CASE NO.: SA 29/2001

IN THE SUPREME COURT OF NAMIBIA

In the matter of

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA **1ST**

APPELLANT

DIRECTOR OF LEGAL AID **2ND**

APPELLANT

THE PROSECUTOR-GENERAL **3RD**

APPELLANT

And

GEOFFREY KUPUZO MWILIMA **1ST**

RESPONDENT

ALL OTHER ACCUSED IN THE CAPRIVI TREASON

TRIAL **2ND TO 128TH**

RESPONDENTS

CORAM: Strydom, C.J., O'Linn, A.J.A., Chomba, A.J.A., Mtambanengwe, A.J.A. *et* Manyarara, A.J.A.

HEARD ON: 25 – 28/03/2002

DELIVERED ON: 07/06/2002

APPEAL JUDGMENT

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

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

> "(a) Second Respondent (i.e. 2nd appellant) is directed to provide such legal aid to the Applicants (i.e. the respondents) as assessed by him so as to enable them to have legal representation for the defence of all the charges brought against

them in the trial referred to as the Caprivi treason trial due to start on 4th February 2002.

(b) Respondents (i.e. appellants) shall pay the costs limited to disbursements and to include the costs of two instructed counsel jointly and severally, the one paying the other to be absolved."

The Government Attorney immediately filed a notice of appeal in which it was stated that the appeal was against the whole judgment and order handed down by the High Court of Namibia. Because of the inept and unsatisfactory way in which this notice was formulated it is necessary to set out in full the relevant part of the notice. This reads as follows:

"To: The Registrar
High Court of Namibia
WINDHOEK

TAKE NOTICE THAT the *Appellant* hereby appeals to the above Honourable Court against the whole judgment and order in the above-mentioned matter handed down in the High Court of Namibia by his Lordship, the Honourable Mr. A J Levy et Mr. J Silungwe et Mr. A J Unengu on 14 December 2001."

In the Court *a quo*, as also in this Court, the 1st and 2nd appellants were represented by the Government Attorney, Ms Erenstein Ya Toivo, and the respondents by Mr. Smuts, assisted by Mr. Cohrssen. The 3rd appellant was separately represented by Ms. Verhoef of the office of the Prosecutor-General who took two points *in limine* and did not address any argument on the merits of the application. Because of the wording of the Notice of Appeal, which clearly refers to an appellant in the singular, and because the notice was filed by the Government Attorney, there was no indication that the Prosecutor-General intended to appeal. The first intimation that the Prosecutor-General intended to appeal came when Ms. Verhoef filed Heads of Argument.

The respondents objected to the appearance of Ms. Verhoef on the basis that the Prosecutor-General was not a party to the appeal, as he gave no Notice of Appeal. Ms. Erenstein Ya Toivo informed us that she was indeed given instructions also to appeal on behalf of the Prosecutor-General and that it was at all times her intention to do so. She consequently applied for an amendment of the Notice to substitute for the word "Appellant", where it appears in the notice, the words " 1st, 2nd and 3rd Appellants". The fact that in the heading of the Notice of Appeal the parties were described as they appeared in the Court *a quo,* and that in terms of the Rules of Court the appellants, being the Government or departments thereof, were not required to file Powers of Attorney, made it further impossible to determine who really brought the appeal. The parties were also separately cited and were represented by different Counsel. After argument the Court allowed the appellants to amend the notice by substituting for the word "appellant", the words "1st and 2nd appellants". Mr. Smuts had no objection to this amendment. As the

Court was of the opinion that the points raised by Ms. Verhoef were sufficiently important to hear argument in that regard, the Court, again with the acquiescence of all the parties, allowed her to present her argument as part of the legal team of the appellants

I shall further, for the sake of convenience and in order to avoid confusion, refer to the parties as they appeared in the Court *a quo*.

The applicants launched their application to the High Court in which they claimed the following relief:

> "(a) Condoning the non-compliance with the Rules of this Honourable Court and hearing the application on a semi-urgent basis as is envisaged in Rule 6(12) of the High Court Rules.
>
> (b) Declaring sections 4 and 5 of the Legal Aid Amendment Act, Act no 17 of 2000 unconstitutional, and/or striking such sections down as being unconstitutional alternatively declaring that the refusal of legal aid to the applicants in respect of their forthcoming treason trial is unconstitutional.
>
> (c) Directing the second respondent to provide legal representation to the applicants for the defence of the charges brought against them in the treason trial against them.

(d) Ordering the stay of criminal proceedings against the applicants until such time as legal representation has been provided.

(e) Ordering that those respondents, who oppose the application, pay the applicants' costs jointly and severally, the one paying the other to be absolved."

The 1st applicant, who acted as spokesman for all the others, declared that most of them were arrested after a state of emergency was declared in the Caprivi Region following an armed attack which was launched upon certain Government offices. Resulting from this the applicants, all of them, are now facing some 275 criminal charges. Since their arrest, shortly after the state of emergency was declared on 2 August 1999, attempts were made to be released on bail. These attempts were unsuccessful. For that purpose some 52 of the applicants jointly contributed N$17,500.00 to appoint a legal representative to apply for bail on their behalf. However, due to the inordinate delay to bring the matter before Court, the funds of all the applicants were then depleted and none of them were able to appoint legal representatives to defend them in the upcoming trial. Applicants are desirous of appointing legal representatives because of the seriousness of the charges against them and because of the fact that they are all lay persons who will not be able to defend themselves effectively.

It was further stated that attempts made to get outside funding, from humanitarian agencies and foreign human rights organizations, were unsuccessful. Some of the applicants applied to the Directorate of Legal Aid for assistance but

have, up to the date that the application was launched, not received any response. It was furthermore alleged that the second respondent had confirmed to Ms. F. Hancox of the Legal Assistance Centre, who is representing the applicants in this application, that his directorate would be unable to provide legal aid to the applicants due to a lack of both financial and human resources.

It seems that in the Court *a quo* the main thrust of the applicants' attack was aimed at sections 4 and 5 of the Legal Aid Amendment Act, Act No. 17 of 2000, in terms whereof the discretion of the Court to issue, under certain circumstances, a certificate which would oblige the second respondent to grant legal aid to an accused, was taken away. The result of the amendments is that the second respondent now has the sole discretion to grant legal aid. Applicants further stated that their right to a fair trial as guaranteed by Article 12 of the Constitution would be jeopardized if they were to be denied legal representation because of financial constraints. Applicants alleged that the said amendments were contrary to their constitutional rights as protected by articles 12(1)(d) and (e) and Article 10 of the Constitution.

In regard to the urgency of the matter the applicants pointed out that the trial was due to commence on 4 February 2002. If the application was processed in the normal way the matter would not have been ready for hearing before that date and if the application was successful it follows that time was needed by the legal representatives appointed to prepare for trial. Applicants further pointed out that the State has disclosed the identities of 34 witnesses and that there were more than 500 undisclosed witnesses which the State also intended to call.

All three respondents opposed the application. On behalf of the first and second respondents the permanent secretary of the Ministry of Justice, Ms. Lidwina Ndeshimona Shapwa, deposed to an answering affidavit together with one Arnold Misiya Mtopa, the acting Director of the Directorate of Legal Aid.

Ms. Shapwa stated that as Permanent Secretary she, in terms of the State Finance Act of 1991, exercised control over the financial and personnel functions of the 2nd respondent. She explained that the 2nd respondent endeavoured to effectuate the principle of State policy as contained in Article 95(h) of the Constitution but that the funds available were always inadequate to meet all the requests for legal aid. The 2nd respondent's briefing of private legal practitioners to represent legal aid clients, resulted therein that the amount budgeted for was always exceeded. The deponent said the situation was further aggravated by the fact that in terms of sec. 8(2) of the Legal Aid Act, Judges could in particular instances issue certificates which had to be complied with by the 2nd respondent. To avoid this problem sections 4 and 5 of the Amendment Act were necessary to impose some control over the spending of the legal aid budget by keeping the decision-making in regard to the spending solely within the Ministry.

According to Ms. Shapwa she was, during 2000, approached by Dr. Mtopa who informed her of the unprecedented scope of the treason trial in so far as the number of charges were concerned and the number of accused appearing in the case which would, so it was anticipated, result in a trial of long duration. Dr. Mtopa enquired of her whether additional funds would be made available, as both

his staff and budget were inadequate to deal with the situation. Ms. Shapwa however informed him that additional funds were not available. In general the deponent further denied that the applicants would not have a fair trial if legal representation was not provided by the State and contended that, in any event, Article 12 of the Constitution had to be interpreted in the light of the Principle of State Policy contained in Article 95(h). She further pointed out that the presiding Judge bore the responsibility to ensure that the rights of unrepresented accused were protected and that all procedural safeguards for the accused were observed so that justice would prevail in the criminal trial. She further explained that special measures were taken to ensure that the accused were in a position to follow and understand the proceedings as a result of which 5 interpreters have been assigned to the trial to ensure that all the accused understand the proceedings.

Dr. Mtopa, who represented the 2nd respondent, also pointed out that Article 95(h) of the Constitution provides that legal aid may be granted by the State but with due regard to the resources of the State. He submitted that if the order, asked for by the applicants, is granted it would stultify Article 95(h) and render it otiose in circumstances where the first respondent does not have the means to comply therewith. Dr. Mtopa pointed out that a decision, concerning the application for legal aid, applied for by some of the applicants, could only have been taken after the applicants were screened and subjected to a means test and that this did not take place because of inadequate staff and because of financial constraints. The deponent further confirmed that he discussed the situation with Ms. Shapwa and that she informed him that additional funds were not available. Dr. Mtopa

explained the problems he had in regard to granting of legal aid by the Courts and denied that this was a function which should be exercised by Judges. Both deponents have also referred to a statement by the Minister of Justice, made on the 1st August 2001, in which he stated that no funds were available to assist the applicants with legal aid.

From what is set out above it is clear that the 2nd respondent, who is the repository of the power, never exercised a discretion and there was therefore no proper functioning of the machinery, created specifically for thus purpose, under the Legal Aid Act, Act 29 of 1990. Bearing in mind the long time lapse since the applications, or some of them, were made, the reasons given, namely lack of staff and financial constraints, are also not convincing. For reasons, which will hopefully later become clear, it is not necessary for me to dwell on this issue further.

The main findings of the Court *a quo* were that the applicants were entitled to have legal representation in order to ensure a fair trial. The Court further found that the respondents might have shown that the Ministry of Justice and the 2nd respondent lacked the funds to provide applicants with the necessary legal representation. That was however not the issue as the duty was that of the Government and there was no proof that the Government did not dispose of the necessary resources to provide the applicants with legal representation. Because of this finding the Court also concluded that it was not necessary to decide the constitutionality of sections 4 and 5 of the Amendment Act.

As previously stated the appeal is against the whole of the judgment and order handed down by the Court *a quo.* Counsel argued various points and issues before us. During argument two main points crystallized. The first was that Article 95(h), together with other articles of the Constitution, limited the liability of the respondents to grant legal aid to indigent accused persons to the circumstances set out in Article 95(h), namely to defined cases and with due regard to the resources of the State, as was submitted by Ms. Erenstein Ya Toivo. On the other hand it was submitted by Mr. Smuts that if the circumstances of a particular case were such that an accused person would not have a fair hearing without legal representation, and the accused was not able to afford legal representation, then Article 12 of the Constitution placed a duty on the 1st respondent to step into the breach and, in some way or another, to provide assistance to such an accused.

Before discussing these main points I shall first deal with the points *in limine* raised by Ms. Verhoef. These were:

> "(a) That the court does not have jurisdiction to hear the application as this application is brought by way of the civil process whilst the criminal trial forming the subject matter of the application is pending against the respondents; and
>
> (b) That the application brought by the respondents was not urgent in any form and the urgency upon which the respondents relied was self-created."

In developing her argument Ms. Verhoef submitted that the case against the applicants was a criminal case and that they were therefore limited to that forum to obtain the relief they are now seeking by way of a civil process in a civil Court.

In support of her contention Counsel referred the Court *inter alia* to cases such as Sita and Another v Olivier NO and Another, 1967 (2) SA 441(A); S v Absalom, 1989 (3) SA 154(AD); S v Strowitzki, 1995 (1) SACR 414 (NmH) and S v Vermaas; S v Du Plessis, 1995 (3) SA 292(CC).

