1995(8) BCLR 1070(Nms)

REPORTABLE

CASE NO. SA 7/93

IN THE SUPREME COURT OF NAMIBIA

WINDHOEK, THURSDAY 13 JULY 1995

BEFORE THE HONOURABLE MR JUSTICE MAHOMED, C.J.
THE HONOURABLE MR JUSTICE DUMBUTSHENA, A.J.A.
THE HONOURABLE MR JUSTICE LEON, A.J.A.

In the application

EX PARTE :

ATTORNEY-GENERAL

in re:

THE CONSTITUTIONAL RELATIONSHIP BETWEEN THE ATTORNEY-GENERAL AND THE PROSECUTOR-GENERAL

CORAM: Mahomed, C.J.; Dumbutshena, A.J.A., et Leon, A.J.A.

Heard on: 1994.10.03 & 1994.12.08

Delivered on: 1995.07.13

APPEAL JUDGMENT

LEON, A.J.A. : -

This is a petition brought by the Attorney-General of the

Republic of Namibia in terms of section 15(2) of the Supreme Court Act, 1990 (Act no. 15 of 1990). This Court is asked to hear and determine a constitutional question referred to us by the Attorney-General under the powers vested in him by Article 87(c) of the Constitution of the Republic of Namibia.

This Court is requested to determine the constitutional relationship between the Attorney-General and the Prosecutor-General in respect of issues referred to hereunder: -

Whether the Attorney-General, in pursuance of Article 87 of the Constitution and in the exercise of the final responsibility for the office of the Prosecutor-General, has the authority:

(i) to instruct the Prosecutor-General to institute a prosecution, to decline to prosecute or to terminate a pending prosecution in any matter;

(ii) to instruct the Prosecutor-General to take or not to take any steps which the Attorney-General may deem desirable in connection with the preparation, institution or conduct of any prosecution;

(iii) to require that the Prosecutor-General keeps the Attorney-General informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority.

I shall refer later herein to the relevant detailed

provisions of the Constitution. For immediate purposes I shall only refer to the provisions for Article 87(a) which provides that the Attorney-General is:-

> "(a) to exercise the final responsibility for the office of the Prosecutor-General".

Both in his replying affidavit and in the Heads of Argument the Prosecutor-General adopted the stance that the three questions posed resolved themselves into one over-arching question: was the Prosecutor-General truly independent under the Constitution? If he was, then it must follow that all three questions should be answered in his favour. However, during argument the Court put to Mr Henning, who appeared for the Prosecutor-General, the question as to whether it was possible for the Attorney-General to exercise final responsibility for the office of the Prosecutor-General unless he was kept informed of the matters raised in (iii) above. If he was not so informed he would not be able to explain what was happening in regard to those matters when they were raised with him and would therefore not be in a position to exercise final responsibility for the office. After due consideration Mr Henning conceded that, in the circumstances, the Attorney-General was correctly entitled to the declarator sought in (iii) above.

A regrettable and sharp difference of opinion has arisen between the Attorney-General and the Prosecutor-General as to their respective functions. By using the word "regrettable" I do not wish to imply in any way any criticism whatsoever of either the Applicant or the

Respondent. On the contrary, the differences of opinion have occurred because of views strongly and sincerely held by both of them each being supported by senior legal advice from his own Department. Indeed in the case of the Attorney-General of Namibia and the Prosecutor-General, Gorelick and Others Case No. C2/93 Strydom J.P. in my respectful view quite correctly observed that:

> "The issue is a complex one which can have far-reaching consequences. The articles and sections which will have to be interpreted are certainly not clear cut."

There are certain disputed matters of fact in the affidavits to which it is not necessary to refer. However I shall refer to some of the others by way of background and to illustrate some of the practical problems which have arisen.

Conflicts have arisen as to whether a prosecution should be postponed or not where the Attorney-General took the view that an opinion should first be sought and obtained while the Prosecutor-General took the opposite view. Conflict has arisen over the applicant's claim that he is entitled to peruse police dockets while it was the respondent's contention that it would be unethical for him to disclose such privileged information to the applicant.

The respondent does not, as a matter of course, keep the applicant informed in advance of prosecutions initiated or to be initiated which are important from the public interest point of view or which might arouse public interest or

involve important aspects of legal or prosecutorial policy.

There has been a good deal of correspondence on the dispute between the parties and other public officials.

In March 1992 the applicant reported the respondent to the Judicial Services Commission on the ground that he was guilty of insubordination. On 10 April 1992 the Secretary-General of the Judicial Services Commission wrote to the applicant expressing the views of that body with respect to the complaint. Part of the letter reads as follows:-

"(a) It is quite apparent that there is a strong difference of opinion in regard to the interpretation of the relevant provisions of the Constitution of the Republic of Namibia and the provisions of the Criminal Procedure Act dealing with the relationship between the Attorney-General and the Prosecutor-General.

(b) The Commission is satisfied that the Prosecutor-General bona fide believes, and at all relevant time believed, in the correctness of his interpretation, i.e. that the Attorney-General does not have unrestricted authority and control over the office of the Prosecutor-General.

(c) The Commission is furthermore satisfied that the Prosecutor-General in those instances that he refused to take instructions from the Attorney-General, did so in the genuine belief that he was legally entitled to do so.

