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CONTENTS

GUIDE TO CONTRIBUTORS

The *Namibia Law Journal* (*NLJ*) is a joint project of the Supreme Court of Namibia, the Law Society of Namibia and the University of Namibia.

The Editorial Board will accept articles and notes dealing with or relevant to Namibian law. The discussion of Namibian legislation and case law are dealt with as priorities.

Submissions can be made by e-mail to namibialawjournal@gmail.com in the form of a file attachment in MS Word. Although not preferred, the editors will also accept typed copies mailed to PO Box 27146, Windhoek, Namibia.

All submissions will be reviewed by one of the Advisory Board members or an expert in the field of the submission.

Submissions for the first semester edition in 2015 need to reach the editors by 15 March 2015.

All submissions need to comply with the following requirements:

- Submissions are to be in English.
- Only original, unpublished articles and notes are usually accepted by the Editorial Board. If a contributor wishes to submit an article that has been published elsewhere, s/he should acknowledge such prior publication in the submission. The article should be accompanied by a letter stating that the author has copyright of the article.
- By submitting an article for publication, the author transfers copyright of the submission to the Namibia Law Journal Trust.
- Articles should be between 4,000 and 10,000 words, including footnotes.
- "Judgment Notes" contain discussions of recent cases, not merely summaries of them. Submissions in this category should not exceed 10,000 words.
- Shorter notes, i.e. not longer than 4,000 words, can be submitted for publication in the "Other Notes and Comments" section.
- Summaries of recent cases (not longer than 4,000 words) are published in the relevant section.
- Reviews of Namibian or southern African legal books should not exceed 3,000 words.

The *NLJ* style sheet can be obtained from the Editor-in-Chief at namibialawjournal@gmail.com.

INTRODUCTION

Nico Horn*

It is almost impossible to believe that this is the last edition of our sixth year. After a slow 2013, 2014 gave us more than enough to read. This edition of the *Namibia Law Journal* is again loaded with interesting articles, mostly from recent Namibian law graduates and legal practitioners.

We would therefore like to thank the Konrad Adenauer Foundation for their continued support of the *NLJ*. Dr Bernd Althusmann, the Resident Representative for Namibia and Angola, has been a dedicated partner – like his predecessors – since his arrival in Namibia.

Congratulations are also in order for Advisory Board Member Judge Dave Smuts, who was appointed to serve on the Supreme Court Bench as from 1 January 2015. Also from that day, the Chairperson of the Namibia Law Journal Trust Board of Trustees, Justice Gerhard Maritz, the longest-serving member of Namibia's judiciary to date, retires from the Supreme Court Bench. We congratulate him on his extensive achievements and wish him well for his retirement, but of course we look forward to his continued and esteemed involvement in the *NLJ*.

Sadly, we need to say goodbye one of the first members of the Namibia Law Journal Trust's Advisory Board, Barbara Olshansky, who has moved on to new challenges outside the legal field. When she joined the Board, Barbara was a member of the well-known Law Faculty of Stanford University and a regular visitor to Namibia. When she joined Maryland University a few years later, she and her law clinic students were also frequent visitors to our country. Barbara has made a huge contribution to our Journal and contributed in many ways to the Namibian legal fraternity. We wish her all the best.

The New Year will also see the long-awaited restructuring of the *NLJ* come into being. We are confident that the Trustees will be able to make the *NLJ* even more exciting and readable than before.

So from the Namibia Law Journal Trustees, its Editorial Board and its Advisory Board, we wish you a prosperous 2015!

* Editor-in-Chief; Professor of Public Law, Faculty of Law, University of Namibia.

ARTICLES

Every story has three versions – yours, mine and the truth: The admissibility of polygraph tests in court

Jaime Smit*

Introduction

Polygraph tests – more commonly known as *lie detector tests* – have become increasingly popular in Namibia. The ongoing debate as to whether or not a polygraph test result is admissible in court has not passed Namibia by. The arguments are always the same:

- That the polygraph test is illegal
- That it is against the Namibian Constitution
- That it infringes on a person's fundamental human rights
- That it is not accurate, and
- That it is inadmissible in court.

From these arguments, unfortunately, it is clear that many people have a misconception of polygraph tests and how they may or may not be used in labour cases or a court of law.

As a practising polygraphist since 2005, I am very often asked whether or not the polygraph test may be used in court, i.e. whether or not it is admissible. The short answer is "Yes, it may, but not on its own: only as corroborative evidence."[1] However, the issue is much more complicated than this. I will therefore discuss the test's admissibility and the weight allocated to it in labour proceedings and courts in Namibia and South Africa, and will address each of the above arguments raised by critics. Unfortunately, since not many cases have been reported relating to polygraph tests in Namibia, we will have to rely more heavily on South African cases.

In order to fully understand the reason as to how the polygraph test came to be disputed, let us look at what the polygraph is, and how it is used.

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* Forensic Psychophysiologist; Managing Director, SICS Polygraph.

1 *FAWU obo Kapesi & Others v Premier Foods Ltd t/a Ribbon Salt River*, (C640/07) [2010] ZALC 61; (2010) 31 ILJ; 1654 (LC); [2010] 9 BLLR 903 (LC) (4 May 2010).

What is a *polygraph test*?

A *polygraph test* is an instrument that is used to determine a person's truthfulness based on questions, by measuring his/her physiological responses to such questions. It is important to note that a polygraph test is only a tool in an investigation, and not the alpha and omega of proving a person guilty or innocent.

Polygraphy is a science:[2] it operates on scientific principles and uses scientific calculations to determine an outcome. The reactions observed are based on scientific facts and, since the process uses a forensic methodology based on science, polygraphy, too, can be viewed as a science.[3]

Conducting these tests is a polygraphist – a professionally qualified person trained in the art of detecting deception.[4] Some are better qualified than others, but in the end it is experience together with the qualification that will make one an expert.

How does the polygraph test work?

The modern polygraph test was derived from instruments designed mainly for use in criminal investigation in the United States in the early 1900s, and was developed by William Marston,[5] John Larson[6] and Leonarde Keeler.[7] Keeler's polygraph, patented in 1939, made simultaneous recordings of changes in cardiovascular activity, breathing and skin conductance (caused by sweating) and is the template on which modern polygraphs are based. The term *polygraph*, meaning "many writings", comes from the multiple pens writing on moving paper that characterised the original instruments. Today, data are digitised and presented on a computer screen.

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2 Wilson, Edward O. 1998. *Consilience: The unity of knowledge* (First Edition). New York, NY: Vintage Books, pp 49–71.

3 Science (from Latin *scientia*, meaning "knowledge") is a systematic enterprise that builds and organises knowledge in the form of testable explanations and predictions about the universe. In an older and closely related meaning, *science* also refers to a body of knowledge itself, of the type that can be rationally explained and reliably applied. A practitioner of science is known as a *scientist*. Available at http://en.wikipedia.org/wiki/Science, last accessed 10 September 2013.

4 DePaulo, BM & RL Pfeifer. 1986. "On-the-job experience and skill at detecting deception". *Applied Social Psychology*, 16(3):249–267.

5 Under the pseudonym Charles Moulton, he was also the creator of the comic book character Wonder Woman and her magic lasso that caused those caught within it to tell the truth.

6 A psychiatrist.

7 Adler, K. 2007. *The lie detectors: The history of an American obsession*. New York, NY: Free Press.

Of the various instruments that exist, the most commonly used are those manufactured by the Lafayette Instrument Company and the Stoelting Co. These instruments record physiological responses to specific questions that a person is asked. Such responses are based on an involuntary physiological reaction known as the *fight-or-flight response*.[8] This autonomic nervous response[9] that a person experiences in turn initiates specific physiological responses in one's body. When the mind perceives that one is in danger, the body reacts by secreting adrenaline and noradrenaline to fight or flee. This sudden surge of adrenaline in turn 'reroutes' the blood away from the extremities to the heart, making it pump faster; one's breathing accelerates in order to allow for more oxygen to be absorbed in preparation of one's reaction to the threat; and, because of this excessive blood flow, one sweats more to keep the body cool.[10] Although all of these reactions happen in a split second and are invisible to the naked eye, the polygraph is able to detect and measure them via various parameters. These parameters will now be discussed.

Parameters of the polygraph

The first parameter is a standard mechanical blood-pressure cuff measuring the cardiographic response. The cuff records pulse rate, the variances of blood volume, and the function of the heartbeat. The second measures pneumographic responses via two tubes (*pneumos*) fastened around the subject's chest. The tubes measure the rate and depth of respiration. A third parameter, which is the galvanic skin response (or perspiration) test, involves two electrodes attached to the subject's fingertips. All of these instruments together record changes in bodily responses only: they do not measure deception or truth directly. It is then up to the examiner to draw a conclusion from the responses in respect of whether the subject has answered the relevant test questions truthfully or not. Thus, the physical responses are used as indirect indicators of deception.

8 The *fight-or-flight response*, also known as the *acute stress response*, refers to a physiological reaction that occurs in the presence of something that is terrifying, either mentally or physically. The fight-or-flight response was first described in the 1920s by American physiologist Walter Cannon. Cannon realised that a chain of rapidly occurring reactions inside the body help mobilise its resources to deal with threatening circumstances. Available at http://psychology.about.com/od/findex/g/fight-or-flight-response.htm, last accessed 10 September 2013.

9 This is a physiological action that cannot be controlled, i.e. it is involuntary or automatic. The autonomic system is the part of the peripheral nervous system that is responsible for regulating involuntary body functions, such as heartbeat, blood flow, breathing and digestion; (ibid.).

10 (ibid.).

The importance of the examiner

The aim of the polygraph examiner is to establish a psychological mindset in the examinee which will in turn bring about a physiological reaction in the examinee's body in response to a question that holds the greatest threat to them at that stage.[11] Whether this reaction is caused by a fear of being caught out in a lie, a conditioned emotional or psychological response to the act of lying, orientation to a matter of emotional salience, the increased cognitive processing required for deception, or some other mechanism is unclear, although theories involving orientation to threat and emotional salience are becoming increasingly popular.[12]

The quality of polygraph test results is directly correlated with the manner in which the tests are conducted and the quality of an examiner's analysis of their results. If the examiner is not well trained or experienced, various factors could be overlooked that could influence the results, such as augmentations;[13] super-dampening;[14] the intonation of the examiner's voice; and the examiner's demeanour, vocabulary, appearance, dress code and ethics, such as providing misinformation to the examinee regarding the accuracy of the tests.[15] All of the above factors may influence the outcome of a polygraph test; and, if the examiner is not an expert in the field, then the validity of his/her analysis and procedure may be questioned in court and may be found to be lacking, rendering the tests unreliable.

General polygraph test procedures

There are various types of polygraph tests that can be conducted for different reasons. There are periodic polygraph tests, to which employees are subjected at random in order to ensure that they are adhering to company policies and procedures and to detect any signs of possible fraud, theft or syndicate workings. Another type is the pre-employment polygraph test, which is used

11 Iacono, WG. 2001. "Forensic 'lie detection': Procedures without scientific basis". *Journal of Forensic Psychology Practice*, 1(1:75–86.

12 Kleiner, M. 2002. "Physiological detection of deception in psychological perspectives: A theoretical proposal". In Kleiner, M (Ed.). *Handbook of polygraph testing*. London: Academic Press, pp 127–182; Bell, BG & D Grubin. 2010. "Functional magnetic resonance imaging may promote theoretical understanding of the polygraph test". *Journal of the American Academy of Psychiatry and the Law*, 3(4):446–451; Senter S, D Weatherman & D Krapohl. 2010. "A proposal for reconciling theory and terminology in polygraph testing". *Polygraph*, 39(17):109.

13 The subject's attempt to 'cheat' or alter the results of the test.

14 When a subject is psychologically super-sensitised to a specific issue, which in turn creates physical responses in the body.

15 Iacono (2001).

to screen an applicant for possible involvement in drugs, syndicates, previous serious criminal deeds that s/he has not been caught for, and theft from an employer. There are also specific or incident-based tests that concentrate on a particular issue or incident.

The general procedure followed when conducting any polygraph test is always the same, however, namely –[16]

- introduction
- pre-test interview
- preparation for the test
- testing, and
- post-test interview.

The introduction entails establishing a rapport with the subject, explaining his/her rights in order for them to give their informed consent to undergoing the test, and explaining that the polygraph test is voluntary. The subject needs to know that being tested is voluntary, that the results may be provided to a third party (usually the person that requested the test), that s/he can leave at any time during the procedure, and that s/he is at liberty to record the interview. It is also essential that no promises be made to the subject and that s/he should be aware of this. The necessary documentation and information are then obtained from the subject in order for the examiner to effectively draw conclusions from the test.

The pre-test interview is usually a forensic assessment of verbal and non-verbal behaviour associated with a deceptive or truthful person.[17] The aim of the interview is to obtain as much information as possible: this will guide the examiner in asking the required questions.

After the interview, the polygraph test is prepared and the questions to be asked by the examiner are explained to the examinee. This ensures that the examinee understands all the questions, words and phrases. It is important to note that this is the final psychological preparation that an examiner needs to perform in order to ensure the questions and the tests are effective.[18] The instrument is set on the examinee's body either before or after the questions have been explained: the sequence is irrelevant. Before the instrument is placed on the subject's body, the examinee is turned away from the examiner to face a wall or space without distractions.

The polygraph test then commences. The questions are asked, and 15- to 25-second pauses are allowed between questions to record physical

16 Kleiner (2002).

17 Zuckerman, M, NH Spiegel & BM DePaulo. 1982. "Nonverbal strategies for decoding deception". *Journal of Nonverbal Behavior*, 6(87):171.

18 Kleiner (2002).

responses to them. After each test, the examinee is asked to relax and, if needed, the questions can be reaffirmed. At least three charts have to be recorded in this manner. The charts are numerically scored and the mean of the charts' scores then determines the results.

The questions are of three types: relevant, irrelevant, and comparative. Each has a very specific function and should be constructed correctly for effectiveness. It should also be noted that the questions relate to a physical action by the person and not its associated concept. For example, expressing a physical action are words such as *taking* or *stabbing*, while the associated concepts are *stealing* and *killing*. Also to be noted is that many people use psychological defence mechanisms to justify or rectify a deed done, such as "No, I did not kill the man; when I left he was still alive," or "No, I did not steal the money; I simply borrowed it without permission."[19]

Accuracy of polygraph tests

Various types of test that have been scientifically evaluated by the American Polygraph Association (APA) can be used. However, the scope of this article does not allow me to detail them all.

Prior to 2011, the scientific validation of polygraph testing was scattered and not very well documented. In 2011, however, the APA tasked several members to conduct a scientific survey to record the accuracy of certain polygraph examination techniques and to allow certain APA standards to be created for examiners to follow in order to obtain the most accurate and reliable polygraph test possible.

Today, the APA has a Standard of Practice that requires its members to use validated Psychophysiological Detection of Deception (PDD) examination techniques that meet certain levels of criterion accuracy.[20] The APA standards require event-specific diagnostic examinations used for evidentiary purposes to be conducted via techniques that produce a mean criterion accuracy level of 0.90 or higher, with an inconclusive rate of 0.20 or lower. Diagnostic examinations conducted using the paired-testing protocol are required to produce a mean criterion accuracy level of 0.86 or higher, with inconclusive

19 DePaulo, BM & R Rosenthal. 1979. "Telling lies". *Journal of Personal Social Psychology*, 37(17):13–22.

20 *Criterion accuracy* refers generally to the degree to which a test result corresponds with what the test is designed to detect. In the field of PDD, *criterion accuracy* denotes the ability of a combination of testing and scoring techniques to discriminate between truthful and deceptive examinees, and ranges from 0.00 for no validity to 1.00 for perfect validity. Criterion accuracy is one form of validity, and in some research reports it may be referred to as *decision accuracy*, or just *accuracy*.

rates of 0.20 or lower. Examinations conducted for investigative purposes are required to be conducted with techniques that produce a mean criterion accuracy level of 0.80 or higher, with inconclusive rates of 0.20 or lower. The goal is to eliminate the use of unstandardised, non-validated or experimental techniques in field settings where decisions may affect individual lives, community safety, professional integrity, and national security. In a meta-analytic survey of the criterion accuracy of validated polygraph techniques conducted for the APA in 2010,[21] 38 studies satisfied the qualitative and quantitative requirements for inclusion in the meta-analysis. These studies involved 32 different samples, and described the results of 45 different experiments and surveys. They included 295 scorers who provided 11,737 scored results of 3,723 examinations, including 6,109 scores of 2,015 confirmed deceptive examinations, 5,628 scores of 1,708 confirmed truthful examinations. Some of the cases were scored by multiple scorers and using multiple scoring methods. The data showed that techniques intended for event-specific (single-issue) diagnostic testing produced an aggregated decision accuracy of 89% (confidence interval of 83–95%), with an estimated inconclusive rate of 11%. Polygraph techniques in which multiple issues were encompassed by the relevant questions produced an aggregated decision accuracy of 85% (confidence interval 77–93%), with an inconclusive rate of 13%. The combination of all validated PDD techniques, excluding outlier results, produced a decision accuracy of 87% (confidence interval 80–94%), with an inconclusive rate of 13%. These findings were consistent with those of the National Research Council's (2003) conclusions regarding polygraph accuracy, and provide additional support for the validity of polygraph testing when conducted in accordance with APA Standards of Practice.

Taking into consideration all of the above, and in light of the findings of the Meta-analytic Survey of Criterion Accuracy of Validated Polygraph Techniques reported in 2011 by Gougler et al.,[22] if the polygraph test is conducted by a professional, its accuracy can easily be established. This expels the argument that polygraph tests are not accurate.

Polygraph test results as evidence

In order for anything to constitute evidence, it has to be relevant and admissible.[23] Section 210 of the Criminal Procedure Act, 1977,[24] provides that

21 Gougler, M, R Nelson, M Handler, D Krapohl, P Shaw & L Bierman. 2011. "Executive summary of the Meta-analytic Survey of Criterion Accuracy of Validated Polygraph Techniques". *Polygraph*, 40(4).

22 (ibid.).

23 Schwikkard, PJ, SE van der Merwe, DW Collier, WL de Vos & E van den Berg (Eds). 2008. *Principles of evidence*. Cape Town: Juta, p 45.

24 No. 56 of 1977.

no evidence as to any fact, matter or thing is admissible in court if it is irrelevant or immaterial, and if it cannot prove or disprove any point or fact at issue in criminal proceedings. Section 2 of the Civil Proceedings Evidence Act, 1965,[25] on which the Criminal Procedure Act is based, contains a considerably similar provision that irrelevant evidence is inadmissible.

Van Wyk[26] clarified *relevance* of evidence as follows:[27]

> Getuienis [is] relevant … wanneer dit oor die vermoë beskik, hetsy alleenstaande of tesame met ander bewysmateriaal, om bestaan van 'n feit in geskil, direk of indirek, meer of minder waarskynlik te maak.

Zuckerman[28] further explains that, should evidence be found to be relevant and, thus, admissible, the weight of the evidence should then be asserted. The weight of the evidence is determined by the degree of the assistance it lends to the court for the purpose of fact-finding. The potential contribution of some evidence will sometimes be apparent immediately; at other times, it will only become apparent once other evidence is submitted. Therefore, the weight allocated to evidence may shift during the trial. However, for admissibility, the court will have to decide up front if the evidence has any potential weight at all. This decision will bear on the admissibility of the evidence.

Taking the above into consideration, polygraph test results fall within the ambit of the description of relevant evidence and have probative value and, thus, are admissible.

The issues of proliferation and prejudicial effect should be explained in conjunction with opinion evidence and the matters relating to it. Even though the literature would like to exclude opinion evidence under most – if not all – circumstances because of the risk of the witness expressing an opinion on the ultimate issue, this expression of an opinion on the tier of facts by witnesses could be seen as influencing the judgement of the court. However, this ultimate issue doctrine is usually ignored in practice, mostly due to science and research being conducted daily and the lack of access that any person has to this constantly revised information. In the case of *DDP v A & BC Chewing Gum Co. Ltd*,[29] Lord Parker states that, every day, courts see cases of experts being called on to give an opinion regarding diminished responsibility and

25 No. 25 of 1965.
26 Van Wyk 1978 THRHR 175.
27 "Evidence is relevant, … if it is able, either directly or indirectly, whether by itself or together with other evidentiary material, to make the existence of a fact in question more or less probable" [Own translation].
28 Zuckerman (1993), cited in Schwikkard (2008:49).
29 1968 AC 159, at 164.

this should ultimately be inadmissible; however, such opinion are allowed and admitted time and again. Indeed, section 3(1) of the Civil Evidence Act, 1972,[30] clearly allows for the opinion of a witness in civil proceedings to be admissible.

Schwikkard[31] also refers to *Ruto Flour Mills Ltd v Adelson (1)*,[32] pointing out that supererogatory evidence is excluded because it is not needed; however, the opinion of an expert is received because his/her skill is greater than the court's in the matter, and the ultimate criterion is if the court can receive appreciable help from the opinion of the witness. When the issue is of a scientific nature or relates to a specialist skill, the expert can be asked the very question that the court can decide on.