Mr. Smuts, on the other hand, submitted firstly that the above cases were distinguishable from the instant case. Secondly Counsel pointed out that the first and second respondents had a direct interest in the outcome of the proceedings and consequently had a right to be heard. This, so it was submitted, would not have been possible if the application was made in the criminal Court where the case was pending. Mr. Smuts further referred to various cases where interdictory relief was granted to applicants who brought their applications by way of civil process. See in this regard Margret Malama-Kean v The Magistrate for the District of Oshakati NO and the Prosecutor-General, (unreported judgment of the High Court of Namibia, delivered on 15 October 2001); Pieter Johan Myburgh v The State and Another, (unreported judgment of the High Court of Namibia, delivered on 9 August 1999) and Klein v Attorney General and Another, 1995 (2) SACR 210 (W). See also Omehoyaaliyatala Hans Sheehama v The State (unreported judgment of the Full Bench of the High Court of Namibia, delivered on 8 November 2001).

In answer to the submission of Mr. Smuts that the process in the criminal Court would not have allowed parties, who had a direct interest, to take part in the proceedings, Ms. Verhoef submitted that such parties could be called as witnesses by the Judge in the criminal proceedings. This would, in my opinion, not be much

more than cold comfort to a party who might in the end be ordered to foot the bill and to provide legal aid. There is a big difference between being a party to proceedings and only being a witness in those same proceedings. First and foremost is the measure of control that a party exercises in presenting his case, e.g. what evidence to present and what submissions to make to the Court. In this instance Ms. Verhoef conceded that in principle it would be better for the prosecution if the applicants were defended. That perhaps explained why the Prosecutor-General did not oppose the application on the merits.

I also agree with Mr. Smuts that the cases relied on by Ms. Verhoef, with the possible exception of the Vermaas/Du Plessis-case, *supra*, were distinguishable from the present case as they were all cases where the relief claimed stood in direct relationship to the criminal prosecution. In the Sita-case, *supra*, the Attorney-General gave directions, in terms of sec. 79(1)(b) of the previous Criminal Procedure Act, Act 56 0f 1955, for the trial to come before the Pretoria Regional Division. Upon being arraigned in that court the accused refused to plead and claimed, on the strength of sec. 190(1) of that Act, to be tried by a Superior Court. The regional magistrate dismissed this claim and an application was launched to a Full Bench of the T.P.D. where the accused persons were equally unsuccessful. They further appealed to the Appeal Court where the second respondent took the point that that Court did not have jurisdiction to hear the matter as no leave to appeal was granted in terms of sec. 21(2)(a) of Act 59 of 1959. The appellants argued that the matter was a civil matter, which originated in the T.P.D. and that the provisions of sec 21(2)(a) were therefore not applicable. The Court rejected this argument and found that the proceedings before the T.P.D. was no more than

an appeal from the decision of the magistrate. Although the proceedings before the T.P.D. were brought on notice of motion, Botha, J.A., who wrote the judgment of the Court, stated that it is "not the form of the procedure adopted but the subject matter of the proceedings which determines their character as either a civil or criminal matter." (p449 B-C). Being an appeal against a ruling given in a criminal case the further process retained that character.

In the Absolom-case, *supra*, the accused applied for condonation of the late filing of his notice of appeal after having been convicted in a magistrate's court. The Court stated, on page 162A, that the application was so closely related to the accused's conviction, sentence and appeal that it was in the opinion of the Court a criminal matter.

In the Strowitzki-case, *supra*, the issue at stake was a permanent stay of criminal proceedings. The Court refused the application, which was brought on the basis that the applicant would not have a fair hearing as a result of an undue delay to commence with the proceedings. On appeal to the Full Bench of the High Court the respondent pointed out that the applicant's process was irregular as no leave to appeal was obtained and as the applicant was also not yet convicted. One argument raised by the appellant was that cases based on the Constitution were *sui generis* and that the provisions of the Criminal Procedure Act should not apply to them. This argument was rejected and the Court found that the proceedings were indeed criminal proceedings.

The Vermaas and Du Plessis-cases, *supra,* originated from the Transvaal Provincial Division of the Supreme Court where the accused appeared before different Judges. The trials, which were both of huge dimensions, had run for some considerable time as a result whereof the accused were no longer able to afford legal representation. Application was made to provide them with legal representation at public expense. The Judges presiding at the trials construed the relevant provisions of the South African Constitution to mean that they could seek a ruling from the Constitutional Court on this point, even though they were competent to decide it themselves. The Constitutional Court found that upon a correct interpretation of the Constitution the referrals were incompetent. The Court went on to say that in any event the trial Judges were much better placed than they were to decide whether it was necessary to provide legal representation at public expense or not. It was stated that the presiding Judges would be in a better position to judge the complexity or simplicity of the case, the aptitude or ineptitude of the accused person to fend for himself in a matter of those dimensions, and to determine how grave the consequences of a conviction would be and any other factors that need to be evaluated to determine the likelihood or unlikelihood that, if the trial proceeds without a defence lawyer, it would result in substantial injustice for the accused. (See p 292C-H).

I must point out that the Constitutional Court did not have jurisdiction in this particular instance because of its finding that the Constitution did not sanction that process. That is not the issue that we must decide as there is no statutory impediment in the present instance which would forbid the High Court to hear the matter, and the case therefore does not assist Ms. Verhoef. What was further said

in regard to the suitability of the presiding Judges to decide whether legal representation should be provided at State expense, is no doubt correct but does also not assist the argument of Ms. Verhoef. In the present instance it is clear from the record handed in by agreement, that the trial has not yet commenced so that under the circumstances the Judges of the Full Bench were in as good a position to make an evaluation, and to determine the issues, as any other Judge.

Mr. Smuts also submitted that if the application was brought in the criminal court and the application was dismissed it was, at the very least, uncertain whether the applicants would have been able to take the matter on appeal at that stage as sec. 316(1) of the Criminal Procedure Act provides that an accused convicted of any offence by a Superior Court may, within 14 days after the passing of any sentence, apply for leave to appeal against his conviction, sentence or any order. See in this regard S v Harman, 1978 (3) SA 767A at 771B and S v Majola, 1982 (1) SA 125 (A). Although it was stated in the latter case that sec. 316 does not absolutely prohibit an accused from applying for leave to appeal before sentence the position is at least uncertain. See the discussion of these cases in the Strowitzki-case, *supra*, at p 419f – 420b. The result would be that if leave to appeal could not be obtained before the trial was completed and sentence was imposed then the trial would continue. If it is later found, in a subsequent appeal, that the accused did not have a fair hearing, because they were not legally represented, it could lead to the setting aside of the matter which, in a case of this magnitude, would be disastrous.

Although in the present matter legal representation is sought in connection with a criminal trial I am not persuaded that that, by itself, is sufficient to classify it now as so closely connected to the criminal process that it takes on that character or that only the Court in the criminal trial will have jurisdiction to try the matter. If one looks at all the surrounding circumstances such as the relief claimed, the parties who have a direct and substantial interest in the subject matter of the relief claimed and whether they are before Court or not and that the relief claimed is not relief of criminal prosecution or germane to the criminal process then, in my opinion, it cannot be said that the criminal trial Court has exclusive jurisdiction to hear the application. This must also be seen in conjunction with the Constitutional provisions of Article 25(2) and (3) which grant to aggrieved persons a right to approach a competent court for protection where a fundamental right or freedom has been infringed or threatened and which empower that court to make all such orders which shall be necessary and appropriate to protect the enjoyment of such rights or freedoms. The High Court is a competent court to deal with these issues. See S v Heindenreich, 1996 (2) SACR 171 (Nm) at page 175d.

It was suggested to Ms. Verhoef that if the applicants had pleaded before a Judge that that would have strengthen her argument. This may be so. However, the record, which was handed in by agreement, reflected various pre-trial proceedings but none containing any pleas except that there was record that applicants 126 – 128, when they were added as accused, were required to plead. This being a pre-trial hearing it is not altogether clear whether these applicants were merely required to indicate what they would plead. I say so because none of their rights in terms of sec. 115 of Act 51 of 1977 was explained to them and neither was any

attempt made to determine what the real disputes between the parties were. There also being no record of pleas from any of the other applicants it is not possible to consider this issue and the effect it may have had on the proceedings.

It is so that in this matter the applicants also asked for a temporary stay of the proceedings. However in the Court *a quo*, as well as in this Court, Counsel for the applicants conceded that the trial court would be better placed to deal with such issue if and when it arises. No order was therefore asked or made in this regard.

Under the circumstances I am not persuaded that the Court *a quo* was wrong to dismiss this point *in limine*.

The second point *in limine* that was argued by Ms. Verhoef is in my opinion without any merit. The application was brought on a semi-urgent basis and was, according to the dates on the documents, launched by the applicants on the 25 October 2001. In the Notice of Motion the respondents were called upon to file their notice of opposition, if any, on or before 17h00 on 1 November 2001. This was done on behalf of all the respondents on 30 October 2001. The respondents were further called upon to file opposing affidavits before noon on 14 November 2001. Two affidavits were filed by the third respondent, one on the 14th and one on the 15th November. (There seems to have been no objection to the late filing of the second affidavit.) The first affidavit, consisting of two pages, raised the two points *in limine* later argued by Ms. Verhoef and the second affidavit, which was even shorter, denied the allegation by first applicant that there were inordinate delays to bring the matter to trial. The application with exhibits can by no means

be described as voluminous and there was no complaint that any of the respondents were prejudiced by the shortening of the periods prescribed by the Rules of the High Court. This could also hardly have been argued in the light of the answering affidavits that were filed by the Prosecutor-General. The 1st applicant explained that the trial was to commence on 4 February 2002 and if the times, prescribed by the Rules, were adhered to the matter would only be ready for hearing sometime after the 4th of February. At most, it can be said that the applicants should have launched their application at an earlier stage but in this regard consideration must also be given to the fact that those who had applied for legal aid were still waiting for an answer to their applications and a positive answer could have obviated the bringing of an application to Court, as that would have opened the door to the others to also apply. In the result I am satisfied that the Court *a quo* correctly dismissed this point *in limine*.

During argument on the merits of the appeal, Counsel on both sides discussed various Articles of the Constitution. Counsel did not only differ in their interpretation of some of the Articles but were also not in agreement as to the effect of those Articles on the issues, which the Court was called upon to decide. These Articles were mainly No's 10, 12, 25, 80(2), 95, 101 and 144. Ms. Erenstein Ya Toivo nailed her colours to Article 95(h) read with Articles 101 and 12(1)(e). In developing her argument Counsel submitted that the said Articles limited the duty of the respondents to grant legal aid to available resources. She submitted that the Court *a quo* wrongly found that the issue was not the resources available to the Ministry of Justice through its Department of Legal Aid, but the resources of the State which was at stake, and as it was not proven that the State did not have the

necessary resources the second respondent was obliged to grant legal aid to the applicants. Counsel submitted that the effect of the order was that the Court now intruded on a function which, in terms of the Constitution, was the exclusive domain of the Legislature to make available and allocate funds to the various Ministries. Although the Court may have the notional power to make such an order it would, under all the circumstances, not be appropriate.

Mr. Smuts, on the other hand, submitted that there was a duty on the 1st respondent to uphold the provisions of the Constitution and more particularly the provisions of Chapter 3, which deals with Fundamental Human Rights. Counsel submitted that bearing in mind the magnitude of the case, the fact that all the applicants were lay persons and the difficult legal issues which will inevitably arise in a case of this nature, their right to a fair trial, as is guaranteed by Article 12, is jeopardized if they had to fend for themselves without any legal representation in the criminal trial. Counsel further submitted that none of the applicants were able to afford legal representation of their own and that it was therefore the duty of the 1st respondent to provide them with such representation. If I understood Counsel correctly it was submitted that this obligation arose, not as a result of the policy of the 1st respondent to make legal aid available to indigent persons out of and in so far as available resources permit, but that it arose from the provisions of, *inter alia*, Article 12(1)(a), which guarantees a fair trial.

It is clear from the submissions made by Ms. Erenstein Ya Toivo that she was of the opinion that the expression of the 1st respondent's policy re legal aid cuts across all other provisions of the Constitution and has the effect that it limits the obligation

of the 1st respondent to grant legal aid to available resources as provided in Article 95(h). If such resources available were insufficient or exhausted that was the end of the matter. It would therefore be necessary to look at the relevant provisions of the Constitution.

Article 95 is part of Chapter 11 of the Constitution under the heading of **Principles of State Policy** and the relevant sub-Article provides as follows:

> **"Article 95 Promotion of the Welfare of the People**
>
> The State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following:
>
> (a) .....
> (b) .....
> (c) .....
> (d) .....
> (e) .....
> (f) .....
> (g) .....
>
> (h) a legal system seeking to promote justice on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the State;"

Article 101 determines the legal effect of the provisions contained under Chapter 11 of the Constitution and provides as follows:

“Article 101 Application of the Principles contained in this Chapter

The principles of state policy contained in this Chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them.”

