

The independence of the judiciary in pre-independent Namibia: Legal challenges under the pre-independence Bill of Rights (1985–1990)

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Introduction

When Namibia became independent in 1990, the Constitution provided that all existing laws – many enacted by either the South African Parliament, the South African Administrator-General, or Namibian authorities legalised by South Africa – remained intact.¹ The Constitution's legal history as part of the greater southern African Roman Dutch legal system dates back to 1919. After World War I, Namibia became a Class C mandate of the League of Nations.² It mandated *His Britannic Majesty to be exercised on his behalf by the government of the Union of South Africa*.³

Proclamation 1 of 1921 gave the Administrator of South West Africa (SWA) legislative powers. Act No. 42 of 1925 of the South African Parliament instituted a Constitution for the territory.⁴ In 1919, South Africa established the High Court of SWA and Roman Dutch law as the common law of the territory under Administration of Justice Proclamation 21 of 1919. Although the wording of Proclamation 21 is not clear, it seems its objective was also to place the High Court of SWA under the supervision of the High Court in the Province of the Cape of Good Hope.⁵

If Proclamation 21 of 1919 left some doubt as to the independence of the High Court of SWA, the Appellate Division Act, 1920 (No. 12 of 1920) established the Appellate Division of the Supreme Court of South Africa as the court of appeal for the SWA court. Consequently, the highest court of the Union of South Africa gained jurisdiction over the SWA legal system.

1 Article 140, Namibian Constitution.

2 The Mandate Commission of the League of Nations, decision dated 17 December 1920.

3 Carpenter, G. 1987. *Introduction to South African International Law*. Durban: Butterworths, p 23; Dugard, J. 1973. *The South West Africa/Namibia dispute*. Berkeley: University of California Press, p 68.

4 Carpenter (ibid.:22).

5 Roman Dutch common law was applicable in SWA as existing and applied in the Province of the Cape of Good Hope.

The independence of the judiciary in pre-independent Namibia

The Appellate Division of the Supreme Court of South Africa ruled in 1924 in *Rex versus Christians* that South Africa held sovereign power over SWA.⁶ The South African government nevertheless accepted its status as the sovereign of SWA after the *Christians* case. The case dealt with a leader of the Bondelswartz community in southern SWA, who was charged with high treason. He alleged that, in terms of the law, he could not be prosecuted since the League of Nations – and not South Africa – was the sovereign authority in SWA.

Post-World War II developments

In 1948, the National Party won the general elections in South Africa. The new government immediately started to administrate SWA as a fifth province, and accordingly implemented the policy of apartheid. In South Africa and in the mandated territory of SWA, the South African government maintained the policy of an integrated southern Africa.⁷

As part of this integration plan, the High Court of SWA was transformed into the South African Provincial Division of the Supreme Court of SWA.⁸ The name says it all: the SWA Court gained the same status as its counterparts in the four provinces of South Africa. At the same time, the legal system was logged into the legal system of the apartheid government and subjected to the jurisprudence of its Supreme Court of Appeal.

In 1975, South Africa set up structures for an internal settlement (excluding the United Nations and the liberation movements). The so-called internal parties were to draw up a new constitution and lead Namibia to independence in 1976. The Turnhalle Consultation, named after the historic Turnhalle building where the consultation took place, eventually led to the so-called Transitional Government of National Unity, excluding only the South West Africa People's Organisation, SWAPO, this time.⁹

In 1977 South Africa empowered the State President of the Republic of South Africa to promulgate legislation by proclamation to prepare for SWA's independence. Simultaneously, the Administrator-General, the South African government's representative in what was by then called SWA/Namibia, was given extensive legislative powers.¹⁰

6 *R v Christians* 1924 AD 101.

7 See D'Amato, A. 1966. "The Bantustan proposals for South West Africa". *The Journal of Modern African Studies*, 4(2):177–192.

8 Supreme Court Act, 1959 (No. 59 of 1959).

9 Carpenter (1987:23).

10 (ibid.).

The independence of the judiciary in pre-independent Namibia

In 1978, the Security Council of the United Nations (UN) adopted Resolution 435, which provided for South Africa to withdraw from the territory, for UN-supervised elections and, finally, for independence.

Between 1978 and 1985, South Africa experienced several failures in its attempt to establish an internationally acceptable internal settlement without including the liberation movements, SWAPO and the South West Africa National Union (SWANU). In 1985, the State President of South Africa, acting in terms of section 38 of the South West Africa Constitution Act, 1968 (No. 39 of 1968), issued South West Africa Legislative and Executive Authority Establishment Proclamation R101 to establish a so-called Transitional Government of National Unity (TGNU).¹¹ The Proclamation made provision for a Legislative Assembly and a Cabinet.

Proclamation R101 included a Bill of Fundamental Rights and Objectives in an annexure, as well as an article providing for the review of laws that contradicted the Bill of Rights.¹² As we shall see, the Supreme Court of SWA approached the Bill of Rights in a liberal, purposive manner. Despite the political pressure of the armed struggle and a transitional government which still operated in the spirit of its colonial masters, the court protected the rights of citizens in the spirit of a constitutional democracy in the making.

It is unfortunate that the South African Appellate Division, which remained the final legal authority in Namibia, did not deviate from their stance on parliamentary sovereignty.¹³ It ignored the challenge of the SWA Supreme Court to evaluate the values and aims of the Bill of Rights and followed the traditional, rigid approach by looking primarily to the intention of the legislator and the legal interpretation surrounding the issues.

Neither the interim government nor the highest court in South Africa gave any indication to the international world or to SWAPO that they were serious about the implementation of a Bill of Rights. The international community had to wait

11 The TGNU was a creation of the South African government. Its aim was to work towards a negotiated settlement with the so-called internal parties – mostly those groups who were part of the Turnhalle negotiations. The TGNU operated in the country between June 1985 and March 1989. The real political power and sovereignty, however, remained in South African hands. The Administrator-General, as the South African government's representative, remained the main representative of the sovereign in Windhoek.

