MCH91-104-1-1 EYC Strydom

A BILL OF RIGHTS AND "VALUE JUDGMENTS" VS POSITIVISM.

During all my years of practice and also during my first few years on the Bench I worked with a Constitution not containing a Bill of Rights. As a result thereof the Constitution very seldom played a role when the question of the rights of individuals was involved. It is perhaps more correct to say that the Constitution in certain ways took away rights rather than positively spelled out rights. Within certain confines Parliament was almighty and could legislate without regard to those "rights". For the lawyer the Constitution was something which he could take from his bottom drawer once in a while, dust it off and then put it away again.

Where a Bill of Rights is part of the Constitution the situation changes completely. It now becomes part of a lawyer's and Judge's daily life and lies on top of the desk to be used at any time.

The Courts of Namibia's first brush with a Bill of Rights came by virtue of the provisions of the State President's Proclamation No. R101 of 17 June 1985 whereby an interim

government was established for the then South West Africa. As an addendum to the proclamation a Bill of Rights containing the following 11 articles was included, namely:

1. The right to life;
2. The right to Liberty, Security of Person and Privacy;
3. The right to Equality before the Law;
4. The right to a Fair Trial;
5. The right to Freedom of Expression;
6. The right to Peaceful Assembly;
7. The right to Freedom of Association;
8. The right to participate in Political Activity and Government;
9. The right to enjoy, practise, profess, maintain and promote culture, language tradition and religion;
10. The right to freedom of movement and residence; and
11. Property rights.

The problem in respect of the 1985 Bill of Rights was that its provisions were only applicable to legislative Acts of the National Assembly which was established as an interim government for South West Africa by Proclamation R101 of 1985. Some dissension regarding this point which existed at the time in the Supreme Court of South West Africa was finally resolved by the Appeal Court in the case of Interim Government for South West Africa v Katofa, 1987 (1) SA 695(A).

This had the effect that the vast legacy of legislation inherited from the Republic of South Africa, including the Security Legislation as applicable to South West Africa, remained in force and could as such not be tested against the Bill of Rights. However, wide legislative powers were given to the National Assembly whereby it, with certain exceptions set out in Section 3 of the Proclamation, could make Acts for South West Africa wherein they could amend or repeal any legal provision including any Act of the Parliament of the Republic of South Africa in so far as it related to or applied to South West Africa.

The most onerous provisions regarding the rights of the individuals were those contained in Security Legislation emanating from the South-African Parliament. As a result of the political situation then existing in South West Africa no attempt was made to bring this legislation in line with the 1985 Bill of Rights.

During the period from 1985 to the beginning of 1991 various cases came before the Supreme Court of South West Africa which necessitated an interpretation of some or other of the rights set out in the 1985 Proclamation containing the Bill of Rights.

For us in Namibia (then South West Africa) this was the start of a most interesting and exciting time. After a lifetime of applying what is called "the austerity of tabulated legalism" we were suddenly confronted with a new set of rules which were foreign to our training and which hitherto did not really form part of our legal thought processes.

Unlike the situation now in South Africa where you are able to hold symposiums such as this one to prepare yourselves and your lawyers and Judiciary for such an event, the Bill of Rights contained in Proclamation R101 of 1985 was almost sprung on us. On the 16th of June 1985 there was no such thing but on the 17th June it was there and we had to work with it. A further problem was the fact that the sources normally available to us such as our own decisions as well as decisions of the South African Courts were in this respect, no longer of much use to us. Neither were the textbooks by writers of the South African Constitutional law of any help to us. We were therefore forced to turn our attention elsewhere to cases and writers where a Bill of Rights formed part of a particular Constitution such as India, Zimbabwe, Canada, America and others as well as writers on this subject such as Seervais and others. Our own library was totally inadequate and at the start we had to make do with the little we had as well as what we got from counsel appearing before us.

Whenever we had to interpret the Bill of Rights, and if possible, the then Judge-President, now Chief Justice Berker, constituted a Court consisting of three and

sometimes even five Judges. As applications concerning the Bill of Rights mostly started off as urgent applications a Court of three or more Judges was even constituted at the expense of the normal Court roll. In retrospect I am convinced that this was the correct way to deal with the situation. We were all breaking new ground and the fact that three or more Judges sat on a matter opened the way for discussion and debate which was very necessary at that stage.

