REPORTABLE

CASE NO.: P.12/2009

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE ATTORNEY-GENERAL OF NAMIBIA	**Applicant**

and

THE MINISTER OF JUSTICE	**First Respondent**
THE PROSECUTOR-GENERAL	**Second Respondent**
HANS PETER ROTHEN	**Third Respondent**
SHARON LYNETTE BLAAUW	**Fourth Respondent**
OTNIEL PODEWILTZ	**Fifth Respondent**
RALPH PATRICK BLAAUW	**Sixth Respondent**
GERRY WILSON MUNYAMA	**Seventh Respondent**
THEODOR ENGELBRECHT	**Eighth Respondent**
ETTIENE JOHAN WEAKLY	**Ninth Respondent**
HEINZ DRESSELHAUS	**Tenth Respondent**
NICOLAAS CORNELIUS JOSEA	**Eleventh Respondent**
MATHIAS SHIWEDA	**Twelfth Respondent**
INEZ GASES	**Thirteenth Respondent**
PAULUS ILONGA KAPIA	**Fourteenth Respondent**
JAMES WILLIAM CAMM	**Fifteenth Respondent**

Coram: SHIVUTE, CJ, MARITZ, JA and STRYDOM, AJA

Heard on: **09 July 2010**

Delivered on: **4 April 2013**

APPEAL JUDGMENT

SHIVUTE, CJ (MARITZ JA AND STRYDOM AJA CONCURRING):

Introduction

[1] In the exercise of his powers to take all action necessary for the protection and upholding of the Constitution pursuant to Art 87(c)[1] read with Art 79(2)[2] of the Namibian Constitution, the Attorney-General referred questions regarding the constitutionality of the provisions of ss 245 and 332(5) of the Criminal Procedure Act 51 of 1977 (hereafter jointly referred to as 'the impugned provisions') to this Court for determination. The Attorney-General therefore petitioned the Court in terms of s 15 of the Supreme Court Act 15 of 1990[3] for it to assume jurisdiction as a court of first

[1] Art 87(c) inter alia provides:
'The powers and functions of the Attorney-General shall be:
(c) to take all action necessary for the protection and upholding of the Constitution.'

[2] Art 79(2)provides for the powers of the Supreme Court as follows:
'(2) The Supreme Court shall be presided over by the Chief Justice and shall hear and adjudicate upon appeals emanating from the High Court, including appeals which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. The Supreme Court shall also deal with matters referred to it for decision by the Attorney-General under this Constitution, and with such other matters as may be authorised by Act of Parliament.'

[3] Which reads as follows:
'Whenever any matter may be referred for a decision to the Supreme Court by the Attorney-General under the Namibian Constitution, the Attorney-General shall be entitled to approach the Supreme Court directly (without first instituting any proceedings in any other court), on application to it, to hear and determine the matter in question.

(2) An application to the Supreme Court under subsection (1) shall be submitted by petition to the Chief Justice and shall further comply with the procedures prescribed for that purpose by the rules of court.

(3) The Chief Justice or any other judge designated for that purpose by the Chief Justice shall decide whether such application is, by virtue of its urgency or otherwise, of such a nature as to justify the exercise of the court's jurisdiction in terms of this section.

(4) Any decision referred to in subsection (3), by the Chief Justice or such other judge, as the case may be, shall be final.

instance and to determine the constitutional issues. In the petition, the Attorney-General submits that the impugned provisions were fundamental to the prosecution of persons accused of fraud and to the prosecution of the directors or servants of corporate bodies under prescribed circumstances; that the constitutionality of the impugned provisions had been challenged in a number of pending matters before the High Court; and that, unless the multiple challenges raised in those matters were once and for all determined by the Supreme Court, delays were likely to be experienced in the proceedings involving some of the respondents and the process may result in an undesirable multiplication of individual appeals or attempts to have the same issues determined in separate substantive trials. He therefore urges that it is in the interests of justice that this Court finally determines the constitutionality of the impugned provisions at a single hearing to set a binding precedent in pending and future prosecutions.

[2] After consideration of the petition and affidavits lodged in support thereof by some of the respondents, we determined that, by virtue of its urgency and the public as well as constitutional importance of the questions raised therein, the application is of such nature as to justify the exercise of the Supreme Court's jurisdiction as contemplated in s 15 of the Supreme Court Act. The Attorney-General, as applicant in

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(5) If the Chief Justice or such other judge, as the case may be, is of the opinion that the application is of a nature which justifies the exercise of the court's jurisdiction in terms of this section, any party affected or likely to be affected by the decision of the Chief Justice or such other judge, shall be informed of that decision by the registrar, and the matter shall, subject to the provisions of section 20, be further dealt with by the Supreme Court in accordance with the procedures prescribed by the rules of court.

(6) Nothing in subsection (4) contained shall be construed as precluding any party affected or likely to be affected by the decision that the application is not of such a nature as to justify the exercise of the court's jurisdiction as contemplated in that subsection, to institute proceedings in any other competent court.'

the process, was accordingly given leave to seek the determination of the constitutionality of the impugned provisions by application, brought on notice of motion to all the respondents cited in the petition and such other respondents as may have an interest in the relief prayed for. A number of further procedural directions regarding the prosecution of the application were also given. These included a direction that the applicant should deliver an affidavit in support of the application noting such facts or circumstances as may support or challenge the constitutionality of the impugned provisions and the interests of the respondents in the determination thereof. He was also directed to lodge two sets of heads of argument: one set in favour of the constitutionality of the impugned provisions and the other set against it.

[3] Accordingly, the applicant has lodged the application on notice of motion as directed seeking determination of the following questions:

> '1. Whether or not sections 245 and 332(5) of the Criminal Procedure Act, No. 51 of 1977, as amended, are unconstitutional on the contended grounds that the impugned provisions:
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> (i) in casting a reverse onus on an accused person, expose such person to being convicted despite the existence of a real doubt as to his or her guilt;
>
> (ii) infringe an accused's right (in terms of Art 12(1)(*d*) of the Namibian Constitution) to be presumed innocent until proven guilty according to law;

(iii) infringe an accused's right to a fair trial, privilege against self-incrimination and not to be a compellable witness, in terms of Art 12(1) (*a*) and (*f*) of the Namibian Constitution, and

(iv) further infringe any general right to silence an accused may have under Art 12 of the Constitution.

2. Whether any limitation imposed by section 245 or 332(5) on any right to a fair trial recognised by Art 12 is authorised by the Constitution.'

The parties

[4] The first respondent is the Minister of Justice and the second respondent is the Prosecutor-General of Namibia. From the affidavit deposed to by Dr Albert Kawana, the Attorney General, in support of the Notice of Motion, it emerged that the third to the fifteenth respondents are indicted in criminal proceedings pending in the High Court of, amongst others, the offences of fraud, alternatively theft and/or corruption. Only the first, second, third, fourth, sixth, ninth and tenth respondents gave notice of their intention to make submissions - and were represented - at the hearing of the application. The second respondent filed an affidavit (to which I shall advert later in this judgment) setting out certain factual matters pertaining to the function served by, and the need to retain the impugned provisions.

[5] On the instructions of the Attorney-General, MrGauntlett SC, assisted by MrPelser, argued for the contention that the impugned provisions were constitutional while MrSemenya SC, assisted by MsA Platt, argued for the proposition that the provisions were unconstitutional. MrBotes contended for the unconstitutionality of the

impugned provisions on behalf of the third, fourth, sixth, ninth and tenth respondents. The Court is indebted to counsel for the assistance rendered to it.

Constitutional framework under which the impugned provisions are to be considered

[6] It is necessary to commence the enquiry before us with the consideration of the historical context and the current constitutional framework under which the impugned provisions are to be considered. They were promulgated as part of the Criminal Procedure Act, an enactment of the South African Parliament applied as a code of criminal procedure both in the Republic of South Africa and, what was referred to in the Act as 'the territory of South West Africa'. At the time of its promulgation, the political, socio-economic and constitutional landscape in Southern Africa was vastly different to that which we see today. Most pertinent to the historical context of the impugned provisions in this case is the fact that they were passed in an era of 'parliamentary sovereignty' when the legislative powers of the South African parliament was not constrained by constitutionally entrenched fundamental rights and judicial review. Most of its enactments were applied and enforced in Namibia which, at the time, was occupied and *de facto* administered by South Africa. The constitutional landscape changed dramatically with this country's Independence in 1990: It brought with it Namibia’s liberation from South African occupation and rule; the establishment of the Republic of Namibia as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all under a Constitution; the constitutional entrenchment of the fundamental rights

and freedoms of all persons[4] and the judicial power to enforce or protect those rights and freedoms[5] – to mention a few of the changes most relevant to this enquiry. In the interest of a smooth constitutional transition from the legislative dispensation which prevailed under the predecessor State and to avoid the obviously undesirable and potentially devastating consequences which a statutory lacuna under a 'clean slate' constitutional approach might have left immediately after Independence, provision was made in Art 140 of the Constitution for the continued application of existing laws in the following terms:

> 'Subject to this constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.'

The Criminal Procedure Act under which the impugned provisions resort is one of the many laws which were in existence immediately before Independence and continued to be applied in this country after the event.

[7] It has also become necessary to restate the well-known general principles relating to constitutional interpretation, with which all counsel were in agreement and which are, in any event, incontrovertible. The first principle is that the Constitution of a nation is not to be interpreted like an ordinary statute. In his characteristic eloquence,

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[4] Art 5 of the Constitution states: 'The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the 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.'

[5] Art 25(2) of the Constitution provides: 'Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom…'

the late Mahomed AJ described the Constitution as 'a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government'. The spirit and tenor of the Constitution must therefore preside and permeate the process of judicial interpretation and judicial discretion.[6] In keeping with the requirement to allow the constitutional spirit and tenor to permeate, the Constitution must not be interpreted in 'a narrow, mechanistic, rigid and artificial' manner[7]. Instead, constitutional provisions are to be 'broadly, liberally and purposively' interpreted so as to avoid what has been described as the 'austerity of tabulated legalism'.[8] It is also true to say that situations may arise where the generous and purposive interpretations do not coincide.[9] In such instances, it was held that it may be necessary for the generous to yield to the purposive.[10] Secondly, in interpreting constitutional rights, close scrutiny should be given to the language of the Constitution itself in ascertaining the underlying meaning and purpose of the provision in question.[11]

[8] The principal submission advanced on behalf of those respondents contending for the unconstitutionality of the impugned provisions is that similar provisions have been held to be unconstitutional by a decision of the South African Constitutional Court, which decision is contended to be persuasive authority for this Court to follow.