The provisions of Article 12, which are relevant to the present enquiry, are the following:

“Article 12 Fair Trial

(1) (a) In the determination of their civil rights and obligations or any

criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.

(b) A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.

(c) Judgments in criminal cases shall be given in public, except where the interests of juvenile persons or morals otherwise require.

(d) All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.

(e) All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and

shall be entitled to be defended by a legal practitioner of their choice

(f) No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no Court shall admit in evidence against such persons testimony which has been obtained from such persons in violation of Article 8(2)(b) hereof."

The policy statement of the 1st respondent, which is set out in Article 95(h), culminated into the promulgation of the Legal Aid Act of 1990, Act 29 of 1990. Section 10(2) deals with the powers of the 2nd respondent to grant legal aid to an applicant who is charged with an offence and provides as follows:

"10 (1) The Director –

(a).....

(b).....

(2) Any person charged with an offence may apply to the Director for legal aid and if the Director is of the opinion that

(a) having regard to all the circumstances of the case, it is in the interest of justice that such person should be legally represented; and

(b) such person has insufficient means to enable him or her to engage a practitioner to represent him or her,

the Director may grant legal aid to such person."

In terms of Act 29 of 1990, Judges of the High Court were given the power to issue a legal aid certificate under certain circumstances and the Director was obliged to give effect to such certificate. These provisions were set out in sec. 8(2) and 10(1)(a) of the Act and provided as follows:

"8(2) If an accused before the High Court is not legally represented and the Court is of the opinion that there is sufficient reason why the accused should be granted legal aid, the Court may issue a legal aid certificate.

10(1) The Director –

(a) shall grant legal aid to any person in respect of whom a legal aid certificate has been issued under section 8(2).”

Sections 4 and 5(a) of Act 17 of 2000 amended Act 29 of 1990 by deleting sections 8(2) and 10(1)(a) as it was felt that certificates were issued indiscriminately by the Judges without due regard to available funds with the result that during successive years the funds allocated for legal aid were exceeded. To overcome this difficulty the granting of legal aid was now left entirely in the hands of the 2nd respondent, the Director of Legal Aid. In the Court *a quo* the applicants submitted that these amendments were unconstitutional and requested the Court to set them aside. However, the Court did not find it necessary to deal with the constitutionality of these provisions and came to its conclusion on other grounds. In argument before us both Counsel referred, sometimes in a wide sense, to legal aid without thereby referring to the same situation. Ms. Erenstein Ya Toivo was mostly referring to legal aid granted under the Legal Aid Act whereas Mr. Smuts, when using the term legal aid, was mostly referring to his interpretation of Article 12 of the Constitution and, as was submitted by him, the 1st respondent’s obligation to provide legal aid under circumstances where that was necessary as a result of the constitutional duty of the 1st respondent. In order to avoid confusion I will further in this judgment refer to aid granted in terms of the Legal Aid Act as “statutory legal aid” to contrast it to the alleged obligation of the 1st respondent to provide legal aid in terms of Article 12.

I think there can be little doubt that Article 95(h) expresses no more than the intention of the 1st respondent to promote justice by providing statutory legal aid to those who have not the means to afford legal representation. This was done against the background and awareness of the founding fathers who drafted the Constitution that, given the high ideals expressed by the Constitution of equality, dignity and non-discrimination, inequalities which exist in this regard should also be addressed as they also affect those who were once disadvantaged by discriminatory laws and practices. However given Namibia's resources in manpower and finances it would be, and still is, impossible to provide free legal aid for each and every person who is indigent and in need of such assistance. This fact is recognized in that the State limited itself to certain defined cases and in regard to available resources. It is further clear that Article 95(h) is not limited to criminal cases only or civil cases only but is intended to include the whole spectrum of instances where the need for legal aid may exist.

Article 95(h) is therefore an expression by the State of its willingness to assist indigent persons to obtain legal assistance in so far as the State's resources may permit. It further seems to me that even without the disclaimer for legal liability, set out in Article 101, that the Article makes it clear that the State's self-imposed duty to provide indigent persons with free legal aid cannot by any means be regarded as limitless. Any attempt by a Court of law to force the Government to, for instance, increase the amount allocated for statutory legal aid, might be an intrusion into the exclusive domain of the Government as to its expenditure and allocation of state funds, which, as was submitted by Ms. Erenstein Ya Toivo, was not permissible. What was said in this regard by Bertus de Villiers referring to the

Indian Constitution in his article **Directive Principles of State Policy and Fundamental Rights: The Indian Experience, (1992) SAJHR 29,** is equally applicable in regard to the expressed Principles of State Policy set out in the Namibian Constitution, namely:

> "...(They) have two important characteristics. First, they are not enforceable in any court of law and, therefore, should they be ignored or infringed the aggrieved have no legal remedy to compel positive action. Secondly, the principles are fundamental to the governance of the country and oblige the legislature to act in accordance with them. They consequently fulfill an important role in the interpretation of statutes... The unenforceability of the directive principles from a judicial perspective, has led Seervai to describe them as 'rhetorical language, hopes, ideals and goals rather than the actual reality of government'." (Pages 33 & 34).

Article 101 further provides that the Courts were entitled to have regard to the principles set out under Chapter 11 in interpreting any laws based on them.

It therefore seems to me that as far as statutory legal aid is concerned that that must be left in the hands of the State. The divergence of opinion between Counsel for the applicants and Counsel for the respondents arises from Ms. Erenstein Ya Toivo's further submission that in terms of the Constitution the 1st respondent's duty to assist begins and ends with statutory legal aid.

If I understood Mr. Smuts correctly he conceded that this Court, or for that matter any Court, could not prescribe to the 1st respondent what amounts it should allocate to its system of statutory legal aid. Counsel however submitted that sec. 8(2) read with sec. 10(1)(a) of the Legal Aid Act, Act 29 of 1990, was the mechanism by which Judges could give effect to the provisions of the Constitution, more particularly Article 12 thereof, to ensure a fair trial for an accused person. However, the main issue argued before us on behalf of the applicants was whether there was a constitutional duty upon the 1st respondent to provide the applicants with legal representation if it was shown that otherwise they would not have a fair trial as guaranteed by the Constitution. Counsel nevertheless invited the Court to express itself in regard to the constitutionality of the amendments whereby the power of Judges to issue legal aid certificates was abrogated, even though this may be *obiter*. The Court *a quo* did not find it necessary to do so and in my opinion this Court should decline to accept the invitation.

Although, as was pointed out by Mr. Smuts, the principles underlying a fair trial formed part of our common law and were, in certain instances, given statutory impetus, e.g. sec. 73(1) of the Criminal Procedure Act, Act 51 of 1977, there was prior to 1990 not a right to a fair trial to be assessed and tested against specific constitutional provisions. However since the coming into operation of the Constitution numerous decisions by the High and Supreme Courts gave content to the fair trial provisions in Article 12. The change brought about by the Constitution was aptly stated in S v Scholtz, 1998 NR 207 at 216 H – I as follows:

> "What, however, has happened is that the law has undergone some metamorphosis or transformation and some of the principles of criminal procedure in the Criminal Procedure Act are now rights entrenched in a justiciable bill of rights. That is, in my view the essence of their inclusion in Article 12 of the Constitution. Any person whose rights have been infringed or threatened can now approach a competent court and ask for the enforcement of his right to a fair trial."

There are numerous other examples to be found in our case law on this point. In Article 12(1)(e) the right of an accused to legal representation was entrenched. The Courts laid down that a presiding officer in a criminal matter has a duty to inform an accused person of his or her right to legal representation and has the further duty to explain to an unrepresented accused his or her procedural rights, more particularly those rights set out in Article 12. A failure to do so may result in the setting aside of that proceeding on appeal. (See in this regard S v Soabeb and Others, 1992 NR 280 (HC); S v Bruwer, 1993 NR 219 (HC) and Albertus Monday v The State, unreported judgment of the Supreme Court, delivered on 21/02/2002). In cases such as S v Kapika and Others (1), 1997 NR 285 (HC) and S v De Wee, 1999 NR 122 (HC) the duty to inform an accused person of his right to legal representation was extended to the pre-trial process and a duty was placed on the police officer dealing with the matter to inform the accused of such right. Again failure to do so could lead to the Court disallowing evidence obtained through a pointing out or statements made by an accused.

In the development of the law of a fair trial, Courts are not limited to the instances mentioned in Article 12. This is amply demonstrated by the case of S v Scholtz, *supra*, where this Court came to the conclusion that in order for a trial to be fair there should be discovery of the information, contained in the police docket relating to the case, to an accused person. The case provided for full discovery by the State unless the Court is satisfied that the disclosure of any such information might reasonably impede the ends of justice or otherwise be against public interest. Also in this instance it was spelled out that the tenets of a fair trial would not require disclosure in every case. See S v Angula and Others, 1996 NR 323 (HC).

Mr. Smuts further submitted that the necessity for legal representation in criminal trials, as entrenched in Article 12, essentially flows from two fundamental principles:

(a) the basic principle that an accused person is entitled to a fair trial now entrenched in Article 12; and

(b) the equally fundamental principle of equality before the law entrenched in Article 10,

and the application of these two fundamental principles to the adversarial process presupposed by criminal trials in Namibian law.

How this application should take place and how the two Articles, 10(1) and 12, interrelate with each other was again set out in the Scholtz-case, *supra,* at page 218 A – C namely:

> "Article 10(1) is fundamental and central to the new perceptions.
>
> Courts of law have to interpret and enforce this protection of fundamental rights and freedoms. Article 10(1) provides: 'All persons shall be equal before the law.' Apart from this, equality pervades the political, social and economic life of the Republic of Namibia. A reading of the Constitution leaves one in no doubt as to what is intended to be achieved in order for the people of Namibia to live a full life based on equality and liberty.
>
> It is in this light that Article 12 should be looked at and interpreted in a broad and purposeful way."

Applying the principles of equality before the law it is certainly clear that, because of the limitations placed upon statutory legal aid, there will be cases where persons similarly placed will not be granted legal aid, because of a lack of funds, or because they do not qualify in terms of the means test. If I understood the Scholtz-case correctly, Article 10(1) would therefore also play a role in the determination whether, in a particular instance, it can be said that a trial is fair according to Article 12. The equality principle, in its application, may however

also have a limiting effect in the sense that Article 10(1) was interpreted by this Court not to mean absolute equality but equality between persons equally placed. See Muller v President of the Republic of Namibia and Another, 1999 NR 190(SC).

Bearing in mind the principles set out above I am satisfied that there may be instances where the lack of legal representation due to the fact that an accused person is indigent, and where statutory legal aid was or could not be granted, have the effect of rendering his or her trial unfair and where this happens it would result in a breach of such person's guaranteed right to a fair trial in terms of Article 12.

I did not understand Ms. Erenstein Ya Toiva to say that in all circumstances a lack of legal representation due to the indigence of an accused person could not result in an unfair trial. Counsel argued that 1st respondent's obligation to provide legal aid is circumscribed in Article 95(h) read with Article 12(1)(e) of the Constitution and there it ends. Coupled therewith is the argument that an order by any Court which would require of 1st respondent to give aid, whether statutory or non-statutory, would be inappropriate as it intrudes on the exclusive domain of parliament to decide how and in what way funds should be allocated to its various ministries. Because this posed certain difficulties counsel was asked what a presiding officer should do if, halfway through a trial, it became clear that an indigent accused would not have a fair trial due to the absence of legal representation. Counsel's answer that in such a case the Court would have to postpone the trial to give the accused an opportunity to find funds somewhere, is in my opinion not a solution as it would be a futile exercise to postpone a case

where there is no real possibility of finding funds and postponement under such circumstances would not be in the interests of justice.

In support of her contentions Counsel referred the Court to the South African Constitution as well as the Constitutions of some other Countries. Various cases were also cited and I shall deal with these submissions as it becomes necessary. Counsel in any event submitted that the lack of legal representation in this instance would not result in a breach of the fair trial provisions of Article 12.

The Constitution is in my opinion clear as to who must uphold the rights and freedoms set out in Chapter 3. Article 5, which is part of Chapter 3 of the Constitution, provides as follows:

> **“Article 5 Protection of Fundamental Rights and Freedoms**
>
> The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.”