During the period 1985 to 1990 judgments such as E.P. Cabinet for South West Africa: In re Advisory Opinion, 1988 (2) SA 832; Namibia National Student's Organisation v Speaker of the National Assembly for South West Africa, 1990 (1) SA 617 and S. v Nathaniel, 1987 (2) SA 225, were delivered.

Probably as a result of their experience gained in this field the Judges in Namibia could and did play a more activist role in cases emanating from legislation which were not subject to the Bill of Rights. See in this respect

Mweuhanga v Cabinet of the Interim Government of South West Africa, 1989 (1) SA 976 and Shifidi v Administrator-General for South West Africa and Others, 1989 (4) SA 631. With this I am not saying that the Bench in South West Africa always played an activist role. There are too many examples indicating the contrary for me to lay claim thereto but the contact with a Bill of Rights and the different approach undoubtedly have influenced us.

After Independence on the 21st March 1990 Chapter 3 of the new constitution sets out the Fundamental Human Rights and Freedoms, and Article 131 of the Constitution entrenched these rights so that no repeal or amendment thereof is permissible "insofar as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms". The effect of this is that no future Parliament will be able, even by consensus, to amend or repeal these rights.

In contrast to the first 1985 Bill of Rights all legislative Acts by Parliament, in so far as they are not covered by one of the exceptions contained in the Constitution, are now subject to the Bill of Rights set out in Chapter 3 and if so

in conflict, can be struck down by the High or Supreme Courts, or Parliament can be given an opportunity to rectify such Act or the offending provisions thereof.

In certain respects the Supreme Court is also a Court of first instance dealing with matters referred to it by the Attorney-General (Art. 79(2)) who is charged with the upholding and protection of the Constitution and can take all action necessary to achieve that goal.

Chapter 3 of the Namibian Constitution was brought in line with the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948. This was required by the 1982 constitutional principles initiated by the five Western Powers and which was then accepted by all the political parties represented in the Constitutional Assembly.

The fundamental rights contained in the Constitution can be divided in three groups, namely:

1. First Generation human rights
2. Second Generation human rights
3. Procedural rights

To the first group belong:

Art. 6 - Protection of life

Art. 7 - Protection of Liberty

Art. 8 - Respect for human Dignity

Art. 9 - Protection against Slavery and Forced Labour

Art. 10 - Equality and freedom from Discrimination

Art. 13 - Privacy

Art. 14 - Protection of the Family

Art. 15 - Children's Rights

Art. 16 - Private Property

Art. 17 - The Right to partake in Politics

Art. 18 - Administrative Justice

Art. 21 - Fundamental Freedoms such as freedom of speech, religion, association, free movement etc.

The second generation human rights include the following:

Art. 16 - The right to private Property

Art. 19 - The right to enjoy your own culture to profess and promote own language and religion

Art. 20 - The Right to Education

Art. 21 - The Right to form Trade Unions and to strike and to practise any profession

Art. 23 - Affirmative Action

The third group consists of the following rights:

Art. 8 - The right to be protected against torture or cruel, inhuman or degrading treatment or punishment.

Art. 11 - The right to be protected against arbitrary arrest or detention

Art. 12 - The right to a fair trial before an independent Court or tribunal

Art. 7, 11, 13, 16 and 18	Protection of personal freedom and property - unless such inroads took place according to certain specific procedures prescribed by law.

As far as existing legislation is in conflict with chapter 3 of the constitution they shall remain in force until amended, repealed or declared unconstitutional by a Court of Law. In this respect the death penalty was abolished and the imposition of cuts by organs of State were declared unconstitutional by the Supreme Court of Namibia in the case of Ex Parte Attorney-General, Namibia in re Corporal Punishment by Organs of State, 1991 (3) SA 76.

As can be seen the Bill of Rights deals extensively with a lot of subjects which are of importance in the day-to-day lives of the people of Namibia. Apart from the wide powers given to the High and Supreme Courts to strike down offending legislation the Courts can also award a monetary compensation in respect of any damage suffered by an aggrieved person as a result of the unlawful denial or violation of his rights.