[6] *S v Acheson* 1991 NR 1(HC) at 10A-B
[7] *Government of the Republic of Namibia v Cultura 2000* 1993 NR328 (SC) at 340A
[8] Id at 340B-C
[9] See the South African Constitutional Court cases of *S v Makwanyane* 1995 (3) SA 391 (CC) at Para [9] footnote 8; *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) at para 17.
[10] *Kauesa v Minister of Home Affairs and Others* 1995 NR 175 (SC) at 183J-184B; *S v Zemburuka* (2) 2003 NR 200 (HC) at 20E-H; *Tlhoro v Minister of Home Affairs* 2008 (1) NR 97 (HC) at116H-I; *Schroeder and Another v Solomon and 48 Others* 2009 (1) NR 1 (SC) at 6J-7A; *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* 2009 (2) NR 596 (SC) at 269B-C.
[11] *Minister of Defence v Mwandinghi* 1993 NR 63 (SC); *S v Heidenreich* 1998 NR 229 (HC) at 234

As regards this contention, while South African and other jurisdictions' precedent may be persuasive authority for our Courts under given circumstances, it is worth observing that after our country's Independence, Namibian Courts have developed a reservoir of distinctly Namibian jurisprudence based on the Constitution and Namibian law. Decisions of foreign courts that are found to be persuasive due to the similarity of applicable principles, provisions, issues and other circumstances relevant to matters at hand may, of course, be followed by our courts on principle rather than precedent. As far as reliance on South African authorities in the interpretation of constitutional provisions is concerned, it should be borne in mind that there are differences between the wording of certain provisions of the Constitution and the corresponding provisions in the South African Constitution. Our Courts have rightly held that South African case law is not to be followed where there are material differences between the provisions in the respective constitutions.[12] Furthermore, even where the wording in a foreign constitution is similar to that of a provision in the Constitution, caution should be exercised when considering the constitutionality of the provisions of a statute: Ultimately the meaning and import of a particular provision of the Constitution must be ascertained with due regard to the express or implicit intention of the founders of the Constitution.[13] Furthermore, as a general proposition, whilst foreign precedent is a useful tool to determine the trend of judicial opinion on similar provisions in jurisdictions which enjoy open and democratic societies such as ours, ultimately the value judgment that a Namibian Court has to make in the interpretation of the

[12]*Kauesa v Minister of Home Affairs* 1994 NR 102 (HC) at 107; *S v Minnies and Another* 1990 NR 177 (HC) at 195D; *Ex Parte Attorney General: In re Corporal Punishment by Organs of State* 1991 NR 178 (SC) at 188E-F; *S v Tchoeib* 1992 NR 198 (HC) at 206G-207C to mention but a few.

[13]*Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia and Others,S v Van den Berg* 1995 NR 23 (NHC) at 39H-J

provisions of the Constitution in as much as they may impact on the impugned provisions, must be based on the values and aspirations of the Namibian society.[14]

Submissions in favour and against the constitutionality of the impugned provisions

[9] It is with these principles in mind that I proceed next to consider the arguments for and against the constitutionality of the impugned provisions before I deal with the constitutionality of the specific sections.

[10] Counsel arguing for the unconstitutionality of the impugned provisions principally contend that they infringe the right to be presumed innocent recognised by Art 12(1)(*d*) of the Constitution and that this right is absolute and cannot be derogated from. Therefore, so the argument proceeds, under no circumstances can an evidentiary burden be placed on an accused to prove, on a balance of probabilities, particular facts. In response to these contentions, Mr Gauntlett submits that counsel contending for the unconstitutionality of the impugned provisions have misconstrued the provisions of Art 12. He argues that the true content of Art 12 is a fair trial. Art 12(1)(*a*) is the dominant clause that provides for entitlement to a fair trial. Art 12(1)(*d*) is a manifestation of the right to a fair trial. The rights provided for under Art 12(1)(*b*) to (*f*) should not be viewed as self-standing but rather as a manifestation and expression of the overall right to a fair trial provision. Mr Gauntlett contends

[14] A similar caveatto the reliance on foreign authorities has been adopted in South African jurisprudence because, as the South African Constitutional Court observed in *S v Makwanyane* at 37 (in the context of a criminal matter), ‘our society and criminal justice system differ’. See also the remarks of Kriegler J in *Bernstein v Bester NNO* 1996 (2) SA 751 (CC) at para. [133] where he expressed himself strongly as follows: 'I wish to discourage the frequent – and I suspect – often facile resort to foreign “authorities”. Far too often one sees citation by counsel . . . in support of a proposition relating to our Constitution, without any attempt to explain why it is said to be in point . . . (the) blithe adoption of alien concepts or inapposite precedents.'

furthermore that the list of the rights in Art 12(1)(*b*) – (*f*) is not exhaustive as suggested in *S v Van den Bergh*. The concept of 'fair trial' in criminal prosecutions is a flexible one; the requirements depend on the circumstances of each particular case, and does not only involve the rights and interests of the accused but also those of the State representing the interests of society in general as well as those of the victims of crime in particular. The public and victims of crime, not accused persons only are also entitled to appreciate that trial proceedings in a court of law are fair, and that their interests are taken into account in the determination of punishment. Mr Gauntlett argues that the use of the expression 'according to law' in Art 12(1)(*d*) means that in the context of the impugned provisions, the Legislature may determine the scope and ambit of the proof required to secure a conviction of a particular crime or offence so long as the parameters are reasonable and do not negate the essential content of the right to be presumed innocent until proven guilty. It is therefore open to the Legislature to place an evidentiary burden on an accused under certain circumstances so that he or she should be required to establish particular facts. This does not negate the content of the right to a fair trial. He contends therefore that the impugned provisions are constitutional and the Court should so find. In the event that the Court finds that the words 'unless it is proved that' in s 332(5) place a legal burden on an accused, he urges the Court to sever those words from the subsection so that the provision places only an evidentiary burden on an accused in line with the reasoning of Kentridge AJ in *S v Coetzee* 1997 SA 527 (CC). In any event, it is counsel's submission that the words 'or servant' in s 332(5) are too wide and may bring within the reach of the provision those persons who may not be in control of the

corporation. He accordingly urges the Court to excise those words from the subsection. Mr Gauntlett seeks to rely on the following principal decisions for the proposition that reverse onus provisions are constitutional: *Freiremar SA v Prosecutor-General of Namibia* 1996 NR 18 (HC); *S vChogugudza*1996 (1) ZLR 28 (H); *S v Meaker* 1998 (2) SACR 73 (WLD), and the minority judgment of Kentridge JA in *Coetzee*.These cases will be dealt with more fully later on in this judgment.

[11] Continuing with counsel's submissions, as regards the contention that the right conferred under Art 12 cannot be derogated from under any circumstance, Mr Gauntlett argues that on a proper construction of Art 24(3) upon which counsel contending for the unconstitutionality of the impugned provisions rely, the derogation contemplated therein relates to a situation when Namibia is in a state of national defence or a period when a declaration of emergency is in force and that it would therefore be untenable to argue that no limitations whatsoever could be placed on Art 12 on the basis of the provisions of Art 24(3).

[12] Mr Semenya departed from his written submissions in respect of the aspect of justification for the derogation and made common cause with the contentions originally advanced by Mr Botes in his written heads of argument and later pressed by him in oral submissions that Art 12 is further entrenched by Art 24(3) of the Constitution. The effect thereof is that no derogation from the rights or freedoms referred to in the Articles listed in Art 24(3) is permitted. Mr Semenya conceded that the end result of his argument is that under the Constitution, it is not at all permissible

for legislation to create presumptions against an accused. In other words, in counsel's submission, reverse onus provisions in relation to certain elements of an offence or crime are anathema to the Constitution. Mr Semenya continues to argue that to contend as Mr Gauntlett does that Art 24 seeks to protect derogation only in instances of state of emergency is in effect to do considerable violence to the language of the Article in question since the Article does not say so. He goes on to argue that to derogate from the rights in the Articles listed in Art 24(3) would 'in essence' be denying the essential content of those rights, something that is not permissible under Art 22. For this proposition Mr Semenya relies, as Mr Botes does, on the dictum of this Court in the *Corporal Punishment*-matter, at 187I–188A where Mahomed AJA, dealing with the interpretation of Art 8 of the Constitution, made the following seminal observations:

> 'Although the Namibian Constitution expressly directs itself to permissible derogations from the fundamental rights and freedoms entrenched in chap 3 of the Constitution, no derogation from the rights entrenched by art 8 is permitted. This is clear from art 24(3) of the Constitution. The State's obligation is absolute and unqualified. All that is therefore required to establish a violation of art 8 is a finding that the particular statute or practice authorised or regulated by a State organ falls within one or other of the seven permutations of art 8(2)(*b*) set out above; "no questions of justification can ever arise" (Sieghart*The International Law of Human Rights* at 161 para 14.3.3).'

[13] Mr Semenya maintains that some of the foreign authorities relied upon by counsel contending for the constitutionality of the impugned sections were decided in constitutional frameworks markedly different from the Namibian constitutional set up and should therefore not be followed. He pointed out that the *Chogugudza*-case, for

example, relied upon by Mr Gauntlett, was decided against the backdrop of a provision in s 18(13)(*b*) of the Constitution of Zimbabwe that authorises the passing of legislation imposing a reverse onus, something that the Namibian Constitution, according to the argument, does not countenance at all. Section 18(13)(*b*) of the Constitution of Zimbabwe 1980 as reflected in *Chogugudza* provides as follows:

> 'Nothing contained in or done under the authority of any law shall be held to be in contravention of-
> (a) ...
> (b) subsection (3)(a) to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts.'

[14] Mr Semenya's submission that s 18(13)(*b*) appears to permit legislation creating reverse onus provisions is undoubtedly correct and falls to be distinguished on that basis. The judgment in *Chogugudza* nevertheless is instructive in another respect: It contains an insightful analysis of the extent to which it is permissible for legislation to create reverse onus provisions against an accused, a relevant and important consideration in the enquiry before us. This aspect will be dealt with further below.

[15] MrBotes made common cause with the arguments presented by Mr Semenya. He added, however, that the impugned provisions violate ‘the cluster of rights to a fair trial’ as enshrined in Art 12 of the Constitution. These he highlighted to be the presumption of innocence entrenched in Art 12(1)(*d*), the right not to be a compellable witness against oneself provided for in Art 12(1)(*f*), and ‘the general right to a fair trial

in terms of Art 12 of the Constitution'. MrBotes contended that the right to a fair trial provided for under Art 12(1)(*a*) is broader than the list of specific rights set out in paragraph (*b*) to (*f*) of subsection (1) of Art 12. He contended that the list of those rights is not closed and as such may be expanded upon by judicial interpretation to give effect to the role of the courts in interpreting the Constitution broadly, liberally and purposively. He submitted forcefully - as Mr Gauntlett did - that the proposition in *Van den Berg at 46A* that the legal maxim *expressiouniusestexclusioalterius* (the express mention of one thing excludes all others) applied to Art 12 and the finding therein at 45J that the list of requirements of a fair trial in the Article was therefore closed is erroneous and should not be followed. Also relying on the dictum of Mahomed AJA inthe*Corporal Punishment*-case,Mr Botes argued that Art 12 is entrenched and, given the express proscription in Art 24(3), may not be derogated from. Mr Botes contended in relation to this sub-article that ‘the state’s obligation in respect of the rights so entrenched is absolute and unqualified and once a violation of any right so entrenched is established no justification in terms of Art 22 of the Constitution can ever arise'.

