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South Africa and Namibia

Advisory opinion in Terms of Section 19(2) of Proclamation R101 of the Republic of South Africa

- (1) As a result of the political developments with regard to the status of the Territory of South West Africa/Namibia on the road to ultimate independence, far-reaching legislative and executive powers and duties were conferred upon a legislative and executive body by the passing of a Proclamation of the Republic of South Africa on 17 June 1985, styled the "South West African Legislative and Executive Authority Establishment Proclamation 1985", (Proclamation R101). I shall refer to this Proclamation as "the Proclamation". These powers and duties were conferred upon a legislative and an executive body consisting of persons nominated by certain six political organizations existing in the Territory as set out in Annexure 2 of the Proclamation. The Legislative Authority was conferred upon a National Assembly created by the Proclamation, whereas the executive powers, duties and functions were conferred upon a Cabinet established by the Proclamation, as set out in detail in Sections 29 and 30 thereof. In so far as it will be necessary I shall hereafter deal in greater detail with the powers, duties and functions of both the legislative and executive bodies created by the Proclamation.
- (2) A most important and fundamental part of the Proclamation furthermore was the enactment of a Bill of Fundamental Rights and Objectives, contained in Annexure 1 of the Proclamation, which, apart from a preamble setting out the objectives and purpose of the Bill of Rights, specifies certain Fundamental Rights set out in eleven Articles. It is the first time in the history of this Territory that such a Bill of Rights has been brought into existence, nor has such a Bill formed part of the constitution of the Republic of South Africa. It should, however, be pointed out that despite the absence of such a Bill of Fundamental Rights the Courts both in the Republic of South Africa and in this Territory have recognized and enforced certain of such rights as forming part of our Common Law. However, the statutory recognition of such Rights in a specific form in a con-

stitutional document such as the Proclamation has given rise, and opened the way to testing existing, and to some extent past, legislative enactments as to their compatibility with the specific provisions of the Bill of Fundamental Rights to a greater extent than was possible before. Indeed a number of provisions in the Proclamation are specifically designed to test such compatibility at the instance of both the Cabinet, as well as by organs of the National Assembly. The present enquiry has arisen as a result of one of these provisions (section 19(2)) of the Proclamation.

- (3) In order to place the present enquiry into its correct perspective it is necessary to refer to certain specific provisions of the Proclamation.

In section 1(iii) of the Proclamation a "fundamental right" is defined as being any of the fundamental rights contemplated in articles 1 to 11 of the Bill "which was adopted on 18 April 1984 by what was then known as the Multi-Party Conference". In this regard it is perhaps noteworthy that specific reference is made to the genesis of the Bill of Rights, that is to a historic event, which is not normally part of an ordinary statutory enactment.

The powers of the Assembly are circumscribed by Section 3 of the Proclamation. The general powers to legislate conferred upon it by Section 3(1) of the Proclamation are, however, restricted by Section 3(2) thereof in several respects. For present purposes it is sufficient to refer to Section 3(2)(b), which specifically provides that the Assembly has no power to make any law abolishing, diminishing or derogating from any fundamental right contained in the Bill of Rights.

This prohibition to make any law in conflict with any of the fundamental rights is, however, modified to some extent by the provisions of Section 3(3) of the Proclamation, giving the Assembly the power to amend or repeal and re-enact any law dealing with the security of the territory which was in force at the time the Assembly met for the first time and which does abolish, diminish or derogate from any of the fundamental rights, as long as such amendment, repeal and re-enactment abolishes, diminishes or derogates from any fundamental right to a *lesser extent* than the original enactment. In other words, despite the general prohibition against making any new law in conflict with any fundamental right, the Assembly can nevertheless amend, or repeal and re-enact, any security law existing prior to the Assembly becoming operative, as long as such amended or re-enacted law conflicts to a lesser extent than before with any fundamental right. Another provision in the Proclamation which is relevant is contained in section 11(1) thereof, which provides for the establishment and powers of standing committees of the Assembly, one of which (to which I shall later refer to as the "ninth committee") is established and which is charged with the specific duty "to consider every law which was in force in the territory immediately be-

fore the first meeting of the Assembly and which abolishes, diminishes or derogates from any fundamental right and, if any such law should in the opinion of the standing committee be repealed or amended in so far as it abolishes, diminishes or derogates from any fundamental right, shall report thereon to the Assembly, and may submit a bill to the Assembly for that purpose.”

- (4) I now come to the provisions which specifically give rise to the present enquiry. They are contained in section 19 of the Proclamation. Section 19(1) specifically provides for this Court to have the competence to enquire into, and pronounce upon, the validity of an Act of the Assembly in pursuance of the question (a) whether the provisions of the Proclamation were complied with and (b) whether the provisions of any law enacted by the Assembly abolishes, diminishes or derogates from any fundamental right. This testing power of this Court is, however, restricted by the further provisions of subsections (4) and (5), which provide that apart from the testing power given to it specifically in subsection (1) referred to above it cannot otherwise inquire into, or pronounce upon, the validity of any law made by the Assembly, and furthermore (as a result of an amendment passed in 1986) that this Court is also not competent to inquire into or pronounce upon the validity of any Act of the Parliament of the Republic of South Africa enacted at any time.

This limited testing power by this Court is therefore restricted to (a) laws made by the Assembly, and (b) laws made prior to the establishment of the Assembly by other legislative bodies *in the Territory*, such as for instance laws made by the Administrator-General of the Territory prior to the coming into force of the Proclamation. Proclamation AG 8 of 1980, being a Proclamation by the then Administrator-General of the Territory, would therefore, for instance, be subject to such testing power.