Thus, the decision as to whether polygraph test results are unnecessary depends on the experience and qualification of the examiner, and his/her skill in detecting deception. If the examiner's qualification and skill is of such a nature that s/he can assist the court in coming to some conclusion of fact, then there would be no reason to disallow the test as evidence. The decision rests with the court as regards the need to go that route or not; however, it should be emphasised that, taking the court's discretion into consideration, there is no rule that prevents polygraph test results from being submitted – with or without the testimony of the expert witness.

Although polygraph test results are admissible as expert evidence, the results alone cannot prove guilt.[33] Nonetheless, in *Govender & Chetty v Container Services*,[34] a dismissal was upheld even though there was no direct evidence linking the applicants to the theft: the Commissioner found the inference of the polygraph test to be "overwhelming".

History of polygraph tests and courts

In 1921, James Frye was charged with murder, having confessed to the crime after his arrest on an unconnected robbery charge. He subsequently withdrew his confession, claiming it was made because of police inducement. He passed a polygraph test, but the examiner was not allowed to testify in court. Frye was convicted, but appealed on the grounds that the polygraph test should have been considered and the examiner allowed to testify. The appellate court upheld the initial decision. This decision has become known

30 No. 30 of 1972.

31 Schwikkard (2008:93).

32 1958 1 SA 720 (Z) 7241l.

33 See the arbitration *Metro Rail v SATAWU obo Makhubela*, (2000) 9 ARB 8.8.3 GAAR003888; *NUMSA obo Masuku v Marthinusen & Coutts*, (1998) 7 CCMA 2.9.1 (Case No. MP5036); and *Ndlovu v Chapelat Industries (Pty) Ltd*, (1999) 8 ARB 8.8.19 GAAR003528.

34 CCMA (1997) KN4881.

as the *Frye standard*. The court stated that the lie detector test had not gained sufficient acceptance within the scientific community to be considered as scientific evidence.[35] Ironically, Frye was later exonerated and set free.

The Frye standard became the test for the admissibility of scientific evidence in United States courts, meaning that polygraph evidence was largely inadmissible in American courtrooms for the next 70 years. In 1993, however, in the Supreme Court decision in *Daubert v Merrell Dow Pharmaceuticals, Inc*., the test for the admissibility of expert evidence was extended. The principles underlying the *Daubert* decision gave judges the freedom to make decisions about whether to admit the evidence of experts, including polygraph examiners, on a case-by-case basis, depending on the relevance and reliability of the evidence in question, and the extent to which it met scientific standards. These so-called Daubert principles, therefore, govern whether or not evidence is deemed admissible. Although jurisdictions vary in their use of the principles, polygraph evidence has been allowed in over 20 states in the US and in 9 of the 12 federal circuits.[36]

Some cases have held the view that –[37]

> … our courts do not accept polygraph tests as reliable and admissible. Nor do they draw an adverse inference if an accused … [employee, in this case] refuses to undergo such a test.

Other courts, however, have implicitly recognised that polygraph tests are of probative value and, therefore, useful; and where there is other supporting evidence, polygraph evidence may be taken into account.[38]

In *Truworths Ltd v Commission for Conciliation, Mediation and Arbitration*,[39] Basson J usefully summarises the status and treatment of polygraph test results as evidence:

> It is accepted that a polygraph is a controversial method of gathering information and that opinion is divided on the probative value of the results. Professor

35 Committee to Review the Scientific Evidence on the Polygraph, National Research Council. 2003. *The polygraph and lie detection*. Washington, DC: The National Academies Press.

36 Committee to Review the Scientific Evidence on the Polygraph (2003).

37 See *Kroutz v Distillers Corporation Ltd*, (1999) 8 CCMA 8.8.16 Case No. KN25613; *Malgas v Stadium Security Management*, (1999) 8 CCMA 10.8.1 GA21495; *E Themba & R Luthuli v National Trading Company*, CCMA (1998) KN16887.

38 *CWIU obo Frank v Druggist Distributors (Pty) Ltd t/a Heynes Mathew*, (1998) 7 CCMA 8.8.19, Case No. WE10734.

39 (2009) 30 ILJ 677 (LC).

> Grogan in *Sosibo & Others v Ceramic Tile Market* (2001) 22 ILJ 811 (CCMA); [2001] 5 BALR 518 (CCMA) sets out the divergent approaches in respect of polygraphs.

In the *Mahlangu* case,[40] attitudes to polygraph test evidence focus more on the examiner's qualifications:

> Polygraph test evidence is not admissible as evidence if there was no evidence on the qualifications of the polygraphist, and if he or she was not called to give evidence. See *Sterns Jewellers v SACCAWU* (1997) 1 CCMA 7.3.12 case no NP144; *Mudley v Beacon Sweets & Chocolates* (1998) 7 CCMA 8.13.3 KN10527; *Spoornet – Johannesburg v SARHWU obo J S Tshukudu* (1997) 6 ARB 2.12.1 GAAR002861; *Chad Boonzaaier v HICOR Ltd* CCMA (1999) WE18745.

It is apparent, therefore, that a polygraph test on its own cannot be used to determine a person's guilt.[41] It may be taken into account when other supporting evidence is available, providing that the qualifications of the examiner are exceptional, and that the test was done according to accepted and recognised standards and in accordance with stringent ethics.[42]

Notably, as mentioned above, these tests have all been developed to assist in investigations and should be used to supplement and direct investigations, indicate deception, identify possible suspects, and collect evidence. The test results can also assist in affording innocent people the opportunity to be heard, and even to prove their innocence in terms of the Namibian Constitution.[43]

Legislation

In Namibia, polygraph tests are usually used in corporate situations: companies ask for them when an issue has occurred at the workplace. This may vary from sexual harassment, a case of "he said/she said", submission of documentation such as an allegedly fictitious doctor's certificate, or theft at the workplace – either allegedly by an employee or by virtue of insider information. Such theft can entail cash, personal belongings, office equipment, stock or vehicles, as well as trucks being hijacked or stolen.

Namibia currently has no legislation regulating the use of polygraph tests. Nonetheless, employees, for example, can legally be requested to voluntarily

40 *S v Mahlangu and Another*, (CC70/2010) [2012] ZAGPJHC 114 (22 May 2012).
41 Grogan, J. 2010. *Workplace Law* (Ninth Edition). Cape Town: Juta, p 160.
42 *Sedibeng District Municipality v South African Local Governing Bargaining Council & Others*, (JR 1559/09) [2012] ZALCJHB 45; [2012] 9 BLLR 923 (LC); 2013 (1) SA 395 (LC); (2013) 34 ILJ 166 (LC) (31 May 2012).
43 Article 12(1)(d).

subject themselves to these tests. Furthermore, nothing prevents the results of such tests from being presented or submitted as additional corroborative material to other evidence in Namibian courts.[44] Indeed, such test results are often used or submitted as incriminatory evidence by employers. During labour disputes, companies often use such tests and their results in internal disciplinary hearings and investigations.

It should also be mentioned that polygraph tests more often than not exonerate employees from disciplinary action. With any case, no matter how many people are tested, there are usually only one or two individuals who will be deemed as exhibiting behaviour associated with deceptiveness, and only on very rare occasions does it happen that more employees are untruthful than are truthful. Therefore, polygraph tests allow the innocent to clear their names.

Namibia's Labour Act, 2007, [45] also does not regard the polygraph as illegal or prohibited. Section 5(4) of the Act specifically states that, if something is not prohibited or does not constitute a contravention of rights, it is permitted. Thus, a polygraph test is permitted. Nonetheless, the Act requires the person conducting a polygraph examination to be professionally trained and certified.

In South Africa, Chapter 2 of the Employment Equity Act, 1998,[46] restricts employee testing. Section 8 therein refers to psychological testing, which is particularly relevant in terms of polygraph testing. The law explicitly allows such examinations in some parts of public employment. In addition, the Commission of Conciliation, Mediation and Arbitration (CCMA) will, under certain circumstances, accept the results of such tests submitted as evidence.[47] Although test results are allowed in South Africa's Labour Court, an important fact to consider is how much weight these results should carry; it is suggested that the answer will depend on the type of test used, the methodology applied, and – once again – the qualification and experience of the examiner.[48]

A common argument is that polygraph tests are unreliable and, thus, should not be used in court. However, as indicated above, if conducted correctly, polygraph tests have been shown to be scientifically reliable and accurate. Thus, the true test of the admissibility of a polygraph test should be the experience of the examiner and the standards and procedures followed by him/her during the process of conducting the test.

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44 *S v Kukame*, 2007 (2) NR 815 (HC).

45 No. 11 of 2007.

46 No. 55 of 1998.

47 http://www.polyinstitute.co.za/?mid=170399&topparent=Law%20and%20CCMA.html, last accessed 10 September 2013.

48 Christianson, M. 2000. "Polygraph testing in South African workplaces: 'Shield and sword' in the dishonesty detection versus compromising privacy debate". *Industrial Law Journal*, 2(21):34.

The CCMA and polygraph evidence

Although Namibia does not have a body similar to South Africa's CCMA, the latter offers a good dais for how polygraph tests can and cannot be used. In some cases, even where a polygraph chart indicated that an employee, say, lied during an examination, the CCMA held that the results still did not provide sufficient information on the misconduct under investigation. For example, in *Sosibo & Others v Ceramic Tile Market*,[49] the CCMA found that polygraph results did not give conclusive evidence, but merely indicated deception. Nonetheless, in most cases, the CCMA has adopted the approach that polygraph evidence is admissible but not conclusive on its own; hence, supporting evidence is required. In the case of *Truworths v Commission of Conciliation*, *Mediation and Arbitration & Others*,[50] Basson J stated the following in her judgement:

> Although it is trite law that the probative value of a polygraph test on its own is not sufficient to find a person guilty, the result of a polygraph test is[,] however, one of the factors that may be considered in evaluating the fairness of a dismissal.

In South Africa, employees are protected against unfair labour practices by the Labour Relations Act (LRA), 1995,[51] particularly against unfair dismissal. In Namibia, the Labour Act, 2007,[52] protects employees. Sections 33 and 47 of the latter Act require a dismissal to be valid, fair and reasonable; to follow fair procedures; and to comply with the Code of Good Practice expressed in the Act.

In South Africa, if an employee refuses to submit him-/herself to a polygraph test where periodic polygraph screening in the workplace is conducted, and if s/he is subsequently dismissed, the dismissal can be regarded as automatically unfair in terms of section 187(1)(c) of the LRA. Unfair discrimination, as defined in section 187(1)(f), can also be claimed. Sections 188(1) and 192 of the LRA require an employer to show on the balance of probabilities that an employee's dismissal was fair in cases where a dismissal is not automatically unfair. The employer is also required to establish an employee's misconduct beyond reasonable doubt, and not merely suspect its occurrence.[53] The general approach of the CCMA and Bargaining Councils in cases of misconduct is that polygraph evidence on its own is not conclusive, and therefore can only be used together with conclusive evidence to prove aggravation.[54]

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49 [2001] 22 ILJ 811 (CCMA).

50 2009 (30) ILJ 677 (LC).

51 No. 66 of 1995.

52 No. 11 of 2007.

53 Scheithauer, A & E Kalula. 2007. "Employee polygraph testing in the workplace". *Development and Labour Law Monograph Series, Monograph No. 2*. Cape Town: University of Cape Town.

54 *Hotellica Trade Union & San Angelo Spur*, WE3799.

The polygraph and employment contracts

The assumption is often incorrectly made that an innocent person has nothing to hide and that, therefore, should s/he refuse to submit to a polygraph test, such person cannot be trusted or indeed has something to hide. The CCMA does not really deal with this issue, but instead limits its focus to the weight that can be attached to the polygraph evidence. The issue was considered in *Meth, LC v Avscan International Consultants – JJ van Zyl*,[55] where an employee was dismissed after he failed a random test. The CCMA held that an employer (such as security firms or drug manufacturers) was permitted to request a polygraph examination in specific investigations. However, employers were not permitted to dismiss or discipline employees purely on a polygraph test result. In *Armoed, Elton K v Gray Security Services*,[56] the CCMA held the following:

> The second significant factor is Mr Armoed's refusal to undergo a polygraph test … to grasp this final opportunity to demonstrate his innocence … To say that it would have been unnecessary to undergo the test does not hold water … It is appropriate to draw an adverse inference from his refusal.

An obligation on the employee to submit to a test can arise from his/her employment contract. The parties to an employment contract are basically free to decide on its contents. This freedom is, however, subject to statutory and collective agreement restrictions designed to protect employees. Many companies include a polygraph clause in their employment contracts, which is neither unfair nor illegal.[57] The gist of such a clause is that employees agree to testing whenever required by their employer, particularly in connection with periodic screening as a means of crime control. In *SA Transport & Allied Workers' Union & Others v Khulani Fidelity Security Services (Pty) Ltd*,[58] for example, the Union and employer parties agreed that Union members should undergo quarterly polygraph tests and that those employed as baggage handlers at OR Tambo International Airport who failed the test should be removed from their positions. All who failed the tests were offered alternative positions and those who refused the alternative positions were retrenched. The Labour Appeal Court upheld the finding by the court that –

- the collective agreement had been designed not as a means of detecting misconduct, but for operational reasons, in order to ensure that only people of proven integrity would be employed as baggage handlers

55 [2001] CCMA, GA118598.

56 [1999] CCMA, EC9809.

57 *Nyathi v Special Investigating Unit*, (J1334/11) [2011] ZALCJHB 66; [2011] 12 BLLR 1211 (LC); (2011) 32 ILJ 2991 (LC) (22 July 2011).

58 Several employees that failed a polygraph test were dismissed by Khulani Fidelity Security Services (Pty) Ltd. The employees' union claimed that they were dismissed unfairly based on the polygraph test, and demanded their reinstatement or payment of three months' salary; JA25/09) [2010] ZALAC 38 (6 May 2010), at 130.

- there had been compliance with the provisions of section 189 of the LRA relating to consultation, and
- the retrenchment of those who refused alternative positions was substantively and procedurally fair.

The court also accepted that, on the authority of the decision in *Khulani Fidelity Service Group v CCMA & Others*,[59] in certain circumstances dismissal for failing a polygraph test might fall within the ambit of an operational requirements dismissal, but distinguished that decision on the facts. The court held that, if not explicitly stated, polygraph testing was not a fair or objective selection criterion for retrenchment.

While the CCMA has also found a polygraph clause in an employment contract legal and reasonable,[60] no legislation in Namibia prohibits or indicates such a clause as illegal. Indeed, section 5(4) of the Labour Act in Namibia indicates that, if it is not illegal, it is permitted. If a company's employment policy and practice require periodic polygraph testing of its employees, an employee who does not cooperate would then contravene that policy and practice and can, therefore, be dismissed for misconduct or breach of contract.[61] However, the employee could still challenge the validity and reasonableness of such a policy if it is not applied consistently, or could claim that his/her dismissal is not an appropriate sanction.[62]

It should also be noted that an employee who has been dismissed or threatened with dismissal or disciplinary sanctions in Namibia and South Africa very seldom make use of polygraph evidence to show that they are not guilty of alleged misconduct. An example where the test was successfully used in South Africa appears in *NUFBWSAW obo Mahlangu & Masango – Sello Baloyi v Stellenbosch Farmers' Winery*,[63] where the test results were accepted to confirm that an employee had not been involved in the alleged misconduct.

Also in South Africa, the LRA and the Employment Equity Act do not apply to members of the Defence Force and the intelligence community. Polygraph testing in that country is explicitly allowed in some parts of public employment, and is mainly used for pre-employment and employment screening purposes.

59 (2009) LCSA.

60 *Lefophana v Vericon Outsourcing*, [2006] 15 CCMA 7.1.7, GAPT 9884-0.

61 *SATAWU obo Lawrence* Mabunda *v Group 4 Falck (Pty) Ltd* (formerly Callguard Security Services), [2002] 11 CCMA 8.8.15, GA1264-02; *Nyathi v Special Investigating Unit*, (J1334/11) [2011] ZALCJHB 66; [2011] 12 BLLR 1211 (LC); (2011) 32 ILJ 2991 (LC) (22 July 2011).

62 Schedule 8(7), LRA.

63 [2000] CCMA, MP11082.

Thus, the National Strategic Intelligence Act, 1994 (NSIA),[64] and the Intelligence Services Act, 2002 (ISA),[65] explicitly permit the use of polygraph testing. The NSIA mentions polygraph testing in sections that deal with investigations to screen persons rendering security services, or who have access in some way to confidential information or restricted areas. Section 2A(4)(a) of the NSIA specifically provides that, in such investigations, a polygraph is permitted to be used "to determine the reliability of information gathered during the investigation". Subsection (b) defines the *polygraph* as –

> …an instrument used to ascertain, confirm or examine in a scientific manner the truthfulness of a statement made by a person.

Based on the test outcome, the security clearance may be issued, degraded, withdrawn or refused.

In the ISA, section 1 defines the *polygraph examiner* as a –

> … person who, in order to ascertain, confirm or examine in a scientific manner the truthfulness or otherwise of statements made by another person, uses skills and techniques in conjunction with any equipment and instrument designed or adapted for that purpose.

Section 14 of the ISA deals with security screening in the appointment and discharge of members of the Intelligence Service. A person is only permitted to be appointed if –

> … information with respect to that person has been gathered in the prescribed manner in a security screening investigation by the Intelligence Services.

In terms of sections 14(3) and 14(4)(a) of the ISA, –[66]

> [t]he Director-General may engage the services of a polygraphist to determine the reliability of the information gathered …

and may issue directives on the use of polygraph testing.

Why are polygraph test results only substantive evidence?

Case law reveals the approach of the CCMA and bargaining councils to be that polygraph evidence is admissible, but on its own it is not conclusive and,

64 No. 39 of 1994.

65 No. 65 of 2002.

66 Cf. Calaca, DF. 2010. "The use of polygraph tests and related evidentiary aspects in labour disputes". Unpublished LLM dissertation, University of Pretoria, p 30; Scheithauer & Kalula (2007).

therefore, can only be used – for whatever purpose – together with conclusive evidence. The experience of the examiner and his/her training as well as the protocols used during testing are of vital importance when deciding on the admissibility of the test results submitted. There is, therefore, still much room left for further research in this regard.

The entire debate of the admissibility of polygraph tests in court can be concluded with the judgment of AC Basson J, as follows:[67]

> I am in agreement that polygraph testing, as they [sic] presently stand [sic], can do no more than show the existence of [sic] non-existence of deception. Even on this score, scientists are divided. Moreover, it is an accepted principle in our law that the mere fact that a person lie [sic] (in a criminal case) cannot in it self [sic] prove that the accursed [sic] is guilty of a crime. By no means can it be used as conclusive proof of guilt of a crime or misconduct. At best the polygraph test can prove that a person lied, not that he is necessarily guilty of a crime or misconduct.

Rex v Nel[68] also states that whether a person is telling the truth or lying is at most a makeweight, and this fact should not take the place of other essential evidence:[69]

> … much of his evidence is hypothesis, wrung from him in cross-examination or given in answer to the court, at the time when he might have genuinely forgotten all about it. Under such circumstances the temptation, even to an innocent man, would be great to venture any explanation which might occur to him in the course of his evidence. And I would point to the danger, in a case such as this, of allowing what is at most a makeweight, such as the untruthfulness of the accused, to loom too large and to take the place of other essential evidence.

Section 209 of Namibia's Criminal Procedure Act further substantiates this point: an accused may be convicted of an offence on the sole evidence of a confession if the confession is confirmed in a material respect, or if the offence is proved by evidence – other than the confession – actually to have taken place. Thus, if a crime cannot be proved to have taken place, then even with a validated confession the accused cannot be found guilty of a crime allegedly committed.

Conclusion

In sum, then, the polygraph test in Namibia is not illegal: it does not infringe on any fundamental human right, and it does not contradict or conflict with

67 *FAWU obo Kapesi & Others v Premier Foods Ltd t/a Ribbon Salt River*.
68 (1937) CPD at 330.
69 (ibid.).

the letter or spirit of the Namibian Constitution. One of the primary reasons for the courts' lack of reliance on polygraph tests prior to 2011 was due to disputes regarding their accuracy because such tests were either not well documented or their accuracy was not established. Since then, however, such tests have been recognised and accepted by the APA, for example, as indicated in the Meta-analytic Survey of Criterion Accuracy of Validated Polygraph Techniques. Whether opinion evidence is admissible, or whether such evidence is supererogatory or prejudicial, is for the Namibian courts to decide; in this, they are assisted by the precedents of admitting polygraph evidence in labour courts in South Africa and further afield, which are slowly but surely also spilling over to Namibia.

Thus, for those who appear to disregard the above information, I cite the cautionary words of William Wilberforce (1759–1833) – English politician, philanthropist, and a leader of the movement to abolish the slave trade:

> You may choose to look the other way but you can never say again that you did not know.