Although we have not so far had any applications in terms of this provision it seems to me that where such compensation can easily be determined a Court can come to the relief of an aggrieved party without resorting to the sometimes cumbersome procedure of a substantive application.

Article 21(2) of the Bill of Rights provides that those fundamental freedoms set out in Article 21(1) shall be subject to the law of Namibia in so far as such law imposes reasonable restrictions which are necessary in a democratic society and which are necessary in the interest of the sovereignty and morality, or in relation to contempt of court, defamation or incitement to commit an offence.

The freedoms set out in Article 21 include, inter alia, the right of freedom of speech and expression, which also includes freedom of the press, and the right to assemble peaceably and without arms. Sometimes sight is lost of the fact that freedom of speech, freedom of the press etc. are not without certain restrictions, and that the exercise thereof to the detriment of the rights of others is not sanctioned by the Constitution.

The High Court of Namibia itself was on one occasion the target of a protest campaign where dismissal of a particular Judge as well as all other 'racist' Judges was demanded. To the credit of the Government it must be said that they firmly stated through, inter alia, the Minister of Justice, that the Government could not and would not interfere with the Judiciary. However no fault was found with the way in which the right of freedom of speech was exercised, in this instance. The impression was gained that such right exists without the restrictions set out herein before.

This was indeed a disconcerting experience for us who were not used to this type of protest and the question was much debated as to where freedom of speech stops and at what stage it becomes contempt of Court. The question may however be asked whether in the past we have not perhaps been oversensitive regarding this aspect and whether it is not necessary to have another look at what constitutes contempt of Court. What happened in Namibia was clearly not sanctioned by the Constitution but it is necessary in my opinion, to strike a balance and our concept of contempt of Court may have to be changed.

Looking at the Bill of Rights as contained in the Namibian Constitution many instances have already come up where the Courts of Namibia were called upon to interpret such rights. The following cases are examples and illustrate the attitude of the Courts towards the interpretation of the rights of individuals.

1. S. v Minnies and Another, 1991 (3) SA 364.

In this case the Court had to decide whether a "pointing out" in terms of Section 218 of the Criminal Procedure Act, 1977 (Act 51 of 1977) was admissible as evidence against an accused. Section 218 provides that evidence of such a pointing out is admissible even though it forms part of an inadmissible confession. The Court accepted evidence that such pointing out was the result of repeated questioning and assaults on the accused. Applying Articles 12(1)(f) - that no person could be compelled to give evidence against himself - and Article 8(2)(b), - which prohibits torture and the subjecting of any person to cruel, inhuman or degrading treatment and

punishment - the Court came to the conclusion that such evidence, notwithstanding the provisions of Section 218, was inadmissible.

In interpreting these Articles set out in the Bill of Rights the following was taken into consideration by the Court:

1.1. They, i.e. the articles contained in the Bill of Rights, Express values and ideals which are consonant with the most enlightened view of a democratic society existing under law. (p384H).

1.2. At p 385B the judge stated "In interpreting and giving effect to human rights provisions, I would rather err, if I do err, on the side of the protection of the individual against police excesses".

1.3. In considering the meaning of the word "testimony" as used in Article 12(1)(f) the Court rejected the narrow interpretation contended for by the State inter alia

because it ignores the benevolent approach to the interpretation of human rights provisions.

2. S. v Acheson, 1991 (2) SA 805.

In this case the State applied for a lengthy postponement of a murder trial and further applied that the accused, who was in custody, should remain so in the interim. The application for a postponement was granted but the accused was let out on bail. In the course of his Judgment the following principles, regarding the Constitution, was applied by the Judge, namely:

2.1. "The law requires me to exercise a proper discretion having regard not only to all the circumstances of the case and the relevant statutory provisions, but against the backdrop of the constitutional values now articulated and enshrined by the Namibian Constitution of 1990".

2.2. The Judge then continued and stated that the Constitution was not simply a statute but "It is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its Government. The spirit and the tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion."