Apart from the specific testing right by this Court of the laws referred to, subsections (2) and (3) of section 19 provide further for an unique procedure for the Cabinet to obtain from this Court a decision in respect of any conflict between a law passed prior to the 17 June 1985 (the date on which the first members of the Cabinet were sworn in) and any fundamental right. The full text of these two sub-sections reads as follows:

“(2) When the Cabinet has any doubt on the question whether any law or provision thereof which was in force in the territory on the date immediately before the date on which the first members of the Cabinet have made and subscribed the oath prescribed in section 23(4), abolishes, diminishes or derogates from any fundamental right, the Cabinet may cause such question to be submitted to the Supreme Court of South West Africa for argument and decision.

- (3) If the court decides that any law or provision referred to in sub-

section (2) abolishes, diminishes or derogates from any fundamental right so referred to, the Cabinet shall cause such law or provision to be submitted to the standing committee concerned for consideration and report to the Assembly on the question whether such law or provision ought to be repealed or amended.”

The standing committee referred to is, of course, the ninth standing committee of the Assembly already referred to. It is in pursuance of these two subsections that the Cabinet has now approached this Court for a decision as to whether Proclamation AG 8 of 1980, or any provision thereof, abolishes, diminishes or derogates from any fundamental right contained in the Bill of Fundamental Rights. I shall in due course quote the full text of the question thus put before this Court for decision.

For the sake of completeness I would also refer to section 27(4)(a) of the Proclamation which provides for the submission by the Cabinet to this Court for decision any question regarding the legality of any contemplated action by the Cabinet. This would also cover any question as to a possible conflict between the provisions of the Bill of Fundamental Rights and any *contemplated* action by the Cabinet. The sub-section reads as follows:

“4(a) When a Minister at any time during a meeting of the Cabinet shows on the strength of a legal opinion obtained by him from a senior advocate of the Supreme Court of South West Africa or the Supreme Court of South Africa that any decision which the Cabinet is then considering in the exercise or performance of its powers, duties or functions may, if taken, successfully be challenged in terms of any rule of law in the Supreme Court of South West Africa by any person or group of persons affected thereby, the Cabinet shall cause the matter to be submitted to the Supreme Court of South West Africa by way of a question of law for argument and decision, and the Cabinet shall not take any such decision until such time as final judgement is given on such question.”

- (5) I have given the references to these various sections of the Proclamation to indicate that it seems clear therefrom that the provisions of the Bill of Rights were considered fundamental to the whole Proclamation and permeate it. The overall intention appears to be that no new legislation may be passed by the Assembly, in conflict with the provisions of the Bill of Fundamental Rights, and that all existing legislation prior to the coming into force of the Proclamation should gradually be brought into line with the provision of the Bill of Fundamental Rights, with the exception of security legislation where, however, also certain limitations are imposed. The question put to this Court to be answered should therefore be decided against this background.

- (6) Coming now to the specific question placed before this Court for decision in terms of section 19(2) of the Proclamation, it reads as follows:

“Word ’n Fundamentele Reg, soos omskryf in artikel 1(1) van Proklamasie R101 van 1985, opgehef, ingekort of aan afbreuk gedoen deur die Proklamasie op Verteenwoordigende Owerhede 1980, (Proklamasie AG 8 van 1980) of ’n bepaling daarvan opsigself, soos wat dit in die Gebied Suidwes-Afrika gegeld het op die datum onmiddellik voor die datum waarop die eerste lede van die Kabinet die eed of plegtige verklaring voorgeskryf in artikel 23(4) van Proklamasie R101 van 1985 afgelê en onderteken het, en indien wel, welke bepalings daarvan hef ’n Fundamentele Reg op, kort dit in, of doen daaraan afbreuk, met verwysing na die Fundamentele Reg en die mate waarin dit in elk geval aldus opgehef, ingekort of aan afbreuk gedoen word.”

The question submitted, in simple language, is to what extent, if at all, does the Representative Authorities Proclamation 1980, hereafter referred to as Proclamation AG 8, or any of its provisions, abolish, diminish or derogate from any of the fundamental rights enshrined in the Bill of Rights enacted as part of the Proclamation.

It will be noticed that the wording of the question submitted is whether any fundamental right is abolished, diminished or derogated from by Proclamation AG 8 “of ’n bepaling daarvan opsigself”. The use of the word “opsigself” in this context has given rise to some difficulty which has led to different interpretations thereof by counsel appearing before us. On the one hand it has been argued by Mr Van der Byl that the use of the word “opsigself” has a limiting effect in the sense that the Court should interpret the relevant enactments without the aid of extrinsic, and in particular documentary, evidence of a factual nature, whereas Mr Farlam submitted that no special significance attaches to the use of the word “opsigself”, and that by using it no limitation was intended with regard to the aids and methods to be employed by the Court in interpreting the relevant enactments. This divergence of opinion was fairly extensively argued inasmuch it could have a bearing on the approach by this Court and the aids to be employed by it in the interpretation of the relevant enactments.

It seems to me, however, that on a proper construction of Section 19(2) of the Proclamation this Court must also determine the procedure, including the rules of interpretation, to be employed in answering any question placed before it, and that it would be neither desirable nor competent for the Cabinet to lay down specific procedural rules to this Court to acquit itself of the task entrusted to it. Nor does it seem to me that this was, in fact, intended by the use of the words “opsigself”. What

was most probably intended was nothing more than to make it clear that the question to be answered was firstly whether Proclamation AG 8 as a whole, was in conflict with one or more provisions of the Bill of Rights, and secondly, if the first question was in the negative, whether any one or more *specific provisions* of Proclamation AG 8 by themselves (opsigself) were so in conflict, and it is on this basis that the question put to this Court will be answered.