(d) **In the premises it cannot be said that the Prosecutor-General was in wilful default or that he displayed insubordination by the conduct in question.**

(e) .....

(f) **It is recommended that the Attorney-General refer the matter in terms of Article 79(2) of the Namibian Constitution to the Supreme Court to obtain a decision, which will be binding on all parties ....."**

The dispute between the parties came to a head in Gorelick's case (supra) in which, after some initial exchanges relating to the applicant's right to inspect a police docket, the applicant on 20 August 1993 instructed the respondent to withdraw the prosecution which the respondent refused to do intimating that he intended to ask the Court to proceed with the matter. The applicant then applied for a postponement of the trial pending a decision by this Court on the constitutional relationship between the Attorney-General and the Prosecutor-General and the status of their respective offices. The matter came before the Full Bench of the High Court (STRYDOM, J.P., LEVY, J. and FRANK, J.) and it was in the course of his judgment granting a postponement that STRYDOM J.P. made the remarks referred to earlier herein.

It is the applicant's case that his constitutional duty is that of guardian of the public interest and of the Constitution and that his function is similar to that of the Attorney-General in England and Wales and other countries or

the Commonwealth whose established conventions and/or constitutions provide for the exercise of the functions by an Attorney-General in circumstances where the Attorney-General is wholly accountable for the functions of the office of the Prosecutor-General (in most countries referred to as the Director of Public Prosecutions) with the ultimate powers of direction consonant with the Attorney-General's responsibility for the office of the Prosecutor-General.

Secondly, it is the applicant's case that there cannot be ministerial responsibility to the President and to Parliament and the concomitant responsibility for prosecutorial decision that it implies, without ultimate superintendence, direction and control being vested in the Attorney-General over the office of the Prosecutor-General in regard to decisions to prosecute, not to prosecute or to discontinue prosecutions. In a famous aphorism Stanley Baldwin once said that "power without responsibility is the prerogative of the harlot throughout the ages". Mr Soggott, who appeared for the applicant, claimed that while it is easy to exercise power without responsibility it is not possible to be responsible without exercising power. And the Constitution provides, as I have shown that the Attorney-General has "final responsibility for the office of the Prosecutor-General".

Thirdly, it is the applicant's case that the provisions of sec 3(5) of the South African Criminal Procedure Act 51 of 1977 are applicable and that therefore the Prosecutor-General prosecutes subject to the directions of the

Attorney-General.

These propositions were all resisted by the Prosecutor-General and on his behalf by Mr Henning who, apart from conceding prayer (iii), contended that under the Namibian Constitution the Prosecutor-General in the exercise of his functions and in the performance of his duties is independent.

When the matter was first argued it was assumed by both counsel that the Attorney-General in Namibia is a Minister and a member of the executive by virtue of his office. At the second hearing is was correctly conceded in reply to a question raised by this Court at the earlier hearing that this is not correct. While the present incumbent is indeed a Minister and a member of the Cabinet there is nothing in the Constitution which requires him to be such or indeed to hold political office. However it is clear from what follows that he is a political appointee.

The Constitution of the Republic of Namibia was published on Independence Day, 21 March 1990. In terms of the Constitution, the offices of the Attorney-General (Article 86) and the Prosecutor-General (Article 88) are constituted. The powers and functions of the Attorney-General are set out in Article 87 and those of the Prosecutor-General in Article 88(2).

The respective Articles read as follows:-

Article 87(a) of the Constitution provides:

"The powers and functions of the Attorney-General shall be:-

(a) to exercise the final responsibility for the office of the Prosecutor-General;

(b) to be the principal legal advisor to the President and the Government;

(c) to take all action necessary for the protection and upholding of the Constitution;

(d) to perform all such functions as may be assigned to the Attorney-General by Act of Parliament."

Article 86 provides:

"There will be an Attorney-General appointed by the President in accordance with the provisions of Article 32(3)(1)(cc) thereof."

[The correct reference should be Article 32(3)(i)(cc)]

Article 32 generally provides for the functions, powers and duties of the President.

Article 32(3)(i)(cc) confers on the President the power, subject to the Constitution, to appoint the Attorney-General. The appointment of the Attorney-General falls into the same category as the appointment of the following officials:

(a) The Prime Minister (Article 32(3)(i)(aa);

(b) Ministers and Deputy Ministers (Article 32(3)(i)(bb); and

(c) The Director-General of Planning (Article 32(3)(i)(dd).

Although the Constitution does not require the Attorney-General to possess any legal qualifications one can assume that in practice he would as he is the Chief Legal Advisor to the President and the Government.

However it is clear under the Constitution that his appointment is a political one and that his functions are executive in nature.

With regard to the Prosecutor-General, Article 88 of the Constitution provides:

"(1) There shall be a Prosecutor-General appointed by the President on the recommendation of the Judicial Services Commission. No person shall be eligible for appointment as Prosecutor-General unless such person:

(a) possesses legal qualifications that would entitle him or her to practice in all the Courts of Namibia;

(b) is, by virtue of his or her experience, conscientiousness and integrity a fit and proper person to be entrusted with the responsibilities of the office of Prosecutor-General.

(2) The powers and functions of the Prosecutor-General shall be:

(a) to prosecute, subject to the provisions of the Constitution, in the name of the Republic of Namibia in criminal proceedings;

(b) to prosecute and defend appeals in the criminal proceedings in the High Court and the Supreme Court;

(c) to perform all functions relating to the exercise of such powers.