12 See article 34, Proclamation R101 of 1985.

13 See later herein under "Constitutional developments after Katofa" for a discussion of the Appeal Court's judgments in cases involving SWA/Namibia constitutional issues.

several more years for the interim government and the internal parties to catch up with the insights of the High Court.

Civil society and the Churches, by and large, did not support the efforts by the South African government, the Democratic Turnhalle Alliance (DTA) and other internal parties to establish independence from South Africa without including SWAPO. They also did not see the reforms of the interim government as a significant development. Yet, with the promulgation of Proclamation R101 of 1985 and its Bill of Rights, Namibians did not hesitate to claim those rights and to approach the court to enforce them.

Proclamation R101 was not a constitution per se: Namibia was not a sovereign state at the time, and the Bill of Rights was only an annexure. However, it was a significant piece of legislation. While still excluding SWAPO from the process, the South African government intended to put Namibia on the path of independence with the Proclamation. And the courts interpreted it as if it were a constitution.

The transitional government, on the other hand, constantly used its right of appeal to limit the application of their own initiative: an interim constitution, with an entrenched Bill of Rights.

Katofa: The first challenge for the interim government

It did not take long for the transitional government to be confronted with human rights issues. The first case did not initially deal with the Bill of Rights of Proclamation R101, but with another notorious Administrator-General Proclamation: AG 26 of 1978.¹⁴ The latter Proclamation severely restricted the rights of people detained without trial or access to a court of law.¹⁵ The *Katofa*

14 Section 2 of the Proclamation was the heart of the restriction upon the individual's personal freedom:

2 (1) *If the Administrator-General is satisfied:*

(a) *that the peaceful and orderly constitutional development of South West Africa is obstructed, hindered or threatened by violence against or intimidation of, or the threat or promotion of violence against or intimidation of, any particular person or persons who are members of any particular class, group or organisation, or persons generally; and*

(b) *that any person committed or attempted to commit, or in any manner promotes or promoted the commission of such violence or intimidation, he may issue a warrant for the arrest and detention of such person.*

15 *Katofa v Administrator-General for South West Africa and Another* 1985 (4) SA 211 (SWA); *Katofa v Administrator-General for South West Africa and Another* 1986 (1) SA 800 (SWA).

The independence of the judiciary in pre-independent Namibia

case was heard shortly before the enactment of Proclamation R101. The legality of Proclamation AG 26 of 1978 in the light of the Bill of Rights was later argued before the Supreme Court of Appeal.

Katofa¹⁶ was the brother of Josef Katofa, a detainee under Proclamation AG 26 Of 1978. The applicant brought a typical habeas corpus writ,¹⁷ requesting the Administrator-General to produce the person of Josef Katofa to the court, and to furnish information to the court as to whether the latter was under arrest, on what charges he had been arrested, why he was being detained, and granting him access to a legal practitioner.

While there is nothing in the Proclamation preventing a detainee access, Josef Katofa's attorney was not allowed to see him. Since the detainee also did not see a magistrate or a medical practitioner as prescribed by the Proclamation, his attorney wrote a letter to the Administrator-General, stating that the detention was illegal and demanding his client's release.

In his answering affidavit, the Administrator-General insisted that since the Proclamation gave him the authority to lay down conditions of detention, he had the discretion to allow or disallow visits by a lawyer. He was also obliged to give reasons for the detention to the detainee, but not to anyone else. The Administrator-General stated that the detainee had not asked for these reasons, and neither had he requested that he be visited by an attorney.

This fundamentalist reliance on textual nuances was typical of the South African authorities. Even the long detention of Joseph Katofa was concealed by detaining him under different Proclamations: he was initially detained in terms of section 4(2) of Proclamation AG 9 of 1977, and on 30 May 1984 in terms of section 5 bis of Proclamation AG 9 of 1977.

On 14 November 1984, Katofa was arrested and detained in terms of section 2 of Proclamation AG 26 of 1978. The Administrator-General stated that he was convinced that the detainee was a person as provided for in the stated section, without referring to any specifics that confirmed this conviction.¹⁸

16 The applicant, Katofa, is identified in the case record as the brother of Josef Katofa, the detainee on whose behalf the application was made. See *Katofa v Administrator-General for South West Africa and Another* 1985 (4) SA 211 (SWA), p 213.

17 The court made no distinction between *habeas corpus* and the Roman Dutch remedy of *homine libero et exhibendo*. It seems as if the court used the terms interchangeably, without referring to the differences between them at all. See also footnote 21.

18 1985 (4) SA 211 (SWA), pp 215–216.

The independence of the judiciary in pre-independent Namibia

The Supreme Court of SWA would have nothing of this, however. While not referring specifically to the annexed Bill of Rights of Proclamation R101, since the Proclamation only came into operation a month later, it concentrated on the rights of the individual. The court used very specific constitutional language. It referred to liberty and the right to see an attorney as fundamental rights, with Judge Berker referring to the problem as “one of the most basic constitutional importance”.¹⁹

The court insisted that the authorities comply with all the conditions set for depriving the detainee of his liberty in the Proclamation. In answer to a point *in limine* by the respondent that the case was not a matter of urgency since the detainee had been arrested more than a year earlier, the court responded that –²⁰

... the present case concerned the liberty of the subject. As such it involved the infringement of a fundamental right and it was of necessity one of urgency.

The court made it clear that the habeas corpus writ or the Roman Dutch remedy of *de homine libero et exhibendo*²¹ intend to protect the liberty of subjects. Quoting *Principal Immigration Officer and Minister of Interior v Narayansamy*,²² the court stated that every individual –²³

... is entitled to ask the Court for his release, and the Court is bound to grant it, unless there is some legal cause for his detention.