- (7) The Cabinet, in submitting the question referred to above to this Court, has instructed two sets of counsel to argue the matter before us, namely advocate P. C. van der Byl, SC, assisted by advocate J. D. G. Maritz, and advocate I. J. Farlam, SC, assisted by advocate J. J. Gauntlett. Presumably this was done in view of the wording of section 19(2) authorising the Cabinet to submit the question referred to above "for argument and decision". The Court was very appreciative of the valuable assistance provided to it by these counsel. Although this Court could have invoked the assistance of other counsel as well, and could even have ordered oral or written evidence to be placed before it, this did not appear to be necessary in view of the thorough assistance rendered by counsel by their argument, and the Court would like to express its gratitude to them for their assistance.

The two sets of counsel were free to take up any position they chose and were in no way instructed to argue opposing views. They did, however, take up divergent standpoints, which in itself was very helpful.

- (8) In order to put the question submitted to us into the correct perspective it will be necessary to analyse Proclamation AG 8 in detail.

This Proclamation was promulgated on 24 April 1980, that is at a time when the Bill of Fundamental Rights, which forms part of Proclamation R101, was not yet placed on the statute book nor probably even contemplated. This only happened on 17 June 1985 — some five years later. It is a trite, but important, observation that the legislator responsible for the promulgation of Proclamation AG 8, could not therefore consider the implications of certain of the provisions of Bill of Fundamental Rights and a possible conflict therewith with the provisions of Proclamation AG 8, at the time. No other Bill of Rights of any kind was, of course, at that time in force in the Territory.

Proclamation AG 8 was promulgated by the then Administrator-General of the Territory, acting in terms of Proclamation 181 of 1977 of the Republic of South Africa, at the request of the National Assembly of the Territory established by Proclamation AG 21 of 1979, which acted in terms of section 3(3) of that Proclamation.

The position generally with regard to legislation in the Territory at the time when Proclamation AG 8 was promulgated was that the National Assembly, established by Proclamation AG 21 of 1979, had power to

legislate for the Territory, subject to certain restrictions, which legislation was, however, subject to the Administrator-General's approval in that he had to sign every bill before it became law. Furthermore the Administrator-General had the power to legislate for the Territory by virtue of Proclamation 181 of 1977. The Administrator-General and the National Assembly therefore were the only local legislative bodies in the Territory. Of course, the State President of the Republic of S.A. had at all times also the power to legislate for the territory, as had the Parliament of the Republic of South Africa.

Returning to the genesis of Proclamation AG 8 it was then considered appropriate to establish what was termed "representative authorities" for the various "population groups" in the territory, and confer upon them limited legislative as well as executive functions. As a result Proclamation AG 8 was drafted and passed by both the then National Assembly and signed by the then Administrator-General. For the record Proclamation AG 8 was amended by Proclamation AG 40 of 1980, Proclamation AG 4 of 1981, Proclamation AG 12 of 1982, Proclamation AG 3 of 1983 and Proclamation AG 40 of 1984.

Proclamation AG 8, as ultimately promulgated, makes provision for the creation and establishment of "representative authorities" in the Territory, on whom certain legislative and executive functions were bestowed. These "representative authorities" were to constitute the legislative and executive organs of a number of "population groups", which were also established by Proclamation AG 8 (in section 3 thereof). The "population groups" so established were in respect of the following:

- (i) the Basters;
- (ii) the Bushmen;
- (iii) the Caprivians;
- (iv) the Coloureds;
- (v) the Damaras;
- (vi) the Hereros;
- (vii) the Kavangos;
- (viii) the Namas;
- (ix) the Ovambos;
- (x) the Tswanas; and
- (xi) the Whites.

Proclamation AG 8 then made specific provision for the legislative as well as executive powers of the various representative authorities, and generally provided the framework within which they were to operate. I shall deal with these various aspects separately.

- (9) The first matter which must be put into proper perspective is the basis on which the various population groups were established, and certain consequences following therefrom.

In terms of section 4 of Proclamation AG 8, every person in the territory, for the purposes of the Proclamation, is deemed to be a member of the population group indicated in the identity document issued to him under the provisions of the Identification of Persons Act 1979 (Act 2 of 1979). Further provision is made for other persons, who for one reason or another are not a member of a population group indicated in the identity document issued to him in terms of, or recognized, by the Act referred to (such as for instance married women or persons under 16 years, or persons holding other types of identity documents), to be assigned to a particular population group. Finally any person who is still not under any of these provisions falling under any population group, is deemed to be a member of the population group of which he is generally accepted to be a member.

The Identification of Persons Act 1979 makes it compulsory (section 2(1)) for any person "in the territory" who is over the age of sixteen years to be in possession of an identity document. Failure to produce such identity document to a member of the security forces on demand may be arrested without warrant, and generally failure to comply with any provision of that Act is made an offence.

In terms of Regulations promulgated under the Identification of Persons Act 1980 (AG 13 of 1980), the application for an Identification Document, which must be completed in order to obtain such a document, requires the applicant to denote the population group to which he belongs, which is then inserted in the identity document issued to him.

The effect of the combined provisions of the Identification of Persons Act 1979, and of Proclamation AG 8, is therefore that for practical purposes every person born or resident in the Territory is deemed to belong to one of the eleven population groups established in section 3 of Proclamation AG 8.

Furthermore, section 4(2) of Proclamation AG 8 provides that if the executive authority of a population group established by that Proclamation considers that any person is incorrectly classified as belonging to that population group, it can take steps to have the identity document withdrawn and a new one issued showing the correct population group. The wishes or consent by the person concerned appear to have no influence on the decision to remove such person from the one population group to the other.