(I pause to observe that it has been held that one of the fundamental functions in exercising a duty to prosecute is the discretion to decide whether to proceed with a prosecution or to withdraw it. Highstead Entertainment (Pty) Ltd t/a "The Club" v Minister of Law and Order and Others, 1994(1) SA 387(c) at 393 H-394H.)

(d) to designate to other officials, subject to his or her control and direction, authority to conduct criminal proceedings in any Court;

(e) to perform all such other functions as may be assigned to him or her in terms of any other law."

Article 32(4)(a)(cc) of the Constitution provides for the appointment of the Prosecutor-General by the President on the recommendations of the Judicial Services Commission. Such appointment falls into the same category as the appointment of the following officials:

(i) The Chief Justice, the Judge President and other Judges of the Supreme Court and the High Court [Article 32(4)(a)(aa)];

(ii) The Ombudsman [Article 32(4)(a)(bb)].

The provisions of the Constitution referred to above suggest to me that the functions of the Prosecutor-General are quasi-judicial in nature unlike the executive functions of the Attorney-General. Moreover the manner of his appointment makes it clear that, unlike the Attorney-General the Prosecutor-General is not a political appointment

because he is appointed by the Judicial Services Commission. That Commission is constituted under Article 85 of the Constitution and consists of the following persons: The Chief Justice, a judge appointed by the President, the Attorney-General and two nominated members of the legal profession.

One of the problems which I have with the argument of the Attorney-General is that it would mean that a political functionary would take over the functions and powers of the Prosecutor-General which are reserved for the latter under Article 88(2) of the Constitution.

However what makes the matter a difficult one is that on the one hand the Constitution expressly provides for the Prosecutor-General performing all functions relating to the exercise of his powers [Article 88(2)(c)] while on the other hand the Attorney-General is required under Article 87(a) "to exercise the final responsibility for the office of the Prosecutor-General".

"Responsibility" is defined in the Shorter Oxford Dictionary as: "1. The state or fact of being responsible. A charge, trust or duty for which one is responsible. A person or thing for which one is responsible" and the relevant meaning of "responsible" given is "answerable, accountable".

Before dealing further with the rival contentions, it is of particular importance in this case, because the issue is neither simple nor clear-cut, to say a word about

constitutionalism and deal thereafter with the manner in which a Court shall interpret a constitution.

In a constitutional State the government is constrained by the constitution and shall govern only according to its terms, subject to its limitations and only for agreed powers and agreed purposes. But it means much more. It is a wonderfully complex and rich theory of political organisation. It is a composite of different historical practices and philosophical traditions. There are structural limitations and procedural guarantees that limit the exercise of state power. "It means in a single phrase immortalised in 1656 by JAMES HARRINGTON in THE COMMONWEALTH OF OCEANA 'a government of laws and not of men'" OLIVIER: CONSTITUTIONALISM IN THE NEW SOUTH AFRICA (1994) JUTA and AEI PRESS page 3.

In his landmark judgment in S v Acheson, 1991(2) SA 805 NmHC MAHOMED A.J. (as he then was) observed at p 813 A-C:-

> "The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and the aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion."

This approach was developed further by the Full Bench of this Court in Minister of Defence, Namibia v Mwandinghi, 1992(2) SA 355 NmSC where it was stated at page 362:-

> "The Namibian Constitution must therefore be purposively interpreted, to avoid the 'austerity of tabulated legalism'."

A construction most beneficial to the widest possible amplitude of its powers must be adopted (British Coal Corporation v The King, [1935] AC 500 at 518), and not be construed in a narrow and pedantic sense (James v Commonwealth of Australia, [1936] AC 578 at p. 614).

It should be noted that in the Minister of Defence case (supra) it was stated (at p. 362 F-G) that it would not be generous and purposeful to ignore the special characteristics of a Constitution when rendering an interpretation of any of its provisions. The Namibian Constitution has a Declaration of Fundamental Human Rights and Freedoms which must be protected. Unless the express provisions of the Namibian Constitution force one to that conclusion, I do not believe that those rights and freedoms can be protected by allowing a political appointee to dictate what prosecutions may be initiated, which should be terminated or how they should be conducted. Nor do I believe that that would be in accordance with the ideals and aspirations of the Namibian people or in any way represent an articulation of its values. I shall return to this later when I consider the relevant provisions of the Constitution.

In the process of interpreting a Constitution, there should

be a recognition of the character and origin of the instrument and a court should be guided by the principle of giving full recognition and effect to those rights and freedoms which are enshrined in the Constitution. [Minister of Home Affairs and Another v Fisher and Another, 1979(3) All E.R. 21(PC) at p. 26(a)].

It is also necessary to refer to the important judgment of this Court in Government of the Republic of Namibia v Cultura, 1994(1) SA 407 NmSC where this Court approved what was said in S v Van Wyk, 1992(1) SACR 147 (NmSC) at p. 173:

> "I know of no other Constitution in the world which seeks to identify a legal ethos against apartheid with greater vigour and intensity."

In the course of his judgment in the Cultura case, MAHOMED C.J. pointed out (at page 561) that many of the laws enacted by the South African Government during its administration of Namibia were plainly inconsistent with both the ethos and the express provisions of the new Constitution and therefore unacceptable to the new Namibia. I shall revert to this topic again but wish merely to record at this stage that the above-mentioned view strikes at the heart of the reliance which the Attorney-General places on sec 3(5) of the South African Criminal Procedure Act no. 51 of 1977.