The fact that a court does not have jurisdiction “to pronounce upon the functions or recommendations of the review committee”²⁴ does not mean that a detainee cannot approach the court if it desires a remedy other than reviewing a recommendation of the review committee.

In this particular case, the court found that the ipse dixit of the Administrator-General that, at the time of the arrest and the time of the application, he was convinced the detainee was a person as provided for in section 2 of the Proclamation, was not good enough to relieve him of the burden to prove that

19 (ibid.:224).

20 (ibid.:216).

21 Following *Principal Immigration Officer and Minister of Interior v Narayansamy* 1916 TPD 274, the court makes no difference between the two remedies. In the Supreme Court of Appeal, the differences became a bone of contention.

22 1985 (4) SA 21 (SWA) at 216.

23 (ibid.:222).

24 Proclamation AG 26 of 1978, section 4(d).

The independence of the judiciary in pre-independent Namibia

the detainee had been legally detained. Since the Proclamation provided for the Administrator-General to furnish the detainee with reasons for the detention, why should a court be deprived of that information?²⁵

Under the circumstances, the court could not find that the detainee had been legally detained. Since there had not been strict and punctual compliance with the provisions of sections 5(1) and 6(1) of the Proclamation, which allowed the detainee to be visited by a magistrate and a medical practitioner for specifically prescribed intervals, although not conclusive, this was an indication that the detainee had been detained illegally.

Access to legal representation, a fundamental right in liberal constitutional democracies, was also taken seriously by the court and interpreted in a broad manner. The fact that the Administrator-General was enabled to lay down conditions for the detention of the detainee did not imply that he could refuse the detainee his fundamental right to legal representation. In an almost prophetic manner, the court relied heavily on *Mandela v Minister of Prisons*²⁶ to underline the fact that the right of access to one's legal advisor survived incarceration, even under security legislation, unless it was attenuated by legislation. In the case before the court, the advice of an attorney was not excluded and, in a sense, was implied.

Furthermore, by necessary implication, one cannot find that any of the provisions would be defeated if a detainee consulted with his attorney. Indeed, the opposite seems to be the case:

[S]ection 7(2) makes provision for a detainee to submit his case in writing for investigation by a review committee. Who better to prepare his case, even if he can write, than his own attorney? Section 7(4) seems to indicate that this in fact was in the lawgiver's mind because that section provides that no person, "other than a person in the service of the State whose presence is considered necessary by the chairman", shall attend proceedings of the review committee. In other words, while the documentation for the attention of the review committee can be prepared by the attorney, there is specific provision that he may not attend the committee proceedings.

Consequently, the application was granted. The Administrator-General was ordered to grant Katofa access to his attorney, and a rule nisi (interim order) was granted.

25 *Katofa v Administrator-General for South West Africa and Another* 1985 (4) SA 211 (SWA) at 222.

26 1983 (1) SA 938 (A) at 957D.

The independence of the judiciary in pre-independent Namibia

On 17 June 1985, a mere seven days after the judgment, Proclamation R101 of 1985 came into effect. The functions of the Administrator-General were transferred to the Transitional Government, more specifically the Cabinet of the Executive Authority. Consequently, the affidavit in reply to the rule nisi is made by the Chairman of the Cabinet of SWA, Mr Dawid Bezuidenhout. Mr Bezuidenhout again made only an *ipsi dixit* statement to the effect that, after familiarising himself with all the documents, he was satisfied that the release of the detainee “at this time is not advisable”.²⁷ The court rejected his plea:²⁸

... in the interests of the security of the State and of the public interest, he is entitled to refuse to give reasons or to place the necessary information before this Court is sound in law [*sic*].

In terms of the Proclamation, the court stated, the Administrator-General or the Cabinet had no privilege to withhold reasons for a detention: such privilege was only to withhold information.²⁹

As a result, the rule was made final. The Cabinet was not satisfied with the result and appealed. The appeal was a huge blow for the recognition of the new quasi-constitutional development in Namibia. While the Supreme Court of Appeal rejected the appeal on the grounds that Mr Bezuidenhout did not relieve the burden of proving that the detainee was in legal detention, it also addressed the review powers of the courts in terms of Proclamation R101.³⁰

The respondent held that, since section 2 of Proclamation AG 26 of 1978 was in conflict with the Bill of Fundamental Rights and Objectives of Proclamation R101 of 1978, the former ceased to exist as a law. However, section 34 of Proclamation R101 of 1985 did not make provision for legislation that was in clear contradiction of the Bill of Rights. Thus, the court of Appeal ruled that existing legislation remained in place after the enactment of Proclamation R101 –

... if it was constitutionally enacted by a competent authority.

It falls outside the scope of this paper to go into the interpretation of section 34 of Proclamation R101. Suffice it to quote counsel for Katofa on this point:³¹

27 *Katofa v Administrator-General for South West Africa and Another* 1986 (1) SA 800 (SWA), p 805.

28 (*ibid.*).

29 Section 4(2) of the Proclamation.

30 *Kabinet van die Tussentydse Regering vir Suidwes-Afrika en 'n Ander v Katofa* 1987 (1) SA 695 (A).

31 (*ibid.*:710).

The independence of the judiciary in pre-independent Namibia

The absurdity (and tautology in this respect) is two-fold: if it was not enacted by a competent authority, or was not “constitutionally enacted” for any other reason, it could hardly be an “existing law”. ... In the second place, the Court’s approach requires it to be accepted that at the same time as a new test for statutory validity was introduced (“met sy strenger vereistes”), the lawgiver provided that any existing law survived if it either met the stringent substantive requirements thus imposed or if it met the anodyne procedural requirement of being “constitutionally enacted”. ... [T]his approach ... fails to adopt the correct approach to interpreting constitutional provisions ... The proclamation remains a constitutional, right-giving statute, ... and is to be interpreted in accordance with the special rules which apply to such provisions.