To sum up. For practical purposes the total population of the Territory over the age of sixteen years is compelled by the Identification of Persons Act 1979 to be in possession of an Identity Document. In the formal application for such an Identity Document, which is prescribed by the Regulations promulgated under the Act, an applicant must indicate the population group to which he belongs. The Identity Document there-

after issued to him in pursuance to the application indicates (by way of a code number) the population group of such person.

Proclamation AG 8 created the concept of representative authorities, which could be established for the eleven named population groups. For the purposes of the Proclamation a person in the territory "shall be deemed" to be a member of the population group indicated in the Identity Document issued to him or her in terms of the Identification of Persons Act, or some other recognized Identity document. For all persons not covered by these provisions further provision is made so that in effect and for practical purposes the whole population of the territory is allocated into one or other population group.

An important feature of all these provisions is that whereas in the first instance a person is free to indicate to which population group he considers him or herself to belong, section 4(2) of Proclamation AG 8 provides the machinery where such a person can be re-allocated to another population group (without his consent) if the executive authority of such population group "is of the opinion" that such a person is, in fact, not a member of that population group.

Thus a person who has indicated, that he belongs, say to the white population group, and was consequently shown in his Identity Document to belong to that group, could be re-allocated to say the coloured population group if in the opinion of the executive authority of the whites he did not belong to the white group, and where the registering officer (under the provision of the Identification of Persons Act) after enquiry is satisfied that such person is, in fact, a member of the coloured group.

Every person in the territory is therefore deemed to be a member of one or other of the eleven population groups by operation of law and not by free choice, and further has no real choice to select the population group he wishes to belong to.

- (10) As far as the composition of the eleven population groups is concerned they are generally perceived to be either racial or ethnic groups. In the case of the white population group this is generally perceived to be a "racial" group. Although all the population groups have been considered as separate groups in the territory for quite a number of years (they were also considered as such by the so called "Odendaal Plan" of 1962), the division on these lines is neither truly scientific, nor in certain cases realistic.

Without going into any detail, the concept of "race" and "ethnicity" has largely defied legal, and I suspect also to some extent, scientific definition. The difficulties in defining these concepts are dealt with in depth in the House of Lords decision in *Mandla v Dowell Lee*, reported in 1983(1) AER 1062 where the concept of "race" and "ethnic origin"

within the meaning of the definition of "racial group" in the English Race Relations Act of 1976 was in issue.

Various definitions of "ethnic" were in that case considered, but eventually the Court arrived at a definition which it found to be commonly used and which is wider than the strictly racial or biological use on which some definitions are based. The Court gave this concept ("ethnic") a meaning which it found to be "consistent with the ordinary experience of those who read newspapers at the present day". The learned judge then continued:

"In my opinion, the word 'ethnic' still retains a racial flavour but is used nowadays in an extended sense to include other characteristics which may be commonly thought of as being associated with common racial origin.

For a group to constitute an ethnic group in the sense of the Act of 1976, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential, others are not essential, but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these:

- (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive;
- (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant;
- (3) either a common geographical origin, or descent from a small number of common ancestors;
- (4) a common language, not necessarily peculiar to the group;
- (5) a common literature peculiar to the group;
- (6) a common religion different from that of neighbouring groups or from the general community surrounding it;
- (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people (say, the inhabitants of England shortly after the Norman conquest) and their conquerors might both be ethnic groups."

As regards the term "racial" in the legal context Lord Simon of Glaisdale in *Ealing London Borough Council v Race Relations Board*, 1972 (AC) 362, referring to the long title of the former Race Relations Act of 1968 said:

"Moreover 'racial' is not a term of art, either legal or, I surmise, scientific. I apprehend that anthropologists would dispute how far the

word 'race' is biologically at all relevant to the species amusingly called homo sapiens".

and later

"This is rubbery and elusive language — understandably when the draftsman is dealing with so unprecise a concept as 'race' in its popular sense and endeavouring to leave no loophole for evasions".

In this connection it is also of interest to note that when the relevant committee of the United Nations dealing with the problems involved in drafting article 27 of the International Covenant of Civil and Political Rights (which as I shall later show is in essence in many respects similar to the provision of Article 9 of the Bill of Rights), the committee decided to replace the word "racial" by the word "ethnic" in all references to minority groups described by their ethnic origin. The reason was that it was felt that the term "racial" should be eliminated "because so-called racial groupings were not based on scientific facts and tended to become indistinct as a result of evolutionary processes, intermarriage and changes in ideas or beliefs". (Capotorti: Study on the Rights of Persons belonging to ethnic, religious and linguistic Minorities—UN Publications.) It was pointed out there that the word "ethnic" seemed to be more appropriate, as it referred to all biological, cultural and historical characteristics, whereas "racial" referred only to inherited physical characteristics.

As already stated, in this territory the division into the eleven population groups has been used for some time, and they have generally been referred to as separate ethnic groups. But, as Professor Malan (Peoples of SWA/Namibia) points out—

"It is important to note that the above-mentioned ethnic groups (which coincide with the eleven groups established by Proclamation AG 8— my comment) have been classified as such on a very generalized basis. With a few exceptions — notably the Basters — these groupings are not to be seen as homogeneous, since most of them are characterized by a high degree of internal cultural and linguistic diversity: In the Kavango the Kwangari and Mbunza share the same language, but the dialects spoken by the Geiriku and Mbukushu are so different that they had to be developed as separate written languages. In Ovambo, again, the dominant Ndonga language is not accepted as a lingua franca by the Kwanyama, which has resulted in the recognition of two indigenous languages for this territory. This diversity is also reflected in other aspects of culture. Among the Khoi-khoi (or 'Hottentots') the spectrum is still wider, where, on linguistic grounds, Nama tribes are arbitrarily classified together with the Oorlams, the River Bushmen of Kavango and the Naron of the Central Kalahari. The Bushmen also represent great diversity,

since the Kung and any of the other four groups are virtually strangers to one another as far as communication in their disparate dialects is concerned.