Further elaboration of the powers of the Court to enforce and protect the rights and freedoms is to be found in Article 25. Sub-article (1) deals with the Court’s

powers in regard to legislative Acts infringing upon such rights and freedoms whereas Sub-articles (2), (3) and (4) are relevant to the present instance. They provide as follows:

“Article 25 Enforcement of Fundamental Rights and Freedoms

(1) ...

(2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

(3) Subject to the provisions of this Constitution, the Court referred to in Sub-Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been

unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.

(4) The power of the Court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases."

Article 5 clearly requires from the 1st respondent and all its agencies as well as from the Judiciary to uphold the rights and freedoms set out in Chapter 3. Whereas the Judiciary must uphold them in the enforcement thereof in their judgments the 1st respondent and its agencies have the duty to ensure that they do not overzealously infringe upon these rights and freedoms in their multifarious interaction with the citizens and must further ensure the enjoyment of these rights and freedoms by the people of Namibia. The argument by Ms. Erenstein Ya Toivo that the Court would intrude on the functions of Parliament would it grant an order for legal aid may be correct in so far as it deals with statutory legal aid. However, where the obligation of the 1st respondent arises from its duty to uphold the provisions of the Constitution, in this case Article 12, the Court, in enforcing that right, can never be said to intrude into the affairs of Parliament. By doing so the Court is merely doing what is required of it in terms of the Constitution, and is exercising the powers given it according to Article 25(2) and (3). The argument of

Ms. Erenstein Ya Toivo that such an order would not be “appropriate” as required by Article 25(3) must therefore be rejected. It seems to me that this argument is based on the wrong premise that the duty to uphold the rights and freedoms are all of a negative nature, i.e. that as long as those who must uphold the rights and freedoms refrain from doing anything, their obligation is fulfilled. That may be so in regard to some of the rights and freedoms but there are also rights where positive action is required such as Article 16(2). In terms of this Article the State may, in the public interest, expropriate property subject to the payment of just compensation. If the compensation paid is not just I cannot imagine anybody arguing that the Court, after determining what just payment would be, would be intruding on the function of Parliament by ordering the State to pay such compensation. If this were not so it would mean that the right becomes illusory and affords no protection to the aggrieved person. In my opinion there is also a positive duty on the 1st respondent to ensure the right to a fair trial and where this means that an indigent accused must be provided with legal representation, in order to achieve that object, that duty cannot be shirked by the 1st respondent.

Ms. Erenstein Ya Toivo, in developing her argument, compared the relevant provisions of the Namibian Constitution with those set out in various other Constitutions such as Australia, Botswana, Zimbabwe, South Africa, Canada and others. Counsel further referred the Court to various cases, also of the Constitutional Court of South Africa, such as Soobramoney v Minister of Health, Kwazulu, Natal, 1998 (1) SA 765 (CC) and Government of the Republic of South Africa v Grootboom, 2001 (1) SA 46 (CC).

A comparative study of the constitutional law of other Countries is always helpful, and in matters concerning the interpretation of fundamental rights and freedoms, this has more or less become the norm, bearing in mind the almost universal application of those rights with more or less the same content. However there are also clear differences among the various constitutional instruments and for such a comparative study to be of real value, due cognizance must be given to these differences when interpreting the Namibian Constitution.

In this regard it is relevant to note that the Australian Constitution does not contain a Bill of Rights although according to the law it is recognized that an accused has a right to a fair trial. See Dietrich v R, (1993) 3 LRC 272. As such the position does not seem to be much different from the position in South Africa, and indeed also that of Namibia, before the change of the constitutional dispensation in 1996 and 1990. See S v Rudman, 1992 (1) SA 343 (A). This notwithstanding the majority in the Dietrich-case affirmed the right of an accused to a fair trial and allowed the appeal because the trial of the accused miscarried as a result of the trial Judge's failure to postpone or stay the trial so that arrangements could be made for legal representation for the accused at public expense. The Court further found that the power to stay proceedings necessarily extended to cases in which representation of an accused by counsel was essential to a fair trial, as it was in most cases where an accused was charged with a serious offence.

Although the Botswana and Zimbabwean Constitutions contain Bills of Rights, section 10(2)(d) of the Botswana Constitution, and section 18(4)(d) of the Zimbabwe Constitution, expressly provide that every person charged with a

criminal offence shall be permitted to defend himself in person or, at his own expense, by a legal representative of his own choice. That, in my opinion, clearly excludes the right of such person to claim legal aid at public expense from the State.

The Canadian Charter of Rights provides for the right to retain counsel (Sec. 10(b)) and a fair hearing (Sec. 11(d)). Ms. Erenstein Ya Toivo correctly pointed out that the Charter does not constitutionalise the right of an indigent accused to be provided with state-funded counsel, regardless of the facts of a particular case. However, in R v Rowbotham, (1988) 41 CCC (3d) 1 the accused was denied legal aid because her annual income was too high and she did not qualify under the legal aid scheme. The Court found that this was in breach of Sec. 7 and 11(d) of the Charter and on a new trial it ordered that legal aid must be provided.

Counsel also referred us to Sec. 25(3)(e) of the Interim Constitution of South Africa, Act 200 of 1993. This section provides as follows:

> "Every accused person shall have the right to a fair trial, which shall include the right to be represented … by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at State expense, and to be informed of these rights." (The relevant wording in the Final Constitution is substantially the same.)

Counsel argued that the words "...where substantial injustice would otherwise result, to be provided with legal representation at State expense..." clearly placed an obligation on the State, in the instance of South Africa, to grant legal aid where substantial injustice would otherwise result. Counsel submitted that it was necessary to insert these words in order to establish an obligation on the part of the State to grant legal aid notwithstanding the fact that the Constitution also contains a fair trial provision. By comparison Counsel argued that the absence of these words in the Namibian Constitution indicate that there is no such obligation on the 1st respondent over and above the obligation undertaken in terms of Article 95(h) in so far as resources may permit.

I do not agree with Counsel. Counsel is correct that the constitutional scheme in South Africa, pertaining to legal aid, differs from that in Namibia. In South Africa the obligation to give legal aid to an accused person is a right because it is contained in the Bill of Rights and it is only qualified by the words "where substantial justice would otherwise result." (I need not discuss the effect, if any, of the limitation clauses contained in Sec. 33(1) of the Interim Constitution and 36(1) of the Final Constitution). In Namibia, statutory legal aid is not a right *per se* because it is contained in the policy statement and is made subject to the availability of resources. As such it is available to all indigent persons who cannot afford to pay for legal representation provided that funds and other resources are available. However Article 12 guarantees to accused persons a fair hearing which is not qualified or limited and it follows, in my opinion, as a matter of course, that if the trial of an indigent accused is rendered unfair because he or she cannot

afford legal representation, there would be an obligation on the 1st respondent to provide such legal aid. This obligation does not arise as a result of the provisions of Article 95(h) but because of the duty upon the 1st respondent to uphold the rights and freedoms contained in Chapter 3 of the Constitution.

Ms. Erenstein Ya Toivo's reliance on the cases of Soobramoney and Grootboom, *supra*, can also not assist her, as those cases are distinguishable from the present case. This is so because the rights, which the applicants in those cases sought to enforce, were both qualified by the availability of resources of the Government. See sections 27(2) and 26(2) of the Constitution of South Africa, Act 108 of 1996. As such it would have assisted the argument of Counsel based on statutory legal aid but it does not assist the respondents in regard to the interpretation of Article 12 of the Constitution.

In Constitutional Rights in Namibia, Naldi interpreted Article 12(1)(e) of the Constitution as not providing for free legal assistance in the interests of justice. That is so but it guarantees the right to legal representation of own choice and Article 12(1)(a) guarantees a fair hearing. Where this cannot be achieved because of the absence of legal representation through the indigence of an accused it is only the 1st respondent which can step in to uphold the guaranteed right. The learned author however accepted that the right to a fair trial enshrined in Article 12, and the various guarantees specified therein, constituted the minimum that is acceptable and is not an exhaustive list. He continued to state that the prime aim is the protection of the individual interest in fundamental justice and is mainly designed to protect the principle of legal certainty and the

interests of the accused. (See p. 61). This is precisely what this Court endeavours to do.

I am therefore of the opinion that it cannot be said that Article 95(h) in any way qualifies or limits the right to a fair hearing as contained in Article 12, and as was contended for by Counsel for the respondents. There is nothing contained in the wording of either Article, which would support such an interpretation, nor would one expect that a policy statement would have such a far-reaching effect as to limit a fundamental right unless it is clearly and unambiguously spelled out. It seems that this approach is very much the same as that in Canada where it was recognized that, notwithstanding a legal aid scheme, which was mostly based on earning capacity, there would be instances where the legal aid scheme falls short but where the dictates of a fair trial require that an accused should be legally represented. See R v Rowbotham, *supra.*

For the same reasons, set out above, I cannot agree with Ms. Erenstein Ya Toivo that the provisions of Article 14 (3) (d) of the International Covenant on Civil and Political Rights are in conflict with the Constitution of Namibia and can therefore be ignored. The Namibian Parliament acceded to this Covenant on 28 November 1994. It also, on the same date, acceded to the First and Second Optional Protocols. This Article provides as follows:

> "14(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees in full equality:

(a).....

(b).....

(c).....

(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in cases where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."

(My emphasis)

According to Article 63(2)(e) read with Article 144 "... international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia." From this it does not follow that the said Article is now part of the Constitution of Namibia but being part of the law of Namibia, it must be given effect to. As such it lays down the parameters within which legal representation to an indigent accused is required namely, in cases where the interest of justice so require. Although no law is permitted to limit the rights set out under Chapter 3 of the Constitution, except as is provided for under the Chapter itself, the interests of justice lies at the root of a fair trial and the provisions of the Covenant is therefore clearly compatible with the tenets of a fair trial. As was pointed out by Mr. Smuts the State not only has an obligation to foster respect for international law and

treaties as laid down by Article 96(d) of the Constitution but it is also clear that the International Covenant on Civil and Political Rights is binding upon the State and forms part of the law of Namibia by virtue of Article 144 of the Constitution.

It is furthermore clear from Article 2, sub-art. 2 of the Covenant, that State parties who have acceded thereto are under an obligation to take the necessary steps to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the Covenant. In my opinion the Legal Aid Act, as amended, does no longer give full effect to the rights of an indigent accused as provided for in Article 14 (3) (d) of the Covenant, if that was the only source whereby assistance could be given to such accused. This is so because in terms thereof the 1st respondent's obligation to provide statutory legal aid is subject to the availability of resources and is therefore qualified and made dependent on the availability of funding. Article 14 (3) (d) creates an obligation in regard to all those cases where the interests of justice require that an indigent accused person be legally represented. The present case illustrates the difference. Under statutory legal aid there would not be an obligation on the 1st respondent if the resources provided under the Legal Aid Act were not sufficient. However if the interests of justice require that those of the applicants who cannot afford legal representation should be legally represented such an obligation to provide legal representation for them would arise from the provisions of Article 14 (3) (d) of the Covenant which is not qualified by the availability of resources.

The above findings now necessitate an investigation into the nature of the trial and whether, given all the circumstances of the case, there is a reasonable possibility

that indigent accused will not get a fair trial if they were denied legal representation. On this issue Counsel are divided. Mr. Smuts submitted that legal representation in this instance is a necessity and he referred us to various authorities underscoring this point. Ms. Erenstein Ya Toivo submitted that the absence of legal representation would not of necessity render the trial of the accused unfair. She pointed out that the presumption of innocence together with the other guarantees contained in Article 12 and the Criminal Procedure Act would ensure fairness of the criminal trial under the supervision of the presiding Judge. Counsel submitted that the Judge has considerable latitude in the measures that he can implement to promote the fairness of a trial by, for instance, taking time to explain to the accused their rights and the charges against them as well as the ground rules of the trial, and to assist the accused in general. Furthermore there is also a duty on the prosecutor to treat the accused fairly by assisting the Court in finding the truth and in providing information to the Court, which would be favourable to the accused. Ms. Erenstein Ya Toivo further pointed out that the accused do not have the profile of typical criminal defendants and that there are amongst their ranks people who are relatively well educated. There are for instance a former Parliamentarian, some teachers, civil servants as well as former policemen and others.