Human rights in the private sphere – Namibia

Nico Horn*

Introduction

The Namibian Constitution is a compromise document. Erasmus[1] correctly points out that it is much more than a futuristic document to organise a post-Independence Namibia. The document itself was an instrument to obtain sustainable peace. Consequently, the new Constitution was not fully negotiated by the Constituent Assembly. The Assembly often opted for a compromise rather than enter into bitter debates between former military opponents.

The United Nations (UN), as the successor of the League of Nations, was involved in settlement talks with all parties involved for many years. Indeed, both the General Assembly and the Security Council maintained constant pressure on South Africa since the 1960s.

A Namibian settlement was extremely important for the international community, not only to bring peace to a war-stricken country, but also to stabilise the southern African region. The Namibian experiment was also used by the South African Government to pave the way for meaningful negotiations and, eventually, the replacement of the apartheid-based society with a democratic dispensation.

In this atmosphere, the Constituent Assembly completed the immense assignment of writing a Constitution for a nation ready to be born. The Constitution's replacement of the oppressive apartheid system with a constitutional, democratic society was done in accordance with the principle of inclusion, rather than an "exclusionary shadow".[2]

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1 Erasmus, G. 2002. "The impact of the Namibian Constitution after ten years". In Hinz, M, S Amoo & D van Wyk (Eds). *The Constitution at work: Ten years of Namibian nationhood*. Pretoria: University of South Africa VerLoren van Themaat Centre for Public Law, p 9f. See also Erasmus, G. 2000. "The Constitution, its impact on Namibian statehood and politics". In Keulder, C (Ed.). *State, society and democracy: A reader in Namibian politics*. Windhoek: Gamsberg Macmillan.

2 I borrow the metaphor from the French philosopher, Michel Foucault. His philosophy of power is based on the conflict between the in-group and the vagabonds, the outcasts, who are always shifted to the periphery of society, or the "exclusionary shadow", as Foucault calls it. However, contrary to popular belief, Foucault did not believe in the inevitability of exclusion. See, for example, his positive view of the Iranian people's revolution. See Foucault, M. 1965. *Madness and civilisation: A history of insanity in an age of reason*. New York: Vintage Books. [Originally

The dream of a community of equal people, sharing resources equally, runs like a golden thread throughout the document – especially Chapter 3, entitled "Fundamental Human Rights and Freedoms". The Chapter is clearly based on the Universal Declaration of Human Rights.

The high premium assigned to human rights and social and democratic values was the result of this negotiated settlement. The demise of communism, the inability of Eastern Europe to fund the ongoing war in Angola, and especially the Cuban military presence in the latter country, all contributed to a milieu conducive to negotiations. Under these circumstances, it was undoubtedly necessary for both parties to compromise. But since South Africa was in power, one can assume that most of the compromises came from the liberation movement – the South West Africa People's Organisation, SWAPO – eager to return to Namibia and contest UN-supervised elections.

The Constitutional Principles of the Western Contact Group

Two important international decisions smoothed the transition to Namibia's independence, but also had a decisive influence on the content of the Namibian Constitution. Firstly, in 1978, the UN Security Council accepted Resolution 435 as a basis for Namibia's independence. While Resolution 435 was elaborated into an extensive plan including UN-supervised elections, the disarmament of the South West African Territorial Force (SWATF) and the confinement to base of the People's Liberation Army of Namibia (PLAN), it was not implemented for another 11 years.

The second important international initiative was the drafting in 1981 of the Constitutional Principles by the Western Contact Group (WCG), also known as the Eminent Persons Group, consisting of Canada, France, West Germany, the United Kingdom, and the United States (US). The Constitutional Principles

published in 1961 in French as *Folie et déraison: Histoire de la folie à l'âge classique] Madness and civilisation* was not a full translation of the original French edition, but rather a selection of the most important issues.

It was not a coincidence that the then South African President, FW de Klerk, made his dramatic speech – announcing the unbanning of the African National Congress (ANC), the South African Communist Party (SACP), the Pan-Africanist Congress of Azania (PAC), the Azanian People's Organisation (AZAPO) and other movements, as well as the release of Nelson Mandela on 1 February 1990 – shortly after the Namibian Constituent Assembly had unanimously accepted the Constitution. The smooth and peaceful elections and the acceptance of a liberal Constitution with an entrenched Bill of Human Rights broke new grounds for negotiations in South Africa.

represented an attempt by the WCG to ease the fears of both South Africa and the internal parties.[3]

In January 1981, the UN sponsored the so-called pre-implementation conference for Security Council Resolution 435. The conference took place in Geneva, where a South African delegation under the leadership of the Administrator-General for South West Africa, Danie Hough, including 30 Namibian leaders from internal parties, met SWAPO Secretary-General Sam Nujoma and a SWAPO delegation. The conference was aimed at getting the negotiations for Namibia's independence back on track. At that stage, South Africa was no longer convinced that an international settlement was possible in Namibia without SWAPO's participation. The conference, however, came to naught because the delegation comprising the South Africans and the internal parties used the opportunity to attack the UN for its partiality. The WCG planned to introduce a three-phase negotiation proposal on the Namibia question, but the process broke down when one of the internal parties, the Democratic Turnhalle Alliance (DTA), presented the UN with a list of demands to stop its pro-SWAPO approach.

After the Geneva conference, the WCG started working on constitutional principles that would ease the fears of whites and be acceptable to all the parties involved. The first draft of these principles was released in October 1981.[4]

The WCG established minimum guarantees for the constitutional process and the eventual Constitution, including a Bill of Rights as part of the latter, an independent judiciary, and a multi-party democracy. Eight supplementary points were added to Resolution 435.

Although SWAPO initially rejected the Constitutional Principles, they eventually agreed that the document could become the foundation for the independence process and the Namibian Constitution. Since SWAPO had confirmed similar principles back in 1976, their rejection was possibly based on the fact that they did not trust the Western powers and did not appreciate US and European states and former colonial powers playing such an important role in Namibia's future.

Eventually, the Principles became the foundation on which the Constitution was built. At the first meeting of the Constituent Assembly on 21 November

3 The Democratic Turnhalle Alliance (DTA) and some smaller parties who cooperated with South Africa in the Transitional Government of National Unity (TGNU).

4 The Principles, officially known as *Principles for a Constituent Assembly and for a Constitution of an independent Namibia*, were received as a UN document on 12 July 1982 (S/15287) and accepted by the Security Council as part of Resolution 435.

1989, Theo-Ben Gurirab of SWAPO proposed that the Assembly adopt the Principles as a "framework to draw up a Constitution for South West Africa/ Namibia". The proposal was unanimously adopted.

Since the Constitutional Principles had become an official annexure to Resolution 435 in 1982, in the UN Secretary-General's note to the Security Council on 16 March 1990, he stated the following:[5]

> The Constitution is to enter into force on Independence Day. As the fundamental law of the sovereign and independent Republic of Namibia, the Constitution reflects the "Principles for a Constituent Assembly and for a Constitution of an independent Namibia" adopted by all parties concerned in 1982 and set out in the annex to document S/15287 of 12 July 1982.

Apart from the independence of the judiciary, the protection of land (or property rights) also formed part of the 1982 Principles. Nonetheless, as regards land rights, the SWAPO Government has been extremely sympathetic with the Zimbabwean land reform programme, which amounted to a 'land grab' from white colonial farmers. Although the Namibian Government has never approved a similar 'land grab', the villain in Zimbabwe – the white colonial farmer – was identical in Namibia and across the rest of Africa. Indeed, the SWAPO Government has often referred to the fact that the struggle was about land and, therefore, real reconciliation could only take place if it went hand in hand with an aggressive land reform programme that would assist the government programme of poverty alleviation.

White farmers in Namibia, on the other hand, refer to the negotiations of 1989 and the eventual settlement in which South Africa and SWAPO agreed that property would be protected. Thus, although these farmers seldom refer to the 1982 Principles, the protection of property rights in Article 16 of the Constitution is often quoted. They see the protection of property rights in the Constitution as a settlement agreement between themselves and the new SWAPO Government at Independence.

One of the aims of the 1982 Principles was to ease the fear of the white minority community. In that sense, it was indeed part of the settlement agreement between the South African authorities and SWAPO. However, while the Constitution has become the basis for property rights, the 1982 Principles will always feature in the background of the land issue, either to motivate the thesis that foreign countries prevented Namibia from dealing with the land issue in a responsible manner, or as part of the idea that the protection of property rights was part of the settlement that led to independence.

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5 UN document S/20967/Add.2. Available at http://www.un.org/en/sc/repertoire/89-92/CHAPTER%208/AFRICA/item%2005_Namibia_.pdf, last accessed 15 January 2010.

The SWAPO constitutional proposal of 1976

The idea of a Bill of Rights as part of a future Namibian Constitution did not originate with the WCG. Neither was it alien to the two major political parties involved in the drafting of the Constitution. Katjavivi[6] observes that the debate started within SWAPO as far back as the early 1970s.

In 1975, the South African Government started preparations for a national conference of internal political parties to set the course for an internationally acceptable independence process without negotiating with SWAPO. The initiative provided the blueprint for the Turnhalle Conference, which later led to the formation of the Transitional Government of National Unity. At the time, the internal SWAPO movement was part of an internal pro-independence alliance, the Namibia National Convention with the South West Africa National Union (SWANU) and three smaller parties.[7]

In response to the Turnhalle Conference, SWAPO released a Discussion Paper on the Constitution of an independent Namibia.[8] The document was in effect a draft constitution, and closely resembled the draft that SWAPO eventually took to the Constituent Assembly after the UN-supervised elections in 1989.

In strong reaction to the South African policies, the document opts for a unitary state and rejects any notion of "Bantustans masquerading as federalism".[9] The democratic and human rights stance is the point of departure for the rest of the text:[10]

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6 Interview, Windhoek, July 2003. See also Katjavivi, P. 1988. *A history of resistance in Namibia*. Oxford: James Currey Publishers; Van Wyk, D. 1991. "The making of the Namibian Constitution: Lessons for Africa". Comparative and International Law Journal of Southern Africa, XXIV:341ff.

7 Dobell, L. 1998. "SWAPO's struggle for Namibia, 1960–1991: War by other means". *Basel Namibia Study Series 3*. Basel: P Schlettwein Publishing, p 40.

8 SWAPO. 1975. *Discussion Paper on the Constitution of Independent Namibia*. Lusaka: SWAPO. The internal SWAPO and NNC leader, Danny Tjongarero, played a prominent role in the process. See Serfontein (in Serfontein, H. 1977. *Namibia*. London: Collins), who states that Tjongarero drafted the document. The draft was sent to the leadership in exile, who finalised its contents with the assistance of Western lawyers, including British lawyer Cedric Thornberry. Katjavivi (1988:246) confirms this interpretation when he says the document was the result of consultations between the internal and exiled leadership of SWAPO. Dobell (1998:45) overstates Thornberry's contribution, however: the latter was probably no more than a legal and technical constitutional adviser.

9 SWAPO (1975).

10 Dobell (1998:45).

> Our experience of persecution and racialism over many years deepened our unqualified commitment to democratic rule, the eradication of racialism, the establishment of the rule of law, and the entrenchment of human rights.

All the proposals of the WCG are embedded in the Discussion Paper. It opts for a parliamentary democracy, with regular elections, an Executive President, a one- or two-chamber Parliament, an impartial public service, an independent judiciary, an entrenched Bill of Rights, and detailed anti-discrimination legislation. While no economic policy is spelled out, the document included a paragraph protecting "vested legal rights and titles in property". It even states that the pensions of public servants would be preserved after independence.[11]

The only radical aspect of the document was a proposal that the South African Roman–Dutch law was to be replaced by a totally new system, incorporating certain elements of customary law.[12]

The document was released in August 1975, shortly before the Turnhalle Conference assembled in Windhoek.[13] In hindsight, it seems almost tragic that neither South Africa, nor its Namibian partners in the Turnhalle deliberations, nor even SWAPO understood the significance of the moment. Indirectly, SWAPO had extended a hand of friendship and cooperation to South Africa, Namibian whites, and the Turnhalle groupings. The message was clear: SWAPO was not the Marxist/Leninist demon that South African propaganda had made it out to be. SWAPO was at pains to point out that the vested interests of whites would be respected, that expatriate expertise would be welcomed in an independent Namibia – a reference to South Africans in the civil service, the police, the defence force, banks and other private enterprises – and that national reconciliation would be an integral part of a future constitutional dispensation.[14]

11 (ibid.:45f).

12 (ibid.:46). The reaction against Roman–Dutch law is understandable, since it was the instrument used by the South African Government to oppress the people. And if the courts confirmed the actions of the Executive, it was inevitable that the perception would develop that Roman–Dutch law was oppressive and unjust per se. At the deliberations of the Constituent Assembly, SWAPO was advised by, among others, Arthur Chaskalson, later to become the President of the Constitutional Court of South Africa and then Chief Justice in that country, and Gerhard Erasmus, a Namibian-born Stellenbosch academic. It became clear that a total change in the legal system would create uncertainty and involve unnecessary state expenses. The Constituent Assembly eventually opted to maintain the South African Roman–Dutch law; see also Article 140 of the Namibian Constitution.

13 (ibid.:46).

14 (ibid.:45).

The Discussion Paper was a clear indication that SWAPO would have been a meaningful and responsible negotiating partner, as observed by the South African press.[15] Unfortunately, some observers and the South African Government were still preoccupied with the harsh separation between the East and the West during the Cold War.

Even the centre-left *Rand Daily Mail* newspaper in South Africa was sceptical – albeit not so much about what the Discussion Paper said, but rather of what it did not say. The newspaper argued that SWAPO often used the rhetoric of African socialism in its speeches and propaganda. The Discussion Paper contained nothing that explicitly revoked the pro-communist SWAPO image. In other words, despite the positive elements of the text, the unwritten ghost behind the letters was a socialist demon.[16]

When South Africa and the pro-South African parties ignored the hand extended for negotiation, SWAPO's attitude hardened. In the years that followed, SWAPO radically opposed the Turnhalle movement[17] and its political and social agenda.

In August 1976, in Zambia, an enlarged SWAPO Central Committee adopted a Constitution[18] and Political Programme[19] for itself. Dobell observes that the document had a predominantly internal purpose, namely to ease the struggle between the old guard and the stream of young people crossing the border to Angola after the fall of Portuguese rule.[20] It also served as an instrument of negotiation and reconciliation with the then ruling party in Angola, the *Movimento Popular la Libertação de Angola* (MPLA). SWAPO was eager to move its headquarters from Zambia, which was under immense pressure from South Africa, to Angola.[21]

The document is highly critical of Western governments and their support of the "Turnhalle circus", while it stands for building a classless, non-exploitative socialist state.[22]

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15 See (ibid.:46) for the cited reactions of David Martin of *The Star* and Hennie Serfontein of the *Sunday Times*.

16 See (ibid.) for the cited J Imrie article, which appeared on 31 August 1975.

17 I use the phrase *Turnhalle movement* here as a collective name for all the role players who foresaw a possible future by way of a negotiated settlement with internal political parties, but without SWAPO.

18 SWAPO. 1976a. *Constitution of the South West Africa People's Organisation*. Lusaka: SWAPO Department for Publicity and Information.

19 SWAPO. 1976b. *Political Programme of the South West Africa People's Organisation*. Lusaka: SWAPO Department for Publicity and Information.

20 Dobell (1998:55ff).

21 (ibid.).

22 (ibid.:6ff).

While the Political Programme was never intended to be a proposal for a future independent Namibian state, it totally overtook the 1975 Discussion Paper. From 1976 onwards, the Political Programme was seen internationally as a statement of SWAPO's political ideology and perceived as the foundation of an independent Namibia. The Political Programme did not include any reference to a Bill of Rights, however. In the international world, SWAPO was seen as a hard-core Marxist movement that intended transforming Namibia into a non-democratic socialist state.[23]

The Constitution and human rights

The Namibian Constitution is a typically Western liberal constitution. It defines Namibia as a –[24]

> … sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all.

The silence of self-definition on the social aspects of governance is revealing. Throughout the liberation struggle the emphasis was on African socialism and alliance with the Eastern bloc.

The SWAPO Constitution, adopted on 1 August 1976, opted to work with –[25]

> … national liberation movements, world socialist, progressive and peace-loving forces in order to eliminate all forms of imperialism, *colonialism and neo-colonialism*. [Emphases added]

The about-face of the majority party in the Constituent Assembly – today the SWAPO Party of Namibia – is not surprising, taking in consideration that the Constitution was drafted in cooperation with other parties in the spirit of compromise and national reconciliation. The demise of Marxist-Leninist governments in the Eastern Bloc did not leave SWAPO with many socialist friends in a time when the new country desperately needed foreign investment and development assistance. Also, bearing in mind that SWAPO had nurtured some democratic sentiments since 1976, the ideological change was possibly not that traumatic. It was a return to accepted values that had been repressed for strategic reasons to obtain much-needed assistance in the war against South Africa – assistance not available from the West.

The ideologically liberal positioning of the Constitution is nowhere better illustrated than in the way in which it deals with human rights. Chapter 3 –

23 See (ibid.:57) for the reaction of the international press and the West in general.
24 Article 1(1), Namibian Constitution.
25 SWAPO (1976b:137).

Fundamental Human Rights and Freedoms – deals predominantly with civil and political rights. It includes Articles on the protection of life and freedom, respect for human dignity, prohibition of slavery and forced labour, equality and freedom from discrimination, prohibition of arbitrary arrest and detention, the right to a fair trial, the right to privacy and family life, children's rights, the right to own property, the right to participate in political activity, an imperative for administrative justice, and the right to education. Article 21 in particular lists a series of fundamental freedoms: freedom of speech, freedom of thought – including academic freedom, freedom of religion, freedom of assembly, freedom of association, freedom to withhold labour, freedom of movement, freedom of residence and settlement anywhere in Namibia, freedom to return to Namibia, and freedom to practise any profession and carry on any occupation, trade or business.

Property rights

The vast majority of the rights and freedoms in Chapter 3 are of a civil and political nature. While the Article 16 right to own property may have the ring of an economic right, the protection it offers is narrow and basically protects the property rights of white farmers. Amoo and Harring say the following about Article 16:[26]

> Article 16 is best approached as a brilliant political move on the part of the SWAPO Party of Namibia – the dominant political party since the country's independence in 1990 – to end the liberation war, reassure white property owners that their land and investments would be protected, and provide a sound legal footing for a multiracial and prosperous independent Namibia, with full access to world markets. It is less satisfying as a careful statement of property rights in a modern African country, although, if one compares this constitutional provision with others around the world, it is completely adequate for the purpose it was intended to serve.

The apartheid system divided property into two separate systems: one for whites, based on the registration and acquisition of title deeds for immovable property, and the registration of patents for intellectual property. Black property claims rested on precolonial occupation and possession,[27] recognised by international law.[28] Black intellectual property rights were – and still are –

26 Amoo, S & S Harring. 2010. "Intellectual property under the Namibian Constitution". In Bösl, A, N Horn & A du Pisani (Eds). *Constitutional democracy In Namibia – A critical analysis after two decades*. Windhoek: Macmillan Education Namibia.

27 See Horn, N. 2005. "Eddie Mabu in Namibia: Land reform and human rights". *Sur – International Journal on Human Rights*, pp 3ff.

28 See International Court of Justice/ICJ. 1975. *Reports of judgments, Advisory opinions and orders. Western Sahara. Advisory Opinion of 16 October 1975*. The Hague: ICJ. Available at http://www.icj-cij.org/docket/files/61/6195.pdf, last accessed 11 November 2014.

based on traditional knowledge and cultural heritage.[29] Amoo and Herring conclude that Article 16 does little to address the issue of black intellectual property rights. However, taking into consideration that the Bill of Rights also prescribes equality (Article 10) and addresses the inequalities of the apartheid era by affirmative action legislation, it is illogical to assume that Article 16 can only be interpreted as protecting "white property rights".[30]

However, the Namibian High and Supreme Courts have not yet considered a broader interpretation of Article 16. For now, it can only be seen as a provision with economic, social and cultural (ESC) rights potential.

Article 5 is clear as regards the application of the Bill of Rights and its direct horizontal effect. It applies to public bodies, but is also enforceable against legal persons and individuals:[31]

> ... [T]his Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia.

Such rights can be enforced by a competent court.[32]

The Bill of Rights protects civil and political rights. While the right to property can be described as an economic right, the intention of the Constituent Assembly was to protect the property rights of vulnerable people, not to develop a more just distribution of property. Thus, Article 16 is one of the many compromises in the Constitution aimed at bringing an end to the liberation war.

Protection of ESC rights in the Constitution

ESC rights are not included in Chapter 3. These only find their way into the Constitution in Chapter 11 as part of the principles of state policy. Chapter

29 See Amoo & Harring (2010:300ff), who quote the use of the hoodia plant as an example of the inability of indigenous peoples to compete with economic powers. The hoodia was used by San communities in Namibia as a traditional medicine for hundreds of years, but it was never patented since they have no access to the sophisticated legal system of registration and selling. The plant was instead privately patented by a South African company, which sold the patent rights to Phytopharm, a British pharmaceutical company. It is now-being sold as an appetite suppressant. The San are set to receive less than 0.003% of the return on sales.