In order to achieve a more realistic image of the ethnic groupings in the territory, it would be safest to refrain from utilizing such single criteria as racial, linguistic, cultural, geographic or modern political factors in isolation. Ideally, a combination of cultural, linguistic and racial factors should be applied in the classification of the different peoples into a number of main groups."

There is, however, a world wide tendency to use the term "ethnicity" in a much wider sense in the field of national and international relations. In this connection the comments by Prof. Nathan Glazer, who is professor of education and social structure at Harvard University, in an article called "Ethnicity: A World Phenomenon" (expanded in his book "Ethnicity: Theory and Experience") are of great interest.

I have dealt at some length with this aspect to show that it is difficult to find the underlying rationale for the composition of these specific eleven population groups. Whilst religion does not appear to play any part in this composition, language and cultural affiliations play a part in some, but not all, of these groups. Having made this point, I would immediately also point out that the underlying rationale for the composition of these specific eleven population groups is not, per se, of any overriding importance in the present enquiry, except that it does become relevant in putting the provisions of article 9 of the Bill of Rights into its proper perspective inasmuch as it deals with the right of all ethnic, linguistic and religious groups to enjoy their cultures, languages, traditions and religions in so far as they do not infringe upon the rights of others or the national interest.

The fact is that the population of this territory is divided up into eleven groups or entities, of, as I shall show hereunder, greatly varying sizes, with certain legislative and executive functions, and the fundamental question does not concern itself with the logic or underlying reasons for their composition in a specific form (which may or may not have taken place for political considerations, which fall entirely outside this enquiry), but whether the rights and privileges of these groups, however constituted, are unequal or discriminatory, and whether on this or any other ground the provisions of the law establishing them (Proclamation AG 8) are in conflict with some of the articles contained in the Bill of Rights.

Another point already referred to is that the population groups established, comprising as they do the total population of the territory, vary enormously in size. According to census figures supplied by Mr Van der Byl the total population of the Territory in 1980 was 1 033 372. Of this

there were, for example, 506 114 Ovambo, that is nearly 49 per cent, 76 430 Whites, that is about 7,4 per cent and 6 706 Tswanas, that is 0,65 per cent. As will later appear different figures (which do not significantly change) were given in a Table on (sic) hereof dealing with a compilation of contributions to the various representative authorities.

(11) In accordance with the provisions of Proclamation AG 8 nine representative authorities were established during 1980, that is to say:

- for the Whites by Proclamation AG 12 of 1980;
- for the Coloureds by Proclamation AG 14 of 1980;
- for the Ovambos by Proclamation AG 23 of 1980;
- for the Kavangos by Proclamation AG 26 of 1980;
- for the Caprivians by Proclamation AG 29 of 1980;
- for the Damaras by Proclamation AG 32 of 1980;
- for the Namas by Proclamation AG 35 of 1980;
- for the Tswanas by Proclamation AG 47 of 1980; and
- for the Hereros by Proclamation AG 50 of 1980.

The Bushmen decided not to have a representative authority established for their population group, so that the legislative and executive functions as far as their group is concerned are now exercised by the Central Government established under Proclamation 101 of 1985 (the Proclamation).

The Baster Community already had certain legislative and executive functions bestowed upon them by the Rehoboth Self-Government Act of 1976 (Act 56 of 1976), which circumscribed the legislative, executive and judicial functions which may be exercised by the appropriate bodies elected or appointed by or from the community. The various powers and functions thus conferred upon that community generally speaking exceed the legislative and executive functions bestowed upon the various representative authorities established by Proclamation AG 8, and there was therefore no need to establish a representative authority in respect of that group. That being so the present enquiry, being confined to the provisions of Proclamation AG 8 in relation to the Bill of Fundamental Rights, does not therefore involve the Baster population group, except by implication.

(12) As already stated provision was made in Proclamation AG 8 for certain defined legislative and executive powers which could be bestowed upon a representative authority once it was established.

Dealing first with the legislative powers section 14 of Proclamation AG 8 circumscribes these powers. Subject to certain provisions contained in section 14, these powers are set out in a Schedule to Proclamation AG 8. In view of the importance of these powers I shall, despite their length, set them out completely. They have been amended in several

respects, and the important amendments have been incorporated, reading as follows:

Item 1 The acquisition, alienation, grant, transfer, occupation and possession of land, or any right to land —

- (a) which in terms of the constitution of the representative authority or any other law is communal land of the particular population group; or
- (b) which is not communal land as aforesaid but which is acquired by the representative authority as owner under a title deed registered in a deeds office, if it appears from such title deed or from an endorsement made thereon, and on any relevant documents in such deeds office, under the authority of the Administrator-General, that such land was so acquired as communal land of the particular population group with the consent of the Administrator-General,

but excluding —

- (i) the acquisition, alienation, grant, transfer, occupation or possession of any surveyed piece of such land or any portion thereof or any right in respect thereof, if the ownership of such piece of land has at any time been transferred to any person, by or under the authority of the executive authority or under any law of the legislative authority or any other law administered by or under the control of the executive authority, by means of the registration of a title deed in any deeds office, and a period of fifteen years has elapsed after the date of such registration, regardless of the registration of any other transfer of such land or any portion thereof, to whomsoever, during such period;
- (ii) the amendment, repeal or replacement of the Abolishment of Racial Discrimination (Urban Residential Areas and Public Amenities) Act, 1979 (Act 4 of 1979), including the extension of any provision thereof relating to a public amenity, as defined therein, to any other amenity, institution, service or activity on any land, or of any such provision relating to a residential erf, as so defined, to any other land in a township, as so defined;
- (iii) any matter relating to the registration of deed in connection with land, the extent of the units into which unsurveyed land is divided by survey for the purposes of such registration, the subdivision of surveyed land by survey,

or the acquisition, alienation, grant, transfer or possession of undivided shares in surveyed land;

- (iv) the expropriation of land or any right in respect of land, or the making available of land for public or official purposes to any authority established by or under any law (except to the executive authority or any authority established by or under a law administered by or under the control of the executive authority);
- (v) any matter relating to mineral rights or prospecting or mining for minerals;
- (vi) any matter relating to soil conservation (except any measures additional to and consistent with the laws on soil conservation of the Assembly or any other competent authority), protection of water sources, or nature conservation and conservation of the environment.