3. Mwandingi v Minister of Defence, 1991 (1) SA 851.

This case concerned the interpretation of Article 140 (3) of the Namibian Constitution. The applicant was unlawfully shot by a member or members of the S.A. Defence Force. Although the claim arose prior to independence it was caught up by that event. When the matter was pursued after independence the Minister of Defence of the Republic of South Africa filed various special pleas inter alia, that the claim against him was no longer justiciable because it constituted an Act of

State. The applicant then applied to substitute the Minister of Defence of Namibia for the Minister of Defence of South Africa.

Article 140 constitutes the transfer of powers from the previous Government to the present Government and was therefore the Article whereby the Namibian Government accepted anything done under any law by its predecessor. On behalf of the Namibian Government it was argued that "anything done under any law" must, according to the interpretation of statutes, be presumed to mean "anything lawful done under any law". The Court came to the conclusion that the applicant's claim forms part of his property which was protected by the Bill of Rights and that in the protection of such rights Article 140 should be interpreted generously in order to give to individuals the full measure of the fundamental rights referred to in the Constitution. The Court adopted the statement by Lord Wilberforce in Minister of Home Affairs v Fisher and Another, 1980 AC 319 (PC), namely that a constitutional instrument calls for principles of interpretation of its own, suitable to its character and without necessary acceptance of all the presumptions that are relevant to legislation of private law.

I have referred to these few examples to try and illustrate that in my opinion the High Court of Namibia has firmly decided how a Court should approach and interpret a Constitution containing a Bill of Rights and that it has concluded that such an instrument requires a generous and purposive interpretation in order to protect the individual and his rights and where necessary regard must also be had to the ideals and aspirations of the people as reflected in the Constitution so that "the spirit and the tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion".

This does not mean that the words in which such rights are couched are to be ignored. I think that in this context it is apt to refer to H.M. Seervai citing what was said by Gwyer, C.J. and remarked in Constitutional Law of India, 3rd ED. Vol. 1 at 68, namely:

".....a broad and liberal spirit should inspire those whose duty it is to interpret the Constitution; but I do not imply by this that they

> are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purposes of supplying missions or correcting supposed errors".

Where those rights now enshrined in a Bill of Rights previously only formed part of the common law and therefore also the common law of the then South West Africa we applied restrictive interpretation where the Legislator, unchecked by a Bill of Rights contained in the Constitution, could make inroads at will on the rights of its subjects. With a Bill of Rights the shoe is now on the other foot and in order to determine those rights, and to restrict Legislative and Executive interference therewith, Courts must give wide and generous interpretation to the provisions of the Constitution. Many of the presumptions which we have applied in the past, and which were designed as protection measures, now became obsolete and would have an opposite effect if applied slavishly to the provisions of a Bill of Rights.

So far I have dealt with the interpretation of the Namibian Constitution in the High Court. As far as the Supreme Court of Namibia is concerned there can in my opinion be no doubt that the same approach concerning the Constitution was followed by our Appeal Court.

The Mwandingi case went on appeal and in its Judgment - as yet unreported - it was stated unanimously by a Court consisting of three Judges, as follows:

> "It would not be generous and purposeful to ignore the special characteristics of a Constitution when rendering an interpretation to any of its provisions. The Namibian Constitution has a Declaration of Fundamental Human Rights and Freedoms which must be protected. These freedoms and rights are framed in a broad and ample style and are international in character. In their interpretation they call for the application of international human right norms".

That the Courts of Namibia are serious about the way in which a Constitution must be interpreted and that such interpretation must take cognizance of the aspirations and ideals contained and set out in the Constitution were in my opinion amply demonstrated in the judgment of the Supreme Court in Ex parte Attorney General, Namibia: in re Corporal Punishment by Organs of State reported in 1991 (3) SA 76.

The question to be decided in this case was whether Organs of State, such as Courts, Schools etc. could impose corporal punishment or whether this was unconstitutional. The relevant section to be interpreted by the Court, namely Article 8, did not specifically prohibit corporal punishment. It stated however as follows:

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

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

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

To begin with, the Court looked at the total context of the Constitution. It did not stop there but the Court went further and stated

> "the Namibian Constitution seeks to articulate the aspirations and values of the new Namibian nation following upon independence".