In an interesting article on Interpreting a Bill of Rights KRUGER and CURRIN compare the stereotyped approach of the Appellate Division in cases such as S v Marwane, 1982(3) SA 717 (A) and Cabinet for the Territory of South West Africa

v Chikane and Another, 1989(1) SA 349 (A) with the more enlightened approach of HIEMSTRA C.J. in Smith v Attorney-General Bophutaswana, 1984(1) SA 196 (B.A.D.) and that of the Namibian Courts.

In the Smith case it was pointed out (at p. 199 B-C) that a system where parliamentary sovereignty reigns differs radically from a human rights dispensation. The case gave recognition to the qualifying and central position of its Bill of Rights (part of the Constitution as containing an overriding set of values and norms [at p. 199 H]) and emphasised the position of the Court as the guardian of those norms (supra cit).

With regard to the Namibian Courts, the article deals in detail with the case of Ex parte Attorney-General Namibia: in re Corporal Punishment by Organs of State, [1991(3) SA 76 (NmSC)] where this Court had regard to the total context of the constitution and the need to have regard to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its constitution.

Before I consider the detailed arguments which were advanced, there is one further matter raised by this Court during the first hearing of this matter to which I shall briefly refer. The question was whether it was permissible to have regard to the debates which preceded the final drafting of the Namibian Constitution.

In the United Kingdom it has been authoritatively held that parliamentary debates may be looked at as a guide to the construction of a statute only where:

a) legislation is ambiguous or obscure; or leads to an absurdity;

b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other parliamentary material as it necessary to understand such statements and their effect; and

c) the statements relied upon are clear. [Pepper v Hart, (1993) AC 593 at 640; Regina v Secretary of State for Foreign and Commonwealth Affairs ex parte Rees-Mogg, 2 WLR (1994) 115 at pp 123-4].

Even if this approach were to be accepted in Namibia, for the reasons which follow, I am of the opinion that it would be unsafe to have regard to the debates before us and that we should decline to do so. Even if it were to be assumed that the relevant provisions of the Constitution are obscure the statements made during the debate are inconclusive. I have read the debates with close attention: while there is no doubt that it was the intention of the Minister to create the office of a Prosecutor-General who would be independent, problems arose as to where he would be housed and how his office would fit in with that of the Attorney-General. The debate ended on an inconclusive note, the matter being referred to "the lawyers". In these circumstances it is my view that the conditions laid down in English cases have not been satisfied and that therefore we should not have regard

to such debates.

I turn now to consider Mr Soggott's argument that his case is supported both by the position in the United Kingdom as well as that which applies in the Commonwealth countries.

For the reasons which follow, I am of the view that that argument cannot prevail.

In the United Kingdom, the Attorney-General was so-called in 1461 (D HOOD PHILLIP'S Constitutional and Administrative Law page 334). The original office of the Director of Public Prosecutions was created in England in 1879 which was in the penultimate year of the second and final term of office of the Disraeli administration. The essential character of the relationship between the Attorney-General and the Director of Public Prosecutions is expressed in section 2 of the enactment which speaks of the Director acting "under the superintendence of the Attorney-General" and "as may be directed in a special case by the Attorney-General". (see The Office of the Attorney-General New Levels of Public Expectations and Accountability by PROFESSOR JOHN EDWARDS, Professor Emeritus, Faculty of Law and Centre of Criminology, University of Toronto at page 9).

"Superintendence" is defined by the Shorter Oxford Dictionary as being: "the function or occupation of a superintendent; the action or work of superintending" and the relevant meaning of "superintending" is given as: "to exercise supervision over (a person)". "Superintendent" is

defined as "one who superintends, an officer or official who has the chief charge, oversight, control or direction of some business, institution or works".

I pause to observe that unless sec 3(5) of Act 51 of 1977 is applicable, there is nothing whatever in the Namibian Constitution which expressly makes the office of the Prosecutor-General subject to the superintendence or direction of the Attorney-General.

Furthermore as I am about to demonstrate, it is extremely unlikely that prayers (i) and (ii) of the Petition would succeed even in an application brought in the United Kingdom today. It is clear from my reading on that subject that, despite the role of superintendence exercised by the Attorney-General over the office of the Director of Public Prosecutions, that the relationship has become a subtle and complex one upon which there is no clear measure of agreement.

A hundred years after the introduction of the 1879 enactment, the then Attorney-General Sir Michael Havers speaking in the House of Commons declared:-

> "My responsibility for superintendence of the duties of the Director does not require me to exercise a day-to-day control and specific approval of every decision he takes. The Director makes many decisions in the course of his duties which he does not refer to me but nevertheless I am still responsible for his actions in the sense

> **that I am answerable in the House for what he does. Superintendence means that I must have regard to the overall prosecution policy which he pursues. My relationship is such that I require to be told in advance of the major, difficult, and, from the public interest point of view, the more important matters so that should the need arise I am in the position to exercise my ultimate power of direction."**

Other respective holders of each of the offices in question have taken a somewhat different view. They are referred to at length in a chapter of Professor Edwards' paper on The Attorney-General, Politics and the Public Interest, (1984) SWEET and MAXWELL pp. 58-78; see also Prosecution and the Public Interest by Sir THOMAS HETHERINGTON (Waterloo Publishers pp. 37-45).