The *Katofa* case was to be repeated time and again in the years between 1985 and 1989, when the transition to an independent Namibia started under UN supervision.

Constitutional developments after Katofa

Two cases – one initiated by the Council of Churches when the transitional government refused South African clergyman Frank Chikane entrance into Namibia, and the other initiated by Namibian-based community activist Uli Eins³² – set the scene for constitutional interpretation in Namibia.

Both cases dealt with applications attacking the constitutionality of section 9 of the Residence of Certain Persons in South West Africa Regulation Act, 1985 (No. 33 of 1985). The Act empowered the transitional government to deny people who were not born in SWA/Namibia residence and entrance rights under certain circumstances. In the *Eins* case, the applicant approached the court because, in terms of an Act of the Legislative Assembly, he could be unconstitutionally removed from the territory.

Eins was born in Germany. Since 1973, he had lived unrestrictedly in SWA as a South African citizen since SWA was not a sovereign country. Eins alleged that section 9 of the said Act was unconstitutional since it unreasonably discriminated against residents not born in the territory vis-à-vis people born in the territory, members of the Defence Force, and South African public servants living and working in the territory.³³

32 In both cases, the transitional government appealed against the judgments. See *Chikane v Cabinet for the Territory of South West Africa* 1990 (1) SA 349 A and *The National Assembly for the Territory of South West Africa v Eins* 1988 (3) SA 369 A. The cases in the court a quo were not reported.

33 Section 9(1) makes provision for prohibiting persons from entering the territory, or ordering some already in the territory to leave if their presence endangers the security of the territory or is likely to engender a feeling of hostility between members of the different population groups of the territory. The Act excludes persons born in the territory (section 9(1)(a)),

The independence of the judiciary in pre-independent Namibia

Eins³⁴ attacked section 9 of the Act on the grounds that it was in conflict with Articles 3, 4, 9 and 10 of the Bill of Rights.³⁵ The Cabinet opted to dispute Eins's locus standi rather than the constitutionality of an Act that ignored the constitutional developments in the territory.

Following the precedent of the *Katofa* case, the Supreme Court of SWA was serious in developing a constitutional dispensation for Namibia. It was not willing to be tied down by technical questions, but wanted to get to the crux of the matter: did the Act infringe on the constitutional rights of a vast number of people in the territory? Or, to put it in a more constitutional framework, was the court obliged to exercise its powers in terms of article 19 of Proclamation R101 and declare section 9 of Act 33 of 1985 unconstitutional?

The court refused to answer the question of locus standi in the abstract. Locus standi depends on the nature of the litigation, in this case an application based on constitutional rights that were severely limited by the same people who had given the territory Proclamation R101 and its annexed Bill of Rights.

persons "rendering active service in the territory in terms of the Defence Act, 1957" (section 3(2)(d)), and persons employed in the territory in the service of the Government of the Republic of South Africa or the Government of Rehoboth or in the Government service of the territory (section 3(2)(e)).

34 *The National Assembly for the Territory of South West Africa v Eins* 1988 (3) SA 369 A, p 387.

35 Article 3 is a general equality clause:

Everyone shall be equal before the law and no branch or organ of government nor any public institution may prejudice nor afford any advantage to any person on the grounds of his ethnic or social origin, sex, race, language, colour, religion or political conviction.

Article 4 deals with the right to a fair trial. Article 9 is a non-discriminatory clause including categories such as ethnic, linguistic and religious groups and their right to enjoy, practise, profess and promote their cultures, languages, traditions and religion. Article 10 allows everyone lawfully present within the borders of the country the right to freedom of movement and choice of residence.

The independence of the judiciary in pre-independent Namibia

The Supreme Court of SWA used its powers in terms of article 19(1)³⁶ of Proclamation R101 and declared section 9 of Act 33 of 1985 –

... unconstitutional, invalid and unenforceable for want of compliance with the Bill of Fundamental Rights incorporated in Proclamation R101 of 1985.

On the day that Justice Hendler declared section 9 unconstitutional, the Council of Churches in Namibia attacked section 9 of Act 33 of 1985 after the Cabinet refused the South African clergyman and activist, Frank Chikane, entrance into Namibia, on the grounds that it was incompatible with the Declaration of Fundamental Freedoms. While the Declaration embodied a fundamental rule against discrimination, section 9 differentiated between two categories of people. The Supreme Court of SWA dealt with the issue in a progressive manner. The *Eins* judgment was made applicable in the *Chikane* case and the notice prohibiting Chikane entrance into the territory was declared invalid and of no legal effect.

However, the transitional government was more interested in restricting their political opponents than serving their own Constitution. They appealed against both the Chikane and the Eins judgments. Although the appellant in the Chikane case did not rely on the unconstitutionality of section 9 of Act 33, both parties and the court agreed that the Appeal Court should also consider the judgment of the *Eins* case, ruling that the said section 9 was unconstitutional. The court made the issue a legal one by asking if the classification was reasonable. The reasonableness again had to be determined by the intention of the Act, and by whether the differentiation had a rational relation to the result that was to be attained by the classification.

On the question as to whether section 9 was unconstitutional since it excluded the audi alteram partem rule (the right of a party to be heard), the court again begins with the intention of the legislation. As a point of departure, it also works with the rule of ut res magis valeat quam pereat, i.e. that the legislator is presumed to have made a valid and effective provision.