Does Art 12(1)(*d*) permit limitations to the right to be presumed innocent until proven guilty?

[16] Art 12 provides as follows and it has become necessary to quote it in its entirety:

‘**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-Art (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 Art 8(2)(b) hereof.

(2) No persons shall be liable to be tried, convicted or punished again for any criminal offence for which they have already been convicted or acquitted according to law: provided that nothing in this Sub-Art shall be construed as changing the provisions of the common law defences of “previous acquittal” and “previous conviction”.

(3) No persons shall be tried or convicted for any criminal offence or on account of any act or omission which did not constitute a criminal offence at the time when it

> was committed, nor shall a penalty be imposed exceeding that which was applicable at the time when the offence was committed.'

[17] It appears to me that the essential content of Art 12 is the right to a fair trial in the determination of all persons' 'civil rights and obligations or any criminal charges against them' and that the rest of the sub-articles, which only relates to criminal trials, expounds on the minimum procedural and substantive requirements for hearings of that nature to be fair. A closer reading of Art 12 in its entirety makes it clear that its substratum is the right to a fair trial. The list of specific rights embodied in Art 12(1)(*b*) to (*f*) does not, in my view, purport to be exhaustive of the requirements of the fair criminal hearing and as such it may be expanded upon by the Courts in their important task to give substance to the overarching right to a fair trial. To take but one example: the right to present written and oral argument during a hearing or trial is undoubtedly an important component of a fair trial, but one searches in vain for it in Art 12. The contrary view expressed in *Van den Berg,* i.e. that the list is exhaustive, cannot be accepted as correct and should therefore not be followed. I am fortified in this conclusion by the *dictum* of Kentridge AJ in *S v Zuma*1995 (2) SA 642 (CC) at 651J–652Arelied on by Mr Botes where the learned Acting Justice in interpreting s 25(3) of the South African Interim Constitution stated as follows:

> 'The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paragraph (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the constitution came into force.'

Kentridge AJ went to observe at 652C-D that when the South African constitution came into operation, s 25(3) had required criminal trials to be conducted in accordance with the 'notions of basic fairness and justice' and that it was then for all courts hearing criminal trials to give content to those notions.

[18] As is apparent from the earlier summary of their submissions, much has been made by counsel on both sides about the application and effect of Art 24(3) of the Constitution on the issues at hand. Counsel advancing the unconstitutionality of the impugned provisions strongly relied on it for their contention that the right conferred under Art 12 may not be derogated from under any circumstances. Mr Gauntlett on the other hand, argues that on a proper construction of Art 24(3), the prohibition against derogation or suspension of the fundamental rights and freedoms contemplated therein applies only under circumstances of a state of emergency or martial law and that it is untenable to rely on the provision for the proposition that no limitations whatsoever could be placed on Art 12 under different circumstances.

[19] There is merit in both of the seemingly contrasting submissions advanced by counsel but, as I shall presently show, if Art 24(3) is understood and applied in its proper context, it is of limited assistance in adjudicating the issues before us. For a determination of the ambit and application of the proscription of a derogation referred to in Art 24(3), it has become necessary to reproduce the entire Art 24 here. It reads:

1.1.1.

1.1.2. '**Article 24 Derogation**

(1) Nothing contained in or done under the authority of Art 26 hereof shall be held to be inconsistent with or in contravention of this Constitution to the extent that it authorises the taking of measures during any period when Namibia is in a state of national defence or any period when a declaration of emergency under this Constitution is in force.

(2) Where any persons are detained by virtue of such authorisation as is referred to in Sub-Art (1) hereof, the following provisions shall apply:

(a) they shall, as soon as reasonably practicable and in any case not more than five (5) days after the commencement of their detention, be furnished with a statement in writing in a language that they understand specifying in detail the grounds upon which they are detained and, at their request, this statement shall be read to them;

(b) not more than fourteen (14) days after the commencement of their detention, a notification shall be published in the Gazette stating that they have been detained and giving particulars of the provision of law under which their detention is authorised;

(c) not more than one (1) month after the commencement of their detention and thereafter during their detention at intervals of not more than three (3) months, their cases shall be reviewed by the Advisory Board referred to in Art 26 (5)(c) hereof, which shall order their release from detention if it is satisfied that it is not reasonably necessary for the purposes of the emergency to continue the detention of such persons;

(d) they shall be afforded such opportunity for the making of representations as may be desirable or expedient in the circumstances, having regard to the public interest and the interests of the detained persons.

(3) Nothing contained in this Art shall permit a derogation from or suspension of the fundamental rights or freedoms referred to in Arts 5, 6. 8, 9, 10, 12, 14,15,18,19

> and 21(1)(a) (b), (c) and (e) hereof, or the denial of access by any persons to legal practitioners or a Court of law.'

[20] Art 26, which defines the exceptional circumstances under which certain fundamental rights may be derogated from or suspended as contemplated in Art 24(1), is part of Chapter 4 in the Constitution which deals exclusively with the declaration of a state of emergency at a time of national disaster or during a state of national defence or public emergency threatening the life of the nation or the constitutional order. Art 24(1) provides, as already noted, that nothing done under the authority of Art 26 shall be inconsistent with or in contravention of the Constitution to the extent that it authorises the taking of measures during any period of national defence or when a declaration of a state of emergency under the Constitution is in force. As is apparent from Art 24(3), no derogation from or suspension of the fundamental rights or freedoms contained in a number of Articles expressly specified therein (including Art 12) is permitted. Furthermore, Art 24(2) makes provision for the rights of persons detained during the state of emergency so as to ensure that such persons enjoy their basic human rights during the period of detention. These include the right to be furnished with a written statement specifying the grounds of their detention;[15] the publication of a notice in the Gazette stating the fact of their detention and giving the particulars of the provision of the law authorising their detention;[16] the right to have their detention reviewed by the Advisory Board referred to in Art 26(5)(*c*) within one month of their detention and thereafter at intervals of not more than three

[15] Sub-Art (2)(*a*)
[16] Sub-Art 2(*b*)

months;[17] the right to be released from detention should the Advisory Board be satisfied that their continued detention 'is not reasonably necessary,'[18] and the right to be given an opportunity to make representations as may be desirable or expedient in the circumstances.[19]

[21] It appears to me that the purpose for the inclusion of some of these provisions in the Constitution is undoubtedly due to the resolve of the founders of our Constitution that the shameful chapter in our country's history where persons were subjected to detention without trial or due regard to their human rights does not manifest itself in any form in an independent Namibia, not even in a state of national defence or state of emergency. I have set out the provisions of Art 24 at length to demonstrate that in my view, the threshold requirements for the application of the non-derogation clause set out in Art 24(3) is a state of public emergency, state of national disaster and martial law. I respectfully agree with the proposition put to counsel during argument by my Brother Maritz JA that a careful reading of Art 24 as a whole, makes it clear that the founders of the Constitution were evidently anxious that, if the derogation or suspension of certain fundamental rights would be permissible and would be required in circumstances when Namibia is in a state of national defence or any period when a declaration of emergency under the Constitution is in force, it should nevertheless infringe upon such rights as little as possible. This much is evident from the provisions of Art 24(1). To paraphrase the language of Article 24: Art 24(1) provides that nothing

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[17] Sub-Art 2(*c*)
[18] Id.
[19] Sub-Art 2(*d*)

contained or done under the authority of Article 26 (dealing with state of emergency, state of national defence and martial law) shall be held to be inconsistent with or in contravention of the Constitution to the extent that it authorises the taking of measures during the period of a state of national defence or state of emergency. Art 24(2) sets out specific measures aimed at ensuring that persons who have been detained during the state of emergency are given substantial protection of the law. Art 24(3) then proceeds to provide that certain specified rights or freedoms may not, nevertheless, be derogated from or suspended at all. The language used, as we have seen, in Art 24(3) is 'nothing contained in this Article shall permit a derogation or suspension of the fundamental rights or freedoms referred to in Articles...' and goes on to list those Articles. Viewed in this way, Art 24(3) is, in effect, a form of a proviso put at the end as opposed to the beginning of the Article.

[22] Mr Gauntlett is therefore correct that, if considered in its proper context, the non-derogation clause finds immediate application only during any period when Namibia is in a state of national defence or any period when a declaration of emergency under the Constitution is in force. But, even if the non-derogation clause in Art 24(3) is to be understood in that context, is it not at the very least a powerful indication that the rights and freedoms mentioned therein may also not be derogated from in any other circumstance? If those rights and freedoms may not even be derogated from during a state of emergency or national defence, Mr Semenya asked rhetorically during argument, why should the Constitution countenance a derogation at a time of peace? Why then was the sub-article expressly relied on by this Court when it held in the

cited quotation from the *Corporal Punishment*-matterthat no derogation from the provisions of Art 8 was permissible?

[23] The language of the Constitution differentiates between the 'limitation of fundamental rights and freedoms'[20] and a 'derogation from or suspension of...fundamental rights or freedoms' as contemplated in Art 24.[21] Fundamental rights and freedoms contemplated by Chapter 3 of the Constitution may only be limited '(w)henever or wherever in terms of this Constitution... (it) is authorised'[22]. Constitutional authorisation for a permissible limitation may therefore be ascertained with reference to time or place or both. Generally, the 'place' where an authorised limitation of a fundamental right or freedom is found, is in the Article entrenching and circumscribing the content and extent of the right or freedom in question. So, for example, the permissible scope of authorised limitations to the fundamental freedoms enumerated in Art 21(1) is prescribed in sub-art (2) thereof[23]. Ultimately, the ambit of a protected right or freedom must also be determined with reference to the limitation of that right as authorised by the Constitution. As this Court held in *Africa Personnel Services*[24] 'the restrictions authorised by Art 21(2) 'must be used only to establish the proper boundaries of the protected right...'So regarded, the difference between a 'permissible limitation' of, and a 'permissible derogation'from, a fundamental right or freedom becomes clear: the prohibition against the derogation from or suspension of fundamental rights and freedoms expressly referred to in Art 24(3) relates to

[20]Compare the heading of Article 22.
[21] Although the heading of Art 24 is simply 'Derogation,' the cited expression is from Art 24(3).
[22]See: Art 22.
[23]Compare:*Africa Personnel Services matter* at par [56].
[24]Ibid.

derogations extending beyond the scope of permissible limitations (if any) authorised by the Constitution in respect of the specific rights. To determine whether a fundamental right or freedom has been derogated from contrary to the proscription in Art 24(3), the content and ambit of the fundamental right or freedom under consideration must first be determined with reference to the permissible limitations authorised by the Constitution and it must then be ascertained whether the derogation thereof further diminishes or detracts from the right or freedom so defined. This may perhaps best be illustrated by an example:

[24] Article 24(3) makes it clear that the permissible derogations under sub-art (1) and regulated derogations permitted under sub-art (2) may not be construed as permitting a derogation from or suspension of, amongst others, Art 21(1)(*a*), (*b*), (*c*) and (*e*) entrenching the right to freedom of speech and expression; freedom of thought, conscience and belief; freedom to practice any religion, and freedom of association. In terms of Art 21(2), these freedoms may be limited by law ‘in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred to by the said sub-article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence’. A law which limits any of those fundamental freedoms, whether promulgated at a time of peace or during any period when Namibia is in a state of emergency or national defence, will not be unconstitutional if the restriction of the freedom concerned falls squarely within the narrow scope of permissible

limitations defined in Art 21(2). It will only constitute an impermissible derogation if it diminishes the freedom in a manner extending beyond the constitutionally permissible limitations.