30 (ibid.:301ff).

31 Article 5 states the following: "The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed".

32 See Article 25.

11 is written in a totally different tone from that adopted in Chapter 3. The introductory Article 95 of Chapter 11 also does not refer to rights but to state obligations in non-imperative terms:

> The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following: …

Then follows a long list of government duties to promote what are normally known as ESC rights, such as –

- equal opportunity for women in all spheres of society
- legislation to ensure workers' health
- right of access to public facilities
- social benefits for the unemployed, incapacitated, the indigent and disadvantaged
- free legal aid, and
- a living wage to ensure a decent standard of living.

Article 95 falls far short of the minimum standards of international ESC rights expectations, however. For one, there is no specific mention of a general right to health care – only the health of workers is dealt with. There is no reference to shelter, unless it is read into a broad interpretation of a decent standard of living. Also, anything that might cost the government money is limited by an affordability statement, i.e. "with due regard to the resources of the State".[33]

To add insult to injury, the principles of state policy set out in Chapter 11 cannot be legally enforced by any court:[34]

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

I shall return to the enforcement of Chapter 11 principles later. What is already clear, however, is the difference between civil and political rights, on the one hand, and ESC rights on the other. The Constitution does not even refer to them as rights: instead, they are principles to which the state may adhere – but only if the funds are available to do so. While the Constitution cannot be amended in such a manner that Chapter 3 rights are taken away, Chapter 11 does not have the same protection. Article 25 gives anyone whose Chapter 3 rights has been violated the right to approach a competent court, while Article 101 denies an aggrieved person who suffers from the government's refusal to adhere to Article 95 access to the courts. Moreover, unlike the Bill of Rights,

33 See Article 95(g) and (h).
34 Article 101.

Chapter 11 does not have direct horizontal effect. Thus, since not even the state can be held responsible for non-compliance with its stated policies, it would be unthinkable that a farmer or factory owner could be held in breach of Article 95(b) for failing to ensure the health and strength of their workers.

In summary, the Namibian Constitution has laid a strong foundation for the enforcement of civil and political rights in both the private and public sphere. When it comes to ESC rights, it is a different story, however:

- The protection afforded by the property clause in Article 16 only benefits the more affluent white community
- The ESC rights listed in Article 95 do not place a heavy burden on the state, and
- Article 101 protects the state against litigation.

The effect of international law on Namibian jurisprudence: The relationship between the human rights Covenants and the Constitution

Nakuta reminds us that Namibian litigation has done little to improve the socio-economic fate of the vast number of poor people or narrow the gap between the rich and the poor.[35] He points to the fact that the Vienna Convention has declared that all human rights are universal, indivisible, interdependent and interrelated.[36]

However, in Namibia, civil and political rights have a vast advantage over social and economic rights, mainly because social and economic rights were excluded from the Bill of Rights and Article 101 limits litigation on economic rights. Nakuta argues correctly that the drafters of the Constitution "bought into the idea that social and economic rights were not true rights".[37] As a 'consolation prize', some social and economic rights were listed in Chapter 11 as principles of state policy. Thus, instead of these rights being human right entitlements and tools of empowerment, the poor are still left at the mercy of government policies and programmes.[38]

35 Nakuta, J. 2008. "The justiciability of social, economic and cultural rights in Namibia and the role of the non-governmental organisations". In Horn, N & A Bösl (Eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Education Namibia, pp 89ff.

36 (ibid.:91).

37 (ibid.:95).

38 See (ibid.:95) and Asbjørn & Allan (2001, in ibid.:3).

Referring to two Namibian cases,[39] Nakuta concludes that economic and social rights can be brought to the Namibian legal agenda through an original application of Article 144 of the Constitution.

He also proposes an indirect application of civil and political rights to litigate for ESC rights.[40] Indeed, several civil and political rights have social and economic consequences. If the right to dignity[41] is taken seriously, social and economic issues cannot be ignored. For example, how can a woman have dignity if she is forced by poverty to live on the streets, has no prospects of earning a decent living, and there is no way she can take care of her children?

Since India has the same limitation clause and inferior position of ESC rights in its constitution, Nakuta quotes an Indian case to prove his point:[42]

> [T]he right to life includes the right to live with human dignity and with all that goes with it, namely the bare necessities of life such as adequate nutrition, clothing, shelter … .

Nakuta's plea for the use of international law to enforce ESC rights in the Namibian courts did not fall on deaf ears. In the case of the so-called Caprivi Treason Trial, the court applied international law to overcome the prohibition of Article 101.

The application of international law in Namibia

Article 144 makes the general rules of international law and international agreements binding on Namibia, and an automatic part of Namibian law. In principle, this means that international law finds direct application in Namibian law without Parliament first having to pass legislation to make it part of Namibian municipal laws.

The Caprivi Treason Trial case against a group of individuals who held the town of Katima Mulilo hostage in 1999 in an attempt to secede the Caprivi Region from Namibia had a very important legal offshoot: in an appeal against a judgment in an application for legal aid,[43] the Supreme Court dealt with the right to free legal representation.

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39 *Kauesa v Minister of Home Affairs & Others*, 1995 (1) SA 51 (NM), also reported as 1994 NR 102 (HC); see also *Müller & Engelhard v Namibia*, CCPR/c/74/D919/2000.

40 Nakuta (2008:98ff).

41 Article 8, Namibian Constitution.

42 *Mullin v The Administrator*, 1981, 2SCR 516 at 529, cited in Nakuta (2008).

43 *Government of the Republic of Namibia & Others v Mwilima & All Other Accused in the Caprivi Treason Trial*, 2002 NR 235 (SC).

The respondents – the 128 applicants in the court *a quo* – were all accused of high treason. Because they were all refused legal aid, they launched an application in the High Court (the court *a quo* in this case). The court ordered the second appellant, the Director of Legal Aid, to appoint legal counsel for the respondents. The government appealed against this decision.

The legal question focused on the enforceability of Article 95(h) of the Constitution. As noted above, ESC rights are not part of the entrenched rights Bill of Rights in Chapter 3.

The government and its subsidiaries argued that Article 95(h), unlike the basic right to legal representation in Article 12(e), was limited to defined cases and the available resources of the state.[44] The respondent did not take up the issue of limited responsibility, but rather argued that, in this particular case, the facts and legal issues were such that the accused would not get a fair trial unless they were provided with counsel. Since the state refused or was unable to provide legal representation in terms of Article 95(h), the court was obliged to make a ruling in terms of Article 12(e) to ensure a fair trial.

An unfortunate amendment to the Legal Aid Act, 1990,[45] was the subtext of this issue. Initially, section 8(2) of this Act gave a High Court bench the authority to issue a legal aid certificate to an unrepresented accused if there was sufficient reason why the accused should be granted legal aid. Such certificate compelled the Director of Legal Aid to grant legal aid to the accused.

It was typical of the period concerned that the government wanted to limit the rights of the courts to make decisions that could place a financial burden on the state. Indeed, the Chief Justice in the Caprivi Treason Trial argued that –[46]

> … certificates were issued indiscriminately by the judges without due regard to available funds with the result that during successive years the funds allocated for legal aid were exceeded.

Parliament therefore amended the Legal Aid Act and scrapped the mentioned sections by way of the Legal Aid Amendment Act, 2000.[47]

The applicants in the court *a quo* concentrated on the amendments and requested the High Court to declare them unconstitutional. The High Court

44 Article 95(h) reads as follows: "The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following: … (h) a legal system seeking to promote justice on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the State".

45 No. 29 of 1990.

46 Commentary of the Chief Justice, at 250.

47 No. 17 of 2000.

found it unnecessary to entertain the amendments' constitutionality or otherwise – as did the Supreme Court. The effect was that the granting of legal aid in terms of the related Act was taken from the High Court and placed solely in the hands the bureaucratic structures of the Ministry of Justice.

The Government Attorney, who represented the appellant, argued that, since principles of state policy could not legally be enforced by a court in terms of Article 101, the courts had no jurisdiction whatsoever to determine if and under what circumstances legal aid should be awarded. Any instruction by the court to the state to ensure legal representation for an accused would be inappropriate and an intrusion –[48]

> … on the exclusive domain of parliament to decide how and in what way funds should be allocated to its various ministries.

The majority judgment agreed that Article 95(h) expressed only the intention of government to facilitate equality and justice by providing statutory legal aid to those who qualified for it. The implementing legislation that gives effect to Article 95(h) is the Legal Aid Act. With the amendment, judges can no longer intervene where the Legal Aid Board or the Director have turned down an application for legal aid. The court calls legal aid provided in terms of legislation *statutory legal aid*.[49]

However, this is not the end of the issue, as the Government Attorney duly argued. If the court found that an accused would not receive a fair trial in terms of Articles 10 and 12 – especially subsection 12(1)(e) – of the Constitution without legal representation, it is the duty of the court to ensure that steps are taken to guarantee a fair trial. Article 12, being part of the enshrined Bill of Rights, is not part of the principles of state policy, and is not subject to state budget constraints or the availability of state resources.

But how can the court obtain the leverage to instruct the government to grant legal aid if it can no longer issue legal aid certificates? The court began its argument by pointing out that the categories of fair trial elements mentioned in Article 12 were not closed. This was demonstrated in *State v Scholtz*,[50] where the court looked at the principle of equality before the law in Article 10(1) of the Constitution and concluded that state disclosure was a principle of a fair trial.

Consequently, Article 10(1) is also a test to determine if a trial is fair in terms of Article 12. There can be instances where two suspects have equally strong defences, yet one may not get a fair trial because s/he does not qualify for

48 Commentary of the Chief Justice, at 255.
49 (ibid.).
50 1998 NR 207 (SC).

legal representation in terms of the provisions of the Legal Aid Act or because of a lack of state resources. Thus, the limitations of Article 95(h) and the Legal Aid Act stand between the accused and his/her fair trial. The Chief Justice in the *Mwilima* case found the answer in Article 144 of the Constitution.

Since Namibia ratified both the International Covenant on Civil and Political Rights (ICCPR) and its Optional Protocols, they form part of Namibian law and the courts are obliged to accede to their provisions. As it turns out, section 14(3) of ICCPR is a combination of Articles 12(1)(e) and 95(h), without the limitations of Article 95, providing for legal aid for an accused –

> … in cases where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

Consequently, as a party to the ICCPR, Namibia is bound to apply section 14(3) in its local jurisdiction.

The two judges who wrote separate judgments in the *Mwilima* case agreed with the principle that the state was bound, under the specific situation, to grant legal aid to the accused. It is not necessary for this study to go into the separate judgments; suffice it here to say that Chief Justice Strydom saw two different categories of legal aid – one of which was grounded in the Legal Aid Act and subjected to the limitations of the Constitution. If, for whatever reason, an accused did not qualify for this category of aid, s/he could follow the route of the state's obligation under the ICCPR. One of the judges[51] also suggested that the idea of two forms of legal aid was confusing. All legal aid, he held, was grounded in the Legal Aid Act. But in the light of the state's obligation under the ICCPR and Article 12 of the Constitution to ensure a fair trial, the court could instruct the state to provide legal aid, irrespective of the fact that a specific budget might be depleted, and despite the limitations of Article 101 of the Constitution.

The court also made it clear that legal aid would never be automatic. The court would always have to satisfy itself that it was indeed in the interest of justice to grant legal aid in a specific case, and that the refusal of legal aid would make a fair trial impossible.

The judgment was a clear message to the legislator. The protection granted by the Constitution, especially in Chapter of the Bill of Rights, could not be annulled by innovative legislation. Justice O'Linn made the following comment in this regard:[52]

51 O'Linn J.
52 (ibid.:279).

> If the intention of the amendment was to exclude the function of the Court, it was an exercise in futility, because as shown in this decision, the Court retains the power in accordance with arts 5 and 25 of the Namibian Constitution to decide whether or not legal aid must be supplied by the Government (the executive) and/or the Director of Legal Aid to ensure a fair trial as contemplated by arts 12 and 10 of the Namibian Constitution and s 14(3)(d) of the aforesaid convention on political and human rights [the ICCPR] which is part of the law of Namibia.[53]

The direct application of Section 14 of the ICCPR was an innovative and exciting development in constitutional jurisprudence in Namibia, albeit somewhat naïve. However, the court's constant reference to "the Covenant" gives the reader the impression that it is not aware of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which was ratified by Namibia on 28 November 1994, the same day that it ratified the ICCPR.

Nevertheless, the judgment opens the door for litigation based on a violation of social and economic rights. If the constitutional mothers and fathers included Article 101 to make sure that government was not burdened with litigation that made claims on economic and social benefits envisaged in Article 95, the Caprivi Treason Trial came as a wake-up call.

The point is clear: The Caprivi Treason Trial led the way for more innovative jurisprudence. One question remains, however: is it a valid interpretive model used by the judges or is it what the government attorney called "inappropriate and an intrusion on the exclusive domain of parliament to decide how and in what way funds should be allocated to its various ministries" and, to add Judge O'Linn's comment, a "wrongful and unlawful intrusion"?

Namibia and the Human Rights Committee

Namibia was taken to the Human Rights Committee twice by Hans Diergaardt, the *Kaptein*[54] of the Rehoboth Baster *Kapteinsraad*,[55] in two separate complaints. One related to the loss of the Basters'[56] ancestral land upon Namibia's independence in 1990. Judgements in the High and Supreme Court went against the Baster community. The Basters had bought land in an area known as the *Gebiet*[57] from the German colonial administration in the 19th

53 In the citation above, Judge O'Linn wrongly referred to the Covenant as a *convention* and he did not cite the name correctly. Everywhere else, the court used the term *the Covenant*.

54 Literally, Afrikaans for "Captain"; denoting the Supreme Leader of the Baster traditional community. The Afrikaans term is the title preferred by the Basters.

55 Literally, "Captain's Council".

56 The Basters migrated from South Africa in the early 19th century.

57 Literally, German for "area" or "territory".

Century. In 1976, the Basters accepted limited self-government under the so-called Odendaal Plan, which was imposed by the South African Government during its illegal occupation of Namibia, and aimed at creating "independent states" for all the indigenous groups in Namibia.

The *Kapteinsraad*'s property was transferred to the Government of Rehoboth in terms of the Rehoboth Self-government Act, 1976.[58] It was possibly never the *Kateinsraad*'s intention to alienate the land from the Baster people. However, at Independence, all the land governed by the various ethnic second-tier administrative structures[59] – i.e. including the *Gebiet* – went back to the central government in accordance with the principle of Namibia being a unitary state. The *Kapteinsraad* opposed the loss of their land in the Namibian High and Supreme Courts. When both judgments went against them, they approached the Human Rights Committee, claiming the expropriation of their land was a violation of the ICCPR. However, the advisory opinion of the Human Rights Committee went against the Baster community, represented by *Kaptein* Diergaardt.[60]

The second complaint related to a letter by the Governor of the Hardap Region, in which the *Gebiet* finds itself. The Governor had instructed government offices not to answer the telephone in Afrikaans, the language of the Baster community. Although the matter was never tried in the Namibian municipal courts, the Human Rights Committee accepted the complaint and issued its advisory opinion in favour of Diergaardt.[61] It stated that, despite English being

58 No. 56 of 1976. Section 23(1) of the Act reads as follows: "From the date of commencement of this Act the ownership and control of all movable and immovable property in Rehoboth the ownership or control of which is on that date vested in the Government of the Republic or the administration of the territory of South West Africa or the Rehoboth Baster Community and which relates to matters in respect of which the Legislative Authority of Rehoboth is empowered to make laws, shall vest in the Government of Rehoboth".

59 Second-tier administrations were the invention of the so-called Transitional Government of National Unity (TGNU) created by South Africa in the 1980s as an attempt to obtain internationally recognised independence for Namibia without including SWAPO. It basically amounted to a non-territorial federation based on ethnicity. These second-tier administrations for various ethnic groups had extensive powers. Among other things, they received the biggest chunk of tax income paid by the members of the ethnic group concerned. The Supreme Court of South West Africa/Namibia later declared the founding legislation of the TGNU, Proclamation 101, a violation of the Bill of Rights attached to it because of the uneven distribution of money to the different second-tier administrations. The revenue allocated to the Administration for Whites eclipsed the others' by far.

60 *Diergaardt et al. v Namibia*, CCPR/C/69/D/760/1997, Communication No. 760/1997, September 2000.

61 Both advisory opinions in respect of the Basters' complaints were given under the same reference and on the same day.

the only official language in Namibia, in areas where there was a dominant language – such as Afrikaans in Rehoboth – citizens had the right to speak in that language when they interacted with government agencies. They could also use that locally dominant language in their correspondence with the government. Not allowing this was a breach of the ICCPR.

The other case before the Human Rights Committee was brought by a certain Mr Müller and his wife, Ms Engelhard. The couple brought a joint application against the Aliens Act, 1937,[62] allowing a wife to take her husband's surname after marriage, but not allowing the husband to take his wife's. The judgments in the High and Supreme Courts went against Mr Müller. The couple then approached the Human Rights Committee, claiming that the Marriage Act in Namibia violated the ICCPR by discriminating against both women and men. The advisory opinion of the Human Rights Committee went in favour of Mr Müller and Ms Engelhard.[63]

However, in none of the cases where the Human Rights Committee opinion went against Namibia did the government initiate changes to local legislation. Mr Müller therefore had his marriage registered in Germany, where he was allowed to adopt his wife's surname. The government also never made a law or issued directives to public servants to speak other languages or answer letters written in any of the other Namibian vernaculars.

Pre-independence sources of Namibian law

Articles 140(1) and (3) of the Namibian Constitution make the following provisions:

> (1) Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court. …
> (3) Anything done under such laws prior to the date of Independence by the Government, or by a Minister or other official of the Republic of South Africa[,] shall be deemed to have been done by the Government of the Republic of Namibia or by a corresponding Minister or official of the Government of the Republic of Namibia, unless such action is subsequently repudiated by an Act of Parliament, and anything so done by the Government Service Commission shall be deemed to have been done by the Public Service Commission referred to in Article 112 hereof, unless it is determined otherwise by an Act of Parliament.

62 No. 1 of 1937.

63 *M*üller *& Engelhard v Namibia*, Communication No. 919/2000, CCPR/C/74/D/919/2000, 26 March 2002.

Article 140 and the stare decisis *rule*

Before Namibia's independence, appeals to the Supreme Court of South West Africa/Namibia lay with the Supreme Court of Appeal of South Africa, which had its seat in Bloemfontein, South Africa. The Bloemfontein Court of Appeal was the highest court of appeal for what was by then officially known as *South West Africa/Namibia*, and all Namibian courts were bound by its judgments.

While the status of the Supreme Court today is undisputed, the position of the High Court is not that clear.

In Namibia today, Article 81 of the Constitution provides that –

> [a] decision of the Supreme Court shall be binding on all other Courts of Namibia and all persons in Namibia … .

Thus, the Supreme Court is the final authority in all legal questions in Namibia now: its position is undisputed, and it is accountable to no other court. Since Article 81 does not refer to the High Court, its position needs clarity.

If the word *laws* in Article 140(1) is interpreted in a broad purposive manner to include statutory law, common law and binding judgments of the Supreme Court of Appeal in South Africa, it goes without saying that pre-1990 judgments are binding and part of Namibian law today. However, in *Myburgh v Commercial Bank of Namibia*,[64] the Supreme Court ruled that the term *laws* in Article 140(1) refers only to statutory laws. In other words, common law and – although not mentioned by the court – case law could only survive independence if it has not fallen foul of the Constitution or any other statutory law.[65]

The question that remains deals with the relationship between the High Court of Namibia and the binding pre-Independence judgments not dealing with constitutional issues of the South Africa Supreme Court of Appeal. While these judgments are still part of Namibian law, it is not clear whether Namibia's High Court is bound by them.

The argument in favour of a binding authority of the South African court is based on a strict application of the *stare decisis* rule. If the pre-Independence Appeal Court judgments are part of Namibian law, only a higher court can override them. In Namibia, the High Court is the legal successor of the Supreme Court of SWA/Namibia.

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64 Unreported case of the Supreme Court of Namibia, Coram Strydom, CJ, O'Linn AJA and Manyarara AJA, CA, SA 2/00 of 2000, delivered on 8 December 2000.

65 *Myburgh v Commercial Bank of Namibia,* 1999 NR, 287 at 292, quoted in *Myburgh v Commercial Bank of Namibia*, Unreported case of the Supreme Court, at 10.

While the Constitution clearly states that the High Court is a competent court with original jurisdiction and is eligible to adjudicate in constitutional matters, it does not give any special attention to the authority of the High Court in respect of the *stare decisis* rule. Consequently, in line with a basic understanding of this rule, the High Court should be bound by pre-Independence decisions of the South African Supreme Court of Appeal, provided that the law on which the decision is based has not changed since 1990, and that the judgment is not unconstitutional.

The counter-argument is based on the principle of sovereignty. When Namibia became independent, the umbilical cord that kept the South African and the then SWA/Namibian legal systems together was cut. Thus, while the pre-Independence judgments of the Supreme Court of Appeal continue to be part of Namibian law today, the High Court is no longer bound by them. If such a judgment deals with a constitutional issue, the High Court can treat it in the same way as it executes its review powers when a common law rule or a statute or sections of a statute are unconstitutional.