In his article, Sir Thomas Hetherington (at p. 42) refers to what Professor Edwards said in his paper (supra cit) where he refers to the Upjohn Lecture given by Sir Thomas on his understanding of the Director's constitutional position when Sir Thomas said that:-

> "He is under the superintendence of the Attorney-General and the Attorney-General may give him directions in a special case although in practice he has never done so in my experience. There is frequent consultation but the Attorney-General does not exercise control over the majority of the Director's decisions, and the Attorney is not, and

> never has been responsible for the Director to the extent that a Minister is responsible for his office. On the other hand, because of his general superintending role, the Attorney is answerable to Parliament for the way in which the Director carries out his duties. That was the position in 1879 and it remains precisely the same under the Consolidating Act of 1979."

Sir Thomas also refers with approval (at page 43) to the view of a former Attorney-General Mr Silkin:-

> "Some seem to think that the Director is a mere creature of the Attorney-General. They are mistaken. The Director is essentially an independent, non-political figure. His decisions are his own and not those of the Attorney-General. Indeed prosecutions under many statutes require his consent, which he is entitled to give or withhold without reference to the Attorney-General. <u>However the powers and responsibilities of the Attorney-General necessarily involve a close and continuous relationship of trust between him and the Director. Each will consult the other, even when no statute obliges him to do so; they could not otherwise perform their respective functions effectively. Yet each is independent of the other</u>" (My underlining)

Reference is made in the article to the famous case of the unsuccessful prosecution of Mr Jeremy Thorpe, a former

Leader of the Liberal Party. That was a matter of great public interest yet the Attorney-General indicated that he did not wish to give the Director any directions about whether to prosecute Mr Thorpe and the Director and most others accepted that the Attorney-General had acted entirely in accordance with accepted constitutional principles and practice.

The above review of the position in the United Kingdom shows that even where the Attorney-General is given express statutory superintendence and direction over the office of the Director of Public Prosecutions, in practice he seldom if ever exercises any control over prosecutions. Yet there is created and developed a constitutional relationship of trust between the holders of the respective offices which involves frequent and regular consultation. Unless sec 3(5) of Act 51 of 1977 applies, the position of the Prosecutor-General is an a fortiori one in the sense that there is nothing in the constitution which expressly places his office under the superintendence or direction of the Attorney-General.

The reliance by the Attorney-General on the provisions of Commonwealth countries rests upon even shakier foundations.

Professor Edwards, at a meeting of Commonwealth Law Ministers in August 1977 prepared a Discussion Paper entitled "Emerging problems in Defining the Modern Role of the Office of the Attorney-General in Commonwealth Countries" (see Gretchen Carpenter: The Executive 1910 to

1983 Introduction to South African Constitutional Law at pp. 196-204). Professor Edwards refers to the fact that it is becoming increasingly evident throughout the Commonwealth that the traditional role of the Attorney-General is no longer uncritically accepted. In paragraph 13 of his paper (see page 200) he deals pertinently with the question whether the control of the entire machinery of criminal prosecutions, namely the initiation and the withdrawal of criminal proceedings should be in the hands of a political Minister or Attorney-General responsible to the Legislature, or be exercised by an independent non-political Director of Public Prosecutions who is a member of the public service. In either case there are the accompanying problems as to what are the essential ingredients of independence and accountability and how best can these basic constituent elements be combined and protected.

Paragraph 14 of the paper (see page 200) is of particular importance. It reads:-

> "A review of the existing systems of operating at present throughout the Commonwealth produces a somewhat bewildering series of alternative arrangements, the nature of which cannot be fully understood without reference to the prevailing political context of each individual country ..... Nevertheless, it may be helpful to identify below the respective models, most of which derive from express provisions in the country's constitution though this practice is not universally adopted; in which event resort must be

had to other legislative sources to ascertain the precise formula that governs the exercise of prosecutorial functions.

Model No. 1

Where the Attorney-General is a public servant, combines with his office the public functions of a Director of Public Prosecutions and is not subject to the directions or control of any other person or authority. Countries exemplifying this model include Kenya, Sierra Leone, Singapore, Pakistan, Sri Lanka, Malta, Cyprus, Western Samoa, Bahamas, Trinidad and Tobago, Botswana and Seychelles (South Africa can now be added to this list.)

Model No. 2

The Attorney-General is a political appointment. He is a member of the Government but, although holding Ministerial office, he does not sit regularly as a member of the Cabinet. Alone of all the Commonwealth countries, strangely enough, the Attorney-General of England and Wales typifies this particular category.

Model No. 3

The Attorney-General is a member of the Government and, as such, is normally included in the ranks of Cabinet Ministers. In some jurisdictions, though this is by no means a universal practice, the

office of the Attorney-General is combined with the portfolio of Minister of Justice (or similar title). Most of the Canadian provinces and the Federal Government have adopted this model. Other countries that fall within this category include Australia (both the States and the Commonwealth Government), Nigeria and Ghana. Where, in these jurisdictions there exists a Director of Public Prosecutions (or its equivalent), the Director is, in the ultimate analysis, subject to the direction and control of the Attorney-General.

.....

Model No. 4

The Director of Public Prosecutions is a public servant, who is not subject to the direction or control of any other person or authority.