[25] Like Art 21(1)(*a*), (*b*), (*c*) and (*e*), Art 12(1)(*d*) is also one of the Articles expressly mentioned in the non-derogation clause of Art 24. Drawn to its logical conclusion, the effect of the argument advanced by counsel contending for the unconstitutionality of the impugned provisions is that, even if a limitation to the presumption of innocence is authorised by the language used in Art 12(1)(*d*), such limitation cannot be countenanced, given the provisions of Art 24(3) precluding a derogation. Such an approach is constitutionally untenable. It bears no consideration to the fact that the scope of a fundamental right or freedom must be determined with reference to the constitutionally authorised limitations, if any, of that right. It is only when the content of that right or freedom, so determined, is diminished beyond the scope of constitutionally permissible limitations that it will constitute a derogation contemplated in Art 24.

[26] It is also in this context that the *dictum* of Mahomed AJA in the *Corporal Punishment*-case on the impermissibility of a derogation of the right to dignity in Art 8(1) and the guarantee against ‘torture or cruel, inhuman or degrading treatment or punishment' in Art 8(2)(*b*) must be considered. Sub-art (1) of Art 8, which is also one of the Articles expressly mentioned in Art 24(3), provides: ‘The dignity of all persons shall be inviolable’. Both sub-arts (1) and (2) allow for no limitations. On the contrary,

the word ‘inviolable’ proclaims no exceptions. It may therefore not be derogated from in any way or at any time: not at times during a state of emergency or national defence and, by parity of reasoning, even less at the time of peace. The contents of the right to dignity being constitutionally inviolable, it was apposite for the Court to refer under the circumstances to the fact that it could not even be derogated from during a state of emergency or national defence as contemplated in Art 24(3). Where the Court stated in the *dictum* relied upon that 'the State's obligation is absolute and unqualified', that statement must be understood in the context of the Court's earlier finding that dignity was inviolable and that no justification for the violation of the right to dignity through torture or cruel, inhuman or degrading treatment 'can ever arise'.

[27] It is for these reasons that I remarked earlier in the judgment that, although the contrasting contentions advanced by all counsel have some merits, their reliance on Art 24(3) is of limited assistance in determining the issues before the Court. Fundamental to the enquiry is whether the Constitution authorises a limitation to the presumption of innocence entrenched in Art 12(1)(*d*). Unlike the provisions of some of the constitutions cited to us by counsel, the Namibian Constitution does not have a general limitation clause which restricts the scope of some or all of the fundamental rights and freedoms entrenched therein. The approach adopted by the founders of our Constitution is different: on the one end of the spectrum are those fundamental rights and freedoms which are inviolable, such as the rights to life and dignity entrenched in Articles 5 and 8. On the other end of the spectrum are those rights and freedoms where limitations are authorised in the clearest of language and the extent

of those limitations are extensively defined, such as in Art 21 entrenching fundamental freedoms. In between those rights and freedoms at either end of the spectrum, are a number of other rights and freedoms of which the scope and application is qualified by phrases such as ‘according to law’, ‘in accordance with law’ or ‘according to procedures established by law’.[25] I turn to this aspect next.

[28] It will be recalled that Art 12(1)(*d*) reads in part that: 'All persons charged with an offence shall be presumed innocent until proven guilty *according to law.*' In *Alexander v Minister of Justice and Others* 2010 NR 328 (SC), this Court had occasion to deal with the meaning of the not too dissimilar phrase ‘according to procedures established by law’ used in Art 7 of the Constitution which provides: ‘No persons shall be deprived of personal liberty except according to procedures established by law.' It concluded at para 119 after a lengthy examination of similar phrases used in the same context in many other constitutions that the phrase indicates that the Article in question is not absolute as it authorises the limitation of the right to liberty embodied therein. As previously stated, the Court went on to caution that where such limitation is permissible, it should be limited to what is necessary to achieve the object for which the limitation was enacted, because Art 22 prohibits limitations that negate the essential content of the right in question.

[29] An almost identical phrase ‘in accordance with law’ is employed in Art 13(1) which deals with limitations on the right to privacy. The sub-article reads:

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[25] See, for example, Art 12(1)(*d*); Art 13(1); Art 7(1)(*a*)

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

[30] It is clear from a reading of the sub-article that the phrase ‘in accordance with law’ contemplates the imposition of a limitation on the guarantee to persons of the privacy of their homes, correspondence or communications and that the words which follow immediately on it are intended to define the permissible extent of the contemplated limitation - in much the same manner as the Art 21(2) limitations to the fundamental freedoms enumerated in Art 21(1) are authorised.

[31] The expression 'according to law' in Art 12(1)(*d*), which, for all intents and purposes, conveys exactly the same ordinary meaning as the phrase ‘in accordance with law’ employed in Art 13(1), serves the same purpose: it allows by implication for the limitation of the right presumption of innocence and implies a measure of flexibility to allow the Legislature to determine substantive and procedural frameworks in the public interest in terms of which a person may be proved guilty 'according to law'. This implicit flexibility is necessary if a balance is to be struck between the rights of the individual to be presumed innocent and the State's obligation to protect the interest of the public. Mr Gauntlett is entirely correct in his submission that the concept of a fair trial is a flexible one, involving as it does, not only the interest of the accused but also

those of victims of crime and the public interest at large. The concept of balancing the interest of victims of crime with the rights of the accused though not new has attained a prominent role in the criminal justice system of late and has thus become part of the social milieu intrinsic in the notion of fair trial.

[32] It follows also from what has been stated above that the *dictum* in the *Corporal Punishment*-case cannot be authority for the proposition that there can never be a permissible reverse onus provision in our law.

[33] In concluding, as I have, that the phrase 'according to law' in Art 12(1)(*d*) by implication authorises a limitation of the right to be presumed innocent, I am mindful that Dickson CJC (who wrote for the majority in *R v Oakes* (1986) 26 DLR (4th) 200 which was followed by the High Court in the *Freiremar*-case in formulating the 'rational connection test' for determining the validity of a reverse onus provision) holds a different view on the interpretation of that phrase in s 11(d) of the Canadian Charter of Rights and Freedoms (the equivalent of Art 12(1)(*d*) of our Constitution). He questioned the appropriateness of reading the phrase as permitting statutory limitations (or 'exceptions', as it is referred to in the judgment). His approach, it must be noted, differs from the interpretation of an identical phrase by the Supreme Court of Canada in s 2(f) of the Canadian Bill of Rights (a statutory equivalent of s 11(d) of the Charter) under an earlier constitutional dispensation. In the earlier cases of *R v Appelby* (1971) 21 DLR (3d) 325 and *R v Shelly* (1981) 59 CCC (2d) 292 that Court held that the phrase 'according to law' which qualified the right to be presumed

innocent under s 2(f) of the Canadian Bill of Rights allows for ‘statutory exceptions’ to the presumption. The later interpretational approach adopted by the same court in the *Oakes*-case must, of course, be understood in the context of the constitutional developments in that country: prior to the implementation of the Canadian Charter of Rights and Freedoms, fundamental rights and freedoms (including the right to be presumed innocent until proven guilty) were protected in the Canadian Bill of Rights, an Act of Parliament promulgated for the recognition and protection of human rights and fundamental freedoms. The Bill did not have a general limitation clause authorising the limitation of the specific rights and freedoms set out therein, as the Canadian Charter now has. Given the different nature of the two instruments, the Bill being a statute and the Charter being part of Canada’s constitution[26], Dickson CJC held that earlier jurisprudence on interpretation and application of the Bill of Rights (such as expounded in the cases of *Appelby* and *Shelly*) no longer constitutes binding authority when it comes to the interpretation of the Canadian Charter. Reasoning that adoption of the statutory exception proviso based in *Appelby’*s-case on the phrase ‘according to law’ in s 2(f) of the Bill of Rights would subvert the very purpose of the entrenchment of the presumption of innocence in the Canadian Charter, the court preferred to keep s 11(d) and s 1 of the Charter distinct for analytical purposes and to adopt a two-stage process in determining the constitutionality of reverse onus provisions: a strict approach on the question whether a reverse onus provision detracts from the presumption of innocence in s 11(d) of the Charter and if so, to determine whether it falls within the permissible ambit of the general limitation

[26] *The Constitution Act*, 1982 (Schedule B of the *Canada Act*, 1982 of the UK Parliament) proclaimed thereof into force by the Queen in terms of s. 58 of the Act.

authorised by s 1 of the Charter. This deviation from the earlier approach of the same court under the Bill of Rights, Lord Woolf[27] noted, was understandable given the wording of the express limitation in s 1 of the Canadian Charter. I respectfully agree with his observation. Section 1 of the Canadian Charter defines the permissible ambit of limitations on the fundamental rights and freedoms set forth in the various sections that follow in the following terms:

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

[34] It follows, logically in my view, that the phrase 'according to law' in s 11(d) of the Charter must be read subject to the general limitation authorised in s 1 thereof. It cannot be understood to allow for limitations on grounds or criteria other than those required in terms of s 1 of the Charter.

[35] These constitutional and jurisprudential developments in Canada were also extensively discussed and commented on by the High Court in *Van Der Berg's*-case.[28]O'Linn J concluded[29] from his review of the Canadian authorities that 'in the absence of a provision such as s 1 (of the Canadian Charter), the Canadian Supreme Court may very well have persisted in the approach in their Bill of Rights jurisprudence such as in the *Appleby* and *Shelly* decisions…'. I do not find it

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[27] Writing for the Board in the Privy Council in *Attorney-General of Hong Kong v Lee Kwong-kut* ; *Attorney-General of Hong Kong v Lo Chak-man,*[1993] 3 All ER 939 (PC) at 951d
[28] At pp 54-59
[29] At 57G-H

necessary to comment on the correctness of the High Court's analysis and conclusion in this regard. Suffice it to re-emphasise that the reasoning in the *Oakes*-matter (as further developed in subsequent Canadian jurisprudence) is based on a constitutional structure for the protection of human rights and freedoms subject to a general limitation clause. The constitutional model and language adopted by the Canadian Charter differs substantially from the structure and language used to authorise the limitation of certain fundamental rights and freedoms by law under the Namibian Constitution. I have already demonstrated with reference to similar phrases elsewhere in Chapter 3 of the Constitution that the phrase 'according to law' in Art 12(1)(*b*) by implication permits limitations on the right to be presumed innocent until proven guilty.