This case is further discussed in an article published in the S.A. Public Law 1991, Vol. 3, P 290 under the title "Value Judgments versus Positivism by Prof. Johan Kruger. I cannot do better than to quote from this article. The author pointed out that both Judges, i.e. Mahomed, A.J.A., and Berker, C.J., referrred to "values" and "value judgments". At p. 294 Prof. Kruger extracted the `elements´ and `factors´ referred to by the Judges and which can be considered as `elements´ and `factors´ of a "value judgment". Regarding the judgment by Mahomed, A.J.A. the following points were noted by Prof. Kruger:

"(a) Article 8 of the Constitution must not be read in isolation but within the context of a fundamental humanistic constitutional philosophy

(b) In that regard the preamble and the manifold structures of the Constitution are indicative of such a humanistic philosophy

(c) The value judgment must objectively be articulated and identified

(d) In the process of such objective identification regard must be had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in, inter alia, the Constitution

(e) Furthermore (and still in the process of such objective articulation) values emerging in the `civilised international community´ (in which Namibians share) should be taken cognisance of

(f) The whole process of identifying such value judgments is a continually evolving dynamic".

The `element´ set out in (f) above is specifically illustrated by Lord Wright in James v Commonwealth of Australia, 1936 AC 578 at p 614 where he stated as follows:

> "It is true that a constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning".

In respect of the judgment by Berker C.J. the following `elements´ and/or `factors´ were identified by Prof. Kruger, namely:

"(a) The Chief Justice not only refers to an inquiry into the generally held norms, approaches, moral standards and aspirations of the people of Namibia, but also to a host of other established beliefs

(b) Not only legal rules and precedents will determine the value judgment, but full cognisance must be taken of social conditions, experiences and perceptions of the people

(c) The aformentioned elements are, however qualified by referring to `the former colonial rulers´ which had `embraced certain ideologies, values and social conventions which were totally unacceptable to the Namibian people and indeed the rest of the world´ .....This left an indelible impression on the Namibian people, which in turn led to a Bill of Rights which protects absolutely the dignity of every person

(d) By way of summary the Chief Justice qualified the application of value judgments by referring to the historical background, social conditions and evolutions, the political impact on the perceptions of the people, the ultimate crystallisation of the basic beliefs and aspirations in a Bill of Rights and (again) `a host of other factors´".

To conclude the learned author, in my opinion very necessarily, points out that in order to avoid legal uncertainty such factors should be `juridically qualified´ rather than be determined subjectively.

These decisions by the Supreme Court of Namibia are not only supportive of those decisions of the High Court where a more liberal and generous approach towards the interpretation of the Constitution were followed but for us they have set the tone of how we should continue in future, and it can therefore, in my opinion be accepted that the High Court will further build on these examples.

There are countries whose Constitutions contain a Bill of Rights but where, judging from reports, the Bill of Rights is either selectively applied or where it is, as regards the ordinary citizen, just non-existent and remains an ideal on paper. For the successful implimentation of a Bill of Rights three prerequisites are in my opinion required, namely:

1. An independent Judiciary. Without an independent Judiciary there is no way in which an aggrieved citizen can hope to redress any violation of his rights.

2. A Government who is committed to the upholding of the Constitution. Without a Government to back it an independent Judiciary won't get far.

3. It is our experience that those whose constitutional rights are the most likely to be invaded and violated are those who cannot afford proper legal representation. I think that an

adequate and improved Legal Aid Scheme goes hand in hand with a Bill of Rights in countries such as Namibia and the Republic of South Arica.

Coming to the Republic of South Africa I am convinced that cometh the day Judges and lawyers will not only be able to adapt themselves to the new situation but that they will also make their own constributions regarding this aspect of the law and we in Namibia look forward to the time when we will again be able to draw on this vast resource of legal learning. After all this generous approach to the interpretation of the Constitution is a natural process because, as it was put by my colleague Levy, backed by a Bill of Rights a Judge can now give full reign to his sense of justice.

G.J.C. STRYDOM

High Court of Namibia