This argument, in my opinion, loses sight of the fact that a case of the dimensions of the instant one brings with it its own unique characteristics and problems. With 128 accused facing 275 charges, mostly of a serious nature, and with some 500 or more witnesses to be called, only by the State, the case has all the makings of a logistical and organizational nightmare for both the prosecution and the defence

and will no doubt run for a couple of years rather than months. Whereas the prosecution will no doubt be able to afford a transcription of the evidence, those of the accused who are indigent will not be able to afford it and will have to make do with notes taken by themselves if they are able to do so. We are also told that five interpreters will serve the accused so that one can accept that they are not all proficient in English, which further complicates matters even if they are provided with a transcription of the record. Because of the possible long duration of the trial and the many witnesses which will be called by the State it is necessary that each accused should know what the evidence is that involves him and to be able to relate it to specific charges. This is essential in order to be able to take informed decisions about the conduct of their trial and to be able to cross-examine witnesses properly and effectively. In a case of this magnitude the task to cross-examine would be a daunting one, even for a legal practitioner, and no matter how many times the presiding Judge may explain to the accused what the art of cross-examination involves, there would be those who would not be able to master it. Counsel for the applicants further pointed out that according to the record many of the accused made statements and confessions, which have now been challenged. This will necessitate the holding of trials within the trial, which involves difficult issues of law and of fact and the outcome of which could be conclusive for the guilt or otherwise of the accused.

The charges against the accused are wide ranging and include high treason, sedition, murder and attempted murder, malicious damage to property, robbery with aggravating circumstances, theft and various contraventions of the Immigration Control Act, Act 7 of 1993, and the Arms and Ammunition Act, Act 7 of

1996. There can be no doubt that most of these charges are serious and would on conviction attract long periods of imprisonment. The complicity of the accused in the commission of these crimes is, in certain instances, based on the doctrine of common purpose and conspiracy to commit the crime both of which contain pitfalls for the unwary and which sometimes even baffle those who are supposed to be informed. See in general Criminal Law, 3rd Ed. by C.R. Snyman p249ff and 280ff and S.A. Criminal Law and Procedure, by J.M. Burchell, Vol. 1, 3rd Ed. p 308ff and 366ff.

Before the start of the trial various steps would have to be considered such as the asking of further particulars. The asking of further particulars is particularly relevant where charges are based on common purpose and also conspiracy and where the State, as is the case here, refuses to make discovery of all the statements to the defence. In these circumstances the asking of further particulars will be a necessity to attempt to determine the complicity of each of the applicants in relation to the charges. However in order to do so knowledge of the elements of the crimes charged is necessary as well as knowledge of the doctrine of common purpose and conspiracy. The framing of the questions must also be within the parameters of what is permissible.

Counsel for the respondents relies heavily on the role to be played by the presiding Judge in the trial and on the procedural and evidential rules which are aimed at achieving a fair trial. It is correct to say that the Judge is not a mere umpire who must only see that these rules are complied with. One such power that the Court has is the discretion to summon witnesses if it is of the opinion that such evidence

is essential for the just decision of the case (see secs 186 and 167 of Act 51 of 1977 and see further Albertos Monday v The State, *supra*). However the fairness of a trial does not only depend on the compliance with these rules. A criminal trial has many other facets, which will determine whether in a specific instance the trial was a fair one. To explain to an accused his rights to cross-examination does not guarantee an effective and proper exercise of that right by the accused. Mostly that is not the case. In most cases where there is a limited number of accused charged with a number of offences the assistance which a presiding Judge may be able to give will differ completely from a case such as the present with 128 accused persons facing 275 charges. In the first instance the Judge may be able to even suggest a particular line of cross-examination and may advise the accused of what previous witnesses have testified. In a case of the magnitude of the instant case it would be an impossibility. How would the Judge ever be able to advise accused No 101 that the evidence given by witness A differs from the evidence now given by witness M six months later. That is the task and duty, which can only be performed by the legal representative of the accused.

It was pointed out by Didcott, J, in S v Khanyile and Another, 1988(3) SA 795 at 798G – 799C that the Judge cannot and ought not be counsel for the prisoner. The learned Judge motivated this statement as follows:

> "A lawyer doing the work confers confidentially with his client and with witnesses whom the client would like to call. Having learnt what each has to say, he advises the client on the line to be taken, on the plea to be tendered, the admissions to be offered, the particular allegations to

be disputed. He plans the strategy and tactics he will use in answering these, then executes the plan. He decides what testimony the defence will present and, when his turn comes, he presents it. Mindful in the meantime of his expectations from that quarter, he determines those parts of the prosecutor's case which the defence will challenge, and he proceeds to challenge them. He objects to the admissibility of any evidence questionable on that score. Cross-examining, he does not content himself with clarification and elucidation. He seeks to draw from the witnesses for the prosecution information damaging to it and, where they incriminate his client all the same, to show errors by them in observation and recollections, to demonstrate uncertainty and confusion in their minds, to exploit inconsistencies and improbabilities in their versions, to expose bias and downright lying once such looks likely. And the case for the client he argues at the end, casting on it the best light that the law and the evidence sheds. Hardly any of this can effectively or may properly be done for an accused person by the judicial officer trying him, under the system we have at all events, a system in which the judicial officer is no inquisitor conducting his own investigations but an adjudicator who by and large must leave the management of the trial he hears and the combat waged in them to the adversaries thus engaged. Above all, to quote again from the article I have mentioned, your judicial officer whose role is that functionally detached one

> 'cannot fling the whole weight of his understanding into the opposite scale against the counsel for the prosecution and

> produce that collision of faculties which … is supposed to be the happiest method of arriving at the truth'."

In the Khanyile-case, *supra*, at p 815 Didcott J mentioned three factors which a Court should take into consideration to determine whether the absence of legal representation would cause substantial injustice to an accused. The first is the inherent simplicity or complexity of the case, as far as both the law and the facts go. Secondly the Court must look at the ability or otherwise of an accused to fend for himself. Thirdly the Court must consider the gravity of the case and the possible consequences of a conviction. I have already tried to show that the present case is unique and, as far as criminal litigation goes in Namibia, certainly exceptional. No one argued that the case was not one in which complex issues of both law and fact will arise. This being the case it seems to me that the applicants are ill-equipped to deal with these issues which are complicated and where a thorough knowledge of the law concerning issues such as common purpose and conspiracy would be required. Again, as far as the gravity of the case is concerned, no one even suggested that a conviction on most of the charges, even if it only were on one of these serious charges, would not have dire consequences for the applicants.

As regards the capability of an accused to fend for himself, I agree with what was generally said in Powell v Alabama, (1932) 287 US 45 at 68 – 69 which was cited with approval by Goldstone J in S v Radebe 1988 (1) SA 191 (T) at p 195 E – G, namely:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue, or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him."

For the reasons set out above I have come to the conclusion that those applicants who cannot afford legal representation will not have a fair trial as guaranteed by the provisions of Article 12 of our Constitution. As there is a duty upon the 1st respondent to uphold the provisions of the Constitution it follows that the obligation to provide legal representation, or the means thereto, rests on the 1st respondent. Whether it do so by means of the machinery put in place by the Legal Aid Act, or by any other means, is not for the Court to prescribe. At this stage I want to put on record that most, if not all, of the instances where the tenets of a fair trial require that an indigent accused should be legally represented such representation is made available through the statutory legal aid scheme by the 1st and 2nd respondents. However, because this is a finding under Article 12 it follows that the means test provided for by the Legal Aid Act is not without more

applicable and it may be found that it does not meet with the exigencies of this case. Furthermore, as the obligation to provide legal aid by 1st respondent is limited to indigent accused persons it follows that it would be necessary to screen the various applicants in order to determine who would qualify for such assistance. One can hardly think that, for instance, the 1st applicant, who testified at one stage that the value of his cattle alone, amounts to N$ 1 million, would qualify. Nevertheless a factor, which must be considered in determining whether a particular applicant qualifies, would be the duration of the trial. It may also be that an applicant who does not qualify in a simple case, may qualify in a case such as the present or an accused that does not qualify at the outset, may qualify as the case progresses and his or her funds become depleted. In the latter instance such an accused must be given the opportunity to apply, or if an application had been rejected, to reapply. It also follows that, where there is no conflict of interest, one or two counsel may represent groups of applicants as long as the groups are not so big that they become unmanageable.

Because the instant case is an exceptional one where the absence of legal representation clearly constitutes unfairness, it can hardly serve as an example of when it can be said that a trial is fair or not fair. Whether, on the other hand, one applies the qualification of the Covenant in determining if a trial is unfair or uses some other formula such as substantial injustice, it seems to me that our law in this regard is still in a developing phase and that it will not be appropriate to lay down hard and fast rules at this stage. It is however clear that the absence of legal representation will not in every instance result in a trial being unfair and that there are limits whereby this right, guaranteed by Article 12, can be invoked.

Counsel also argued various other points such as whether the applicants had a vested right to legal assistance unaffected by the amendments brought about to the Legal Aid Act. Ms. Erenstein Ya Toivo also attacked certain findings by the Court *a quo*. The conclusion to which I have come makes it unnecessary to deal with these points, as they also do not affect that finding.

In regard to the payment of costs Ms. Erenstein Ya Toivo referred us to a decision of this Court in the case of Hameva and Another v Minister of Home Affairs, 1997 (2) SA 756 (NmSC) in which the Court confirmed a decision of the High Court whereby a review against the decision of the Taxing Master to disallow counsel's fees paid by the Legal Assistance Centre, which acted on behalf of the appellants, was not successful. The *ratio* of the Court of Appeal was, so it seems to me, that on an interpretation of the Deed of Trust of the Legal Assistance Centre, they were not entitled to claim these costs as a disbursement.

In the Court *a quo* the order included the costs of two instructed Counsel as part of the disbursements. Ms. Erenstein Ya Toivo is of course correct that if the situation pertaining to the Deed of Trust of the Legal Assistance Centre were still the same as when the Hameva matter was decided then it follows that the Centre would not be entitled to such disbursements. However if the Deed of Trust was amended to also include the costs of counsel as disbursements then the Centre would be entitled to recoup such costs. Under the circumstances I agree with Mr. Smuts that this is a matter for the Taxing Master but I think that this Court should frame the Order in such a way that cognizance is taken of this matter. I also am of the

opinion that the Court *a quo* correctly allowed the costs of two Counsel, that is if the Legal Assistance Centre is entitled thereto.

As the reasoning of this Court, in coming to its conclusion, differs to a certain extent from that of the Court *a quo*, it will also be necessary to reframe the order granted by that Court.

In the result the appeal is dismissed and the following order is substituted for the order made by the Court *a quo*:

(a) First Respondent is directed to provide such legal aid to those of the applicants who are indigent as assessed by it so as to enable them to have legal representation for the defence of all the charges brought against them in the trial referred to as the Caprivi treason trial.

(b) First respondent shall pay the costs in the Court *a quo* and the costs of appeal in this Court limited to disbursements and to include therein the costs of two instructed Counsel provided that provision is made therefor in the Deed of Trust of the Legal Assistance Centre.

STRYDOM, C.J.

I agree.

_____

MTAMBANENGWE, A.J.A.

I agree.

_____

MANYARARA, A.J.A.

O'LINN, A.J.A.:

A: INTRODUCTORY REMARKS

I have read the judgment proposed by my brother the Chief Justice and agree that in the circumstance set out in the judgment, legal aid at State expense must be

provided to enable those of the accused who are unable to pay for such services, to have the necessary legal assistance to ensure a fair trial.

I however do not agree with the form of the order and the reasons and motivation for such order.

The order proposed by the Learned Chief Justice reads as follows:

(a) 1st Respondent (i.e. the Government of Namibia) is directed to provide such legal aid to those of the applicants who are indigent as assessed by it so as to enable them to have legal representation for the defence of all the charges brought against them on the trial referred to as the Caprivi treason trial.

(b) First respondent shall pay the costs in the Court *a quo* and the costs of appeal in this Court, limited to disbursements and to include therein the costs of two instructed counsel provided that provision is made therefore in the Deed of Trust of the Legal Assistance Centre.

The order in the Court *a quo* reads as follows:

"(a) Second Respondent (i.e. the Director of Legal Aid) is directed to provide such legal aid as assessed by him so as to enable them to have legal representation for the defence of all

charges brought against them in the trial referred to as the Caprivi Treason Trial due to start on 4th February 2002.

(b) Respondents shall pay the costs limited to disbursement and to include the costs of two instructed counsel jointly and severally, the one – paying the other to be absolved."

The differences between the order of the Court *a quo* and that proposed by the Chief Justice are the following:

(a) Whereas the Court *a quo* ordered the 2nd respondent (i.e.) the Director of Legal Aid) to provide the legal aid, the order proposed by the Chief Justice orders the first respondent (the Government) to provide the Legal Aid and makes no order at all against the Director of Legal Aid.

(b) As far as the costs is concerned, whereas the order *a quo* ordered costs to be paid jointly and severally by the two respondents, the 1st respondent is now ordered to pay the costs in the Court *a quo* as well as the costs on appeal.