[36] In what follows, I shall briefly refer to jurisprudence in other jurisdictions where similar phrases are interpreted and the approach to be adopted in determining the permissible extent of reverse onus provisions is discussed. I do so to emphasise that Namibia will not be unique in this approach. The first case in point is a constitutional matter decided by the Judicial Committee of the Privy Council in the matter concerning the interpretation of art 11(1) of the Hong Kong Bill of Rights. Art 11(1) of the Hong Kong Bill of Rights, in the terms substantially similar to the provisions of our Art 12(1)(*d*) provides that '(e)veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.' The position in Hong Kong is also similar to ours in that their Bill of Rights does not contain a general limitation clause and no express provision for a reverse onus has been made. The

appeal in the matter of *Attorney-General of Hong Kong v Lee Kwong-kut*[30]went before the Judicial Committee of the Privy Council. The first respondent in the appeal was charged in Hong Kong with contravening s 30 of the Hong Kong Summary Offences Ordinance which provided that a person charged with 'having in his possession or conveying in any manner anything which may be reasonably be suspected of having been stolen or unlawfully obtained' and who was unable to 'give an account to the satisfaction of a magistrate, how he came by it' committed an offence. The trial magistrate dismissed the case on the basis that s 30 was inconsistent with art 11(1) of the Hong Kong Bill of Rights.

[37] The issue before the Judicial Committee was whether a reverse onus provision infringed a right in the Hong Kong Bill of Rights to the same extent as Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention on Human Rights). It was held *inter alia* that the reverse onus was permissible within certain limits. Giving the opinion of the Board, Lord Woolf stated at 949c-d in relation to the case law of other jurisdictions to which the Board was referred in argument:

> 'Placing to one side for the moment the decisions in Canada, all of the many decisions in different jurisdictions to which their Lordships were referred recognise that provisions similar to art 11(1) are always subject to implied limitations so that a contravention of the provisions does not automatically follow as a consequence of a burden on some issues being placed on a defendant at a criminal trial.'

[30]Op. Cit.

His Lordship went on to remark at 954g-h that while the Hong Kong judiciary should be zealous in upholding an individual's rights under the Bill of Rights, it was also necessary to ensure that disputes regarding the effect of the Bill of Rights are not allowed to get out of control. The issues arising out of the Bill of Rights should be approached with realism and kept in proportion. If that was not done, the Hong Kong Bill of Rights would become a source of injustice and would be debased in the eyes of the public. He concluded at 954j *in fine*-955a as follows:

> 'In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime... It would not assist the individuals who are charged with offences if, because of the approach adopted to 'statutory defence' by the courts, the legislature, in order to avoid the risk of legislation being successfully challenged, did not include in the legislation a statutory defence to a charge.'

I respectfully associate myself with the above sentiments. Lord Woolf thus acknowledged that situations may arise where the strict application of the principle that the prosecution must prove the guilt of an accused beyond reasonable doubt may be deviated from and gave an example where this may be done and why. He reasoned at 950c-h and I find it necessary to quote *in extenso*:

> 'There are situations where it is clearly sensible and reasonable that deviations should be allowed from the strict application of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt. Take an obvious example in the case of an offence involving the performance of some act without a licence. Common sense dictates that the prosecution should not be required to shoulder the virtually impossible task of establishing that a defendant has not a licence when it is a matter

> of comparative simplicity for a defendant to establish that he has a licence... Some exceptions will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which art 11(1) enshrines. The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable. In deciding what are the essential ingredients, the language of the relevant statutory provision will be important. However, what will be decisive will be the substance and reality of the language creating the offence rather than its form. If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless, as was pointed out by the United States Supreme Court in *Leary v US* (1969) US 395 6 at 36, "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend".'

[38] See also the decision of the Hong Kong Court of Appeal in *R v Sin Yau Ming* [1992] HKCLR 127 (CA)[31] where one of the presumptions with which the court was concerned provided that if the accused was proved to have had more than a certain quantity of dangerous drugs, it would be presumed, until the contrary was proved that he had such drugs with intent to trafficking therein. Although on the facts the court did not uphold the presumption on the ground that the volume of drugs required to trigger the presumption was too small, it nevertheless held that a mandatory presumption of fact was compatible with the presumption of innocence if it could be shown, with due regard to the purpose of the legislation, that the fact to be presumed rationally and

[31] As discussed in *Chogugudza at 37A-C*

realistically follows from the proved fact and that the presumption meets the test of proportionality.

[39] I move next to consider the jurisprudence of the European Court of Human Rights. Art 6(2) of the European Convention on Human Rights provides that 'every one charged with a criminal offence shall be presumed innocent until proven guilty according to law.' As far ago as 1981, in the well-known decision of *Lingens v Austria* (1981) 4 EHRR 373 at 390-391, the European Court of Human Rights in the case that concerned an onus provision casting a legal burden on an accused to prove the truth of a statement when charged with criminal libel, held that the Convention on Human Rights does not prohibit rules which transfer to the defence the burden of proving or disproving an element of an offence, provided that the overall burden of establishing guilt remains with the prosecution. In *Salabiaku v France* (1988) 13 EHRR 379 at para 28 the court cautioned, however, that the article requires Contracting States to confine presumptions within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence. I find the above decisions of the European Court to be of valuable guidance in the interpretation of the provisions of Art 12 and the determination of the issues before us. I do recognize, of course, that the European Court is not concerned 'directly with the validity of domestic legislation but whether, in relation to a particular complaint, a state has in its domestic jurisdiction infringed the rights of a complainant under the European Convention...'[32]

[32] *A-G of Hong Kong v Lee Kwong-kut* at 948b

[40] Against the backdrop of the need to comply with the Convention on Human Rights and not to infringe the Human Rights Act, 1998 recent case law of the courts in England and Wales also shows a trend to uphold reverse onus provisions within certain limits. The approach is summarised in *Phipson on Evidence* 17th ed (Sweet & Maxwell 2010), by Malek (ed) at 6-36, where the learned editor, having distilled the principles to be applied from leading decisions of the House of Lords, described the position in the following terms:

> 'In assessing reverse onus provisions, the court will look to whether the statute imposes a persuasive or merely evidential burden; whether it is mandatory or discretionary; whether it relates to an essential element of the offence or only to an exemption or proviso. Some of the issues to consider in determining whether a mandatory persuasive burden is imposed is inter alia what the prosecution must prove before the onus on the accused arises and the extent to which the factual matter to be proved by the accused is readily provable by him as a matter within his own knowledge or to which he has ready access. An overriding consideration is that it is Parliament's constitutional role to decide, as a matter of policy, what should be the constituent elements of a criminal offence. It is not for the court to second guess Parliament's choice in this regard.'

[41] In line with this approach to reverse onus provisions it was held, for example, in *SA (A Juvenile) v DPP* [2003] QB 137 that a presumption placing an onus on an accused to show good reason or lawful authority for carrying a 'bladed or sharply pointed article other than a small pocket knife' was justified. The presumption was held to be striking a fair balance between the interests of society and the fundamental rights of an accused. In *Attorney-General's Reference (No 4 of 2002)* [2004] UKHL

43, one of the reverse onus provisions in issue required the accused to prove that he did not participate in a proscribed organisation. A majority of the House of Lords held that the section in question had to be read down so as to impose only an evidential burden. Reverse onus provisions with regard to knowledge on the part of the accused were also considered and upheld by the courts of England and Wales in less serious criminal cases which I do not find necessary to detail here and in not doing so, I mean no disrespect to counsel who argued for the constitutionality of the impugned provisions for the many helpful examples he gave in his written heads. Suffices it to say that the Strasbourg jurisprudence and English case law evince a trend (postdating *Coetzee* in the case of English case law) permitting reverse onus provisions within certain limits, as previously mentioned. This trend, as I shall later show, is eminently in accord with Kentridge AJ's approach in *Coetzee*. I find this approach highly persuasive and illuminating and would therefore recommend it to the courts of this country.

[42] It remains next to consider whether the impugned provisions amount to a limitation of the rights as contended for and if so whether such limitation falls within the ambit of what is authorised by the Constitution.

[43] As a precursor to the determination whether the impugned provisions are constitutional or not, I wish to make the following general observations. The Court is being called upon to determine the constitutionality of the impugned provisions at the time when crime, particularly commercial crime, has continued to increase to the

extent that the hard-won gains the country and the people have made in the consolidation of the country's constitutional democracy and ingraining the values which our Constitution articulates are in danger of being eroded. We also live in the times that the roles played by corporations and particularly by those behind the corporate veil have come in sharp focus because of the overarching influence of corporations on a country's economy in particular and their impact on the stability of the world economic order in general. In her affidavit Mrs Olyvia Martha Imalwa, Prosecutor-General, also referred to deleterious effects crime has on the country's development and provides statistics to demonstrate her point that the offences of fraud and theft in Namibia had escalated to unacceptable levels. She says that the impugned provisions serve an important purpose in the prosecution of commercial crimes since they require the accused in those cases to deal with matters that are peculiarly within their knowledge and which are difficult or impossible for the prosecution to establish. She points out the simple truth that economic crimes erode the development of a vibrant and reliable economy; that such economy is essential to the growth of business and employment in the country, and that the impugned provisions seek to assist her office to combat those crimes on behalf of society. These considerations are undoubtedly worthy and must inform the Court in the judgment that it may be called upon to make in the determination of whether or not the impugned provisions are constitutional. Against this brief background, it is proposed then to consider the impugned provisions starting with s 245.

Section 245 of the Criminal Procedure Act, 1977

[44] It is trite that s 245 is part of the Criminal Procedure Act, which as previously mentioned predates the country's Independence. As already stated, the Act has remained on our statue books after Independence by virtue of Art 140(1) of the Constitution. Although the Act has been amended from time to time since Independence, the impugned provisions have not been amended and have continued to be applied until the current challenge. As mentioned before, identical or substantially the same provisions in the same Act were the subject matter of constitutional litigation in South Africa where they were declared unconstitutional by the majority of that country's Constitutional Court in *Coetzee's*-case.A reading of thearguments advanced by counsel contending for the unconstitutionality of the impugned provisions reveals a heavy reliance on the majority judgment in *Coetzee* for the proposition they contend for.

[45] Section 245 reads as follows:

> '**Evidence on charge of which false representation is element**
> If at criminal proceedings at which an accused is charged with an offence of which a false representation is an element, it is proved that the false representation was made by the accused, he shall be deemed, unless the contrary is proved, to have made such representation knowing it to be false.'

[46] As the Attorney-General and the Prosecutor-General rightly point out in their affidavits, the section is fundamental to the prosecution of cases of fraud and theft by false pretences where knowledge of the falsity of the representation by the person making it is an essential element of the crime. The section is said to contain a type of

a reverse onus presumption the main function of which was explained by Langa J in *S v Coetzee* at para 12 as follows:

> 'Its purpose is to facilitate the task of the State in the prosecution of crimes such as fraud and theft by false pretences by relieving the prosecution of the need to prove that the accused knew that the misrepresentation was false at the time that he or she made it. The presumption has been held to be applicable to instances in which the representation relates to facts which are objectively ascertainable.'