It does not make sense, therefore, that a superior court with extensive review powers can still be bound by judgments of pre-Independence colonial courts. However, the binding power of colonial judgments over now independent former colonies is not without examples in recent history. For instance, the British Privy Council remained the appeal court of last instance for many countries in the Commonwealth of Nations long after their independence from the United Kingdom.

While the relationship of the former British colonies is not exactly the same as the Namibian High Court's relationship with the Supreme Court of Appeal in South Africa, one could argue that the similarity between the two situations is to be found in a common agreement between the colonial power and the colony at its independence. A new sovereign member of the Commonwealth entered into agreements with the United Kingdom to acknowledge the limited jurisdiction of the colonial court over the superior courts of its former colonies. In the same way, Article 140(1) of the Namibian Constitution leaves the Supreme Court of Appeal with some authority over the Namibian High Court. This authority does not affect the sovereignty of the Namibian state, nor the autonomy of the Namibian legal system.

However, while the High Court is bound to non-constitutional pre-Independence judgments of the South African Appeal Court, the Supreme Court of Namibia is not. If an aggrieved litigant is not satisfied with a High Court judgment or a confirmation of a pre-Independence South African Appeal Court judgment, s/he can approach Namibia's Supreme Court.

Relationship between Articles 66 and 140

In the case of *Myburgh v Commercial Bank of Namibia*,[66] the court dealt with the question of the emancipated female. The non-discriminatory clause[67] ruled any discrimination against women unconstitutional. However, immediately before Independence, women married in community of property were incapacitated to sue or be sued.

The question before court dealt with the relationship between Articles 66 and 140. Article 66 states that customary and common law remain valid –

> … to the extent to which such customary or common law does not conflict with the Constitution or any other statutory law.

The wording clearly implies that customary and common law can only survive the constitutional era if they comply with the Constitution. In other words, if a common law or customary law rule is in conflict with the Constitution, it is automatically excluded from the corpus of Namibian law.

Article 140, on the other hand, states that, "[s]ubject to the provisions of this Constitution", all laws in force before Independence remain in force until they are repealed or amended. If the phrase "all laws" includes common and customary law, there is a clear contradiction between the two Articles, since unconstitutional common or customary law would not require repeal or amendment: under Article 66, they simply fall away.

However, both the High and Supreme Courts concluded that the opening words of Article 140 – "subject to" – clearly show that Article 140 is subordinate to the rest of the Constitution, i.e. including Article 66(1). The only logical conclusion that can be drawn from the relationship between Articles 66 and 140 is that "laws" in Article 140 refers only to statutory laws. The court deciding the *Myburgh* case accepted the argument that the opening words of Article 140(1) indicate that it is subordinate to other clauses in the Constitution, including Article 66.

Consequently, statutory laws remain intact until repealed or amended, even if they are *prima facie* unconstitutional. Common and customary law, however, are dealt with in terms of Article 66(1). Thus, only constitutionally sound common law and customary law became part of the legal corpus as at Independence on 21 March 1990.

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66 1999 NR 287 (HC); Unreported case of the Supreme Court of Namibia, Coram Strydom, CJ, O'Linn AJA and Manyarara AJA, CA, SA 2/00 of 2000, delivered on 8 December 2000.

67 Article 10(2), Namibian Constitution.

In the two cases where individuals took Namibia to the ICCPR, the eventual influence of international law was less impressive.

Human rights and private law in post-Independence jurisprudence

It never dawned on Namibians that the Constitution had direct horizontal effect. Although Namibia's Supreme Law preceded the interim (1993) Constitution of the Republic of South Africa by three years, Namibian's courts gave no attention to the wording of Article 5. However, when the issue of direct horizontal effect was raised in *Du Plessis & Others v De Klerk & Another*,[68] Kentridge J quoted the Namibian Constitution to emphasise the different construction of Article 5 of the Namibian Constitution and the similar Section in the South African Constitution that determine the binding force of the Bill of Rights. The Namibian Constitution, he pointed out, clearly stated in Article 5 that it had direct horizontal effect, while the 1993 interim Constitution that obtained in South Africa from 1994 to 1997 was silent on direct horizontal application.[69]

With such clarity in Namibia regarding the horizontal application of the Bill of Rights, one would have expected some vigorous application of the Constitution in the private sphere. That is, however, not the case: constitutional issues referring to the private sphere remained few and far between. Private interests generally only came into play indirectly, in the blurred area between administrative law and private law.

Cases where human rights were taken to the public sphere

The emancipation of women under the Constitution

In *Myburgh v Commercial Bank of Namibia*,[70] the appellant – the respondent in the court *a quo* – was a woman married under common law in community of property. She had borrowed money from the respondent, a Namibian bank, to buy a truck and a trailer. Her husband, as the administrator of their joint estate, insured the truck and trailer under his name. As a result of her husband's financial position, however, the insurance was cancelled. When the truck was in an accident, Ms Myburgh was unable to honour her agreement with the bank. The court *a quo* had granted summary judgment in favour of the bank.

68 1996 (3) SA 850 (CC).
69 (ibid.:878).
70 1999 NR 287 (HC).

Ms Myburgh appealed to a full bench of the High Court. She contended that, as a woman married in community of property, she had no legal capacity and, therefore, no *locus standi* to be sued in her own name.

In its ruling on the matter, the High Court stated that the Namibian Constitution nullified the common-law rule making women married in community of property legally incapacitated to sue or be sued in their own names.[71] Furthermore, the promulgation of the Married Persons Equality Act, 1996,[72] affirmed the constitutional abolition of discrimination against women on the basis of sex. It also gave meaning to the constitutional concepts of *affirmative action*[73] and to the principles of state policy,[74] especially the expectation of the Constitution to ensure equality between men and women, the latter having been the victims of special discrimination:[75]

> Article 66(1) [of the Namibian Constitution] makes it quite clear that[,] for any rule of the common law of Namibia in force at the time of Independence to have remained valid, it must not have fallen foul of the Constitution or any other statutory law. One question which immediately arises is whether the common law rule in question did or did not violate the Constitution. In the light of what has already been discussed above [in the ruling], the categorical answer is that the Constitution was violated with the result that the said common law rule at once became unconstitutional. The clear picture that emerges is that the common law rule that made women married in community of property victims of incapacity to sue or be sued was swept away by the Constitution at Independence.

The judgment was confirmed in the Supreme Court.[76] The latter made it clear that only the aspects of common law that were in line with the Constitution remained part of Namibian common law after independence.

Racial discrimination and the Constitution

In a criminal case with definite private application, namely *State v Smith & Others*,[77] the constitutionality of the Racial Discrimination Prohibition Act, 1991,[78] was tested.[79] Section 11 therein reads as follows:

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71 (ibid.).
72 No. 1 of 1996.
73 Article 23(2) and (3).
74 Article 95(a).
75 *Myburgh v Commercial Bank of Namibia*, at 300.
76 *Myburgh v Commercial Bank of Namibia*, Unreported case of the Supreme Court of Namibia, Case No. SA2/00; SA2/00 [2000] NASC 3 (8 December 2000).
77 1996 NR 367 (HC).
78 No. 26 of 1991.
79 It is interesting that the first significant case of contravening the Act only came in 1996, five years after its enactment. Also in 1996, at the 47th Session of the Committee

(1) No person shall publicly use any language or publish or distribute any written matter or display any article or do any act or thing with intent to –
   (a) threaten, ridicule or insult any person or group of persons on the ground that such person belongs or such persons belong to a particular racial group; or
   (b) cause, encourage or incite disharmony or feelings of hostility, hatred or ill-will between different racial groups or persons belonging to different racial groups; [or]
   (c) disseminate ideas based on racial superiority.

The case emanated from an advertisement in a Windhoek newspaper congratulating the Nazi Rudolph Hess on his birthday. In an *obiter dictum* in *Kauesa v Minister of Home Affairs & Others*,[80] a full bench of the High Court found section 11 to be constitutional. However, the judgment was later overturned by the Supreme Court.[81]

After defining the sufficiently significant object of the Act, the High Court applied the tests of the Canadian benchmark case of *Rex versus Oakes*[82] (also applied in the Supreme Court *Kauesa* case) to determine if the derogations from Article 21(1) and (2) of the Constitution were reasonable and rationally connected to the objective – to impair the right to freedom of expression to the minimum extent possible in a democratic society.[83] Justice Frank (as he then was) failed the Act on every requirement. The court clearly saw the Act

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on the Elimination of Racial Discrimination (CERD), one of the Commissioners, Adv. Andrew Chigovera, asked the Namibian representative, Mr Utoni Nujoma, if the fact that the Prosecutor-General had to institute all prosecutions under the Act did not limit its application. It was also clear from Namibia's Country Report that no significant prosecutions had taken place under the Act. See CERD. 1996. *Summary Record of the 1169th Meeting: Namibia, Venezuela. 06/11/96.* Geneva: CERD.

80 1995 (1) SA 51 (NM); also reported as 1994 NR 102 (HC).

81 *Kauesa v Minister of Home Affairs*, 1996 (4) SA 965 (NMS).

82 1986 (26) DLR 4 200.

83 See the quote in the text of *Rex v Oakes*: "[O]nce a sufficiently significant objective is recognised, then the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves 'a form of proportionality test': *R v Big M Drug Mart Ltd*, supra. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in the first sense, should impair 'as little as possible' the right or freedom in question: *R v Big M Drug Mart Ltd*, supra. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'".

as a bridge from the old apartheid order to the new, democratic, constitutional era.[84] The significant objective of the Act is the prevention of a recurrence of the type of racism and its concomitant practices which prevailed prior to Namibia's independence. Thus, the Act serves as the bridge to take the racist society away from apartheid-based values and morals to a new, democratic, constitutional era, where people are respected regardless of their race or ethnic origin.

Consequently, the court concluded that groups of persons who had never featured in the pre-Independence era of this country and were never part of or a party to the social pressure brought to bear amongst the different peoples could not be seen as objects justifying the restrictions of freedom of speech described in Article 21(a) and (b) of the Constitution. The court's definition of *racial group* went beyond what was required. In this specific case, the insult to the Jewish people by the heroic treatment of a Nazi war criminal and to the sensitivities of the Jewish people were not sufficient justification to derogate from a broad interpretation of the constitutional right to freedom of speech.

Furthermore, following the *Oakes* case, the High Court criticised the Act for not allowing language or publications that might be offensive to certain groups if the facts contained therein were true. Offensive language or even views shocking and disturbing to the state or sectors of the population were needed to build a democratic society.

The Namibian Act, unlike the Canadian Criminal Code,[85] does not make provision for statements that may cause disharmony although they are intended to oppose and remove racist practices. Consequently, the High Court found that the Act, as it stood, did not impair freedom of expression "as little as possible" in that it inhibited and even stifled public debate on important issues such as affirmative action and historical assessments. Section 11(1) was overbroad and unconstitutional, in the court's view, therefore.

The state did not appeal against the judgment, and Parliament opted to amend the Act. The amendments followed the case almost to the letter.[86] The new section 14(2) now exonerates racist language and publications envisaged in section 11(1) if they are a subject of public interest, part of a public debate, and the truth – or, on reasonable grounds, believed to be true. The amendments also exclude prosecution if someone contravenes section

84 The metaphor was first used by the late Etienne Mureinik. See Mureinik, E. 1994. "A bridge to where? Introducing the Interim Bill of Rights". *South African Journal on Human Rights*, 10:31.

85 Sections 318 and 319.

86 The Racial Discrimination Prohibition Amendment Act, 1998 (No. 26 of 1998).

11(1) with the intention to improve race relations and to remove racial insult, tension and hatred.[87]

The new exclusions are extremely broad. It is no surprise that no one has been prosecuted under section 11(1) since the *Smith* case: even in cases where prosecution should at least be considered, neither the public nor the authorities even mention prosecution under the Act.

Racial discrimination in the private sphere

In *Berendt & Another v Stuurman & Others*,[88] the issue of racial discrimination was challenged in a family dispute over the actions of a son whose mother had died intestate, and for whose deceased estate he acted as executor. His siblings were not comfortable with his actions and challenged the fact that their mother's estate was – like all those who die intestate – devolved in terms of a harsh black/white racial division. For blacks, the definition of whom under the relevant legislation included Ms Berendt, the enacting law at the time was

87 The full text reads as follows:

"11.(1) No person shall publicly use any language or publish or distribute any written matter or display any article or do any act or thing with the intent to –

(a) threaten or insult any person or group of persons on the ground that such person belongs or such persons belong to a particular racial group; or

(b) cause, encourage or incite hatred between different racial groups or persons belonging to different racial groups; or

(c) disseminate ideas based on racial superiority. …

14(2)(2) No person shall be convicted of an offence under subsection (1) of section 11 –

(a) if the act complained of was, at the time of the commission thereof, relevant to any subject of public interest, the discussion of which was for public benefit, and if on reasonable grounds such person believed the statement or statements concerned to be true; or

(b) if such person, in good faith and with the intention of removing matters tending –

(i) to threaten or to insult any racial group or any person belonging to such racial group; or

(ii) to cause, encourage or incite hatred between different racial groups or between persons belonging to different racial groups, pointed out such matters; or

(c) if it is established that the language, publication or distribution complained of communicated the truth and that the main purpose thereof was to so communicate the truth and not to cause any of the acts referred to in that subsection".

88 2003 NR 81 (HC).

the Native Administration Proclamation,[89] which ruled that the property be distributed "according to native law and custom".[90]

The siblings alleged that the differentiation between blacks and whites was discriminatory in terms of Article 10(2) of the Constitution, listing race, colour and ethnic origin as categories of prohibited discrimination. Both the Minister of Home Affairs and the Master of the High Court argued that the differentiation was not necessarily discriminatory since it provided for uncomplicated and inexpensive administration of estates by magistrates.

The High Court was not impressed. Its finding stated that, if the administration of estates by a magistrate had advantages for poor people, such benefits should be equally available to all poor people without using humiliating categories of race to differentiate among them.[91] The High Court also found the discriminatory provisions unconstitutional and Parliament was afforded time to amend the Proclamation.

Parliament opted to make a farce of its constitutional obligation to remove discriminatory elements from Namibian legislation. In a mockery of the Constitution and its role as legislator, Parliament promulgated the Estates and Succession Amendment Act, 2005.[92] The Act repealed the infected legislation merely the addition of a second section stating that, despite the repeal, the rules of intestate succession would still apply even though the sections dealing with it were repealed. In a strange manner, the discriminatory sections of the Proclamation were at once repealed and reinstated in one short Act.

The Berendt family received their justice, and no one challenged the legitimacy of the Act. Today, the piece of legislation stands as a reminder of parliamentary arrogance as well as a manifestation of a lack of respect and sense of duty by the highest legislative body in Namibia for their constitutional responsibility and their appreciation of the separation of powers and the role of the judiciary.

The state and contractual responsibility

In *Permanent Secretary of the Ministry of Finance & Others v Ward*,[93] the Permanent Secretary cancelled a contract with Ward, a medical doctor, entered into with the Ministry to act as a service provider for the Public Service Employees' Medical Aid Scheme. The respondent's execution of the contract was questioned by the Ministry and the contract eventually cancelled, in

89 Proclamation 15 of 1928.
90 (ibid.:section 18(9)).
91 2003 NR 81 (HC) at 84.
92 No. 15 of 2005.
93 2009 (1) NR 314 (SC).

terms of a clause therein, on the grounds of the respondent's dishonesty. The respondent denied that he had acted dishonestly, but the applicant refuted this allegation. The High Court granted the respondent the right to have the cancellation reviewed. In other words, the court *a quo* saw the Permanent Secretary's action as an administrative action and, therefore, as subject to the constitutional requirement that administrative actions have to be fair and reasonable.

On appeal, the Supreme Court found that the Permanent Secretary's action was not the fulfilment of any legal onus or obligation but was grounded in both the common-law rules of cancellation and the content of the contract, which, like the common-law rules, provided for cancellation in instances of fraud, dishonesty, false representation and engagement in dishonest business practice. Such instances could, in any commercial agreement between private individuals, lead to cancellation of the contract summarily and without being a specific term of such agreement. What mattered was not the functionary (the Permanent Secretary) but the function performed by such functionary. The court noted that, in this case, the nature of the power exercised, and the source of the power, was not the result of a duty placed on the Permanent Secretary by legislation or the result of the implementation of legislation. Consequently, one could also not speak of a contractual relationship between an unequal and a superior power. Because the court saw this as a pure contractual agreement, Article 18 of the Constitution demanding fair and just administrative action did not apply: the respondent thus used the wrong remedy, the Supreme Court found.

Coleman and Chase comment that the *Ward* case may be "the beginning of a gradual erosion of the right to enforce administrative justice" in Namibia, the effect of which might be that, whoever enters into a contract with government, "may not expect fair treatment and a right to be heard before such contract is cancelled".[94]

The Constitution and the rights of an 'illegitimate' child

Roman–Dutch common law prohibited an illegitimate child to inherit from its father. In *Frans v Paschke & Others*,[95] the court ruled that the differentiation between *legitimate* and *illegitimate* children was based on social status. The rule condemned all children born outside marriage without even considering whether an 'illegitimate' child was born as a result of incest, adultery or a

94 Coleman, G & E Shimming-Chase, 2010. "Constitutional jurisprudence in Namibia since independence". In Bösl, A, N Horn & A du Pisani (Eds). *Constitutional democracy in Namibia: A critical analysis after two decades*. Windhoek: Macmillan Education Namibia, p 209.

95 2007 (2) NR 529 HC.

loving relationship between two people cohabiting but, for whatever reason, opted not to get married.

The plaintiff, who was the deceased's child born outside the deceased's marriage, did not inherit when his and the defendant's father passed away. The plaintiff instituted an enrichment claim against the first defendant, and alleged that the common-law rule had been invalid since 21 March 1990 because it violated, abridged and/or infringed one or more of the following plaintiff's rights:

(i) not to be discriminated against on the ground of the plaintiff's social status (Article 10(2) of the Namibian Constitution);
(ii) to equality before the law (Article 10(1) of the Constitution);
(iii) to dignity (Article 8(1) of the Constitution);
(iv) to know and to be cared for by both his parents (Article 15(1) of the Constitution);
(v) to acquire property (Article 16(1) of the Constitution).

The court ruled that the differentiation between *legitimate* and *illegitimate* children was discriminatory and based on punishing the parents. This punishment was transferred to the children and amounted to unfair discrimination against children born outside marriage.[96]

Hubbard comments that, in 20 years, the equality cause has been applied three times to invalidate existing laws:

> [O]nce on the basis of sex (Myburgh), once on the basis of race (Berendt) and once on the basis of social status (Frans). [97]

Freedom of speech in the private sphere

In both administrative review cases and criminal cases, the courts made a preferential option for freedom of speech when it competed with other freedoms and rights. In the *Kauesa* case, for example, the Supreme Court acknowledged that Kauesa, a junior police officer, had impaired the dignity of the senior command of the Namibian Police. Yet the court ruled that the right to speak and the need to debate issues such as affirmative action overshadowed

96 By the time the case came before court, the Children's Status Act, 2006 (No. 6 of 2006), was already promulgated, albeit not enacted. The Act replaced the common-law restrictions on inheritance with statutory law in line with the Constitution. However, it was only enacted late in 2008.

97 Hubbard, D. 2010. "The paradigm of equality in the Namibian Constitution". In Bösl, A, N Horn & A du Pisani (Eds). *Constitutional democracy in Namibia.* Windhoek: Macmillan Education Namibia, p 234.

the rights of the senior officers in this case. As a result, the sections of the Police Regulations limiting freedom of speech were declared unconstitutional.

Similarly, in the *Smith* case, the High Court considered the Racial Discrimination Prohibition Act to be too broad in its limitations of free speech. The Act was amended and, at the time of writing, no one had been prosecuted under the Act again.

In *Trustco Group International Ltd & Others v Matheus Kristof Shikongo*,[98] the Supreme Court had to weigh the respondent's right to dignity against a newspaper's right to press freedom and freedom of speech.

The three appellants, players in a weekly Windhoek tabloid, *Informanté,* were sued by the respondent for defamation after the tabloid had published an article questioning his dealings with municipal land while being mayor. The High Court ruled in Mr Shikongo's favour and awarded him N$175,000 plus costs. The appellants then appealed to the Supreme Court. The latter court explained the issue to be decided as follows:[99]

> How should the law of defamation give effect both to the right to freedom of speech as entrenched in article 21(1)(a) of the Namibian Constitution[100] **and the constitutional precept that the dignity of all persons shall be inviolable as set out in article 8 of the Constitution?**[101] [Emphasis and footnotes in original]

The appellants wanted the respondent (the plaintiff in the court *a quo*) to establish the falsity of the defamatory statements. However, the court confirmed that the plaintiff only needed to prove that the other party had defamed him/her in a

98 2010 (2) NR 377 (SC).

99 (ibid.:382).

