Board denied that it had discriminated against the respondents on moral grounds and the respondents had failed to make out a case that they had been discriminated against on moral grounds, applicant Frank's application should continue to be considered on its own merits, and as the application of an unmarried alien who is not a spouse for the purpose of section 26(3)(g) of the Namibian Immigration Control Act. However, the appellant Board may, in the exercise of its wide discretion consider the special relationship between respondents and decide whether or not to regard it as a factor in favour of granting the application for permanent residence.

Whether or not an amendment shall be made to section 26(3)(g) to add the words "or partner in a permanent same-sex life partnership", is in my view a matter best left to the Namibian Parliament.

I believe that Parliament has the right to decide, in accordance with the letter and spirit of the Namibian Constitution, on the legislation required for the admission of aliens to citizenship and/or residence and or employment in Namibia.

It is also the right and responsibility of Parliament to provide in legislation which classes or categories of persons should be given special dispensation and which not. In this function Parliament is entitled *inter alia,* to consider and give effect to the traditions, norms, values and expectations of the Namibian people, provided it does so in accordance with the letter and spirit of the Namibian Constitution.

For the foregoing reasons, the issue of the respondents' lesbian relationship, does not alter my view that the order of the Court *a quo* should be set aside.

I must reiterate in conclusion that, in my respectful view, this Court should not allow a judgment or order of a lower Court to stand when it is patently wrong, even if the gross negligence of the appellant's attorney, caused substantial delay in reaching finality.

In the result the following order should be made:

1. Appellant's application for condonation for the late submission of the appeal record, is granted.

2. The appeal is upheld and the order of the High Court dated 24 June 1999 is set aside.

3. The decision of the Immigration Control Board to refuse a permanent residence permit to first respondent Frank, is set aside and the issue is referred back to the Board to reconsider and decide after complying with the *audi alterem partem* rule.

   3.1 The first respondent is allowed 30 days from the issue of this order to make written representations to the Board in regard to the issues raised by the Board in paragraphs 10 and 12 of the opposing affidavit of Mr. Simenda.

   3.2 The said Board must thereafter within 30 days reconsider the aforesaid representations if any, apply the guidelines set out in this judgment and decide afresh whether or not to grant the permanent residence permit to applicant Frank.

4. As a mark of disapproval of the extremely negligent conduct of the attorney of the appellant Board, and the misrepresentation made to the Court by the chairman of the appellant Board, the Court makes no order as to costs.

(signed) O'LINN, A.J.A.

I agree.

(signed) TEEK, A.J.A.

/mv

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