The applicants in the Court *a quo* asked that the second respondent, not the 1st respondent, be directed to provide legal representation to the applicants and it is to this prayer that the Court *a quo*, a full bench decision of three (3) judges, acceded.

In that Court the applicants also asked that those respondents, who oppose the application, "pay the applicants' costs jointly and severally, the one paying the other to be absolved." The Court *a quo* in its judgment also acceded to this prayer.

On appeal before us, the applicants continued to support the order as made in the Court *a quo* and for the appeal against it to be dismissed.

The order I now propose corresponds with the order of the Court *a quo* in so far as the Second Respondent is ordered to provide the legal aid and in regard to the payment of costs, but with the important difference that first respondent is ordered to supply the necessary logistic and financial aid to 2nd respondent to enable him to give effect to par (a) of the Court order.

B: MOTIVATION FOR MY DISSENT

1. I regard the omission of any order against the Director of Legal Aid, unjustifiable, particularly because his function and action or inaction, was from the beginning a central issue in the proceedings and the Director remains the main and obvious State organ through which the order for legal aid will have to be channelled and administered.

2. It is therefore necessary in the first place to establish whether the complaint of the applicants, and which led to their application to Court, was justified to the effect that the

Director had not responded to their applications after the lapse of a considerable period. He had consequently failed completely to exercise his discretion in terms of the unamended section 10(2) of the Legal Aid Act, No 29 of 1990 which reads:

"Any person charged with an offence may apply to the Director for legal aid and if the director is of the opinion that –

(a) having regard to all the circumstances of the case, it is in the interest of justice that such person should be legally represented; and

(b) such person has insufficient means to enable him or her to be legally represented, the Director may grant legal aid to such person."

Although the discretion given to the Director is very wide, he is at least bound by article 18 of the Namibian Constitution relating to Administrative Justice in exercising his discretion.

Article 18 provides that he must act "fairly and reasonably" and "comply with the requirements of the common law and any relevant legislation."

In this case it was common cause that the applicants never received a hearing from 2nd respondent and never received a response from 2nd respondent. They were never told whether their applications were still being considered, or whether or not the applications were refused and if so, for what reason.

From these facts it appears that the 2nd respondent never even exercised his discretion – i.e. he failed or refused to function – to exercise the discretion vested in him by the aforesaid Section 10(2); alternatively, he didn't act fairly and reasonably in a matter of such importance and urgency.

It is trite law that such conduct by an office holder vested with a discretion to decide on a person's rights – involving such person's fundamental rights – such as the person's right to a fair trial – justifies the approach to the Court by such person for relief – both in accordance with the common law and the provision of article 5, and 25 of Chapter 3 of the Namibian Constitution, read with articles 10, 12, and 18. See also the recent decision of this Court in *Monday v the State*.[1]

In the latter case the failure of the Legal Aid Directorate to consider the case of the accused for legal aid fairly and properly, constituted an irregularity which in conjunction with other irregularities and misdirections, eventually led to the setting aside of a conviction and sentence in a criminal case of considerable gravity.

This Court, in the fairly recent decisions in "the Government of the Republic of Namibia and Sikunda", and Chairperson of the Immigration Selection Board and Frank and Another, had

[1] Monday v the State, NmS, 21.2.2002, unreported, pp 20-21

occasion to spell out the requirements of our law for a person or institution exercising a discretion and set aside the decisions made on the ground of various irregularities, such as not exercising a discretion at all; non- compliance with the *audi alterem partem* rule; being influenced by a higher authority, when purporting to exercise its discretion; misreading the provisions of the law to be applied.[2]

On behalf of 2nd respondent the excuse was belatedly made in the course of the litigation that he could not conduct the "means test" used by his directorate to establish whether or not a person has sufficient funds to enable him/her to be legally represented, because he did not have the personnel to conduct such tests; secondly his directorate does not have the legal personnel to defend the accused;

that insufficient funds were allocated by the government on the yearly budget appropriation to provide legal representation to all those who need it in the normal situation and that the Minister of Justice had allegedly said in Parliament that the government did not have sufficient financial resources to provide legal assistance of the magnitude required for the Caprivi Treason Trial accused.

The judges of the full bench in the Court *a quo* were correct in stating that there was no allegation or evidence properly put before it to show that the State did not have the available financial resources to fund the defence of the accused. They also correctly held that the mere fact that sufficient financial resources had not been allocated to the Legal Aid Directorate in the

[2] Government of the Republic of Namibia and Sikunda, NmS, 21/2/2002, not reported.
See also: The Chairperson of the Immigration Selection Board and Frank and Another., NmS, 5/3/2001, not reported.

past and also not currently to deal with the case of the Caprivi Treason Trial accused, was not an answer to the claim of the accused to legal aid provided by or funded by the State in the case of accused in need of legal aid.

I agree with the above finding by the Court *a quo* and the distinction it drew between the Government not providing sufficient funds in its budget for legal aid and an allegation that the State did not have sufficient financial resources to provide legal aid where necessary as provided for by implication in the Namibian Constitution and expressly in section 14(3)(d) of the International Covenant on Civil and Political Rights. This Covenant was approved by the Namibian National

Assembly on 28th November 1994 in accordance with its powers under article 63 (2)(e) of the Namibian Constitution.

By virtue of article 144 of the Namibian constitution itself, the provisions of the Covenant became part of the law of Namibia as from 28 November 1994 and as from that date all concerned, including the Namibian Government and the Director of Legal Aid, had to give effect to that. That the Director of Legal Aid had to give effect to it as relevant legislation, also in terms of article 18 of the Namibian Constitution, read with article 144, admits of no doubt.

It is now necessary to look carefully at this part of the law of Namibia contained in section 14(3) and introduced into the law of Namibia by the special mechanism of Article 144. Article 144 of the Namibian Constitution provides:

> "Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law binding upon Namibia under this constitution, shall form part of the law of Namibia."

Section 14 (3)(d) of the Covenant, incorporated into the law of Namibia, provides:

> "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality …….
>
> (d) ……and to have legal assistance assigned to him, in any case when the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;"

The status of this part of the law of Namibia is further enhanced by Article 96 (d) of the Namibian Constitution which provides:

> "The State shall endeavour to ensure that in its international relations, it ….. (d) fosters respect for international law and treaty obligations."

It will be noticed that two requirements for legal aid in section 14 (3)(d) which corresponds with that in section 10 (2) of the Legal Aid Act are :

(i) whether it is in the interests of justice that such person should be legally represented.

(ii) Whether such person has insufficient means to enable him/her to pay for legal aid.

The difference is that section 10 (2) provides that the Director "may" not "must" or "shall" provide in such an instance.

The part of section 14 (3)(d) providing for legal aid on the other hand regards it as a "MINIMUM guarantee" "in full equality" that a person has legal aid where the abovestated two requirements are met.

Section 14 (3)(d) is also part of later legislation than section 10(2) and must be regarded as supplementary to section 10(2). To the extent that it differs from section 10(2), the provisions of section 14(3)(d) should be regarded as not only supplementing 10(2), but being the later enactment, to have amended it to the extent of the difference. It is a necessary implication from the wording and surrounding circumstances that section 14(3)(d) of the Covenant as incorporated in Namibian law, altered section 10(2) of the Legal Aid Act in so far as the latter is inconsistent with the Covenant as incorporated in Namibian Law in 1994.[2(a)]

[22(a)] *Ex parte Smit*: In re Boedel Smit, 1983(3) SA 438 (T)
The Interpretation of Statutes: L M du Plessis, 1986 at p72.

The Chief Justice acknowledges that section 14 (3)(d) has become part of the law of Namibia and must therefore be implemented. It was also held in the Supreme Court judgment in "Thomas Namunjepo and others and the Commanding Officer of Windhoek Prison and Others", that the whole of the International Covenant on

Civil and Political Rights, has become part of the law of Namibia and has to be implemented.[3]

Further the Chief Justice correctly holds that when legal aid is required to ensure a fair trial in accordance with article 12 (1)(e) of the Constitution, and the accused persons are indigent and unable to pay for such aid from their own financial resources, the Government will have the legal duty to supply such legal aid. This duty flows from article 12 (1)(e) read with article 10, 5 and 25 of the Namibian Constitution. But it is not only the Government that is so bound, but also the Director of Legal Aid. This obligation flows from article 5 which provides in the most emphatic language:

> "The fundamental rights and freedoms, enhanced in this Chapter, shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the government and its agencies, and where applicable to them, by all natural and legal persons in Namibia and shall be enforceable by the Court in the manner hereinafter prescribed."

The provisions of the Namibian Constitution aforesaid does not expressly provide for such aid to be provided, but this is a necessary implication if the accused is

[3] Namunjepo, 2000(6) BCLR 671 NmS

unable to pay for such services in cases where a fair trial will not be possible, unless such legal aid is provided by the State. These provisions, being contained in Chapter 3, are absolute in the sense that it cannot be revoked or amended to change its substance, by any subsequent law. These provisions are furthermore supplemented by the provisions of the International Covenant on Civil and Political Rights, which in its section 14 (3)(d) are much more specific than article 12 (1)(e). Together, all these provisions, including section 10 (2) of the Legal Aid Act, in so far as section 10 (2) are not inconsistent with these provisions, constitute the body of law with which both Government and the Director of Legal Aid, the respondents in this case, have to comply.

Unfortunately it seems that both the respondents gave no attention at all to section 14 (3)(d) aforesaid when they had to deal with the application for legal aid by the accused in the Caprivi Treason Trial. In argument before us, their counsel Ms Erenstein Ya Toivo, contended that the aforesaid provisions of Namibian law must be read subject to article 95 (h) of the Namibian Constitution and that the respondents were entitled not to provide legal aid on the ground that the government did not have sufficient financial resources to do so and that being so, article 95 (h) is constitutional authority for refusing legal aid on this ground. Furthermore, according to this argument, the government has the constitutional

duty and function to draw up the budget and the Court is not entitled to interfere with this function.

It is necessary therefore to take a closer look at article 95 (h) of the Namibian Constitution. The first part to note is that the article appears in Chapter XI (eleven), dealing with "Principles of State Policy."

Under the subheading-
"Promotion of the Welfare of the People" a number of items are enumerated beginning with the introductory words: "The State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following:"

Par (h), read with its introduction, reads as follows:

> "The State shall actively promote and maintain the welfare of the people by adopting *inter alia* ….a legal system seeking to promote justice on the basis of equal opportunity by providing free legal aid in defined cases, with due regard to the resources of the State." (My emphasis added)

In article 101 under the heading –

> "Application of the principles contained in this Chapter" the "application of the principles" is described as follows:

> "The principles of State policy contained in this chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them."

The following characteristics must be emphasized:

(i) Article 95 – contain broad policy guidelines and do not in themselves constitute enforceable laws and are in particular not enforceable by the Courts except that the Courts may, have regard to them in those cases where laws based on them have to be interpreted. (My emphasis added)

The provisions of Chapter 3 of the Namibian Constitution, are clearly not based on the principles of state policy contained in article 95 and therefore cannot be used by the Courts to interpret article 5, 10, 12, 18 and 25 of the Namibian Constitution.

Section 14 (3)(d) of the International Covenant on Civil and Political Rights came into being as a result of international negotiation in the first place and was incorporated into Namibian law by virtue of articles 63 (e) read with article 32 (3)(e) and 144 of the Namibian Constitution and

was clearly not based on article 95 (h) of the Namibian Constitution. It follows that when a Court applies and interprets section 14 (3)(d) of the Covenant, article 95 (h) of the Constitution is not relevant and not used as a factor in interpreting section 14 (3)(d).

As far as the Legal Aid Act No. 29 of 1990 is concerned it was obviously based on the requirements for a fair trial contained in article 12 of the Namibian Constitution read with article 10. If based on article 95 (h), why then did it not incorporate in section 10 of the Act, the consideration or condition "with due regard to the resources of the State," as contained in article 95 (h)? It is however possible that the amendment brought in by Act 17 of 2000, eliminating the power of the Court to issue a certificate compelling the Legal Aid Director to provide legal aid, was inspired, in whole or in part, by article 95 (h) of the Constitution. But even if I am wrong in my view, the Court is not compelled to have regard to article 95 (h), but "is entitled" to have regard to it as provided in article 101 in interpreting laws based on article 95 (h).

One must further keep in mind that although at most the Court may have regard to article 95 (h), it will be compelled to apply the said articles 5, 10, 12, 18 and 25 of the Namibian Constitution as well as section 14 (3)(d) of the aforesaid convention, because these are laws to be enforced, not mere policy guidelines as contained in article 95.