36 The article reads as follows:

- 19 (1) *The Supreme Court of South West Africa shall be competent to inquire into and pronounce upon the validity of an Act of the Assembly in pursuance of the question -*
- (a) *whether the provisions of this proclamation were complied with in connection with any law which is expressed to be enacted by the Assembly; and*
 - (b) *whether the provisions of any such law abolish, diminish or derogate from any fundamental right.*

The independence of the judiciary in pre-independent Namibia

From here, the court attempts to make section 9 compatible with a Bill of Rights by departing from the position that it would prefer a construction in which the Act and the Rule of Law are not necessarily incompatible if a minimum allowance for the *audi alteram partem* is included in the Act.

The court approached Eins's challenge in the same manner. Justice Rabie restricted the application of the Bill of Rights by pointing out that Eins, a South African citizen living in SWA/Namibia, had always been restricted in his residence rights. Section 9 of Act 33 of 1985 was just a repetition of earlier proclamations, he pronounced, and Eins could have faced deportation in terms of the security legislation. He further ruled that, since restrictions to the enjoyment of certain residential rights had always been part of Namibian law, the categorisation of section 9 could not be seen as unreasonable and, therefore, a derogation from the Bill of Rights was permissible.

Hence, the Supreme Court of Appeal of South Africa ignored the basic rule of constitutional interpretation: to interpret fundamental rights in a broad and purposive manner. Instead, the explicit rights given by the Bill of Rights were subjected to old colonial proclamations, notably the oppressive security laws.

The political context of the Chikane and Eins judgments was, however, the invisible subtext. While the SWA/Namibian court prepared itself for an independent constitutional democracy, the Appellate Division was still trapped within the limited scope given to it by the apartheid government. And the 'total onslaught',³⁷ which needed special measures, seems to be the unwritten agenda behind the court's strictly textual interpretation. On the restrictions of rights, the judge had the following to say:³⁸

Daarbenewens is 'n persoon soos die respondent, ingevolge art[.] 5 van die Wet op Oproerige Byeenkomste 17 van 1956, onderworpe aan verwydering uit die gebied indien hy skuldig bevind word aan 'n misdryf in art[.] 2 van daardie Wet bedoel (wat, onder andere, betrekking het op die verwekking van 'n gevoel van ernstige vyandigheid tussen verskillende dele van die inwoners van die gebied. . . . Daarbenewens kan 'n persoon wat 'n gevoel van ernstige vyandigheid tussen die verskillende dele van die inwoners van die gebied verwek ingevolge voormelde art[.] 5 uit die gebied verwyder word. 'n Persoon beskik slegs oor regte vir sover dit nie deur die een of ander Wet ingeperk of weggeneem is nie. [Emphasis added]³⁹

37 The term was used by the South African government and the ruling party to define what they called the communist onslaught against South Africa.

38 *Eins v The National Assembly for the Territory of South West Africa*, p 371.

39 "Besides, a person defined like the respondent is, in terms of section 5 of Act 17 of 1956, subjected to removal from the territory if he is convicted of a crime in terms of section 2 of the said Act (which includes the creation of a feeling of serious enmity between different

The independence of the judiciary in pre-independent Namibia

Both examples in the quotation refer to government action against apparent political activism. And here the South African Court missed an important issue: the Bill of Rights was included in the Proclamation to end discrimination and to prevent history from repeating itself. The mere fact that the rights of the applicant had been restricted before was a good reason why the Bill of Rights should have been interpreted in a broad, non-restrictive manner.

The ‘total onslaught’ mindset of the ruling National Party in South Africa resulted in a series of legislation aimed at restricting the powers of the prosecutorial authority and judiciary in SWA/Namibia. The new Criminal Procedure Act, 1977 (No. 51 of 1977) is a case in point. Acting Supreme Court of Namibia Judge AJA Leon (as he then was) later made the following observation regarding the implementation of section 3 of the Act to SWA/Namibia:⁴⁰

It was made applicable by an apartheid government bent on domination[,] no doubt determined to enforce its political will on the independence of the prosecuting authority in South West Africa. I cannot for one moment believe that that would be in accordance with the ethos of the Namibian people.

More legal challenges after the Chikane case

In *The Free Press of Namibia (Pty) Ltd v Cabinet for the Interim Government of South West Africa*⁴¹ the court set aside an order in terms of section 6 bis of the Internal Security Act, 1950 (No. 44 of 1950), which required the applicant, *The Namibian* newspaper, to deposit an amount of R20,000 as a condition of registration. The respondents admitted in their affidavit that the Cabinet had taken issue with the editor because she had written critical articles of Cabinet members while working for another newspaper. They nevertheless used their power in terms of draconian security legislation since they believed that criticism of Cabinet members would eventually endanger state security.

The court emphasised the right to freedom of expression in the Bill of Rights and found no way in which it perceived the criticism to be a danger for state security. It is interesting that the Minister of Home Affairs in South Africa used the same tactics against the Afrikaans newspaper, *Vrye Weekblad*.⁴²

sections of the population of the territory). ... Besides, a person who creates a feeling of serious enmity between different sections of the population of the territory can be removed from the territory in terms of the mentioned section 5. An individual only has rights in as far as they have not been limited or removed by an Act.” Emphasis added; translation NH.

40 *Ex Parte Attorney-General: In re The Constitutional Relationship Between The Attorney-General and The Prosecutor-General*, 1998 NR 282 (SC) (1), p 301.

41 1987 (1) SA 614 (SWA)

42 See Du Preez (2003:171ff).

The Supreme Court of SWA and oppressive South African legislation

The South African government often used laws to manipulate prosecutions in the territory. A case in point is the well-known brutal murder of SWAPO activist and former Robben Island detainee, Immanuel Shifidi.⁴³

Shifidi was killed at a political rally in Windhoek on 30 November 1986. The Attorney-General for SWA instituted criminal proceedings against five members of the South African Defence Force. However, the case was stopped when a certificate was issued under section 103 ter (4) of the Defence Act, 1957 (No. 44 of 1957) by the Administrator-General and authorised by State President PW Botha. The section in question gave the State President the right to authorise a certificate and stop any prosecution against Defence Force members for acts committed in the operational area.