This model will be recognised as the classic Commonwealth officer pattern which the United Kingdom Government consistently sought to incorporate in the independence constitutions of many of the countries represented at the present meeting. Following independence in many countries, this particular provision was changed to bring the Director of Public Prosecutions under the direct control of the Attorney-General. Jamaica and Guyana, however, have retained the total independence of the office of Director of Public Prosecutions.

Model No. 5

The Director of Public Prosecutions is a public servant. In the exercise of his powers he is subject to the directions of the President but to no other person. This is the situation that exists in Tanzania and which prevailed in Ghana during the latter stage of the first Republic from 1962 to 1966.

Model No. 6

The Director of Public Prosecutions is a public servant. Generally the Director is not subject to control by any other person but if, in his judgment, a case involves general considerations of public policy, the Director must bring the case to the attention of the Attorney-General, who is empowered to give directions to the Director. This model is applicable in Zambia alone at present. In Malawi, it is of interest to note, the Director is subject to the directions of the Attorney-General. If, however, the Attorney-General is a public servant, the Minister responsible for the administration of justice may require any case, or class of case, to be submitted to him for directions as to the institution or discontinuance of criminal proceedings."

Professor Edwards subscribes to the importance of placing a high premium on safeguarding the independent exercise of

prosecutorial decision-making. To do this it is necessary to resist improper political pressure. But this does not mean that the Attorney-General or the Director of Public Prosecutions should not have regard to the political considerations in the non-party political interpretation of the word "politics".

He concludes by observing (see page 202) that the basic question is who should be the final arbiter of legitimate political considerations affecting prosecutions, the Cabinet, the Prime Minister or Chief Executive, the Attorney-General or Director of Public Prosecutions if the Constitution has made the office truly independent.

There has been published a study entitled Chief Public Prosecutors: A Short Comparative Study of the Constitutional Powers in Commonwealth Jurisdictions in 1992 by the Commonwealth Legal Advisory Service of the British Institute of International and Comparative Law, New Memoranda Series, No. 11.

In the study the point is made (see page 2) as to whether an Attorney-General who is a member of the Legislature and/or the Executive can ensure that any decision to prosecute or not to prosecute is based on important considerations and not on political ones.

> "An attempt to solve this dilemma has been the creation in some jurisdictions of the office of D.P.P. The constitutional theory behind this is

> **that the D.P.P., or public servant, will exercise greater independence and impartiality than a political Attorney-General. However much depends on the constitutional powers granted to the D.P.P.; some D.P.P.'s are granted total independence in their powers to make decisions; while others are subject to the general or special directions of the Attorney-General. The degree of independence granted to the D.P.P. raised the issue of accountability. If the D.P.P. is subject to the directions of the Attorney-General, it is the Attorney-General who is accountable to Parliament. But unless the D.P.P. is totally independent, the accountability is obviously less direct."**

The study (at page 3) refers to the four categories of constitutional arrangements which can, broadly speaking, be discerned in Commonwealth countries:

1. A political Attorney-General
2. A public service Attorney-General
3. A specially appointed public prosecutor subject to at least some specific directions of a supervisor (including the Attorney-General)
4. A specially appointed public prosecutor not subject to the directions of a supervisor.

It is pointed out that the distinctions between these categories is sometimes blurred and there follows a list of a number of countries falling into each category.

It is of interest to record that in the Study the following is stated about Namibia (at page 6):-

> "Article 88 of the Constitution creates the office of the Prosecutor-General with a general power, inter alia, to prosecute in the name of the Republic. But by Article 87, which creates the office of the Attorney-General one of the latter's powers and functions is to 'exercise the final responsibility for the office of the Prosecutor-General'. Whether or not this gives the Attorney-General power to overrule the Prosecutor-General in the exercise of his power is for the moment unclear."

On the other hand, PROFESSOR ERASMUS has no such uncertainty. Writing in the Stellenbosch Law Review 1990(3) he expresses the following view at page 308 (my translation):-

> "It has already been mentioned that the Attorney-General of Namibia is a new creation. It becomes a political appointment. The new Attorney-General becomes the chief legal advisor to the President and the Government and is also responsible for the office (kantoor) of the Prosecutor-General. The latter now fulfils the functions of the erstwhile Attorney-General but with considerably more independence. He or she has a constitutionally prescribed post and is solely responsible for decisions concerning criminal prosecutions. Neither the Attorney-General and even less the

Minister of Justice can give instructions to the Prosecutor-General."

The detailed provisions of the various Commonwealth countries are referred to in Mr Henning's most impressive and comprehensive Heads of Argument. I do not wish to do any injustice to his industry and that of his junior by saying that it is not necessary to refer to them. What is undoubtedly clear from the analysis above is that there is no single policy to be discerned in these countries as their constitutions have adopted different models and, in some cases, a hybrid mixture. Moreover in none of them has the same language been used as in the Constitution of Namibia. In these circumstances Mr Soggott's argument (which he advanced with much eloquence) relying on constitutions of the Commonwealth countries cannot prevail.

Before expressing my final views on the remaining issues raised, I wish to say a word about the potential danger of political appointees deciding on when to prosecute and thereafter I shall deal with the concept of legality and the Rechtsstaat.