100 Article 21(1) provides as follows: "All persons shall have the right to: (a) freedom of speech and expression, which shall include freedom of the press and other media; …". Article 21(2) then provides that "[t]he fundamental freedoms referred to in sub-article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said sub-article, which are necessary in a democratic society and are required by 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".

101 Article 8 provides as follows:

"(1) The dignity of all persons shall be inviolable.

(2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.

(b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment".

publication. Once defamation was proved, there was a rebuttable presumption that the publication was wrongful and intentional. However, the respondents wanted the court to condone their right to the reasonable publication of facts if doing so was in the public interest. Moreover, argued the respondents, the mere fact that defamatory statements were false was not always unlawful if it was considered reasonable to publish such statements at the time, once all the available facts had been considered. Klazen[102] summarises the Supreme Court judgment as follows:

> Ultimately, the Supreme Court rejected the appellants' argument of burdening a plaintiff with the duty to establish falsehood and found, in favour of the respondent, that a defence of reasonable publication "will provide greater protection to the right of freedom of speech … protected in article 21 without placing the constitutional precept of human dignity at risk". The court did not find it necessary to decide whether the reasonable publication defence was available only to media defendants.

The *Shikongo* case is an important development in Namibia's common law in the light of the Constitution. It also clarifies the manner in which competing rights ought to be dealt with: the one right should not be applied in such a way that the other disappears. Cognisance also needs to be given to both rights and their relationship to each other or to the situation.

Conclusion

The great expectation created by the *Du Plessis* case in South Africa of a Namibian legal system where the Constitution guaranteed horizontal application of the Bill of Rights never really materialised. Human rights and constitutional issues remain the domain of the criminal courts. The application of human rights and constitutional issues in the private sphere remains an occasional event rather than part of a developing human rights jurisprudence in private law.

However, the *Mwilima* and the *Shikongo* cases have opened the door for future development in the private sphere.

102 Klazen, K. 2011. "The law of defamation in Namibia: Recent developments". *Namibia Law Journal,* 3(2).

Conciliation and arbitration proceedings: Separating the different dispute resolution mechanisms – A critical analysis of case law

Jaco Boltman*

Abstract

Conciliation, as a separate dispute resolution mechanism, and a conciliation attempt by an arbitrator are often considered to be one and the same. However, an arbitrator is not designated by the Labour Commissioner to resolve a dispute: first as a conciliator and then as an arbitrator, an arbitrator is designated as such from the onset. Moreover, the powers of the arbitrator remain those of an arbitrator: his/her designation and powers do not adjust midway to accommodate the process. When conciliation and/or arbitration proceedings are not considered distinctly in this way, confusion arises and the process is convoluted. This article is a critique on the judgments that have confused these processes.

Conciliation

Conciliation, as a separate mechanism for dispute resolution, is governed by Part B of Chapter 8 of the Labour Act, 2007,[1] which consists of sections 81, 82 and 83. In a later section, however, the Act also refers to an attempt by an arbitrator to resolve a dispute by way of conciliation.[2]

Conciliation and arbitration disputes are referred in an almost identical manner:[3] the aggrieved party completes the relevant dispute referral form with the accompanying statement of claim and the referral form is then delivered in accordance with the relevant rules.[4]

However, a proper distinction is not always drawn between an appointed conciliator and an appointed arbitrator that attempts to resolve a dispute by way of conciliation. If it is not kept in mind that a conciliator is designated in terms of Part B of the Act, and an arbitrator in terms of Part C thereof, then

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1 No. 11 of 2007.

2 Section 86(6), Labour Act.

3 Rules 11 and 14, Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner (hereinafter *Con/Arb Rules*).

4 Rules 6, 7 and 8, Con/Arb Rules.

the process is unnecessarily complicated. I illustrate this below by discussing a number of Labour Court Judgments as well as a Supreme Court Judgment.

Discussion of case law

The first case under discussion is *Andreas Shanjenka v Transnamib Holdings Ltd*.[5] In this appeal, the Labour Court set aside a finding to the effect that the conduct of the respondent did not amount to unfair labour practices. The point of debate is the court's reasoning on the first ground of appeal, and its discussion of the processes of conciliation and arbitration, following the referral of a dispute for arbitration. The first ground of appeal is reflected in the judgment,[6] as follows:

> 1. the arbitrator erred in law/and or [sic] on the facts by failing to conciliate the dispute in terms of section 86(5) of the Labour Act, Act 11 of 2007 read with section 82 of the Act … .

The court deals with this ground of appeal as follows:[7]

> [10] Regarding the first ground of appeal:
> Section 82(9) provides that the Labour Commissioner, if satisfied that the parties have taken all reasonable steps to resolve or settle the dispute[,] *must* refer the dispute to a conciliator to attempt to resolve the dispute through conciliation and in terms of section 82(15) a conciliator *must* issue a certificate if a dispute is unresolved.
> [11] Section 85(6) provides as follows:
> "Unless the dispute has already been conciliated, the arbitrator must resolve the dispute through conciliation *before* beginning the arbitration."
> …
> [12] The word "must" used by the Legislature is an indication that aforementioned provisions are peremptory and that there must be a process of conciliation prior to any arbitration proceedings. Mr Nederlof[,] who appeared on behalf of the respondent[,] submitted that the failure by the arbitrator to attempt to resolve the dispute first through conciliation rendered the entire arbitration proceedings a nullity.
> [All emphases in original]

The court is of the view that the conciliation attempt to be used by an arbitrator, on the one hand, and the conciliation proceedings by a conciliator so appointed, on the other, constitute one and the same process. The court refers to sections 86 and 82 interchangeably, which is not correct. The Act, throughout, prescribes which disputes have to be referred for arbitration in

5 LCA 89/2009 [2012] NALC 23, a reported judgment of Hoff J.
6 (ibid.:4, para. [9]).
7 (ibid.).

terms of Part C of Chapter 8, and which are referred for conciliation in terms of Part B of that Chapter.[8]

An arbitrator is never appointed as a conciliator; therefore, an arbitrator can never make use of the process as envisaged in Part B of Chapter 8 of the Act. An arbitrator merely attempts to resolve the dispute by way of conciliation. As a consequence, an arbitrator, so appointed, is not empowered to issue a certificate of unresolved dispute as envisaged in Part B of Chapter 8. Insofar as the court might have placed a duty on the arbitrator to issue such a certificate to show a failed conciliation, this was not correct. An arbitrator can only act in terms of Part C of Chapter 8: s/he has no other powers.

Arbitrators and conciliators, so appointed

Arbitrators are appointed to preside over disputes of rights, whereas conciliators are appointed to preside over disputes of interests. This is the yardstick to be used (in general) in order to separate the Labour Commissioner's referral of a dispute to an arbitrator or to a conciliator. Whereas an arbitrator has the power to make a binding award, a conciliator can never make a binding finding and/or award:[9] a conciliator can merely attempt to obtain an agreement between the parties as a resolution to the dispute.

In this regard, sections 81 and 84 of the Act are helpful in that they define the disputes that may be referred for conciliation and arbitration, respectively. The former deals with disputes where neither party has an existing right which can be enforced and/or that might have been breached (i.e. disputes of interest), whilst the latter is singularly aimed at disposing of disputes involving the alleged breach of an existing right and/or rights.

A conciliator may dismiss or determine the matter on non-appearance of a party in terms of sections 74(3), 83(2)(a) and 83(2)(b) of the Act. An arbitrator may dismiss a matter – or proceed with the hearing in the absence of a party – in terms of Rule 27(2) and (3) of the Rules Relating to the Conduct of Conciliation and Arbitration before the Labour Commissioner (hereinafter *Con/Arb Rules*).

An arbitrator designated to resolve a dispute in terms of section 86(4) of the Act is first required to attempt to resolve the dispute by way of conciliation. This process of conciliation, designed to either settle the dispute prior to arbitration or to shorten the arbitration proceedings in the manner as provided for in Rule 20 of the Con/Arb Rules, does not amount to conciliation proceedings as

8 See e.g. sections 38, 47, 51, 69, 73 and 74(1)(a), Labour Act.

9 *Purity Manganese (Pty) Ltd v Katzao & Others*, LC 80/2010 [2011] NALC 19.

envisaged by Part B of Chapter 8 of the Act simply because the arbitrator was never appointed as a conciliator in terms of Part B.

Disputes concerning allegedly unfair labour practices, such as a unilateral change of a condition or term of employment, are required – as provided for in Chapter 5 of the Act – to be referred to an arbitrator to be resolved by means of Part C of Chapter 8 of the Act.[10] An arbitrator appointed to resolve a dispute in terms of section 86(4)(a) of the Act is not empowered to furnish a certificate of an unresolved dispute, as such dispute was not specifically referred to him/her in terms of section 82(9) of the Act.

The Act only requires of an arbitrator to attempt to resolve the dispute through conciliation before beginning the arbitration. In practice, this might amount to a mere enquiry as to whether the parties wish to negotiate a possible settlement and, thereafter, to make use of the process provided for in Rule 20 of the Con/Arb Rules in an attempt to shorten the proceedings. These enquiries are also only necessary if both parties are present at the arbitration.

If one of the parties does not appear on the day of arbitration, confusion might arise as to the process to be followed as well as the manner in which to proceed with, dismiss, postpone or determine the matter. Arbitrators sometimes become confused in that they dismiss and/or determine the matter in terms of section 83(2)(b) of the Act instead of Rule 27(2) of the Con/Arb Rules. Indeed, this was what transpired in the matter of *Purity Manganese (Pty) Ltd v Katzao & Others*.[11]

For purposes of brevity, I will only refer to the head notes of the *Purity Manganese v Katzao* judgment. The facts, as reflected therein, were as follows: a conciliator was designated in terms of section 82(3) of the Labour Act in order to conciliate the dispute. After hearing the version of the employee who referred the dispute of unfair dismissal to the Labour Commissioner in terms of section 82(7) for conciliation, and in the absence of the employer who had notice of the conciliation meeting but failed or neglected to attend, the conciliator purported to make a binding and enforceable termination in terms of section 83(2)(b).

The court held that the conciliator, acting under Part B of Chapter 8, was not a court or tribunal within the meaning of Article 12(1)(a) of the Namibian Constitution: the conciliation proceedings lacked the trappings of the court and/or tribunal, and were an informal venue for resolving labour disputes. Ultimately, a conciliator is not empowered to determine the civil rights and obligations of the parties and, if a conciliator makes a binding finding and/or award, he has acted *ultra vires*.

10 Section 51(3), Labour Act.

11 LC 80/2010 [2011] NALC 19, a reported judgment of Damaseb JP.

I pause to note that the vast majority of the issues were properly dealt with in the judgment. The error, with deference, lies in the fact that a dispute for unfair dismissal would never have been referred for resolution by way of conciliation: it could only have been referred to the Office of the Labour Commissioner for resolution by way of arbitration.[12]

I refer to paragraph [12] of the judgment, where the court states the following:

> [12] On 1 April 2010, the second respondent issued a determination duly signed by him as an '***Arbitrator***'. [Emphasis in original]

In his judgment, Damaseb JP states, among other things, the following:[13]

> In the absence of any input by the respondent or its representative. I have to accept what was said by the applicant as the probable true version of what transpired. I therefore found that the dismissal of the applicant was substantively unfair. I subsequently issue the following order:
> AWARD: The respondent Purity Manganese (Pty) Ltd must reinstate the applicant, Tjeripo Kazao [sic], in the position previously occupied by him with immediate effect ...
> This Award is final and binding on both parties.

Armed with this final and binding award, the first respondent on 29 June 2010 applied for its enforcement, as a result of which – and this is common cause – the Labour Inspector purported to issue a compliance order in terms of section 90 of the Labour Act.

As of paragraphs [13] to [29], the court deals with and separates conciliation and arbitration proceedings. Here, one can find no fault with the court's reasoning. However, the error arose when it was assumed that the arbitrator was proceeding with conciliation as provided for in Part B of Chapter 8, as opposed to arbitration as provided for in Part C of that Chapter.

The court was correct to hold that a conciliator cannot make a binding finding and/or award in terms of section 83(2) of the Act.[14] However, the arbitrator, having been appointed in terms of Part C of Chapter 8 of the Act, was within his powers to proceed with the arbitration and to issue an arbitration award;[15] and the arbitrator was correct in that he was entitled to determine the matter in terms of Rule 27 of the Con/Arb Rules, which provide for the matter to proceed in the absence of one of the parties.[16]

12 Section 38(1)–(3), Labour Act.
13 *Purity Manganese (Pty) Ltd v Katzao & Others.*
14 Para. 22.
15 Rule 27(2), Con/Arb Rules.
16 Rule 27(2)(b), Con/Arb Rules.

The arbitrator's error lies with the fact that he did not issue an award in terms of Rule 27 of the Con/Arb Rules: instead, he disposed of the arbitration in terms of section 83(2) of the Act, which was not correct. His actions created confusion and, in any event, they amounted to a nullity. The court's reasoning that the arbitrator had erred in that he did not first make use of the conciliation procedure in terms of Part B of Chapter 8 before moving to part C of Chapter 8 was, however, not correct as the dispute was not one where the Labour Commissioner was ever entitled to appoint a conciliator in terms of Part B: the Labour Commissioner could only, in terms of Part C, have appointed an arbitrator to preside over the dispute and, as such, the arbitrator was bound by the Act in his actions. The arbitrator's incorrect reliance on section 83(2) of the Act was the cause of all the confusion herein.

The confusion surrounding the process has reared its head in several other cases, such as *Purity Manganese (Pty) Ltd v Katjivena*[17] and *National Housing Enterprise v Hinda-Mbazira*.[18] I intend to deal with the judgments very briefly.

Purity Manganese (Pty) Ltd v Katjivena

In the *Purity Manganese v Katjivena* matter, the essence of the court's ruling came down to ratification of a defective referral form by participation of a party. The court held as follows at paragraph [34]:

> [34] The arbitrator considered that the process, which had been commenced by the referral form, had reached an advanced stage when the arbitration started. This is because there had been conciliation (which also requires a signed referral form in rule 13) which had immediately preceded the arbitration and which had also been chaired by her. The applicant and the third respondent had participated in the preceding conciliation. It would appear that there be no point taken as to the failure on the part of the third respondent to have signed the referral form during conciliation. The point was then taken, after conciliation had been contemplated (and failed) and the arbitration had got under way. By that time, the referral – necessary for conciliation – had been ratified.

The court, by reasoning that there was a conciliation process (as envisaged by section 82 of the Act) which required a separate referral, ruled that the respondent only acted on the defective referral for purposes of arbitration, and not on the referral for conciliation, and therefore ratified the referral necessary for conciliation.

As is clear from the preceding discussions, this dispute was only ever referred for purposes of arbitration:[19] it was never referred for conciliation in terms

17 LC 86/2012 [2014] NALCMD 10 (26 February 2014).
18 LCA 17/2011 [2012] NALC 10 (3 April 2012), and NASC (SA 42-2012) 4 July 2014.
19 Section 38, Labour Act.

of section 82 as the dispute concerned a dispute of rights (alleged unfair dismissal). The conciliation that took place was an attempt as provided for in section 86(5). During this conciliation, an arbitrator is obliged to make use of the process provided for in Rule 20 of the Con/Arb Rules. Rule 20(1) and (2) are prescriptive in that regard,[20] and go on to provide for the arbitrator assisting the parties in reaching consensus on ways to shorten the arbitration proceedings, including resolving any preliminary points that are intended to be taken by any party.[21] As conciliation in terms of section 86(5) aims to settle the dispute by agreement between the parties, the remainder of the process provided for in Rule 20 (should this attempt have failed) can only be interpreted to mean that the arbitrator is required to ascertain which preliminary points will be argued, on record, at the start of the arbitration proceedings. Rule 20 aids in shortening the procedure by highlighting what has to be addressed during arbitration by way of evidence and arguments. From a proper reading of Rule 20, it is clear that conciliation is not the platform for any evidence and/or preliminary arguments. If the purpose of the conciliation/arbitration proceedings is primarily to allow parties to settle disputes by agreement, then the parties should be allowed, during conciliation proceedings, to entertain possible settlement without having to deal with the merits of the matter. Only after this bona fide attempt at settlement has failed should the parties move on to shorten the procedure by agreement on certain issues, and only thereafter should arbitration, on the record, begin.

In other words, the opportune time for the appellant (the respondent in the arbitration) to have argued the preliminary point of the alleged defective referral document was at the commencement of the arbitration proceedings, on record, as the respondent in fact did.[22]

The *Purity Manganese v Katjivena* judgment is premised on participation in a procedure as envisaged by section 82 of the Act. This is incorrect because there was no referral for purposes of conciliation: the referral was for purposes of arbitration, and the process of conciliation that took place was merely conciliation as provided for in terms of Rule 20.

National Housing Enterprise v Hinda-Mbazira

My discussion of the two *NHE* judgments will focus on the Supreme Court judgment. The portion and/or order of the Labour Court, relevant for this

20 "20. (1) Unless a dispute has already been conciliated, the arbitrator must attempt to resolve the dispute through conciliation before beginning the arbitration.
(2) In such conciliation, the arbitrator must attempt to assist the parties to reach consensus on issues to shorten the proceeding, including – …".

21 Rule 20(2)(i), Con/Arb Rules.

22 (ibid.:para. [34]).

discussion, revolves around the Labour Court's judgment to the effect that a dispute provided for in the Act is not synonymous with dismissal, for not every dismissal begets a dispute in terms of the Act.

The Supreme Court accordingly held that, when the complainant received the letter of dismissal, a dispute had not yet arisen: the dispute only arose subsequent to the finalisation of the internal appeal. In its judgment, the court quotes the relevant legal provisions,[23] where it refers to portions of sections 82, 86, 88 and 89 of the Act.

Later in the judgment, the court deals with the subject matter relevant to this discussion, as follows:[24]

> [24] Section 86(2)(a) when read together with s 82(9) leaves no doubt that a referral can only be considered by the Labour Commissioner once all internal remedies in an undertaking have been exhausted …
>
> [25] The argument that s 82(9) could not be read together with s 86(2)(a) because it was seated in Part B while s 86(2)(a) was in Part C of the Act, has no merit, as Part A, B, C and D are clustered under Chapter 8 headed "Prevention and Resolution of disputes". Conciliation is but the second port of call, from the employer's disciplinary enquiry in the hierarchy of decision-making forums[,] and I fail to see how the provisions related thereto could be read in isolation to the provisions related to arbitration. In dispute resolution[,] conciliation is stage one and arbitration stage two, they are inseparable. Section 86(5), (6) and (11) provides:
>
> "(5) Unless the dispute has already been conciliated, the arbitrator must attempt to resolve the dispute through conciliation before beginning the arbitration.
>
> (6) If the conciliation attempt is unsuccessful, the arbitrator must begin the arbitration.
>
> (11) If the parties to the dispute consent, the arbitrator may suspend the proceedings and attempt to resolve the dispute through conciliation".

Further on, the court holds the following:

> [30] Therefore, the Court a quo was correct in the interpretation it accorded to s86(2)*(a)*, that is, the six[-month] time limit[,] in terms of s 86(2)*(a)* of the Act, begins to run after all reasonable or all internal remedies have been exhausted and failed to resolve or settle the dispute. Such an interpretation does not violate or offend the intention of the legislature in its use of the words "dispute" and "date of dismissal" in s 86(2)*(a)*. [Italics in original]

So the question arises as to how section 86(2)(a) reads, i.e. how the terms *dispute* and *dismissal* are used. The wording is as follows:

23 At 13, para. [15].

24 Commencing at para. [20], at 22ff.

(2) A party may refer a dispute in terms of subsection (1) only –
(a) within six months after the date of dismissal, if the dispute concerns a dismissal, or …

On a plain reading of the section, the wording leaves no interpretation other than one that provides for a dispute to be lodged within six months after the date of dismissal, if the dispute concerns a dismissal. This particular dispute is expressly linked to the act of dismissal.

The Supreme Court's judgment was based on the premise that sections 82 and 86 should be read together. The court rejected the argument that section 82 should not be used to interpret section 86, but it was not correct in such rejection.

Sections 81 and 84 specifically define *dispute* for the respective purposes of Parts B and C of Chapter 8 of the Act. These definitions are not similar, and they respectively provide for when conciliation (in terms of section 82) or arbitration (in terms of section 86) should follow. In their reasoning, both the Labour Court and the Supreme Court ignore these sections and the clear intention of the legislature to make provision for two separate dispute resolution mechanisms for purposes of dealing with disputes, as identified by sections 81 and 84. The Supreme Court also ignores all of the sections throughout the Act that require certain disputes to be referred specifically for conciliation and others to be referred specifically for arbitration.

The argument that section 82 could not be read to interpret the wording contained in section 86 is correct. It is the misconception that section 86(5) refers to a conciliation in terms of section 82 that swayed both the Labour Court and the Supreme Court to read the requirements in section 82(9) into the clear and concise time period provided for in section 86(2)(a). This was not correct.