[47] The successful prosecution of the crime of fraud would normally require, amongst others, proof by the State beyond reasonable doubt that the accused made a misrepresentation knowing it to be false.[33] The enactment of the presumption has been substantiated on the basis that it deals with matters that are peculiarly within the knowledge of the accused and that proving the state of mind of the accused in the context of a false representation is much more difficult than in other cases[34]. The effect of the section is that, in a prosecution where an accused charged with a crime in which knowledge of the falsity of the representation is an element, the presumption becomes operative once the State has proved that the accused had made the false representation. The onus is then on the accused to prove on a balance of probabilities that he or she did not know at the time that the representation was false.[35] The principal basis on which the presumption is being challenged is that, in the absence of such proof by the accused to discharge the onus on him or her and in the circumstances where the probabilities are, for example even, the court would be

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[33] *S v Nakare* 1992 NR 99 (HC) at 100H
[34] id. par 14
[35] *S v Van Niekerk* 1981 (3) SA 787 (T) at 790A-B

obliged to convict ‘notwithstanding the existence of a reasonable doubt regarding the state of mind of the accused.’[36] Whether the statutory reverse onus presumption created by s. 245 falls within the ambit of permissible limitations on the constitutional presumption of innocence is what must be considered next.

[48] Reverse onus presumptions and evidential presumptions are not necessarily unconstitutional. This much is clear from decisions in this jurisdiction such as, for example, *Freiremar, Van den Berg* and *S v Shikunga*1997 NR 156 (SC). The same approach is also evident from judgments in other jurisdictions within the region, such as in*Chogugudza, Meaker*and *Zuma*cases. It has become necessary to consider these cases in some detail. The *Freiremar*-matter concerned the constitutionality of the proviso to s 17 of the Sea Fisheries Act, 58 of 1973,[37] that provided as follows:

> '(1) The court convicting any person of any offence in terms of this Act may, in addition to any other penalty it may impose declare any fish, sea-weed, shells or implement or any fishing boat or other vessel or vehicle in respect of which the offence was committed or which was used in connection with the commission thereof, or any rights of the convicted person thereto, to be forfeited to the State,...: Provided that such a declaration of forfeiture shall not affect any rights which any person other than the convicted person may have to such implement, boat, vessel or vehicle, if it is proved that such other person took all reasonable steps to prevent the use thereof in connection with the offence...'

[49] Drawing from Canadian cases considering the general limitation clause in art 1 when applied to the presumption of innocence in Art 11(d) of the Canadian Charter of

[36] *Coetzee* at par 5

[37] Replaced by the Sea Fisheries Act 29 of 1992, which was in turn replaced by the Marine Resources Act 27 of 2000

Rights and Freedoms, Strydom JP observed that the fact that a reverse onus is placed on an accused does not necessarily make the reverse onus provision unconstitutional. Much will depend on whether the provision in question satisfies the 'rational connection' test. Expanding on the application of the rational connection test in cases applied by the High Court of Namibia, Strydom JP stated[38] that:

> 'In my opinion the test as applied in these cases is a practical one which would require an accused to speak up in circumstances where an explanation would be required because of the presumption raised by the proved facts and because of the personal knowledge of the accused. However, where the proven facts are not such that an explanation is readily required the placing, in those circumstances, of an inverted onus on an accused will require an accused to prove his innocence which will be contrary to the Constitution containing a provision as that set out in art 12(1)(d) of the Namibian Constitution.'

[50] In *Van den Berg*'s-case the High Court grappled with the question whether the reverse onus provision in s 35A of the Diamond Industry Protection Proclamation, 1967, violated the presumption of innocence Art 12(1)(*d*) of the Constitution. Paragraph (b) of the section provided that if 'the person charged contends that any article or substance, the subject of the charge is not a rough and uncut diamond, the burden of proving that...such article or substance is not a rough or uncut diamond...shall lie upon the person charged.' After an extensive analysis of relevant Canadian, United States and Namibian authorities as to presumptions imposing burden of proof on an accused and a comparative examination of Art 12(1)(*d*), the Court extracted guidelines to be applied in determining the constitutionality of the

[38] At 26B-D

reverse onus provision and concluded[39] that the impugned presumption could not survive the rational connection test because it failed to mount the first leg, i.e. because there was no provision for a fact to be proved by the State with which the presumed fact could be connected. It held that the provision placed the onus squarely on the accused to prove the absence of an element of the offence: the element being that the diamonds bought, sold or possessed were rough and uncut. The Court thereafter proceeded to consider the constitutionality of the presumption in paragraph (a) of the section which placed a burden on the person charged to prove that he or she was the holder of a licence, permit or authority or was otherwise entitled or authorised to be in possession of, or authorised to buy, receive, sell, offer for sale, deal in, barter, pledge or otherwise dispose of or deliver, or to import or export any diamond. Applying the guidelines earlier referred to, the Court concluded that the reverse onus presumption in para (a) of the section was constitutional.

[51] In *Chogugudza*, the Supreme Court of Zimbabwe was concerned with the question whether or not the presumption created under s 15(2)(e) of that country's Prevention of Corruption Act whereby an onus was cast on a public officer who is shown to have done an act favouring a person, to show that he or she did not do the act for the purpose of showing favour or disfavour to that person was constitutional. Writing for the unanimous court, Gubbay CJ analysed Southern African case law dealing with the extent to which it is permissible for legislation to create reverse onus provisions and distilled the following principles therefrom:

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[39]At 66H

'(a) The presumption must not place the entire onus on the accused. There is always an onus on the State to bring the accused within the general framework of a statute or regulation before any onus can be placed upon the accused for his defence.

(b) The presumption may relate to a state of mind, that is, *mensrea,* where the element of the crime is a fact exclusively or particularly within the knowledge of the accused.

(c) A presumption will be regarded a reasonable if it places an onus upon the accused where proof by the prosecution of such a specific fact is a matter of impossibility or difficulty; whereas such fact is well known to the accused;

(d) The presumption must not be irrebuttable.[40]' (Reference to authorities omitted)

[52] The Supreme Court of Zimbabwe further held, remarkably in line with Strydom JP's approach in *Freiremar*, and as succinctly summarised in the headnote that:

'A presumption of fact was compatible with the presumption of innocence if it could be shown by the State, due regard being paid to the enacted conclusion of the legislation, that the fact to be proved rationally and realistically follows from that proved; and also if the presumption is no more than is proportionate to what is warranted by the nature of the evil against which society requires protection. On this basis, some presumptions will be justifiable, others not; whether they are will depend on whether it remains primarily the responsibility of the prosecution to prove the accused's guilt to the required standard and whether the presumption is reasonably imposed. The test of proportionality in particular provides useful guidance, since it is the need to balance

[40] At 33C *in fine*-34C

> the interests of the individual and society which is at the heart of the justification of an exception to the general rule that the prosecution must establish the accused's guilt.'

[53] *Meaker*'s-case concerned the question whether the presumption contained in s 130 of the South African Road Traffic Act 29 of 1989 offended the presumption of innocence provided for by s 35(3)(*h*) of that country's Constitution. In the judgment rendered by Cameron J (Mailula J concurring), the court held that whether s 130 infringed the Constitution and, if so, whether it was justified, depended largely on facts concerning the social milieu which gave rise to the legislation. The relevance of the evidence which the parties had tendered was confined to assisting the court in what is in essence a common sense analysis of s 130 and in answering the question whether its application was reasonably justified. As to the question whether the section in question was constitutional, the court held further that it was not difficult to conclude that s 130 offended against the right to be presumed innocent as provided for by s 35(3)(*h*) of the South African Constitution. Regarding the issue of whether s 130 was saved by the provisions of s 36 of that country's Constitution, the Court distilled[41] the following principles from Constitutional Court decisions on reverse onus provisions:

(a) Cases where it is practically impossible or unduly burdensome for the State to discharge the onus of proving all the elements pertaining to the offence beyond reasonable doubt;

[41] At 75f-i

(b) Where there is a logical connection between the fact proved and the fact presumed and the presumed fact is something which is more likely than not to arise from the basic facts proved;

(c) Cases where the application of the common law rule relating to the State's onus cause substantial harm to the administration of justice;

(d) Generally, where the presumption in its terms is cast to serve only the social need it purports to address or is it disproportionate in its impact, and

(e) Cases where the State could adequately achieve its legitimate ends by means which would not be inconsistent with the constitution in general and the presumption of innocence in particular.

[54] The *Zuma*-matter, concerned the constitutionality of s 217(1)(*b*)(ii) of the Criminal Procedure Act, 1977. Writing for the unanimous South African Constitutional Court, Kentridge AJ embarked upon a survey of case law of other jurisdictions in open and democratic societies and came to the conclusion that 'reverse onus provisions were by no means uncommon and were not necessarily unconstitutional'.[42] He went on to state that reverse onus provisions in South African statute law were also not

[42] At 653D-E

uncommon.[43] I pause to observe that on this score, and as previously alluded to, the position in Namibia is no different. Kentridge AJ recognised that the prosecution authorities in appropriate cases may require reasonable presumptions to assist them in the execution of the important task of prosecution so as to meet the 'pressing social need for the effective prosecution of crime'. I respectfully share this view. Kentridge AJ, explained the various types of presumptions and the scope of the judgment in the*Zuma*-matter[44] as follows:

> 'Presumptions are of different types. Some are no more than evidential presumptions, which give certain prosecution evidence the status of prima facie proof, requiring the accused to do no more than produce credible evidence which casts doubt on the prima facie proof. See, for example, the presumptions in s 212 of the Criminal Procedure Act. This judgment does not relate to such presumptions. Nor does it seek to validate every legal presumption reversing the onus of proof. Some may be justifiable as being rational in themselves, requiring an accused person to prove only facts to which he or she has easy access, and which it would be unreasonable to expect the prosecution to disprove. The provisions in s 237 of the Act (evidence on charge of bigamy) may be of this type. Or there may be presumptions which are necessary if certain offences are to be effectively prosecuted, and the State is able to show that for good reason it cannot be expected to produce the evidence itself. The presumption that a person who habitually consorts with prostitutes is living off the proceeds of prostitution was upheld on that basis in *R v Downey* (*supra*) by the Supreme Court of Canada. A similar presumption in a United Kingdom statute was upheld by the European Court of Human Rights in *X v United Kingdom* (Application 5124/71, Collection of Decisions, ECHR 135). This is not such a case. Nor does this judgment deal with statutory provisions which are in form presumptions but which in effect create new offences. See *Attorney-General v Odendaal* 1982 Botswana LR 194 at 226-7.'