While is cannot for one moment be suggested that the present incumbent of the office of the Attorney-General has behaved in an oppressive, arbitrary, unreasonable or unfair manner, there is in my view always potential danger of political appointees allowing political considerations to influence their decisions even subconsciously.

In a keynote address on the Decisions to Prosecute at the First Conference of Commonwealth Directors of Public Prosecutions (see Commonwealth Law Bulletin July 1991 at pp. 1032-1137) Mr Justice AYOOLA said this at p. 1034:-

> "The manner in which such discretion is exercised and the process of prosecutorial decision making are central to the criminal justice system. If prosecutorial decisions are to lead to public confidence in the system and are to be consistent with Human Rights Norms they must also not only be just but also be seen to be so. The mechanism for arriving at such decisions must itself be seen to be such as can be conducive to fairness."

I respectfully agree. The learned judge went on to say at page 1037:-

> "Experience in many parts of Africa has shown that arbitrary and oppressive use of prosecutorial powers have often been potent weapons of fostering political ends to the detriment and ultimate destruction of democracy. On the other hand, experience, such as that of The Gambia, has also shown that where there is no abuse of prosecutorial powers public confidence in the Criminal Justice System is maintained."

The modern rule-of-law state or Rechtsstaat was created in the ashes of post-war Europe. On 23 March 1933, following the burning of the Reichstag on 28 February, Hitler persuaded it to pass an enabling Act which transferred its legislative powers to the Nazi cabinet; conferred on the

Administration the right to make changes to the Weimar Constitution and vested in Hitler the right to draft legislation. Thus was established the Nazi totalitarian state, as the enabling Act in effect meant the end of constitutional government in Germany for nearly two decades.

The weakness of the 1919 Weimar constitution, Hitler's enabling law of 1933, and the ultimate horrors of the Nazi totalitarian state were to lead, in 1949, to the creation of a constitutional democracy by the Basic Law of Grundgesetz. The Basic Law by the Federal Republic of Germany was adopted by the states (länder) of the former West Germany on 23 May 1949 following eight months of intensive negotiations by the Parliamentary Council.

According to LOAMMI C. BLAAU "The Rechtsstaat idea compared with the rule of law as a paradigm for protecting rights (1990) 107 SALJ 76, the Rechtsstaat concept was developed in early nineteenth century Germany. This was, however, the formal Rechtsstaat based on a simple concept of legality. The abuse to which this was put led to the material Rechtsstaat with its concept of higher juridical norms. The material Rechtsstaat of which the Basic Law is a prime example, "obliges the legislature to act in accordance with the requirements of substantive justice when exercising its function of lawmaking." (BLAAU ibid 85).

The most outstanding characteristic of the material Rechtsstaat, based upon the formal concept of the Rechtsstaat, is that state authority is bound by a set of

higher juridical norms (Grundsätze). The realisation of these norms creates a situation which may be described in legal terms as materially just. The material aspect of the Rechtsstaat provides protection of rights within the normative structure of the Constitution.

> "The aim is to keep lex and ius in harmony with each other, that is to say the law as it is formally expressed by statute must also reflect proper ethical norms. The Constitution, therefore, not only binds state authority to uphold procedural safeguards but also obligates the legislature to act in accordance with the requirements of substantive justice when exercising its function of lawmaking."

(BLAAU at page 85 notes 59 to 61 and the writers cited).

Namibia is a Rechtsstaat just as South Africa under the apartheid regime was not. The famous English poet W.H. AUDEN wrote cynically in 1940:-

> "Law is neither wrong nor right
> Law is only crimes
> Punished by places and times
> Law is the clothes men wear
> Anytime, anywhere,
> Law is 'Goodmorning' and 'Goodnight'"

(see W.H. AUDEN 'Law like love' in the Norton Anthology of Poetry (1970) 1076 at 1077.

AUDEN's view of law captures the apartheid state: expedient, transient and ultimately self-serving. By

contrast, Namibia which is properly founded on liberal democratic principles has created a constitutional state founded on law and justice and has thereby established a civil society. (And see also, with regard to the Grundnorm or basic or fundamental norm DIAS, Jurisprudence (4th ed.) 1976 at pp. 493-495; WIECHERS in Essays in Memory of Oliver Denys Schreiner (ed. E. Kahn 383 at page 390 where he deals with section 79(3) of the German Constitution.) Reference can usefully also be made to the leading Canadian case of R v Oakes (1986) 26 DLR (4th) 200. In that case the Canadian Supreme Court was asked to assess the constitutionality of a reverse onus provision in sec 8 of the Narcotic Control Act, 1970. This section provided that if a person was found to be in possession of a narcotic the onus was on him to establish that he was not trafficking in drugs. The Supreme Court held that the provision was not constitutional as it undermined the presumption of innocence entrenched in the Canadian Charter which must be interpreted purposively. The Court emphasised the importance of a purposive approach in examining any guarantee enshrined in the Charter. This shall be done "by understanding the cardinal values it embodies" (see page 212).

Against the background of the principles which I have discussed in some detail herein I turn now to consider whether sec 3(5) of Act 51 of 1977 (The Act) is applicable.