Conclusion

The legislature clearly intended for sections 82 and 86 to be applied in different circumstances; this is corroborated by sections 81 and 84. To interpret the two sections together is difficult and cumbersome, because there are conflicting rules and processes for both. Rule 27 also distinguishes between the way in which section 82 and 86 matters should be treated in the event that a party does not show. To interpret sections 82 and 86 as having to be read together, and to be two different components of one process, is to confuse two distinct dispute resolution proceedings.

For instance, if the date of the dispute arising is taken as the date of the finalisation of the internal appeal as opposed to the actual date of dismissal as per section 86(2)(a), then where would this leave the issue of remuneration

of a dismissed employee for the duration of his/her period of appeal? Would the parties then have to contract into a position in order to safeguard that which has been accepted by our common law until now, i.e. that the duty to remunerate an employee ends with dismissal, unless reinstated on appeal or thereafter?

The Supreme Court judgment may cause disputes already disposed of (by the passing of a six-month period) to be brought back to life by new referrals, i.e. by an employee merely filing an appeal against this old dismissal, and thereafter referring the matter to the Labour Commissioner again. The possibility exists because the cause of action is no longer dismissal as per section 86(2)(a), but the finalisation of an internal appeal subsequent to the act of dismissal.

What happens to the settled principles on the law of damages and/or compensation and, particularly, a party's duty to mitigate his/her losses, and/or the accepted principle that no one person should be enriched at the expense of another?

Conversely, what is the situation with an employee not afforded a disciplinary hearing at all? Would that employee be barred from instituting a dispute if s/he has failed to appeal the decision to be dismissed without a hearing? What if the employee elects not to make use of the process of appeal, having lost faith in the employer's process? Will such an employee also be forced to become involved in an appeal process in which s/he wants no part in order to enable the employee to refer a dispute?

What would be the situation where an employer does not have written disciplinary procedures, i.e. no set time for lodging an appeal? Due to the new date that a cause of action arises, it is also conceivable that a dismissed employee might lodge an appeal long after a period of six months have lapsed since his/her date of dismissal, and then, s/he could claim remuneration for that period at the Office of the Labour Commissioner until such time as his/her appeal is finalised or otherwise disposed of.

The courts have misinterpreted the intention of the legislature insofar as conciliation proper and conciliation as an 'attempt to settle' (during arbitration proceedings) are concerned. In doing so, our courts have strayed from the accepted definition of the word *dismissal* by interpreting the wording of section 82 into the time limits of the process provided for in section 86 – and it should never have done so.

The courts have also consequently altered a position in our law that provided clarity and certainty to all concerned, i.e. a position which called for a dispute to be referred within six months of the date of a dismissal, and to apply the accepted common law principles to regulate the relationship between a dismissed employee and his/her employer.

Our courts have substituted their intention for that of the legislature and, in the process, they have altered a settled and accepted portion of our law – the consequences of which are not yet fully known or understood.

JUDGMENT NOTES

Anti-retroviral drugs for foreign inmates in Botswana: *Tapela & Anor v Attorney General & Others*

Obonye Jonas* and Tshepiso Ndzinge-Makhamisa**

Introduction

Botswana is one of the countries hardest hit by the HIV and AIDS[1] pandemic in the world. The pandemic is arguably the most important challenge facing Botswana since it gained independence from Britain in 1966. It has a national HIV prevalence rate of 23% among 15–49-year-olds, the second highest in the world after Swaziland.[2] It has claimed many lives of *Batswana*, inflicting untold pain and grief, causing distress and uncertainty, and threatening the economy as the country has lost active and **able-bodied people** in their productive stages. In a study conducted in 2008, Jeffries et al.[3] observe that HIV and AIDS significantly undermine economic growth and increase household poverty. They argue that the impact is so critical that it affects the whole economy, and threatens to pull some segments of the uninfected population into poverty.[4]

The Botswana Government has declared the fight against HIV and AIDS a top priority. As a mitigatory measure against the adverse effects of the pandemic, in January 2002, the government rolled out anti-retroviral (ARV) drugs to its people through the public health care system, being the first African country to do so.[5] Within three years, about 34,000 HIV-infected *Batswana* had

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1 Human immunodeficiency virus and acquired immune deficiency syndrome.

2 See http://www.avert.org/hiv-aids-botswana.htm#sthash.q0R1qvnc.dpuf, last accessed 27 September 2014.

3 Jeffries, K, A Kinghorn, H Siphambe & J Thurlow. 2008. *Macroeconomic and household-level impacts of HIV/AIDS in Botswana*. Available at http://www.ncbi.nlm.nih.gov/pubmed/18664942, last accessed 27 September 2014).

4 (ibid.).

5 Malemaand, BKW & SF Koch. 2008. "The free provision of ARV therapy: Is it a golden opportunity on a silver platter for organisations?". *Botswana Journal of Economics*, 5(7):68.

been enrolled for ARV therapy, representing about 9% of all people on ARV therapy within developing countries.[6] The government is spending millions of US Dollars annually in purchasing ARV drugs, and has succeeded in providing more than 95% of adult and children in need of treatment with HIV therapy.[7] However, Botswana is facing mounting funding challenges following its classification as an upper-middle-income country. This has resulted in a decreased flow of international donor funds into the country. Botswana's President, Ian Khama, has stated that provision of free ARVs is weighing heavily on the government's budget and would be unsustainable in the long term.[8]

Whereas Botswana's abiding commitment to the fight against HIV and AIDS has been commended the world over, it has attracted trenchant criticism from civil society for denying foreign penitentiary inmates ARV therapy. It is estimated that about 2,000 HIV-positive foreign prisoners are in Botswana prisons.[9] Dialogue between the government and civil society on this matter has not yielded any results. The government's intransigence in this regard led to the litigation in *Tapela & Anor v Attorney General & Others*,[10] which is the subject matter of this article.

The litigation in *Tapela & Anor v Attorney General & Others*

The facts

The central issue at the heart of the application concerned the health and well-being of foreign prisoners incarcerated in Botswana. The facts of this case are straightforward and can be recounted as follows. The applicants, both nationals of Zimbabwe, are serving time at Central Prison in Gaborone, following their convictions in 2007. Both of them were diagnosed with HIV while in prison in Botswana. The first applicant last had his CD4[11] count tested in August 2012, when it was measured at 74 cells/uℓ. The second applicant had his CD4 count tested in August 2009, and it was measured at 243

6 (ibid.).

7 http://www.southernafricalitigationcentre.org/2014/08/25/botswana-botswana-loses-arv-case-against-foreign-inmates/, last accessed 27 September 2014.

8 See http://www.southernafricalitigationcentre.org/2014/08/25/botswana-botswana-loses-arv-case-against-foreign-inmates/, last accessed 27 August 2014.

9 See http://www.sabc.co.za/news/a/19b0f8004532345dbf09bfa5ad025b24/Botswana-ordered-to-provide-ARV%E2%80%99s-to-foreign-inmates-20142208, last accessed 27 August 2014.

10 MAHGB-000057-14.

11 A *CD4* (cluster of differentiation 4) is a glycoprotein found on the surface of helper T cells. In humans, it enables HIV to enter a cell. See http://en.wiktionary.org/wiki/CD4 and http://en.wikipedia.org/wiki/CD4, both last accessed 7 November 2014.

cells/uℓ.[12] Both of them are, thus, clinically required to be enrolled for highly active anti-retroviral therapy (HAART) in terms of Botswana's HIV and AIDS Treatment Guidelines. In Botswana, HAART is obliged to be provided to all HIV-positive adults and children with a CD4 count of less than 350 cells/uℓ.[13] In terms of Presidential Directive No. Cab 5(b) of 2004, non-nationals are not eligible for state-subsidised enrolment for ARV therapy.[14] Around late 2010 or in early 2011, both applicants requested and were accordingly refused state-subsidised ARV therapy on the tenor of the aforesaid Presidential Directive. Following the government's refusal to enrol the two prisoners for ARV treatment, the applicants arranged for their enrolment on HAART to be paid for initially by their families, and when their families were no longer able to assist, by a public interest organisation. As at the time of the litigation of the case, the applicants' ARV treatment was still being paid for by the said public interest organisation, but there was no certainty that the organisation will continue to assist them in future.[15] If the prisoners stop treatment, they risk being resistant to first-line HAART, and if they do not resume treatment promptly, they may die.[16]

On 9 August 2013, the Botswana Government adopted the Revised Botswana National Policy on HIV and AIDS. It provides for universal access to ARV therapy. On hearing about the adoption of this Policy, the applicants renewed their request to be included in the provision of ARV therapy at the government's expense, as applied to Botswana nationals. The applicants' requests were ignored by the government – and this can be taken to mean that they were rejected. Dissatisfied with the government's decision to enrol them for HAART, the applicants approached the High Court, seeking to impugn the government's decision to refuse them access to state-sponsored ARV therapy. Their contentions were that a policy which excludes foreign inmates from ARV treatment was unconstitutional as it violated the prisoners' rights under the Constitution of Botswana, namely the right to life (section 4), the right to freedom against inhuman, cruel and degrading punishment (section 7), and the right to equality and non-discrimination (section 15). The applicants also argued that the refusal to extend ARV therapy to foreign inmates was not sanctioned by law, and that the Presidential Directive being relied on by the government in respect of the exclusion of foreign inmates from ARV therapy was *ultra vires* of the Constitution and, therefore, unenforceable.

The ruling of the court

On 22 August 2014, the High Court, per Sechele, J, delivered its ruling in favour of the applicants. As a springboard to its legal conclusions, the court

12 Applicants' heads of argument, para. 6.
13 Treatment Guidelines, p 70.
14 See para. 3 thereof.
15 Founding Affidavit, para. 28.
16 (ibid.).

aptly observed that, although a prisoner has his/her liberty curtailed by reason of incarceration, the residuum of his/her fundamental rights under the Constitution of Botswana remained intact.[17] The court proceeded to hold that denying non-citizen inmates access to ARV therapy was discriminatory and violatory of their right to life. In support for this view, the court relied on the decision of Marshall J of the United States Supreme Court in *Estell v Gamble*,[18] where the court stated that the government had an obligation to provide medical care for those whom it was punishing.[19] The court proceeded to state that "the deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain", and that this conduct was –[20]

> … inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common law view that it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself … .

In dealing with the state defence that foreign inmates were denied ARV therapy on account of budgetary constraints, Sechele J made reference to the South African case of *B & Others v Minister of Correctional Services*,[21] where inmates who were HIV-positive sought a declaratory order for access to medical attention, care and treatment while in the control and custody of the state. In that case, the court declared that –[22]

> … lack of funds cannot be an answer to a prisoner's constitutional claim to adequate medical treatment. Once it is established that anything less than a particular form of medical treatment would not be adequate, the prisoner has a constitutional right to that form of treatment and it would be no defence for the prison authorities that they cannot afford to provide that form of medical treatment. I do not, however, agree with the proposition that financial conditions and budgetary constraints are irrelevant in the present context. What is adequate medical treatment cannot be determined in vacuo. In determining what is adequate, regard must be had to, inter alia, what the state can afford. If the prison authorities should, therefore, make out a case that, as a result of budgetary constraints, they cannot afford a particular form of medical treatment or that the provision of such medical treatment would place an unwarranted burden on the state the court may very well decide that the less effective medical treatment which is affordable to the state must in the circumstances be accepted as 'sufficient' or 'adequate'.

17 *Tapela* case, at 15.
18 428 US 97.
19 (ibid.).
20 (ibid.).
21 1997 (6) BCLR 789.
22 (ibid.:para. 49).

General remarks

It is an elementary and well-established principle of law, backed by authorities of respectable lineage and predating the era of constitutionalism, that a prisoner is entitled to all his/her fundamental rights and freedoms in their full breadth, save for those limited or withdrawn to meet penological ends, or those rights that are necessarily inconsistent with incarceration.[23] As the former Chief Justice of Zimbabwe, Anthony Gubbay, stated in *Woods & Others v Minister of Justice, Legal and Parliamentary Affairs & Others*, –[24]

> [t]he view no longer holds firm … that by reason of his crime a prisoner sheds all basic rights at the prison gate. Rather he retains all the rights of a free citizen save those withdrawn from him by law, expressly or by implication, or those inconsistent with the legitimate penological objectives of the corrections system.

Indeed, certain rights are justifiably limited for penal reasons. These include aspects of the rights to liberty, security of person, mobility, and security against search and seizure.[25] Nevertheless, prisoners retain a substantial residue of basic rights which cannot be taken away from them; and if taken away, then they are entitled to legal redress.[26] Clearly, the rights that the applicants were seeking to vindicate in the *Tapela* case, namely the rights to life, equality and non-discrimination, and freedom from cruel, inhuman and degrading treatment were not taken away from the applicants by reason of incarceration. To this end, the court was correct in ordering the government to extend ARV therapy to the applicants for the protection of these rights.

It is also important to note that the persons entitled to protection under the Bill of Rights in the Constitution of Botswana include non-citizens. Section 3 of the Constitution prohibits discrimination in the enjoyment of rights guaranteed thereunder on grounds of "place of origin". Similarly section 15(3) proscribes

23 In *Minister of Justice v Hofmeyr*, 1993 (3) SA at 141, Hoexter JA emphasised the need to "… negate the parsimonious and misconceived notion that upon his admission to gaol a prisoner is stripped, as it were, of all his personal rights; and that thereafter, and for so long as his detention lasts, he is able to assert only those rights for which specific provision may be found in the legislation relating to prisons, whether in the form of statutes or regulations. … [T]he extent and content of a prisoner's rights are to be determined by reference not only to the relevant legislation but also by reference to his inviolable common-law rights".

24 1995 (1) SA 703 (ZS), at 47. See also *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs & Others*, 1992 (2) SA 56 (ZS), at 61–62; *Turner v Safley*, 482 US 78 (1987), at 84–85.

25 *Woods*, para. 48.

26 *August & Another v Electoral Commission & Others*, 1999 3 SA 1 (CC) para. 18.

discrimination on the basis of "place of origin".[27] At a judicial level, the view that the protective scheme of the Constitution's Bill of Rights extends to non-nationals was expressed by Tebbutt P in the local case of *Good v Attorney General*.[28]

South African courts have adopted the same approach. For instance, in *Minister of Home Affairs v Watchenuka & Another,*[29] the South African Supreme Court of Appeal stated that notions of human rights had no nationality and that they inhered in every human being – citizen and non-citizen alike – and that when a person happened to be in South Africa, legally or illegally, their fundamental rights had to be respected and protected at all times.[30] In *Dawood, Shalabi & Thomas v Minister of Home Affairs & Others*,[31] Van Heerden AJ said the following:

> It is a well-established principle of international law that, as a consequence of its territorial sovereignty, a State has the right to control the entry of aliens into its territory ... However, once an alien has entered its territory, the State concerned is obliged under international law to "respect basic human right norms in its treatment of such alien" ... Moreover, under the South African Constitution an alien who is inside this country is entitled to all the fundamental rights entrenched in the Bill of Rights, except those expressly limited to South African citizens.

In *Patel v Minister of Home Affairs*,[32] Booysen J said the following:[33]

> In my view, aliens have the same rights under the Constitution that citizens have, unless the contrary emerges from the Constitution.

To this end, it was fully competent for the applicants in *Tapela & Anor v Attorney General & Others* to launch a constitutional challenge to vindicate their rights to life, equality and non-discrimination; to freedom from cruel inhuman and degrading treatment; and to human dignity before the courts of Botswana despite the fact that they were non-citizens. Such rights are also guaranteed by many international instruments that Botswana has ratified. These instruments include the International Covenant on Civil and Political Rights[34] and the African Charter on Human and Peoples' Rights.[35] However, because Botswana is

27 Section 15 of the Constitution of Botswana is a general non-discrimination clause.
28 2005 (2) BLR 337 (CA).
29 2004 (4) SA 326 (SCA).
30 (ibid.:para. 25).
31 2000 (1) SA 997 (C), at 350.
32 2000 (2) SA 343 (D).
33 (ibid.:1003).
34 Adopted 16 December 1966, entry into force 23 March 1976.
35 Adopted 27 June 1981, entry into force 21 October 1986.

a dualist state,[36] the provisions of international treaties and conventions are not justiciable before Botswana's courts unless such instruments have been incorporated legislatively in the domestic legal order.[37] Nonetheless, despite the state's dualist nature, in *Attorney General v Dow*[38] the Court of Appeal held that Botswana courts were required to interpret domestic legislation in a manner that was consistent with the country's obligations under international law as laid down in treaties, conventions, agreements and protocols within the United Nations (UN) and Organisation of African Unity (OAU) (now African Union, AU).[39] In this regard, the Interpretation Act[40] provides that, as an aid to the construction of an enactment, Botswana's courts may have regard to any relevant international treaty, agreement or convention.[41] Thus, courts in the country have occasionally invoked rules of international law as contained in international instruments, including those that have not yet been incorporated into the domestic law, to determine disputes that come before them. To this end, in Botswana, the importance of international treaties in the public law adjudicatory process cannot be overemphasised. It may also be indicated that norms contained in international instruments serve as a beacon towards which states should gravitate in an endeavour to comply with international best standards and practice. In this regard, Viljoen has observed that international human rights law instruments provide a –[42]

> … normative beacon of commonly agreed standards of humanity and dignity that all states should respect.

There are other non-binding international instruments that seek to protect the rights of foreign inmates, and which pertain to the present discussion. In terms of Recommendation 26 of the UN Recommendations on the Treatment of Foreign Prisoners,[43] –

36 See Tshosa, O. 1997. "Giving effect to treaties in the domestic law of Botswana: Modern judicial practice". *Lesotho Law Journal*, 10:205.

37 *Dow v Attorney General of Botswana*, [1992] BLR 119 (CA) at 165, at 154.

38 (ibid.).

39 (ibid.).

40 Cap 01:04, Laws of Botswana.

41 See section 24 thereof.

42 Viljoen, F. 2011. "Contemporary challenges to international human rights law and the role of human rights education". *De Jure*, 44:209.

43 https://wcd.coe.int/ViewDoc.jsp?id=1989353&Site, last accessed 29 August 2014. The UN recommendations were approved by the Seventh United Nations Congress on the Prevention and Treatment of Offenders in Milan in 1985, together with the Model Agreement on the Transfer of Foreign Prisoners. The recommendations, the Model Agreement as well as the Standard Minimum Rules for the Treatment of Prisoners can be found in the Compendium of the United Nations Standards and Norms in Crime Prevention and Criminal Justice (2006), published by the United Nations.

> [p]rison authorities should provide medical care free of charge to all prisoners, including foreign prisoners who may not have health insurance.

In terms of Rule 6 of the Standard Minimum Rules for the Treatment of Prisoners,[44] also called *the Basic Rule*, –

> [t]here shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, *national* or social origin, property, birth or other status … [Emphasis added]

in relation to prisoners. According to Principle 9 of the Basic Principles for the Treatment of Prisoners,[45] –

> … prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.

Although these instruments are not binding, they serve to stimulate a constant endeavour to protect the rights of foreign inmates.

In an analysis for the rights of prisoners, it is important to be cognisant of the fact that a penitentiary prisoner loses his/her autonomy at the prison gate and becomes wholly dependent on the state for his/her physical well-being. This is because their capacity or ability to make decisions about their destiny and implement them stands withdrawn or neutralised during the currency of their imprisonment.[46] In *Lee v Minister of Correctional Services*,[47] the Constitutional Court of South Africa, per Nkabinde J (quoting the court *a quo*), stated the following:

> A person who is imprisoned is delivered into the absolute power of the state and loses his or her autonomy. A civilised and humane society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation to see to the physical welfare of its prisoner. We are such a society and we recognise that obligation in various legal instruments. One is s 12(1) of the Correctional Services Act No. 111 of 1998, which obliges the prison authorities to "provide, within its available resources, adequate health care services, based on the principles of primary care, in order to allow every inmate [of a prison] to lead a healthy life". The obligation is also inherent in the right given to all prisoners by s 35(2)(e) of the Constitution to "conditions of detention that are consistent with human dignity".

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44 http://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx, last accessed 27 August 2014.

45 A/RES/45/111, 14 December 1990; http://www.un.org/documents/ga/res/45/a45r111.htm, last accessed 29 August 2014.

46 See *Mtati v Minister of Justice*, 1958 (1) SA 221 (AD) 22.

47 2013 (2) SA (CC), para. 77.

It is submitted that the above dictum applies to Botswana in equal measure. As the court pointed out in the *Tapela* case,[48] section 56 of the Prisons Act[49] enjoins the state to appoint a health officer to attend to the medical needs of prisoners. The Act requires such health officer to report on the health and treatment needs of the prisoners under his/her care and take such action as s/he considers necessary to safeguard or restore the health condition of the prisoners or prevent the spread of a disease, if applicable.[50] It must also be pointed out that, owing to their captive status and loss of individual autonomy, prisoners, especially foreign ones, are amongst the most vulnerable segments of any population. Thus, the state needs to do everything in its power, within the capacity of its resources, to meet their basic needs, such as those for health, food and sanitation.[51] There is no doubt that prisoners suffering from HIV and AIDS and denied ARV therapy are in an even worse position. Also indubitable is that, when a prisoner is kept in harsh prison conditions over a long duration, with the spectre of death by AIDS hovering over his/her head, s/he suffers cruel, degrading and inhuman treatment. Their condition is akin to a death-row phenomenon[52] and amounts to torture.