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[43] Id.
[44] At 662E-I

[55] At paras 22-25 Kentridge AJ gave a useful and succinct summary of the jurisprudence on reverse onus provisions developed by the Supreme Court of Canada. At para 22, reference is made to the decision of Supreme Court of Canada in the *Oakes*-matter, where Dickson CJC made the following seminal observations in relation to the presumption of innocence:

> 'The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice.'[45]

[56] In *Coetzee* the South African Constitutional Court found, unanimously and as previously mentioned, that s 245 was in conflict with the long-established rule of the common law that the burden of proof had always been on the prosecution to prove the guilt of the accused beyond reasonable doubt and that to that extent the provision had infringed the presumption of innocence entrenched in s 25(3)(*c*) of the South African Interim Constitution.[46]

[57] In his written heads of argument, Mr Gauntlett argued correctly that the wording of the relevant provisions in the South African and Namibian Constitutions are

[45] At 212-13
[46] At par 8

different. Section 25(3)(*c*) of the South African constitution stated that the right to a fair trial included the right '...to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial'. In contrast, Art 12(1)(*d*) of the Constitution simply states that:

> '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.'

The differences between the two constitutions in the formulation of the right to a fair trial and the other constituent rights relating thereto as emphasised by him in argument are apparent and duly noted. They are by and large the result of different constitutional mechanisms employed to protect the substance of those rights: The South African Constitution, for example, has an extensive general limitation clause equally applicable to the individual rights protected in their Constitution's Bill of Rights[47], unlike the Namibian Constitution which, in addition to certain limitations of general application mentioned in Art 22, authorises the further limitation only in respect of some of the rights and freedoms and, in most such instances, defines the permissible ambit of such limitations differently and with due regard to the specific right or freedom in question. Mr Gauntlett went on to argue that where Art 12(1)(*f*) of the Constitution provides that 'no person shall be compelled to give testimony against themselves,' it does not in principle preclude a rebuttal presumption of knowledge or a presumption that merely places an evidentiary burden on an accused person and it is not unconstitutional to discharge a purely evidentiary burden. He contended that a

[47]See; S 36 of the South African Constitution.

statutory provision that imposes an evidentiary burden does not violate the presumption of innocence because there is no possibility of being convicted despite the existence of a reasonable doubt. Counsel accordingly submitted that the presumption deals with matters that are peculiarly within the knowledge of the accused. The accused is in the best position to explain why he or she did not know that the presentation was false. The section requires of him or her to advance facts to which he or she has easy access and which would be unreasonable to expect of the prosecution to disprove. There is also a logical connection between the facts which the State is required to prove beyond reasonable doubt and the presumed fact.

[58] I have carefully considered Mr Gauntlett's submissions regarding the differences of the wording of the provisions of the South African and Namibian Constitutions and other relevant submissions as summarised above. The mandatory legal presumption created by s 245 significantly alleviates the evidential burden which the prosecution would otherwise have borne under common law to prove the guilt of accused persons charged with offences of which a false representation is an element. Unlike the position under common law where the prosecution had to prove all the elements of those offences beyond reasonable doubt to secure convictions, the section casts a reverse onus on persons prosecuted for those crimes to disprove an essential element of those crimes: once the prosecution has proved that they made the alleged representations and that the representations were false, the accused persons are required to establish on a preponderance of probability that they were ignorant of the falsity of the representations at the time when they were made. The objective of the

section is clear: to alleviate the difficulties experienced by the State in prosecutions of that nature to prove what the mindsets of accused persons were regarding the veracity or falseness of the representations at the time of their making.

[59] I accept that it may be quite burdensome for the State to prove an accused person's state of mind in prosecutions of this nature. I also accept that, in instances where the falsity of the representation is easily ascertainable and, given the nature of the fact or belief which is the subject matter of the representation, it ought to have been quite apparent to the accused person that the representation was false, there would be a logical connection between proof that the representation was false and the presumption that the accused knew about its falseness. This notwithstanding, it must be recognised that the presumption created by s 245 relates to an important element of the type of offences referred to therein and that, once the operative threshold for the presumption has been met by the prosecution, the accused would be required to disprove that element on a balance of probabilities - an element, as noted earlier, which the State otherwise would have had to prove beyond a reasonable doubt to secure a conviction. The shifting of the onus from the State to the accused in respect of such an important element of the offences in question is a significant departure from the evidential norm which would otherwise apply in criminal law and procedure. The Court is therefore obliged to scrutinise the justification for the deviation closely and to satisfy itself that the presumption is fair, rational and not disproportionate in its impact.

[60] One of the concerns about the application of the presumption is that the falseness of the representation may not always be so obvious or easily ascertainable by the maker thereof that it can be 'said with substantial assurance that (knowledge of its falsity) is more than likely than not to flow (from later proof that it was false)' - to borrow from the caveat in *Leary*'s-case. There are many instances where the line between what is true or not is difficult to observe or ascertain and persons may sometimes *bona fide* err in representing something as the truth – even confidently so – which may later be proved false. At other times a person may so strongly believe in something - which may later be proved false - that, instead of representing it as his or her subjective belief, hope or expectation, he or she may *bona fide* represent it to another as a factual truth. If the reverse onus provision created by s 245 were to be retained, there is a real danger that even if the accused is able to persuade the court that there is a reasonable possibility that he or she did not know that the representation was false at the time it was made, but nevertheless fails to prove that as a fact on a balance of probabilities, a court will be constrained to convict - assuming, of course, that the State has proven all the other elements of the offence in question.

[61] In *Alexander v Minister of Justice* this Court restated that the Constitution must be interpreted liberally so as to afford to its subjects the full protection of the rights set out therein. As regards limitations on constitutional rights, the Court emphasised that, to pass the test of constitutional validity, a limitation on constitutional rights must be proportionate. The limitation must not constitute a disproportionate interference with

the right in question: it must be fair, not arbitrary and the means used must impair the right to the minimum possible extent.

[62] The Court has not been referred to similar reverse onus provisions in other democratic societies or, for that matter, a pressing social need to retain a mandatory legal presumption in the form of s 245. I recognise that the objective of the provision is to ameliorate the evidential difficulties which the prosecution might otherwise face to prove beyond reasonable doubt that a person accused of the offences contemplated therein knew that the representation was false. Had the section been formulated differently and, instead of creating a legal presumption, imposed a mere evidential burden by providing that, proof of a false representation would constitute *prima facie* evidence that the accused had made such representation knowing it to be false, the section's impact on the right protected by Art 12(1)(*d*) would have been significantly less. The imposition of an evidentiary burden would have been more in line with the minimum impairment requirement and in my view would have gone a long way to redress the evidential considerations which had given rise to the promulgation of the section (or its statutory predecessor) in the first instance.

[63] For these reasons, I have come to the conclusion that there is no sufficient justification for the reverse onus presumption created by s 245 to warrant a limitation of the fundamental right to be presumed innocent until proven guilty and, in any event, to the extent that it permits the conviction of accused persons in spite of the existence of a reasonable doubt that they knew that the representations made by

them were false, is disproportionate to the objective which the section seeks to achieve. Therefore, I take the view that s 245 is unconstitutional. I turn next to consider s 332(5).

Section 332(5)

[64] Section 332(5) reads as follows:

> 'When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor.'

[65] As already mentioned, the constitutionality of s 332(5) was considered by the South African Constitutional Court in *Coetzee* andcounsel contending for the unconstitutionality of the section urged us to follow the approach of the majority of that court. The Constitutional Court did not speak with one voice on the issue whether or not the section was constitutionally defensible; there were multiple judgments with a number of dissentions. The majority found, as captured in the headnote, in the first place that the *onus* provisions of s 332(5) violated the right to be presumed innocent under s 25(3)(*c*) of that country's Interim Constitution. The effect of the provision was to permit the conviction of the accused despite the existence of a reasonable doubt as to his or her guilt.Furthermore, the violation of s 25(3)(*c*) of the South African

Interim Constitution by the section could not be justified in terms of s 33(1) of that Constitution. It was further found that in imposing an *onus* also on a servant of a corporation for the offences of the corporate body, the section was impermissibly overbroad. The majority found further that notwithstanding the legitimate purposes served by the section in relation to the honest conduct of the affairs of corporate bodies, the section was impermissibly overbroad in its scope of operation. The type of offence by the corporate body for which an accused director or servant could be held liable was not limited. All offences were included notwithstanding their nature, purpose or degree of remoteness from the ordinary activities of the corporate body and therefore from the legitimate purpose of the section. The majority ultimately came to the conclusion that no severance of the invalid provisions of s 332(5) that would leave the section constitutionally valid while giving effect to the purpose of the legislative scheme was possible and struck it out as being inconsistent with the constitution.

[66] The majority nevertheless found that the Legislature was 'fully entitled to place a positive duty on directors and to make omission to discharge that duty an offence'.[48] The majority was concerned about the manner that positive duty had been placed on directors, pointing out the effect of merely changing the form of the provision to require the accused, rather than the prosecution, to prove elements which are essential to the guilt or innocence of the accused person.[49]

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[48] At 547F
[49] At 547G

[67] In a minority judgment, Kentridge AJ took a different approach. He commenced his judgment by examining the nature of the provision and, in line with the views of the learned authors De Wet and Swanepoel,[50] stated that the subsection does not create a new type of offence, but 'undoubtedly creates a new form of liability for the offence of another.'[51] He opined that it was clear from the language of the subsection that it was the intention of the legislature to create a new form of vicarious liability. Kentridge AJ went on to say that though vicarious criminal liability was unknown to the Roman-Dutch common law, it was a common phenomenon in modern statute law world-wide informed by the complexities of societies as consequences of industrialisation and modernisation. In the light of these developments, it became necessary and imperative to embark upon measures aimed at controlling, in the public interest, the conduct of corporations involved in these activities.[52]Kentridge AJ expressed the view that the legislature did not create an absolute vicarious liability in s 332(5). Instead, it chose to mitigate what would have been the harshness of the provision, by allowing an accused falling within its reach to escape liability upon proof on a balance of probabilities of the two exempting factors, namely 'that he did not take part in the commission of the offence and that he could not have prevented it'.[53] The learned Acting Justice went on to observe that it cannot be said in the circumstances that by rendering the impact of the section less severe than it would have otherwise been, the Legislature was thereby rendering a trial under the subsection less fair than it would otherwise have been.[54] Although he would have considered the analysis he

[50] De Wet and Swanepoel *Strafreg* 4th ed. at 61 note 83
[51] At 561E-F
[52] At 561G-562A
[53] At 563B-D
[54] Ibid.

offered about the nature and scope of the subsection to be 'a complete answer' to the attack based on the ground of a fair trial provision in the South African Interim Constitution, he nevertheless found it necessary to deal with the other contention of the applicants in that case, i.e. that whatever the position might have had been, the effect of the subsection was to permit the conviction of an accused person notwithstanding the existence of a reasonable doubt as to their guilt, which would in turn offend the presumption of innocence.[55]Kentridge AJ indentified the object of the provision to be as follows:

> '[T]he object of the subsection is to control the activities of corporate entities by imposing a responsibility on those who control or conduct their activities, and ensuring that they do not regard themselves as beyond the reach of the criminal law if a crime is committed in the course of corporate activities.'