Item 2

- (1) Farming settlements on land which, as contemplated in Item 1(a) or (b), is communal land of the particular population group or has been acquired as such communal land or of which the representative authority or any member of the particular population group is the owner.
- (2) Forestry, within the limits of any law relating to a matter referred to in paragraph (vi) of Item 1, on land which, as contemplated in paragraphs (a) and (b) of that Item, is or has been acquired as communal land of the particular population group.
- (3) The rendering of assistance, including assistance and financial assistance by way of or in connection with the sale or lease of immovable or movable property, the transfer or consolidation of debts, a compromise with creditors and the staying of legal proceedings pending the outcome of an application for assistance to members of the particular population group carrying on or undertaking to carry on farming operations, the exercise of control in respect of any such assistance being rendered, and the protection of the interests of the authority rendering such assistance, including such protection by means of the endorsement of documents registered or kept in any deeds office and the attachment and sale of property without an order of court, but excluding—
 - (a) the rendering of assistance by means of subsidies on the cost of any works on surveyed land or on the interest payable on loans for any such works, if the

- maintenance of such works forms a burden on the land;
- (b) any matter relating to the application of the Land Bank Act, 1944 (Act 13 of 1944), or the amendment, repeal or replacement of that Act.
 - (4) Applied research and tests in connection with farming engaged in by members of the particular population group or with a view of the extension of the farming activities of such members.
 - (5) The provision to members of the particular population group carrying on or intending to carry on farming operations, of information, instruction, advice and training in connection with farming methods, practices and management techniques and the utilization and protection of the soil and other resources.
- Item 3
- (1) The provision to members of the particular population group of education of any standard up to and including the standard ordinarily required for an examination for the tenth standard, but excluding —
 - (a) the provision of such education under courses of study and syllabuses;
 - (b) the conduct of examinations; or
 - (c) the form and issue, in respect of examinations, of certificates,
 which do not comply with such minimum standards and minimum requirements as may be prescribed by or under any law of the Assembly or any other competent authority in respect of such education in schools and other institutions in the territory generally.
 - (2) The training of persons as teachers for the provision to members of the particular population group of education of a standard not higher than the standard ordinarily required for an examination for the fourth standard.
 - (3) The establishment, erection, maintenance and management of, and the control over, schools, training colleges, hostels and other institutions for or in connection with the provision of education or training contemplated in paragraph (1) or (2).
- Item 4
- The provision (within the limits of any law of the Assembly or any other competent authority in relation to the prevention and combating of infectious or communicable diseases, or the co-ordination of health services, in the territory generally) to members of the particular population group of health services

aimed at the treatment, cure, correction or mitigation of physical or mental defects, illnesses or deficiencies in man, or the immunization or treatment otherwise of any person in order to prevent his contracting any such defect, illness or deficiency, including —

- (a) district surgeon and district nursing services and such health services at schools under the control of the executive authority;
- (b) maternity services and pre- and post-natal care; and
- (c) the establishment, erection, maintenance and management of, and the control over, hospitals, clinics and other institutions for the provision of such services,

but excluding any matters in relation to —

- (i) the registration of medical practitioners, dentists, nurses, midwives, chemists and other persons practising any profession having as its object the prevention, treatment, cure, correction or mitigation of physical or mental defects, illnesses or deficiencies in man, and the control over their respective professions;
- (ii) the control over and the registration of medicines and other substances used or intended for use for or in connection with the prevention, treatment, curing, correction or mitigation of such defects, illnesses or deficiencies, and poisonous substances, dependence-producing substances and other substances that are dangerous or injurious to the physical or mental health of man.

Item 5 (1) The provisions to members of the particular population group of social welfare services, including —

- (a) family and child welfare and the adoption of children;
- (b) social care or rehabilitation of juveniles, aged persons, physically or mentally handicapped persons, indigent persons, maladjusted persons, alcoholics and drug addicts;
- (c) social and emergency relief; and
- (d) the establishment, erection, maintenance and management of, and the control over, homes, other institutions and schemes for or in connection with the rendering of such services,

but excluding any matters in relation to —

- (i) the registration of welfare organizations;
- (ii) the registration of social workers, and control over their profession;
- (iii) the collection of money or other contributions for