In the *Shifidi* case, no operational action of the Defence Force was involved and the killing took place on a football field in Windhoek. The court held that the Minister of Defence or State President, or anyone else, could not exercise their discretion to decide where an operational area was located for the purpose of section 103 ter. In this case, it could not be said objectively that a football field in Windhoek was an operational area. To overcome the shortcomings of the certificate, the Administrator-General issued a proclamation declaring Windhoek an operational area.

Section 103 ter empowered the State President to terminate proceedings against members of the SADF if –

- (i) *[h]e is satisfied after being informed by the Minister of Defence (in South West Africa by the Administrator-General) that the members acted in good faith to prevent or suppress acts of terrorism in an operational area; and*
- (ii) *[i]f it is not in the national interest that the proceedings before court should continue.*

The daughter of the deceased then applied for a court order declaring the Administrator-General's certificate invalid.⁴⁴ A full bench of the Supreme Court considered the case and concluded that the documentation presented to the court did not justify the issuing of the certificate. While Justice Levy said in his judgment that the State President had been misled, then SWA Supreme Court

43 See *S v JH Vorster*, unreported case of the Supreme Court of SWA, where the prosecution was stopped on 1 March 1988 by the handing in of a certificate in terms section 103 ter of the Defence Act, 1957 (No. 44 of 1957); and *Shifidi v Administrator-General for South West Africa and Others* 1989 (4) SA 631 (SWA).

44 *Shifidi v Administrator-General for South West Africa*, supra.

The independence of the judiciary in pre-independent Namibia

Justice Strydom based his judgment on the fact that the discretion exercised by the State President was so unreasonable that interference by the court had been necessary. Thus, the President did not apply his mind when he found that the act the accused had committed was a bona fide attempt to combat terrorism. In his judgment, on the other hand, Justice Levy not only withdrew the certificate, but also set aside the decision of the Attorney-General not to proceed with the prosecution against Vorster.

Again, this was a brave decision. Justice Bryan O'Linn, a lifelong opponent of apartheid and, at the time of the transitional government, an activist advocate critical of the Supreme Court Bench, made the following observation:⁴⁵

The South West African Supreme Court in this decision upheld the high traditions of the Courts. The South African State President and Minister of Defence[,] on the other hand, by this act betrayed the values of a Christian and civilised people by covering up a heinous crime ... In doing that they became party to murder and public violence by association and collusion.

The members of the Defence Force were never prosecuted. Soon after the case had been heard by the Supreme Court, the process of Namibia's independence started. Their deeds were eventually covered by the blanket amnesty that initially applied only to returnees, but was later extended to members of the security forces.⁴⁶

Even more blunt and aggressive was the conduct of the South African government during the trial of Heita, a SWAPO member, under the vicious section 2 of the Terrorism Act, 1967 (No. 83 of 1967), which had been repealed in South Africa.⁴⁷

The defence objected to the indictment on the grounds that section 2 of the Terrorism Act⁴⁸ was not valid in SWA since it was in conflict with the Bill of Rights. On 5 September 1987, before the due date of the hearing of the objection but after the objection had been filed, the State President of South Africa promulgated Proclamation R157 of 1986. The Proclamation prohibited the court from enquiring into or pronouncing upon the validity of any Act of the South African Parliament that had been enacted before or after the Proclamation.

Despite submissions by the state that the amendment was only procedural and could, therefore, have retrospective application, the court found that Proclamation

45 O'Linn, B. 2003. *Namibia. The sacred trust of civilization*. Windhoek: Gamsberg Macmillan, p 278.

46 Proclamation AG 13 of 1989.

47 *State v Heita and others* 1987 (1) SA 311 (SWA).

48 The section created presumptions that affected the presumption of innocence.

The independence of the judiciary in pre-independent Namibia

157 was a substantive amendment to prevent the court from reviewing the validity of South African Acts, and had no retrospective application. The change in law did not affect the case before court, therefore.

The court found the provisions of section 2 of the Terrorism Act to be in conflict with article 4 of Annexure 1 to Proclamation R101 of 1985 (the Bill of Fundamental Rights). Although SWA was not a sovereign state, the court nevertheless found that Proclamation R101 ought to be seen as a Constitution, holding a place of pride in relation to other legislation:⁴⁹

For the reasons set out earlier in this judgment, Proc[.] R101 of 1985 is certainly no ordinary enactment and should be accorded pride of place amongst existing enactments. It has been enacted as a stepping stone towards independence (s 38 of Act 39 of 1968). The National Assembly is given wide powers, which include the power to repeal Acts of the Parliament of South Africa and, for the first time in the legislative history of South West Africa, the fundamental rights of the inhabitants are spelt out and entrenched. This is the existing constitution of SWA/Namibia and the fact that certain organs have retained legislative rights does not and cannot alter the character and importance of the proclamation.

Consequently, the court found that section 2 of the Terrorism Act was repealed by Proclamation R101. While the State President attempted to stop the Supreme Court of SWA from striking down unconstitutional acts of the South African Parliament after 5 September 1986, the *Heita* case confirmed the drastic change in the power structures of government in SWA/Namibia with the implementation of a Constitution containing an entrenched Bill of Rights. Justice Levy did not answer the question as to whether the State President did indeed close the gap.⁵⁰

As far as the Supreme Court of SWA was concerned, a new dispensation had begun with the implementation of Proclamation R101. It is understandable that the review powers of the court created tremendous problems for South Africa. If all the security laws made applicable in SWA/Namibia could theoretically have come under scrutiny by the Supreme Court of SWA, the chances were good that the court would have declared them unconstitutional.