[68] He rejected the contention that the subsection created a new offence, or a new criminal liability, an essential element of which is that an accused must have participated in the commission of the offence and must have been able to prevent its commission. He reasoned instead that the clause in fact did not constitute an element which the prosecution must negative, 'but in terms creates an exemption or excuse which the accused may prove by way of defence'. All that needs to be charged and proved is that the accused was a director or servant of a corporate body that was liable to be prosecuted for a specific offence. It is then left for the accused to bring himself or herself within the permitted defence.[56]Kentridge AJ next dealt with the

[55] At 563D-E
[56] At 564A-B

alternative submissions informed by Canadian jurisprudence, namely that once a criminal statute contained a reverse onus provision requiring the accused to provide proof of some fact in order to escape conviction, it mattered not whether that onus related to an essential element of the offence or to a defence by way of excuse or one by way of exemption. In either case, so the argument went, the presumption of innocence was destroyed and the fairness of the trial impaired. The learned Acting Justice observed in this regard that even judges of the Canadian Supreme Court themselves pointed out that the protections to be found in the Canadian Charter of Rights are to be interpreted and applied according to the context in which they may arise and not in the abstract.[57] After a careful analysis of certain of the Canadian authorities relied upon for the contentions, Kentridge AJ concluded that those cases were decided in a completely different statutory context. Although they dealt with offences of strict liability, they did not directly deal with a provision imposing a vicarious liability such as the subsection.[58] They did not therefore support the contentions made by counsel. Kentridge AJ also pointed out that the burden of proof imposed by s 332(5) is substantially less than in some of statutes considered in certain of the Canadian authorities relied upon for the proposition under consideration.

[69] I respectfully agree with the persuasive and compelling approach adopted by Kentridge AJ in his minority judgment. I consider that his views that the subsection has created a new form of liability for corporate crimes and that in enacting the

[57] At 565C-D
[58] At 566I-567B

subsection, the Legislature chose to mitigate what would otherwise have been the harshness of the provision by permitting an accused director or servant to escape liability upon proof, on a balance of probabilities, of the two exempting factors are, with respect, correct. It cannot be said with any degree of conviction that a provision that is meant to ameliorate what would otherwise have been the harshness of the strict vicarious liability can for that reason be said to be unfair or unconstitutional. It is my considered view that the subsection does not derogate from the presumption of innocence provided for in Art 12(1)(*d*) of the Constitution, because, as Kentridge AJ convincingly reasoned, the State is still required to prove the offence by the corporate body beyond reasonable doubt without the aid of the presumption before the accused may be called upon to establish, on a balance of probabilities, a defence or excuse. As Kentridge AJ rightly observed, if an accused is convicted under s 332 it will be because all the elements required by s 332(5) in order to give rise to that liability have been proved beyond a reasonable doubt and because the excuse provided for by the subsection has not been established.

[70] It is trite that s 332(5) has been introduced in the public interest. It is meant to ensure that those that are in control of corporations, particularly commercial ones, are called to account when the corporations under their control perpetrate offences. Once the elements of the offence have been proved and a defence or excuse is called from them, all that the accused director is required to show is that he or she did not take part in the commission of the offence and that he or she could not have prevented it. The accused is, of course, not obliged to testify but if he or she does not do so, he or

she takes a risk and it is the risk, to my mind, that an accused who elects not to testify in the face of prima facie evidence against him or her takes in all criminal cases. It cannot be said that he or she is thereby compelled to give testimony against oneself and there can be no question of Art 12(1)(*f*) being infringed in those circumstances. It is trite that a corporation is an artificial person that 'has no body to be kicked or soul to be damned'. The directors are its controlling minds. Whether the director of a corporation did not take part in the commission of the offence and he or she could not have prevented it is a matter that should be well known by the director concerned. On the other hand, such specific fact is a matter of considerable difficulty for the prosecution to prove. The subsection requires the accused director of the corporate body, in the words of Strydom JP in *Freiremar* to 'speak up in the circumstance where an explanation would be required because of the presumption raised by the proven facts and because of the personal knowledge of the accused'. Similar remarks by Gubbay CJ about the nature of the presumption under consideration in *Chogugudza* apply with equal force to the presumption under s 332(5). The learned Chief Justice said:

> 'The presumption does not have the effect of requiring the accused unfairly to discharge a major ingredient of the offence for no reason at all. A strong suspicion will have been created on the facts proved by the State from which a permissible inference could be drawn... The accused is simply called upon to reveal something peculiarly within his knowledge...This seems to me essentially an exercise in common sense.'[59]

[59] At 35E-F

[71] Kentridge AJ observed in *Coetzee*[60] that s 332(5) has been part of South African statute law since 1939. The learned Justice decisively commented on what is expected of those that take positions of control of corporations and remarked as follows:

> 'It is not unreasonable to regard those who take positions of control in corporate bodies as voluntarily subjecting themselves to the regime of company and corporation law, which must be taken to include the provisions of s 332(5).'

I respectfully agree with the above remarks and also agree with the submission by Mr Gauntlett in his written heads of argument that:

> '[T]hose who choose to assume a directorship of a company have, in doing so, placed themselves in a position of responsibility not only vis-à-vis the company but in relation to the public generally. They must accept the consequences of that position of responsibility on behalf of what is an artificial legal entity, otherwise beyond effective redress. This is because any such director of the corporate body is in the best position to prevent the harm which may result from the activities of the corporation. More specifically, such persons must accept (and indeed, for practical purposes, are deemed to accept) that the law requires them to control the corporate body and in doing so, otherwise discharge their duties as directors or principals of the corporation in accordance with the standards of governance, failing which criminal and/or civil liability would ensue.'

[72] Kentridge AJ's insightful *dictum* about the operation of the subsection in the South African history and the impact of its possible excision from the Criminal

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[60] At 573D-E

Procedure Act applies with equal force to the operation of the section in the history of this country since the two countries share similar historical backgrounds. He said:

> 'There is nothing before us to show that the operation of the present subsection or its predecessors has in practice given rise to injustices. Nor, I should add, have the provisions anything to do with the history of racial and other discrimination in this country. They were provisions enacted for the protection of the public in a society in which corporate entities played an increasingly pervasive and important role. To strike out s 332(5) would leave a considerable gap in the mechanisms available for ensuring the honest conduct of corporate institutions.'

Subject to the considerations that follow, I respectfully agree and have therefore come to the conclusion that s 332(5) is constitutional. It complies with the test of proportionality as set out in the *Alexander*-matter and other cases in that the provision is not disproportionate in its impact: there is a logical connection between the fact proved and the fact presumed. The means adopted to deal with the threat faced by society which the subsection is designed to combat are reasonable and necessary if the offence is to be effectively prosecuted.

[73] I am of the considered view, however, that in extending the deemed liability for corporate crimes to servants of the corporation, the Legislature has cast the net too wide. On this aspect counsel were unanimous in their submissions. I agree that the words 'or servant' make the section impermissibly overbroad. Included in the description of 'servant' are lowly placed workers in the corporation who cannot conceivably be said to be the mind and soul of the corporation so as to be in a

position to prove the two exempting factors set out in the subsection. Without further qualification, every employee of such a corporate body is exposed to prosecution irrespective of his or her position in the corporation or proximity or connection to the act which constitutes the offence. To that extent, the presumption is arbitrary and disproportionate in effect, overbroad and irrational. Thus, the expression 'or servant' in the subsection has the effect that the subsection exceeds the permissible ambit of the limitation authorised by the Constitution in respect of the right protected under Art 12(1)(*d*).

[74] Although the expression may well be severable, regard being had to the test for severability as endorsed by this Court in the *Cultura 2000*-case,[61] the application before the Court only requires of it to provide answers to the questions posed regarding the constitutionality of the impugned provisions. The terms of the referral under Art 79 and the nature of the relief prayed for in the Notice of Motion do not require of the Court to excise any phrases or provisions from the impugned sections or, for that matter, to strike any of the sections which offends the Constitution. I assume that the relief prayed for has been deliberately cast in that form to allow accused persons and institutions of State alike to take such further action, based on the determination of the issues by this Court as they may be allowed or advised to

[61]At 346D-E where it held as follows 'The test to be applied is set out as follows in the judgment of Centlivres CJ in the case of *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 (A) (at 822C-F):
"... (W)here it is possible to separate the good from the bad in a statute and the good is not dependent on the bad, then that part of the statute which is good must be given effect to, provided that what remains carries out the main object of the statute . . . Where, however, the task of separating the bad from the good is of such complication that it is impractical to do so, the whole statute must be declared ultra vires. In such a case it naturally follows that it is impossible to presume that the legislature intended to pass the statute in what may prove to be a highly truncated form: this is a result of applying the rule I have suggested and is in itself not a test."'

take. For these reasons I conclude that the reverse onus presumptions created by the impugned provisions exceed the scope of limitations authorised in respect of the right to be presumed innocent under Art 12(1)(*d*). In as much as the presumption of innocence is also a necessary and inseparable component of the overarching right to a fair trial in the determination of criminal charges against accused persons protected by Art 12(1)(*a*), it follows that the latter right is also unconstitutionally diminished as a result. In view of the conclusion which I have reached, it is not necessary to elaborate on the question whether the impugned sections also infringe accused persons' right not to be compelled to give testimony against themselves as protected under Art 12(1)(*f*) or other rights or privileges associated with it. Suffice it to say that if the onus contemplated in s 245 would have been evidential in nature and the expression 'or servant' would have been omitted in s 332(5), the effect of the ameliorated presumptive provisions in the impugned sections would not have unconstitutionally diminished any of the rights protected under Art 12.

[75] For all these reasons, I would give the following answers to the questions posed by the Attorney-General:

(1) Sections 245 and 332(5) of the Criminal Procedure Act 51 of 1977, as amended, are unconstitutional to the extent that –

(a) the provisions of s 245 cast a mandatory legal onus on an accused person, charged with an offence of which a false representation is

an element, to prove on a balance of probabilities that he or she did not know that the representation was false once the State has proved that he or she had made the false representation;

(b) a servant of a corporate body is in terms of s 332(5) deemed to be guilty of an offence committed for which the corporate body is or was liable to be prosecuted, unless he or she proves on a balance of probabilities that he or she did not take part in the commission of the offence and could not have prevented it

on the grounds that they impermissibly infringe an accused's right under Art 12(1)(*d*) of the Constitution to be presumed innocent until proven guilty according to law and thus also an accused's right to a fair trial in terms of Art 12(1)(*a*) of the Constitution.

(2) To the extent noted in paragraphs (1)(a) and (b) above, the limitations imposed by sections 245 and 332(5) on an accused person's right to a fair trial under Art 12 of the Constitution are not constitutionally authorised.

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SHIVUTE CJ

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MARITZ JA

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STRYDOM AJA

APPEARANCES

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3rd, 4th, 6th, 9th and 10thRESPONDENTS:	L C Botes Instructed by: For the 3rd Respondent: Engling, Stritter& Partners For the 4th and 6th Respondents: Stephen F Kenny Legal practitioners For the 9th and 10th Respondents: DrWeder, Kauta&Hoveka