Section 3(5) of the Act provides:-

> "An Attorney-General shall exercise his authority and perform his functions under the Act or under

> **any other law subject to the controls and directions of the Minister, who may reverse any decision arrived at by the Attorney-General and may himself in general or in any specific matter exercise any part of such authority and perform any of such functions."**

The Attorney-General relies on Article 140(1) of the Constitution which provides:-

> **"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."**

The argument for the Attorney-General is that as the Act was in operation immediately before Independence, that the Prosecutor-General takes the place of the former Attorney-General while the latter takes the place of the Minister, and that the Prosecutor-General (like the former Attorney-General) must now prosecute subject to the directions of the Attorney-General just as the former Attorney-General had to prosecute subject to the directions of the Minister under the Act.

With regard to Article 140, I refer again to the Cultura case (supra) where it was pointed out that many of the laws enacted by the South African Government during its administration of Namibia were plainly inconsistent with

both the ethos and the express provisions of the Namibian Constitution and were therefore unacceptable to the new Namibia. They were open to challenge on the grounds that they were unconstitutional.

Between 1926 and the 31st December 1992 when sec 3(5) of the Act was repealed, the Attorney-General in South Africa prosecuted subject to the control and directions of the Minister. Before 1926 the Attorney-General was independent. On the other hand the Attorney-General of the former South West Africa was vested with absolute management and control of the right and duty of prosecution until 22 July 1977 when the Act was made applicable to the territory of South West Africa. All the relevant legislation in this regard is referred to in the Prosecutor-General's Heads of Argument (Head 12.1 - Head 12.19 which it is not necessary to repeat here). The analysis of the history of sec 3(5) of the Act indicates that it is the product of legislative developments peculiar to the Republic of South Africa and out of step with the relevant legislation and constitutional evolution in Namibia. The latest South African legislation has restored the independence of the South African Attorney-General which is similar to the position he enjoyed prior to 1926. The South West African Attorney-General enjoyed independence at all material times until the Act was made applicable to the Territory in 1977. 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 believe for one moment that that would be in accordance with

the ethos of the Namibian people.

Section 3(5) of the Act is not the product of a Rechtsstaat and is not compatible with the Grundnorm relating to the separation of powers. It paves the way for executive domination and state despotism. It represents a denial of the cardinal values of the constitution.

The reasons advance above would in themselves justify the conclusion that sec 3(5) of the Act should be regarded by this Court as unconstitutional. But there are other reasons why in my view sec 3(5) is not applicable. In the first place Article 140(1) of the Constitution commences by stating "subject to the provisions of this Constitution" which signifies to me that Article 87 and 88 of the constitution which provide specifically for the powers and functions of the Attorney-General and the Prosecutor-General take precedence over the provisions of sec 3(5).

In New Modderfontein Gold Mining Company v Transvaal Provincial Administration, 1919 AD 367 at 397 the Court cites with approval the following passage from an American decision (Gorham v Luckett):-

> "And if this last Act professes, or manifestly intends, to regulate the whole subject to which it relates, it necessarily supersedes and repeals all former Acts, so far as it differs from them in its prescriptions. The great object, then, is to ascertain the true interpretation of the last Act. That being ascertained, the necessary consequence

is that the legislative intention thus deduced from it must prevail over any prior inconsistent intention to be deduced from a previous Act."

Secondly and allied to the last point is the significant change in language between sec 3(5) and Articles 87 and 88. Sec 3(5) of the Act expressly makes the Attorney-General subject to the directions of the Minister while Articles 87(a) and 88 use quite different language. Under Article 87(a) the Attorney-General exercises "**the final responsibility for the office of the Prosecutor-General**" while under Article 88 the Prosecutor-General prosecutes, subject to the provisions of the Constitution, and performs all functions relating to the exercise of his powers. Sec 3(5) of the Act does not therefore apply.

In the light of what I have said earlier in this judgment on my understanding of the aspirations, expectations and the ethos of the Namibian people, it seems to me that one must interpret the Constitution in the most beneficial way giving it the full amplitude of the powers which are given to the Prosecutor-General. Thus interpreted, the office, appointed by an independent body, should be regarded as truly independent subject only to the duty of the Prosecutor-General to keep the Attorney-General properly informed so that the latter may be able to exercise ultimate responsibility for the office. In this regard it is my view that final responsibility means not only financial responsibility for the office of the Prosecutor-General but it will also be his duty to account to the President, the

Executive and the Legislature therefor. I accept that on this view of the respective Articles the "final responsibility" may be more diluted and less direct but it is nevertheless still possible for such responsibility to be exercised provided that the Attorney-General is kept properly informed. On this view of the matter the Constitution creates on the one hand an independent Prosecutor-General while at the same time it enables the Attorney-General to exercise final responsibility for the office of the Prosecutor-General. The notions are not incompatible. Indeed it is my strong view that this conclusion is the only one which reflects the spirit of the Constitution, its cardinal values, the ethos of the people, and articulates their values, their ideals and their aspirations. It also is entirely in accordance with the "uniquely caring and humanitarian quality of the Constitution."

In my judgment questions (i) and (ii) must be answered in the negative while question (iii) must be answered in the affirmative.

I would add only this. I would strongly recommend that, these issues having been settled, the Attorney-General and the Prosecutor-General adopt the English practice of ongoing consultations and discussions which would be in the best interests of the cause of justice and the well-being of all the citizens of Namibia.

LEON, A.J.A.

MAHOMED C.J. :

DUMBUTSHENA J.A. :

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MATTER ARGUED:	3 October 1994 and 6 December 1994
JUDGMENT DELIVERED:	13 July 1995