The provision that the government shall be guided by the principles contained in article 95 in making and applying laws, must be distinguished from the role of the Court in enforcing provisions in the constitution providing for the protection of the human rights therein entrenched and for enforcing the rights expressed in the aforesaid section 14(3)(d) of the Convention.

Surely, once the Government through Parliament has enacted a law based on or inspired by article 95, it will have to implement that law. Once the law is made based on article 95, the provisions of article 95 shall nevertheless "guide the government in ….. applying such laws to give effect to the fundamental objectives of the said principles."

The question in the latter case that must also be answered is what are the "fundamental objectives."

Surely the fundamental objective in 95 (h) is "a legal system to promote justice on the basis of equal opportunity." The manner to promote this fundamental objective is to "provide free legal aid in defined cases with due regard to the resources of the State."

Cases have been defined in section 10 of the Legal Aid Act, to be those where the interests of justice so require and where the accused is unable to pay for such services from his/her own financial resources. Further than that, there has been no effort to spell out the "defined cases" in legislation. As to the qualification "with due regard to the resources of the State," this

remained a policy guideline not incorporated in the Legal Aid Act or any other legislation. So there is no legislation that can be said to be based on this part of the policy guideline. Although the Government may still be guided by this part of the policy guideline in applying laws to give effect to the "fundamental objectives", it will not qualify for the Courts to have regard to it in its interpretation, because there is no law based upon it which could be interpreted by the Courts. But to the extent that the aforesaid qualification is relevant for any of the aforesaid purposes, the meaning of the qualification "with due regard to the resources of the State" cannot be stretched to mean that legal aid may be refused *in toto*, even where a fair trial is impossible without legal aid and where the accused is unable to pay for such aid from his/her own resources. In such a case there will be an obligation based on

articles 5, 10, 12, 18 and 25 of the Namibian Constitution as well as on section 14(3)(d) of the Covenant incorporated in our law. The policy guideline "with due regard to the resources of the State," cannot be allowed to frustrate the law as herein set out.

In any event, the said policy guideline says no more than that regard must had to the resources of the State. If it was meant that legal aid could be refused *in toto* if the State had scarce or inadequate resources, why did the guideline not say so expressly.

It seems to me that what was intended was that when deciding on the nature and extent of the legal aid to be supplied, the extent of the State's resources will have to be considered.

So eg. no accused can claim the services of an extremely competent and expensive legal representative at the State's expense.

It is also necessary at this point in time to point out that what is referred to in this part of article 95 (h), is the "State's" resources. Although the government of the day is the custodian of the State's resources whilst in government, it is not the Government's resources. The distinction was underlined already in the pre-

independence decision in the "*Free Press of Namibia (Pty) Ltd v Cabinet* for the Interim Government of South West Africa". [4]

It is also important to pause here to stress that there was no evidence placed before Court to the effect that the State did not have the resources to grant legal aid. If such an allegation was in fact made on behalf of respondents, I am certain that such a proposition would have been strongly assailed by the applicants and their counsel.

As it stands, the question of whether, if properly raised on the papers, it would have been a sufficient legal justification for denying legal aid to all the accused, appears to be academic. Consequently, it cannot be used in these proceedings to deny applicant the relief they claimed in these proceedings.

[4] SA Law Reports 1987 (1) SA 614 (SWA) at 625 E-H.

One wonders whether the State's resources have declined to such an extent since 1994 when the National Assembly endorsed the aforesaid International Covenant, that Namibia can no longer give effect to the obligations the National Assembly undertook in accepting that Covenant. The Covenant, it will be remembered, provides *inter alia*, as a "MINIMUM guarantee," "in full equality," "to have legal assistance assigned to him, in any case where the interests of justice so require,

and without payment by him in any such case if he does not have sufficient means to pay for it." (The term "him" in the Covenant obviously includes "her".)

It is against this background that I find the distinction between so-called "statutory" legal aid and legal aid to be provided in accordance with article 12 of the Namibian Constitution as unnecessary and unhelpful, if not confusing. Statutory legal aid, according to the Chief Justice, is that provided in terms of the Legal Aid Act. The Court went on to say that "the argument of Ms Erenstein Ya Toivo that the Court would intrude on the functions of Parliament would it grant legal aid, may be correct in so far as it deals with statutory legal aid."

I understand by the contention by Ms Erenstein Ya Toivo, that she meant a "wrongful and unlawful intrusion" on the functions of Parliament.

Parliament, as well as the Director of Legal Aid must, in exercising their functions, comply with the law – whether it is the law contained in article 12 of the Constitution, read with 5, 25, 18 and 10 or the law contained in section 14 (3)(d) of the Covenant or section 10 of the Legal Aid Act or all of these provisions taken as a whole.

If Parliament, and/or the Director of Legal Aid, fail to exercise their functions in compliance with the law, the Court is required by article 5 and 25, read with the

provisions of the High Court Act and Supreme Court Act, to adjudicate on the issues, if any person claims in legal proceedings that the Government and/or the Director of Legal Aid have infringed their rights or have failed to uphold their rights.

When the Court finds in litigation that the Government and/or the Director of Legal Aid has failed to act in terms of the law applicable to them, the Court makes a declaration or finding to that effect and order them to take the necessary measures within their power to uphold the law.

Such action by the Court is not "intrusion" or "interference," at least not unlawful or wrongful intrusion or interference. It is also not, as Ms Erenstein Toivo Ya Toivo argued – "inappropriate." It is nothing more and nothing less than a function and duty placed on it by the Namibian Constitution itself.

Unfortunately the matter did not end with this argument by counsel for the respondents. The learned Chief Justice developed the argument further. In order to facilitate commenting on it and the economy of space, I will break up and number the various propositions contained in the further statement by the Chief Justice as follows:

(i) "In my opinion, the Legal Aid Act, as amended, does no longer give full effect to the right of an indigent accused as provided in 14(3)(d) of the Covenant, if that was the only source whereby assistance could be given to such an accused…."

(ii) "This is so because in terms thereof the 1st respondents obligation to provide statutory legal aid is subject to the availability of resources and is therefore qualified and made dependent on the availability of funding."

(iii) "Article 14(3)(d) creates an obligation in regard to all those cases where the interests of justice require that an indigent accused person be legally represented."

(iv) "The present case illustrates the difference. Under statutory legal aid there would not be an obligation on the 1st respondent (i.e. the government) if resources provided under Legal Aid were not sufficient. However if the interests of justice require that those of the applicants who cannot afford legal representation should be legally represented, such an obligation to provide legal representation for them would arise from the provisions of article 14(3)(d) of the Covenant which is not qualified by the availability of resources."

In my respectful view, the position is as follows:

Ad(i): The Legal Aid Act as amended does not in itself prevent full effect to be given to the rights of an indigent accused as specified in section 14(3)(d) of the Covenant.

As shown in my analysis supra, the Director of Legal Aid is required to comply with the law, which include section 14(3)(d) of the Covenant and articles 5, 10, 12, 18 and 25 of the Namibian Constitution. The Government is similarly bound to provide the financial and logistical infrastructure to make it possible for the Director of Legal Aid to comply with the aforesaid law.

Section 10(2) of the Legal Aid Act as amended does not lay down that the granting of Legal Aid is subject to the State having funds available. As found by the Court *a quo*, no allegation was made and no proof was provided in the Court *a quo* that the "State" did not have the necessary resources.

The only provision relied on by the respondents, is article 95(h) of the Namibian Constitution. But as I have shown in the analysis supra, the principles of policy contained in article 95 (h) cannot override the fundamental rights contained in Chapter 3 of the Namibian Constitution and the specific provision in section 14(3)(d) regarding legal aid.

Ad (ii): It follows from the above that it is wrong to say that the first respondent's (the government's) obligation to provide "statutory legal aid is subject to the availability of resources and made dependant on the availability of funding."

The provisions of the law contained in Chapter 3 of the Namibian Constitution and 14(3)(d) of the Covenant applies to the provision of legal aid, channelled by the Government through the Legal Aid Directorate.

After all, the Legal Aid Directorate is merely the institution established by Act of Parliament to channel and administer the funds provided for legal aid and to take decisions, in accordance with the law, as to when it is in the interests of justice to provide legal aid when an applicant is unable to pay for the required legal aid from his/her own resources.

Ad (iii): This statement made by the Chief Justice, is correct in regard to section 14(3)(d) of the Covenant.

But the point is that this is no ground for a distinction between so-called “statutory legal aid” and legal aid required as a necessary implication by article 12 relating to a fair trial.

Ad (iv): The present case,” in my respectful view, does not “illustrate the difference.”

It is not correct to say that “there would not be an obligation on the first respondent (i.e. the government) to supply legal aid, if resources provided under legal aid were not sufficient.”

Surely, there is an obligation on government, to provide legal aid at least in those cases where the interests of justice so require and where the accused is unable to pay for such services from his/her own resources.

(See section 14(3)(d) of the Covenant as well as 10(2) of the Legal Aid Act.)

I however agree that 2nd respondent, the Director of Legal Aid cannot give effect to a decision that legal aid is required, if the 1st respondent (the Government) does not provide the necessary funds for him to execute his functions. But that does not excuse him from not making a decision that legal aid is required in a particular case, without being influenced, or obstructed by Government or any other entity. This is so because, as has been shown in cases referred to supra, the discretion is vested in him to decide and in no one else.

Where the Director has arrived at a decision that legal aid is required in a particular case and insufficient funds have been allocated to his directorate to enable it to fulfil its obligations under the law, then the remedy is for the Court to order the Government to provide the necessary funds to enable the Directorate to properly execute its function in terms of the applicable law.

I conclude this part by reiterating that second respondent had failed to function in this case, whether it is because of outside interference or obstruction of his function or not.

It is therefore necessary that this Court, in the interest of justice express itself on the issue and furthermore, make the appropriate order against the first as well as the second respondent.

I agree in substance with all the other findings and reasons contained in the judgment of the Chief Justice. I nevertheless wish to make a few comments on four other points.

1. Ms Erenstein Ya Toivo, contended that the Government is committed to the constitutional principle of equality before the law contained in article 10 of the Namibian Constitution.

   It can consequently not expend all or most of the available funds on the accused in the Caprivi Treason Trial and then neglect others who are also entitled to legal aid on the merits. This argument discloses a misconception of the provisions for equality contained in article 10 and in the aforesaid International Covenant.

   Surely, equality before the law means equality for those equally placed. To make unequal things equal is in itself a form of inequality and amounts to discrimination. [5]

   Because of its magnitude, complexity and gravity, this case can truly be regarded as exceptional and unique. It is therefore absurd for the authorities to deal with it in the same manner as it would deal with ordinary criminal cases coming before Court, which even though serious, only involves one or a few accused and one or a few charges.

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[5] Muller v President of the Republic of Namibia and Another 1999 NR 190 (SC)
Mwellie v Ministry of Works, Transport and Communications NmHc, 9.3.95, not reported, p17.
"The International Bill of Rights: The Covenant of Civil and Political Rights," by RAMCHARAN, edited by Hewkin, at p252.
State v Vries, 1996(2) SACR 639 NmHc, at 668(b) – 670 (a).

2. I agree that in the circumstances of this case, the fairest procedure to all the interested parties, was the one embarked on by the applicants.

However in a case where the accused have already been arraigned in a Criminal Court and furthermore have properly pleaded as required by law, the "competent" court for bringing an application like the present will probably be the Criminal Court before which the accused have been arraigned and have pleaded.

3. The respondents and their counsel have argued that justice will not necessarily fail if the accused have no legal representation.

In support of this contention Ms Erenstein Ya Toivo has relied on provisions in the Criminal Procedure Act placing certain duties on the presiding judicial officer which would enable justice to be done.

It is so that the High Court has in several decisions and this Court in the recent past, has dealt with the Court's function as "an administrator of Justice" and its power, and in some cases obligation, to decide *mero motu* or at the request of the parties to call and examine certain witnesses who may assist in the search for the truth and itself to put questions to any witness, not only for the purposes of clarification, but also in order to assist in the search for the truth. These powers and obligations are contained in section 167 and 186 of the Criminal Procedure Act 51 of 1977. These

provisions have in fact introduced some inquisitorial elements into our law of criminal procedure. [6].

4. Counsel for the applicants contended before the High Court and in the argument before us that the amendment of the Legal Aid Act purporting to remove the power of the trial judge to issue a certificate compelling the Director of Legal Aid to provide legal aid to an accused, was unconstitutional.