- such services or for charity, from members of the public.
- (2) Old age, blind person's, disability, war veteran's and similar social pensions and allowances for members of the particular population group.
- Item 6 The provision of sub-economic or subsidized housing to members of the particular population group, the planning and implementation of, and control over, schemes for such housing, the conversion of any such housing or schemes being provided or implemented, into economic housing or schemes for economic housing, and the continued implementation of and control over such schemes.
- Item 7 Matters having as their object the promotion of art and culture in relation to the particular population group, including the establishment, erection, maintenance and management of, and the control over, art galleries, theatres, libraries, museums, archives, herbariums, botanical gardens, zoos, aquariums and similar institutions, and any services in connection therewith, but excluding any matter referred to in Item 1(ii).
- Item 8 The establishment of and control over associations and organizations, and the assignment of powers, duties and functions and the provision of financial and other assistance to such associations or organizations or to tribal, community or regional authorities referred to in Item 9, in connection with civil defence and local security in relation to communities established outside the area of jurisdiction of any local authority (as defined in any law on civil defence in the territory generally) on land belonging to members of the particular population group or which, as contemplated in Item 1(a) or (b), is or has been acquired as communal land of the particular population group, and the provision of instruction to members of such communities in connection with civil defence and local security.
- Item 9 The recognition, establishment, replacement, constitution and powers of tribal community and regional authorities in respect of tribes or other communities on land which, as contemplated in Item 1(a) or (b), is or has been acquired as communal land of the particular population group, including the recognition, appointment, deposition and dismissal, with the prior approval of the Administrator-General, of paramount chiefs, chiefs or headmen, and the discipline, retirement, pensioning and other conditions of service of paramount chiefs, chiefs or headmen, but excluding any matter affecting the constitution of the legislative authority or the executive authority.

- Item 10 The administration of justice in accordance with the traditional law and customs observed by tribes and communities referred to in Item 9, including the exercise of civil and criminal jurisdiction in accordance with such law and customs by persons or bodies acting in terms of such law and customs.
- Item 11 Elections for members of the legislative authority, and the registration or identification of members of the particular population group as voters, including the determination of the right of voting and the qualifications to be complied with by any candidate for election.
- Item 12 (1) Direct taxes on the income of, and personal taxes on, members of the particular population group, apart from any such taxes levied in terms of any law of the Assembly or any other competent authority.
(2) Moneys payable for services rendered by or on behalf of the executive authority.
- Item 13 The collection of and control over all revenue and moneys accruing to the representative authority subject to the provisions of the State Finance Act 1982 (Act 1 of 1982).
- Item 14 (1) The raising of loans by executive authority with the prior consent of the Administrator-General obtained in each particular case, and subject to the conditions, if any, determined by the Administrator-General.
(2) The making or receiving of donations by the executive authority.
- Item 15 Estimates of revenue and expenditure of the executive authority, and the appropriation of moneys for the purposes of such estimates, but excluding such appropriation of moneys for any purpose other than the purpose for which such moneys are made available by or in terms of any law of the Assembly or any other competent authority for such appropriation subject to the provisions of the State Finance Act 1982 (Act 1 of 1982).
- Item 16 Except in so far as it relates to a matter contemplated in section 6(2)(b) or (f) of the Government Service Act, 1980 (Act 2 of 1980), the planning of and control over the work connected with the exercise or performance of the powers, duties and functions of the executive authority and the services rendered by it, and the acquisition, provision and maintenance of and control over supplies, services, buildings, works and accommodation, transport and other facilities for the purposes of the performance or rendering of such work and services or the work connected with the exercise or performance of the powers, duties and functions of legislative authority, but subject to

- the provisions of the State Finance Act, 1982 (Act 1 of 1982), or any other law in relation to the acquisition, provision and maintenance of and control over supplies, services and transport and other facilities; and
- Item 17 Deleted by AG 40 of 1984 (sec. 9).
- Item 18 The making available and rendering by the executive authority to, and the use by, persons who are not members of the particular population group, of services provided by the executive authority for members of the particular population group in terms of the laws administered by it or under its control, in so far as such making available, rendering or use is not regulated by any agreement contemplated in Item 19, but excluding the imposition or maintenance of any prohibition on such making available rendering or use to or by any person of any health services (save health services in any institution exclusively connected with any school or any old age home or other establishment in connection with matters defined in Item 3 or 5), merely on the ground of his race or colour or on account of the fact that he is a member of a population group other than the particular population group.
- Item 19 The execution of agreements which under any law of the Assembly or any other competent authority may be or have been entered into by the executive authority with one or more other executive authorities established for any population group or population groups or with the Administrator-General, in connection with the exercise or performance —
- (a) by any such other executive authority or by the Administrator-General, as the agent of the executive authority; or
 - (b) by the executive authority as the agent of any such other executive authority or of the Administrator-General; or
 - (c) by the executive authority in co-operation with any such other executive authority or authorities or with the Administrator-General, of any power, duty or function conferred or imposed in terms of any law upon the executive authority or upon any such other executive authority or upon the Administrator-General, as the case may be.
- Item 20 The imposition of penalties, and provision for the forfeiture of property, for the purposes of enforcing any law made by the legislative authority or any law administered by or under the control of the executive authority, including penalties that may be imposed in accordance with the laws and customs referred to in Item 10 by the persons or bodies so referred to.

The legislative powers contained in the Schedule just quoted are not

necessarily the powers eventually bestowed upon the various representative authorities. In terms of section 14(2)(b) of Proclamation AG 8 the Administrator-General may

- “(a) (i) issue different proclamations in respect of different legislative authorities;
- (ii) with reference to any particular legislative authority, issue different proclamations in respect of different defined matters or in respect of different subjects falling under a defined matter and defined in the proclamation concerned, and determine different dates in respect of different such matters or subjects.”

I have already referred to the various Proclamations in terms of which representative authorities for nine of the eleven population groups were established.

Subsequent thereto various Proclamations were promulgated in terms of which, inter alia, the date on which the representative authority concerned became empowered to exercise legislative functions was fixed as well as the items in respect of which it could so legislate. Thus by Proclamation AG 13 the Representative Authority of the Whites became empowered to exercise legislative functions as from the 1st June 1980 onwards in respect of Items 1 to 8 and 11 to 20 of the Schedule referred to. (The two items omitted, namely 9 and 10, clearly do not apply to this population group.)