49 1987 (1) SA, p 324.

50 Justice Levy did not follow Justice Strydom's judgment in *S v Angula en Andere* 1986 (2) SA 540 (SWA), where the court found a conflict between the Bill of Rights and certain security legislation. Judge Strydom, however, found that section 2 of the Terrorism Act, 1967 (No. 83 of 1967) was still in place.

The independence of the judiciary in pre-independent Namibia

And the Supreme Court of SWA did not waiver. The constitutionality of the Terrorism Act came around again in 1989 when a full bench confirmed a judgment of the Supreme Court of SWA ordering the release of six prominent internal SWAPO members detained without trial in terms of section 6(1) of the Terrorism Act. The appellant was once again the Cabinet of the interim government.⁵¹

Although the applicants did not rely on the Bill of Rights to substantiate their application for an interdictum de homine libero et exhibendo, the judgment of the full bench follows the constitutional lines of previous decisions. Emphasising the importance of a strict compliance with the provisions of the law when the liberty of an individual is concerned, Justice Levy comments that –⁵²

... [s]ince time immemorial the safety of the State, social unrest and warlike conditions have been invoked by enthusiastic executives as reasons for the Courts to overlook the executives' non-compliance with the provisions of the law.

Even more fascinating is the contribution by Acting Justice Henning, who relied primarily on the *Rechtsstaat* (the rule of law) concept.⁵³ He acknowledged that SWA/Namibia at the time could not be classified as a *Rechtsstaat* (a state governed by law), but still operated as a *Wetstaat* (a state based on laws) because of its captivity by the Appellate Division in South Africa. He quotes the *Katofa* case⁵⁴ to point out that the SWA/Namibian court did not have the power to review Acts of the South African Parliament made applicable in SWA/Namibia, even if they contradicted the Bill of Rights.⁵⁵ He nevertheless suggested that, on the road to a justice state, power had to be limited by power: *le pouvoir arrête le pouvoir*.⁵⁶

And since it was not possible to strike the Terrorism Act down because of its obvious contradiction of section 3 of the Bill of Rights, which prohibited detention

51 *Cabinet for the Interim Government of South West Africa/Namibia v Bessinger and Others* 1989 (1) SA 618 (SWA).

52 (ibid.:622).

53 The judge quotes both German and Dutch legal philosophers to state his case (ibid.:631): “*Der Staat soll Rechtsstaat sein: ... Er soll die Bahnen und Grenzen seiner Wirksamkeit wie die freie Sphäre seiner Bürger in der Weise des Rechts genau bestimmen ...*” [Friedrich Stahl] and “*Hoe meer de rechtsstaatsidee tot werkelijkheid wordt, destemeer zal de Overheid volgens regels van recht handelen*” [Stellinga].

54 *Tussentydse Regering vir Suidwes-Afrika v Katofa* 1987 (1) SA 695 (A). The ridiculous result of the judgment was that oppressive legislation could remain on the books and be enforced even when it contradicted the rights of Namibians protected by the Bill of Rights.

55 *Cabinet for the Interim Government of South West Africa/Namibia v Bessinger and Others* 1989 (1) SA 618 (SWA), p 631.

56 (ibid.).

The independence of the judiciary in pre-independent Namibia

without trial, the court would nevertheless take the rights of individuals seriously by assuring that the procedures of the security legislation were adhered to before allowing the loss of liberty.⁵⁷

In yet another case⁵⁸ with strong political undertones, the full bench of the Supreme Court of SWA/Namibia declared parts of an Act ironically called the Protection of Fundamental Rights Act, 1988 (No. 16 of 1988) unconstitutional since it contradicted entrenched rights such as freedom of expression and freedom of assembly. As Justice Hendler commented, –⁵⁹

[i]t is clear that it creates criminal offences for activities which in democratic societies have been perfectly acceptable and legal.

In another brave decision the full bench declared the notorious Proclamation AG 8 of 1980 unconstitutional.⁶⁰ The South African-appointed Administrator-General had legislative powers to make proclamations. AG 8, as this particular proclamation was known, laid the foundation for a segregated future Namibia. It divided the people of Namibia into 11 ethnic groups, and created a so-called second-tier government for each such group. Every Namibian was obliged to belong to one of these groups, even if he or she did not belong to one in an ethnic sense.

57 (ibid.:632). It is interesting that the Supreme Court of SWA considered striking down the Terrorism Act despite the *Katofa* case:

In passing I should point out that many of the other provisions of Act 83 of 1967 are also in clear conflict with the provisions of the Bill of Fundamental Rights and Objectives. This has already been authoritatively laid down by the Appellate Division in S v Marwane 1982 (3) SA 717 and repeated by this Court in S v Heita 1987 (1) SA 311 in October last year. Marwane's case dealt with a provision in the Constitution of Bophuthatswana which is similar to the corresponding provision in our Bill of Rights. Under the circumstances one is filled with dismay that our Legislative Assembly has still not made use of its powers under Proc[.] R101 of 1985 to repeal or amend the Terrorism Act. It is incomprehensible that citizens of South West Africa should still be subject to the Draconian [sic] provisions of a South African Act of Parliament which was repealed in South Africa 15 years ago and which is moreover in conflict with our Bill of Rights.

This Court has in the past refrained from adopting the procedure of American Courts of "striking down" legislation which conflicts with fundamental constitutional rights. We have done so because the Court hoped and indeed expected that the National Assembly would itself take the necessary steps to repeal or amend such laws, but the time might come when the Supreme Court of South West Africa has to reconsider its attitude in this regard.

58 *Namibia National Students' Organisation and Others v Speaker of the National Assembly for South West Africa* 1990 (1) SA 617 SWA.

59 (ibid.:627).