The respondents and their counsel on the other hand explained that Judges of the High Court had granted these certificates indiscriminately and without due consideration of the merits and the financial resources made available to the Legal Aid Directorate by the Government. Consequently the Government through the Legislature had to intervene and did so by abolishing the power of the trial judges to grant certificates.

I agree that it is not necessary in this case to decide whether or not the amendment was unconstitutional or not.

It is however necessary to make a few observations in this regard.

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[6]S v van den Berg 1995(4) BCLR, 479 Nm at 426 C-I
S v K, 2000(4) BCLR 405 NmS 426 C-I
S v Silunga, NmS 28/12/2000, not reported.
Kadila and Others v The State NmS, 9/10/2000, not reported at pp 12-16

If some judges did not exercise their discretion correctly, their decisions in this regard could have been taken on review.

Alternatively amending legislation could have circumscribed their discretion more precisely to give effect to the Namibian Constitution and the aforesaid Convention.

The amendment purported to exclude the Courts discretion and to leave the decision to grant or refuse legal aid exclusively in the hands of the Director of Legal Aid, who was vested not only with the exclusive discretion, but with a very wide discretion at that.

If the intention of the amendment was to exclude the function of the Court, it was an exercise in futility, because as shown in this decision, the Court retains the power in accordance with article 5 and 25 of the Namibian Constitution to decide whether or not legal aid must be supplied by the Government (the executive) and/or the Director of Legal Aid to ensure a fair trial as contemplated by article 12 and 10 of the Namibian Constitution

and section 14(3)(d) of the aforesaid convention on political and human rights which is part of the law of Namibia.

All that the aforesaid amendment will achieve is that applicants for legal aid will in future increasingly approach the High Court and Supreme Court with applications

> similar to the present one, alternatively to set aside convictions and sentences already imposed, on the ground that the accused did not have a fair trial because legal aid was refused to accused persons who were unable to afford such aid from their own resources.
>
> Such applications will obviously lead to long delays in bringing criminal cases to a just and expeditious conclusion and will in many cases, where convictions and sentences will have to be set aside, abort justice. This will bring the criminal justice system into disrepute, not only nationally, but also internationally.

However, I fully agree with the Chief Justice that in a case of the magnitude and complexity of the present case, the aforesaid function of the Court "as administrator of justice", armed with the powers and obligations contained in the aforesaid sections 167 and 186, could never be a substitute for legal representation for the accused.

In the present case, the accused obviously need legal representation and without it, a fair trial will probably not be possible.

In the result, the order proposed by me reads as follows:

1. The appeal is dismissed.

2. The following order is substituted for the order of the Court *a quo*.

(a) The 2nd respondent (the Director of Legal Aid) is directed to provide such legal aid to the Applicants (respondents herein) as is assessed by him so as to enable them to have legal representation for the defence of all the charges brought against them in the trial referred to as the Caprivi Treason Trial due to commence in due course.

(b) The first respondent (the Government of Namibia) is directed to provide sufficient logistic and financial resources to the 2nd respondent to enable him to supply the necessary legal aid to the accused persons as assessed by him.

(c) The respondents must pay the costs of applicant in the Court *a quo* as well as on appeal on the basis of joint and several liability – provided such costs are limited to disbursements and include the costs of two (2)

instructed counsel and further provided that provision is made for the recovery of such costs in the Deed of Trust of the Legal Assistance Centre, who acted as the instructing attorneys for the applicants.

O'LINN, A.J.A

CHOMBA, A.J.A.: I have had an opportunity of reading the draft judgment prepared by my brother Strydom, CJ, and wish to state at the outset that I agree with the overall result of it . This is undoubtedly a complex case which a layman cannot handle unaided especially when burdened with pressures arising from concerns of the possible devastating effect a conviction may cause. I equally feel that it would be expecting too much of the trial judge to assume that he should be legal advisor and watchdog on behalf of the respondents in such a case. The judge could stand the risk of being misunderstood because essentially a judge in a criminal trial is supposed to be an impartial arbiter. Therefore, I have no scruples in subscribing to the verdict that those of the respondents in the present case who would truly be categorized as indigent should be legally represented at public expense.

My agreement with the judgment notwithstanding, what has prompted me to make a contribution to the undoubtedly erudite and brilliantly written judgment is that it has an element in it which suggests that the right to legal representation created by the Constitution is open-ended and without qualification. This element, to my understanding, is epitomised by the passage which in the original draft was on page 34 and which I reproduce hereunder -

> 'In Namibia, the statutory legal aid is not a right per se because it is contained in a policy statement and is made subject to the availability of resources. As such, it is available to all indigent persons who cannot afford to pay for legal representation provided that funds and other resources are available. However Article 12 guarantees to accused persons a fair hearing

> which is not qualified or limited and it follows, in my opinion, as a matter of course, that if the trial of an indigent accused is rendered unfair because he/she cannot afford legal representation, there will be an obligation on the (STATE), to provide such legal aid. The obligation does not arise as a result of provisions of Article 95(h), but because of the duty upon the (STATE) to uphold the rights and freedoms contained in Chapter 3 of the Constitution. (underlining supplied).

My understanding of the foregoing extract is that –

a) there is guaranteed a fair trial to every accused person in Namibia without discrimination,

b) if it is apprehended that the trial will be unfair on the sole ground that the accused is indigent, then the State has an obligation to provide legal aid at public expense to the accused; and

c) the State's obligation does not emanate from the provisions of Article 95(h) but rather from the State's duty (imposed by Article 5) to respect and uphold the fundamental rights and freedoms.

Whereas (a) above presents no problem, on the other hand I fear that (b) could open a Pandora's box. The criterion it sets is one of indigence only irrespective of the nature of the offence an accused person may be facing. On that basis an indigent person arraigned for say, pilferage from a shop would claim to be entitled to State sponsored legal representation. I do not understand the Constitution to have created such a right. I am equally concerned about (c) for the reason that if Article 95(h) is deprived of having a bearing on the

considerations of legal representation, then it would be like a dead wood in the Constitution.

For the sake of rationality, I wish to first examine (c) and then express my opinion on it. In doing so I shall start by considering the status of a provision in a written document or statute: how is such a provision to be considered in relation to other provisions in the document or statute?

In the Zambian case of **Nkumbula V Attorney-General (1972) ZR 204** Baron DCJ had this to state at page 211 -

> " No provision can be read in isolation and construed in isolation: any word or phrase or provision in an enactment must be construed in its context."

In airing that view Baron derived inspiration from the dictum of Viscount Simonds in **Attorney-General v H R H Prince Augustus (1957) ALL E.R. 45**, a House of Lords case. The reputed law Lord stated the following at page 53 -

> "My Lords, the contention by the Attorney-General was, in the first place, met by a bald general proposition that, where the enacting part of a statute is clear and unambiguous, it cannot be cut down by the preamble, and a large part of the time which the hearing of this case occupied was spent in discussing authorities which were said to support the proposition. I wish, at the outset, to express my dissent from it, if it means that I cannot obtain assistance from the preamble in ascertaining the meaning of the relevant enacting part. For words, and particularly general words, cannot be read in isolation; their colour and

> content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use the word context in its widest sense which I have already indicated as including not only the other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in *pari materia* and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy." (emphasis supplied).

I appreciate that this court, being the highest in Namibia, cannot hold itself bound by the decision of any foreign court, no matter its status in its own country. However, it is an accepted principle, and a prudent one I believe, that authoritative judicial pronouncements can be persuasive and to that extent may influence considerations of cases in this country. Moreover Viscount Simonds' dictum can have a salutary effect on principles of interpretation of statutes and documents in this country. The learned law Lord's dictum boils down to this, that in construing a word or indeed a provision in an enactment, it must be read within the context of the entire enactment in which it occurs. Nay, he goes further and states that it should also be read within the context of the existing state of the law and other statutes in *pari materia*.

In the present case we are considering the right to legal representation in the context of the State's duty to provide legal aid to persons facing the rigors of the law and criminal justice. The learned Chief Justice has, quite aptly, in this judgment considered Article 5 (the obligation of the Executive to protect and uphold fundamental rights and freedoms) Article 10 (dealing with equality before the law), Article 12 (right to fair trial), Article 25 (enforcement of fundamental rights and freedoms), etc. Clause (e)of Article 12 in particular establishes the right

to legal representation. Similarly Clause (h) of Article 95, as we have seen, deals with the policy aim which the State should adopt, namely to promote a system of justice which aims to provide " free legal aid in defined cases with due regard to the resources of the State". On the basis of Lord Simonds' dictum it is necessary to read the said clause(h) together with the other provisions of the Constitution, particularly those hinging on legal presentation. This is more so because by Article 101 courts are urged to have regard to the principles of State policy in interpreting the laws based on them.

Reading article 95 (h) within the context of the whole Constitution of Namibia, I come to the understanding that the intent of the framers of that Constitution was one of the enjoining any government that might come to power following the adoption of that Constitution to promote –

i) a justice system based on equal opportunity
ii) by providing free legal aid
iii) in define cases
iv) with due regard to the resources of the State.

That is how, in my opinion, the court should, pursuant to Article 101, interpret any laws based on the principles of State policy. To my mind therefore the legal aid system that was envisaged for Namibia was to be available in defined cases and had to have regard to the availability of resources of the State. My reading of the Constitution is that the legal aid system was not intended to be available to all sundry merely because, being accused in a criminal trial, a person pleads

indigence. In other words, while indigence was intended to be one of the criteria, there was to be a further requirement, namely that the offence the accused would be facing should be in the category of defined cases. Furtherstill there was to be a limit to which the State would be required to sponsor free legal aid, ensuring that the resources available to it would also be available to other essential sectors of the economy and indeed other members of the Namibian society.

Unfortunately the Constitution does not contain provisions as to what these defined cases are. In my view, however, it is the responsibility of courts, which after all deal with cases that are contemplated by Article 95(h), to define what these cases should be. This court is, however presently not competent to enter into the exercise of defining the cases because this is a matter of great import which should be fully argued in a proper case before the court can make a pronouncement on it. We therefore have to leave that issue open for consideration in the future. This notwithstanding, there is an immediate problem to resolve now. That is, whether the case wherewith we are concerned in this appeal should attract a grant of legal aid at the State's expense. I believe that the learned Chief Justice has amply elaborated this issue and in my view he has come to the correct conclusion. The complex nature of this case, coupled with the dictates of the Constitution, to the extent that it guarantees fair trial to every accused person, is sufficient reason to justify such a grant of legal aid by the State.

I am all the more convinced of the qualitative interpretation I have placed on the constitutional provisions dealing with legal representation for a further reason. There are many other sectors in the Namibian society which have to make calls

upon the State resources. Some of them are health, education, agriculture and transport and communications. If the State is held to be constitutionally obligated to provide unlimited legal representation at public expense to all indigent accused persons facing criminal charges in courts of law, solely on the ground indigence, the State resources, I fear, could be overstretched. In the process some sectors of society would be prejudiced.

In the Zambian Constitution there is a provision which states that –

> "..... provisions of (Part III - dealing with the protection of fundamental rights and freedoms) shall have the effect ..... of affording protection to those rights and freedoms subject to such limitations .....designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or of the public interest." (see Article 11).

Similarly in Article 43(1) of the Ugandan Constitution it is stated - " In the enjoyment of the rights and freedoms prescribed in this Chapter, no person shall prejudice the fundamental or other human rights and freedoms of others or the public interest".

The provisional Constitution of The Gambia has a counter-part provision in Section 17(2). However there appears to be a conspicuous lacuna in the Namibian Constitution in this regard. That notwithstanding, I believe that even as a matter

of common sense no state authority would brook the enjoyment of fundamental rights and freedoms by any individual if in doing so that individual would be trampling on the rights and freedoms of other members of the society or endangering the public interest. That is why for instance, no one would be allowed a free rein in the enjoyment of the freedom of movement if by doing so he/she would be violating other people's proprietary rights.

In the result, while concurring with my brother the Chief Justice that in this particular case that is on hand the State must provide legal aid to deserving respondents, I hold a different view on the interpretation of the Constitution in regard to who is and who is not entitled to State sponsored legal representation. In my view that entitlement is not untrammelled, but is circumscribed. It is intended for indigent persons facing charges that are conceived to contain legal issues which are multifarious and/or so complex that an accused who is not legally represented would be unlikely to competently defend himself/herself, and as a result he/she would be unlikely to have a fair trial which is guaranteed by the Constitution.

As regards the orders to be made in the light of the sting of the judgment just delivered by the Chief Justice I feel that the orders he has made do adequately meet the requirements of this case. I would consequently endorse those orders.

CHOMBA, A.J.A.

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