In prohibiting cruel, inhuman and degrading treatment, the Constitution of Botswana lays down both a legal and moral imperative that is to be observed. Thus, in the *Gamble* case, the US Supreme Court observed that, in some instances, failure to provide for inmates' medical needs may "actually produce physical torture or a lingering death".[53] In the local case of *Binda v The State*,[54] Chinhengo J stated that the intentional refusal of vital medical care can be characterised as inhuman treatment.[55] In that case, the accused – also an HIV-positive foreign inmate – was convicted of armed robbery by the magistrate's court and sentenced to ten years in prison. The appellant appealed his sentence to the High Court, contending that his being required to serve the mandatory term of imprisonment of ten years – while he was HIV-positive and was not given the ARV therapy afforded to other prison inmates

48 Para. 30.

49 Cap 21:03, Laws of Botswana.

50 Section 57(1). Some of the medical actions contemplated under the Act are forcible feeding, inoculation, vaccination, and any other treatment of the prisoner whether of a like nature or otherwise.

51 This point is expressed in Recommendation 12 of the UN Recommendations on the Treatment of Foreign Prisoners.

52 The *death-row phenomenon* refers to "the inhumane treatment resulting from special conditions on death row and often prolonged wait for executions, or where the execution is carried out in a way that inflicts gratuitous suffering" (Schabas, WA. 1993. *The abolition of the death penalty in international law.* Cambridge: Grotius Publications, p 127).

53 At 97.

54 2010 BLR 286.

55 (ibid.:287).

– constituted cruel, inhuman and degrading treatment, which offended against section 7(1) of the Constitution of Botswana. He also urged the court to hold that the refusal by the Botswana Government to extend ARV therapy to him as a foreign inmate had to be regarded as constituting an exceptional extenuating circumstance in terms of section 27(4) of the Penal Code[56] of Botswana. Section 27(4) thereof states that, –

> [n]otwithstanding any provision in any enactment which provides for the imposition of a statutory minimum period of imprisonment upon a person convicted of an offence, a court may, where there are exceptional extenuating circumstances which would render the imposition of the statutory minimum period of imprisonment wholly inappropriate, impose a lesser and appropriate penalty.

On the tenor of this provision, the appellant argued that the minimum mandatory punishment of ten years imposed on him by the lower court was wholly inappropriate and induced a sense of shock, regard being had to the fact that, as a foreign inmate, he was not allowed ARV therapy while in prison. The appellant argued that denying him such therapy while in prison constituted an exceptional extenuating circumstance as contemplated by the aforesaid section 27(4) and, thus, urged the court to derogate from the mandatory minimum sentence and impose a less severe one that took into account his particular circumstances. Although the High Court refused his appeal, it did, however, grant him leave to appeal his sentence against the backdrop of the aforesaid section 27(4) to the Court of Appeal.

In granting the leave to appeal, the High Court remarked that, although the discrimination in the provision of ARV between foreign inmates and citizen inmates was not inherent in or incidental to imprisonment, it was relevant in determining the appropriateness of the sentence to be imposed under the aforesaid section 27(4). The court proceeded to observe that there was no doubt that the applicant suffered severe mental anguish owing to prospects of death by AIDS, as he was being denied vital ARV therapy which was, however, being given to citizen inmates. The court also pointed out that Botswana's refusal to provide foreign inmates with such therapy was devoid of compassion.[57] In this connection, the court cited with approval the dictum of Nganunu CJ in *Moyo & Others v The State*,[58] where the Chief Justice blended justice with compassion, thus:[59]

56 Cap 08:01, Laws of Botswana.

57 The Botswana's National Vision promises that, by 2016, Botswana will be a compassionate, just and caring nation (Presidential Task Force. 1997. *Botswana National Vision*. Gaborone: Government of the Republic of Botswana): The denial of ARV therapy to foreign inmates belies these precepts.

58 Crim. App 12/06 [Unreported].

59 (ibid.:154).

> In the case of the 1st appellant I am thinking that in the circumstances of a 23[-] year[-]old man who is not a citizen of Botswana and who suffers from a disease where prison conditions can never be suitable for its treatment [–] even ignoring his assertion that he is not offered the treatment that citizens get, a 10[-]year sentence of imprisonment is grossly disproportionate and excessive in the light of the moral standards to the sanctity of life. I believe that the sentence should be characterised as inhuman and degrading and should be set aside … .

Chinhengo J concluded that, in his view, the "moral standards to the sanctity of life" mentioned by Nganunu CJ in the above case were also involved in the *Binda* case before him. The court concluded that, by denying foreign inmates ARV therapy, Botswana fell below the baseline standard of common human decency. This logic is also applicable to the *Tapela* case.

To this end, there can hardly be any divergence of opinion that the *Tapela* case is a historic victory for foreign inmates in prison. Its message is that foreign inmates, like all human beings, are endowed with inherent human dignity and are worthy of concern.

However, this judgment has one main weakness. Although the judge stated from the outset of his ruling that the case before him concerned "a constitutional challenge", and proceeded to conclude that, by denying ARV therapy to inmates, the Botswana Government had violated a panoply of constitutional human rights provisions identified above, he did not analyse these provisions (including relevant international law principles) and how they bore on the case before him. He merely glossed over the constitutional implications of the case without any serious analysis. Where the judge came close to analysing the facts of the case against the background of relevant human rights provisions in the Constitution, he merely pointed out in passing that the denial of ARV therapy to foreign inmates by the Botswana Government had implications on their right to life guaranteed under section 4 of the Constitution, and ignored discussing how the same conduct impacted on other constitutionally guaranteed rights such as freedom from cruel, inhuman and degrading treatment, and human dignity. In relation to international law, the court invoked Articles 2 and 16 of the African Charter dealing with the rights to non-discrimination and health, respectively, demonstrating how these provisions applied to the case before him. Thus, the court missed an opportunity to lay down a compact foundation for the development of a robust local jurisprudence dealing with prisoners' rights within the context of the Constitution and international human rights texts.

Concluding remarks

The inclusion of HIV-positive inmates in ARV therapy was long overdue in Botswana. The discrimination between citizen and non-citizen inmates in the provision of ARV therapy was fundamentally unjust and constituted

an offence against their dignity. As Sechele noted in the *Tapela* case, "[p]unishment in the form of imprisonment equalises all inmates regardless of their status and place of origin".[60] There is, therefore, no doubt that, despite its inadequate treatment of relevant constitutional provisions and principles of international law, the decision in *Tapela* represents an important starting point in the development of a human rights jurisprudence dealing with foreign inmates' rights in Botswana and beyond. It is a great stride for the realisation of prisoners' rights generally, and their right to health care services in particular. Principally, the case restates the fundamental principle that, once prisoners enter the prison gates, they shed their autonomy and become fully dependent on the state that is incarcerating them for their general well-being and that, during their incarceration, inmates are entitled to enjoy, to the fullest extent practicable, all their rights that are not inconsistent with the penological objectives of the corrections system. The decision also communicates an important message: in dealing with cases such as these, the court should blend justice with compassion and humaneness. There can be no doubt that the refusal to provide ARV therapy to foreign inmates is a cruel, brutal and unfeeling conduct that is bereft of all natural compassion or kindness. If a law is devoid of compassion and only concerns itself with philosophical notions that bear remotely on conceptions of *justice*, as understood by right-thinking members of society, it will one day be cast away by the people because it will have ceased to operate as an instrument of justice.

60 *Tapela* case, para. 32.

NOTES AND COMMENTS

The Competition Act, 2003: Out with the old and in with the new – Part 1

Bernhard Tjatjara*

Abstract

The Competition Act, 2003 (No. 2 of 2003) has created a culture of what can be viewed as serious, aggressive and straightforward competition regulation in Namibia. This article is one of the first attempts in Namibia to explain the changes brought about by the new Act. It explicates the aims of the Act and its scope of application, the establishment and functions of the Namibian Competition Commission and, lastly, the regulation of restrictive business practices that are deemed anti-competitive.

Introduction

The Competition Act, 2003,[1] heralds a major shift in Namibian competition law, from an Old Testament regime regulated by the now repealed law titled the Regulation of Monopolistic Conditions Act, 1953.[2] The Competition Act was produced at the end of a long and arduous path. It commenced with a feasibility study with the assistance of the European Union (EU), and then the drafting of a Competition Bill in 1996. Only after seven years of the Bill did the Competition Act[3] come into being. The enactment of the Competition Act was a step in the right direction by the legislature to rewrite the old law and remain consonant with government policies documented in Namibia's long-term development plan, Vision 2030.[4] The Competition Act launched a new era in competition law under the new constitutional dispensation featured in the Namibian Constitution of 1990.[5]

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1 No 2 of 2003.

2 No. 24 of 1953.

3 Published in the *Government Gazette* on 24 April 2003, and in full operation on 3 March 2008.

4 Available online at http://www.gov.na/vision-2030, last accessed 23 June 2014.

5 The Namibian Constitution ushered in a system of constitutional supremacy, which ended the epoch of parliamentary sovereignty that had prevailed before Namibia's independence in 1990.

The Competition Act appears to follow an eclectic approach, in that it has borrowed extensively from the competition law regimes of other jurisdictions, such as the EU and South Africa.

Concepts and rules that are new to Namibia have now been created and are being applied and tested in practice by the Commission and the courts.[6] This article aims to discuss current competition law in Namibia as codified in the Competition Act, and offers a brief overview of the Commission's functions. Lastly, an analysis of restrictive business practices proscribed under Chapter 3 of the Competition Act is presented.

Purpose and scope of application of the Competition Act

The overriding purpose and intention of the Competition Act is to maintain and promote competition in order to realise a number of economic and social objectives.[7] These include –

- the promotion of economic efficiency, adaptability and development,[8] as well as competitive prices and product choices for consumers[9]
- the promotion of employment opportunities and the advancement of Namibians' social and economic welfare,[10]
- international competitiveness,[11]
- market access and equitable opportunity of small- and medium-scale enterprises,[12] and
- the diversification of ownership particularly in favour of historically disadvantaged persons.[13]

The Competition Act applies to all economic activity within, or having an effect within, Namibia.[14] On the other hand, the Act does not apply to the activities of collective bargaining or collective agreement negotiated or concluded in terms of the Labour Act, 2011,[15] concerted conduct designed to achieve a non-commercial socio-economic objective,[16] or goods or services which the Minister of Trade and Industry, with the concurrence of the Commission,

6 *NaCC & Minister of Trade and Industry v Walmart Stores Inc.*, SA 41/2011 (Supreme Court of Namibia, unreported judgment).
7 See Preamble, Competition Act.
8 (ibid.:section 2(1)(a)).
9 (ibid.:section 2(1)(b)).
10 (ibid.:section 2(1)(c)).
11 (ibid.:section 2(1)(d)).
12 (ibid.:section 2(1)(e)).
13 (ibid.:section 2(1)(f)).
14 (ibid.:section 3(1)).
15 No. 11 of 2007; section 3(1)(a)), Competition Act.
16 (ibid.:section 3(1)(b)).

declares by notice in the *Gazette* to be exempt from the provisions of the Competition Act.[17] Additionally, the latter Act does not apply to activities of statutory bodies insofar as those activities are regulated by other laws.[18]

The Namibian Competition Commission

The regulator of competition in the Namibian market is the Namibian Competition Commission. It is a creature of statute, as the Commission was established under section 4 of the Competition Act.[19] The Commission is a parastatal body that falls under the Ministry of Trade and Industry.

The Commission assumes a role of *loco parentis* in enforcing the provisions of the Competition Act. The functions of the Commission, which are laudable, are stated in section 16 of the Act, and can be summed up as being centred on the following:

- Advocacy[20]
- Knowledge, information and expertise exchange[21]
- Research[22]
- Advice[23]
- Market transparency[24]
- Investigations[25]
- Consultations,[26] and
- International agreements.[27]

The Commission primarily has two Divisions responsible for the enforcement of the Act. The first is the Restrictive Business Practices (RBP) Division, and the second is the Mergers and Acquisitions (M&A) Division. Broadly stated, with regard to regulation of business conduct, the functions of the Commission are mainly investigative in nature.

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17 (ibid.:section 3(1)(c)).

18 (ibid.:section 3(3)).

19 Section 4 of the Act reads as follows: "There is established a juristic person to be known as the Namibian Competition Commission, which has –
(a) jurisdiction throughout Namibia;
(b) is independent and subject only to the Namibian Constitution and the law; and
(c) must be impartial and must perform its functions without fear, favour or prejudice".

20 (ibid.:section 16(1)(a)).

21 (ibid.:section 16(1)(b)).

22 (ibid.:section 16(1)(c)).

23 (ibid.:section 16(1)(d)).

24 (ibid.:section 16(1)(e)).

25 (ibid.:section 16(1)(f)).

26 (ibid.:section 16(1)(g)).

27 (ibid.:section 16(1)(h)).

The RBP Division is tasked with investigating and evaluating alleged restrictive practices and applications for exemptions from the Competition Act. It also deals with negotiating and concluding consent orders, reviewing of contracts or agreements between businesses, drafting of advisory opinions at request of stakeholders, businesses or in its own stead and finally assists businesses and other stakeholders with proactive compliance with the Competition Act through publications education programmes and the media.

The RBP Division is run by a Director, under whom fall a Senior Law Officer and two Law Officers, as well as one Senior Economist and two Economists. These individuals are responsible for the day-to-day enforcement of the provisions of Chapter 3 of the Competition Act. The Director assumes the overall oversight and supervisory functions for the Division's work.

The M&A Division deals with business mergers. It investigates the impact of mergers and acquisitions on competition. It can approve a business merger with or without conditions or can decline a merger if it has an impact on competition in the market in Namibia.

The M&A Division is run by a Director, under whom fall a Senior Law Officer and two Law Officers, as well as one Senior Economist and two Economists. These individuals are responsible for the day-to-day enforcement of the provisions of Chapter 4 of the Competition Act. The Director assumes the overall oversight and supervisory functions for the Division's work.

There is additionally a third Division, namely the Economics and Research Sector (ERS) Division. It focuses on research, primarily that which is requested by the Minister of Trade and Industry, but also on research generated on its own initiative as regards issues of economic or public interest pertaining to competition in the market. The ERS Division also consults or advises the Minister of Trade and Industry on issues of economic or public interest.

The ERS Division consists mainly of economists who assist with economic research in identified sectors. Like the other two, this Division is also headed by a Director.

At the Commission's helm is the Secretary to the Commission (also known as the Chief Executive Officer)[28] who, subject to the directions of the Commission, is responsible for the formation and development of an efficient administration[29] and the organisation, control, management and discipline of

28 The current incumbent is Heinrich Gaomab II. He is the first to fill the position since the Commission's establishment.

29 Section 13(2)(a), Competition Act.

Commission staff.[30] The Secretary/CEO also functions as the Commission's Accounting Officer.[31]

Prohibited restrictive business practices

Two types of restrictive business practices are proscribed under Chapter 3 of the Act.[32] They are discussed below.

Restrictive agreements, decisions and concerted practices

Part I of Chapter 3 of the Competition Act deals with restrictive agreements,[33] decisions and concerted practices.[34]

The legal yardstick for testing whether an agreement, decision or a concerted practice is prohibited under the Act is contemplated in section 23(1). This section proscribes agreements, decisions and practices by two or more undertakings which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia or part of Namibia, unless they are exempt in accordance with the provisions of Part III of the Act. The said section applies to parties in horizontal[35] and vertical relationships.[36] Prohibited practices include –

- fixing of prices or unfair trading conditions between competitors[37]
- dividing or allocating of markets by competitors[38]
- collusive tendering[39]
- minimum resale price maintenance[40]

30 (ibid.:section 13(2)(b)).

31 (ibid.:section 17(4)).

32 Chapter 3 is headed "Restrictive business practices".

33 An *agreement* is defined in section 1 of the Act as including "a contract or arrangement, whether or not legally enforceable". This definition is trite in EU competition law; see e.g. Case 41/69 *ACF Chemiefarma v Commission*, [1970] ECR 661, para. 112; Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck & Others v Commission*, [1980] ECR 3125, para. 86; Case T-7/89 *Hercules Chemicals v Commission*, [1991] ECR II-1711, para. 256.

34 A *concerted practice* is defined in section 1 of the Act to mean "deliberate conjoint conduct between undertakings achieved through direct or indirect contact that replaces their independent actions".

35 (ibid.:section 23(2)(a)), which relates to parties trading in competition that is between competitors.

36 (ibid.:section 23(2)(b)), which relates to parties such as an undertaking and its customers or suppliers, or both customers and suppliers.

37 (ibid.:section 23(3)(a)).

38 (ibid.:section 23(3)(b)).

39 (ibid.:section 23(3)(c)).

40 (ibid.:section 23(3)(d)).

- limiting of market access, production, outlets or investments[41]
- price discrimination,[42] and
- tying.[43]

Underpinning section 23(1) of the Act are the "object or effect tests". It follows as a result of the tests that, if an agreement, decision or concerted practice of two or more undertakings does not have an object to prevent competition or does not prevent or substantially lessen competition in the market in Namibia, the Competition Act does not come into play.

Abuse of dominant position

Part II of Chapter 3 of the Act governs abuse of dominance.

The legal standard: Section 26 of the Act

Section 26(1) of the Act states the following:

> Any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market in Namibia, or a part of Namibia, is prohibited.

Thus, the governing criterion used in section 26(1) of the Act[44] on the abuse of dominance was intentionally widely formulated, namely that "any conduct ... of a dominant position ... is prohibited".

The terms *dominance* and *abuse of dominance* are not defined in the Act. Due to this lack of definition, a test is used to determine which firm is dominant in the market and which is not. The test for dominance is expressly laid down in Rule 36 of the Rules Made Under Competition Act. Thus, a firm is *dominant* in the market if –[45]

- it has at least 45% of that market
- it has at least 35%, but less than 45%, of that market, but has market power
- it has less than 35% of that market, but has market power.

41 (ibid.:section 23(3)(e)).
42 (ibid.:section 23(3)(g)).
43 (ibid.:section 23(3)(g)).
44 See also section 8 of South Africa's Competition Act, 1998 (No. 89 of 1998).
45 Rule 36(1), Rules Made Under Competition Act.

Market power is the criterion determining dominance when a firm has less than 45% or 35% of the market.[46] Under EU law, *dominance* was defined in the *locus classicus* judgment of *Hoffmann-La Roche v The Commission* as follows:[47]

> [I]t is the power to behave to an appreciable extent independently of competitors, customers, and consumers.

Section 26(2) of the Act spells out the nature of the conduct that constitutes an *abuse of dominance* in a market. These include the following:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting or restricting production, market outlets or market access, investment, technical development or technological progress;
(c) applying dissimilar conditions to equivalent transactions with other trading parties; and
(d) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject-matter of the contracts.

It is not the purpose of this article to go into detail as to what the prohibitions entail.

The threshold requirement for applying section 26(1) of the Act

It follows that section 26 of the Act does not apply automatically to all abuses for which it is alleged that the firm (a business undertaking) is in a dominant position in the relevant market and is abusing its dominance. Section 24 of the Act comes into play as well in this regard. Thus, a subsequent Government Notice[48] defines that Part II of Chapter 3 of the Act applies to dominant firms with a threshold (assets or annual turnover) of above 10 million Namibia Dollars. This means that the Commission will only be concerned with firms

46 *Market power* is defined in Rule 36(2) of the Rules Made Under Competition Act as "the power an undertaking or undertakings have to control prices, to exclude competition, or to behave to an appreciable extent independently of its competitors, consumers or suppliers". In EU law, this definition is attached to a meaning of a *dominant position*. See also *Hoffmann-Le Roche v Commission*, Case No. 85/76, (1976) ECR at 61; *United Brands & United Brands Continental BV v The Commission of the European Communities*, (1978) EUECJ C-27/76; (1978) 1 CMLR 429.

47 Case No. 85/76, (1976) ECR, para. 41.

48 No. 306, published in *Government Gazette* No. 5107 of 24 December 2012.

that meet the stated threshold requirement when there are allegations of abuse of dominance.[49]

Conclusion

The coming into force of the Competition Act is to be welcomed for many reasons. One is that it can be seen as a sign by the legislature in Namibia that it will follow global trends in regulating competition at home. Another reason is that it is the first comprehensive source of competition law in Namibia to date.

Clearly, the overarching function of the Commission, as dictated by the Act, is the maintenance and promotion of healthy competition in the market in Namibia. The Commission also enforces competition law through advocacy, investigations of contraventions of the Act, and giving non-binding advisory opinions to stakeholders and members of the public on issues relating to competition law.

49 The Namibian Competition Commission's contact details are as follows: Shop No. 14, Mezzanine Floor, BPI House, Independence Avenue, Windhoek, Namibia; telephone +264 61 22 46 22; fax +264 61 40 19 00/1; www.nacc.com.na.