60 *Ex Parte Cabinet for the Interim Government of South West Africa: In re Advisory Opinion in terms of s 19(2) of Proclamation R101 of 1985 (RSA) 1988 (2) SA 832 (SWA).*

The independence of the judiciary in pre-independent Namibia

The budget allocation to each group was not based on the numbers of the group, but the taxes paid by members of the group. Consequently, the whites – with less than 10% of the total population – received a budget substantially higher than that for any other group.

The court took cognisance of the fact that –⁶¹

... articles or provisions laying down fundamental rights were, by their very nature, drafted in a broad and ample style which laid down principles of width and generality, and ought to be treated as sui generis.

Therefore, the interpretation of the said articles or provisions should not be subjected to rigid literalism. Consequently, when the court had to interpret the word *advantage* in the Bill of Rights, they concluded that it should also include material advantage, even if the rights enshrined in the Bill of Rights were civil and political, and not social or economic.⁶² The court found that AG 8, in its entirety, was in conflict with the Bill of Rights.

The judgment is important not only because it challenged the principle of racially separated development in South African-occupied Namibia, but also because it laid the foundation of the constitutional pillars framed by the South African Parliament for a future independent Namibia. While the tenability of a segregated state based on race or ethnicity had been rejected by both the SWAPO and SWANU liberation movements, the Supreme Court declared that it was also impossible to reconcile an ethnic-based state with a Bill of Fundamental Rights. Or to use Justice Henning's terminology in the *Bessinger* case, a *Rechtsstaat* cannot be built on the pillars of a *Wetstaat*.

Conclusion

The Supreme Court of SWA had a constant battle with both the transitional government and the South African Appellate Division. In doing so, the judiciary prepared the way for a new dispensation in Namibia, where the courts would play a much more significant role in enforcing constitutional rights against oppressive legislation. The interim government, however, opted to take refuge at the South African Appellate Division rather than strengthen its Supreme Court in the making.

61 (ibid.).

62 (ibid.:835).

The independence of the judiciary in pre-independent Namibia

The judgments of the Appellate Division are typical of the fundamentalist approach of courts in South Africa before 1994. This is a typical example of what Dyzenhaus calls “the unwillingness of judges to allow any moral sensibilities to have an impact on interpretation”.⁶³

However, the political influence on the judgments cannot be ignored. Justice Rabie’s examples in the *Eins* case are anything but neutral.⁶⁴ The judge also took it for granted that Proclamation R101 of 1985 (including the Bill of Rights) was subject to the laws of the South African Parliament.⁶⁵

One seeks in vain for any indication in the judgments that the Appellate Division had any vision whatsoever of the birth of a nation. The Supreme Court of SWA, on the other hand, took the Bill of Rights and the protection of the people of Namibia extremely seriously.

The legal fraternity gave little – if any – attention to the paradigm shift that took place in the Supreme Court in Windhoek between 1986 and 1990. Scholars often refer to the post-independent 1991 judgment of *State v Acheson* as the turning point in Namibian jurisprudence, ignoring the radical stance of the Supreme Court of SWA in the 1980s.

In South Africa, Kruger and Curren⁶⁶ only took notice of the positive constitutional interpretations after Namibia’s independence. And Nico Steytler took it for granted that the white judges of the Namibian High Court would be the protectors of the old order.⁶⁷

While the judges may not have expressed support for SWAPO during the struggle, their relationship with the transitional government was anything but friendly. On the contrary, the Supreme Court of SWA bench proved to be a thorn in the flesh of the transitional government. Looking at their track record in protecting the rights of Namibians during the struggle, they can hardly be seen as part of the governing elite.

63 Dyzenhaus, D. 1998. *Truth, reconciliation and the apartheid legal order*. Cape Town: Juta and Co., p 16ff.

64 See *Eins v The National Assembly for the Territory of South West Africa*.

65 Cf. his words:

Artikel 2 van die Handves handel met die persoonlike vryhede (“liberty of person”) van die individu wat nie deur die bepalings van art[.] 9 van die Wet in gedrang gebring word nie. (“Article 2 of the Bill of Rights deals with personal liberties [liberty of person] of the individual not dealt with in the stipulations of section 9 of the Act”; translation NH).

66 Kruger, J & B Curren. 1991. *Interpreting a Bill of Rights*. Cape Town: Juta and Co.

67 Steytler, N. 1991. “The judicialization of politics”. *South African Journal of Human Rights*, 9:488.

The independence of the judiciary in pre-independent Namibia

O'Linn criticises the judges in the interim period for their over-enthusiastic evaluation of Proclamation R101 of 1985.⁶⁸ The criticism is justified. It should have been clear at the time that there would be no settlement in Namibia without SWAPO's presence. However, the bench was not a political party and it did not have a power base in politics. Even if Proclamation R101 was not a Constitution and Namibia was not a sovereign state, the Proclamation gave the court a tool that enabled them to take Namibian jurisprudence out of the rigid, oppressive thinking of the South African Supreme Court of Appeal.

The fact that Proclamation R101 was so closely linked to the transitional government and the latter's lukewarm commitment to the rule of law clearly undermined the status of the Bill of Rights. The exclusion of SWAPO from the so-called constitutional process also alienated the majority of the people. However, despite these shortcomings, the SWA/Namibian court played an important role in laying the foundations of a culture of constitutional supremacy in Namibia.

One must remember that, before independence, the courts operated under a system of Parliamentary supremacy, which limited them in respect of applying human rights principles. Moreover, the Administrator-General had legislative powers. Successive Administrator-Generals did not hesitate to use these powers to enact draconian proclamations during the struggle for liberation. O'Linn justifiably softens his criticism of the Supreme Court of SWA by concluding that they maintained a high legal standard, especially after the implementation of Proclamation R101.⁶⁹

68 O'Linn (2003:264).

69 (ibid.:280).