Generally speaking the power to make laws in respect of *all* items contained in the Schedule were bestowed upon the various representative authorities, and in the few cases where some items were omitted, as for instance in the case of the Whites and Coloureds, this is of no significance as regards the present enquiry. (See Proclamations AG 16 of 1980, AG 25 of 1980 (Ovambo), AG 28 of 1980 (Kavango), AG 31 of 1980 (Caprivian), AG 34 of 1980 (Damaras), AG 37 of 1980 (Namas).)

Although the legislative powers so bestowed upon the various representative authorities could be extended or restricted at any time, for practical purposes generally all the legislative powers set out in all the items in the Schedule were exercised, and are still so exercised by the various authorities.

- (13) Apart from the legislative powers conferred upon the various representative authorities, similarly executive powers have been bestowed upon them. In terms of Part III of Proclamation AG 8 an executive authority is created for each representative authority, to administer the affairs of each population group in respect of all matters in respect of which such authority is empowered to legislate — in practice in respect of all matters contained in the Schedule to Proclamation AG 8, quoted in full above, plus such further matters which could be specifically added by competent authority.

- (14) Proclamation AG 8, of course, only provided the general framework for the establishment of representative authorities. In order to create a specific representative authority for any particular population group, further legislation was necessary establishing such specific authority and determining the procedural and other parameters which were to apply to such representative authority, including the establishment of an executive committee, the method of election of the members of such population group to the executive committee, the size thereof and so on. These provisions are not the same for each one of the executive committees. Thus for instance in the case of the White population group Proclamation AG 12 of 1980, which established that specific representative authority, provision is made for an executive committee consisting of a chairman and four members, to be elected by the Legislative Assembly established by that Proclamation, whereas for instance in Proclamation AG 23 of 1980, which established the representative authority for the Ovambos, provision is made for an executive committee consisting of a chairman and six other members, where the chairman is elected by the Legislative Assembly, but where the remaining six members are appointed by the chairman.

It is not necessary to go further into details as regards this aspect. Sufficient to say that whilst all the Proclamations establishing the various Representative Authorities are broadly the same, they do nevertheless differ in some important respects.

- (15) I have dealt in considerable detail with the powers and duties of the Representative Authorities created by Proclamation AG 8, and the whole governmental structure created by that Proclamation, because only by doing so can one test the implications and practical effects of that structure against the provisions of the Bill of Fundamental Rights.
- (16) The next step in the present enquiry would be to identify those articles in the Bill of Rights which are, or could be in conflict with either the whole of Proclamation AG 8, or specific provisions thereof. Before doing so, it will be convenient to say something about the principles which should be employed in interpreting and evaluating the relevant statutory provisions involved. Quite considerable argument has been put before the Court on this aspect. The basic problem that arises in an enquiry of this sort is that whilst the relevant provisions are statutory enactments in a general sense, they are enactments of a special kind, commonly referred to as constitutional instrument or documents, which, by their nature, ought to be interpreted in a wider and less rigid way than ordinary statutes. Bills of Rights are also a type of constitutional instrument, and different rules of interpretation should therefore also be applied to them as well.

I do not wish to deal in any detail with the arguments placed before us

— there was in any event no basic divergence of views in this regard. It is sufficient to refer to the case of *Minister of Home Affairs v Fisher* 1980 AC 319, where the Privy Council had to deal with the interpretation of a section of the Bill of Rights forming part of the constitution of Bermuda, and where certain guidelines were adopted, which have been followed in similar cases in various parts of the world, including South Africa. The result the Court arrived at can be summarized as follows: Articles or provisions laying down fundamental rights are, by their very nature, drafted in “a broad and ample style which lay down principles of width and generality”. They should be treated *sui generis* “calling for principles of interpretation of its own, suitable to its character”, without necessary acceptance of all the presumptions and principles applicable to legislation of ordinary statutes. The object is to ascertain the spirit of the various provisions of a Bill of Rights, as revealed by the language used, and to avoid the pitfalls of rigid literalism. As it was put in the Fisher case referred to above, the provisions of a Bill of Rights “call for a generous interpretation avoiding what has been called the ‘austerity of tabulated’ legalism, suitable to give to individuals the full measure of fundamental rights and freedoms referred to”. This does not, of course, mean that one must put a strained interpretation on the language used, where the meaning is clear, and that respect must be paid to the language used and to the traditions and usages which have given meaning to that language.

- (17) Bearing these thoughts in mind when interpreting the relevant provisions of the Bill of Rights in issue here, I will now proceed to deal with the various articles thereof to identify the articles which are or may be relevant to the present enquiry.

Here again very considerable and helpful argument has been placed before us, which we have carefully considered. Again it would serve no purpose, bearing in mind the nature and purpose of this enquiry, to deal with all these arguments, and I shall confine myself to a few general observations and the conclusions arrived at.

Generally speaking the eleven articles contained in the Bill of Rights before us deal with non-material rights and liberties, with little or no relation to a subject's economic or material well-being. They are, of course, fundamental, and ultimately the most important rights and freedoms, such as the right to life, to liberty, to a fair trial, freedom of movement and so on. There are also the fundamental freedoms which are to some extent of a political nature, such as the right to freedom of expression, to peaceful assembly, to participate in political activity and Government and the like. Except for article 11, dealing with the right to own property, and as I shall show, article 3, none of the other articles deal with the material or economic rights of a person.

In the course of argument a number of these articles were dealt with as

being possibly to a greater or lesser extent in conflict with the provisions of Proclamation AG 8. We have carefully considered these arguments, but again a full analysis and discussion of these would unduly enlarge this opinion, and which in the light of our ultimate conclusion it would not be necessary to deal with.

- (18) We have come to the conclusion that article 3 of the Bill of Rights in itself is crucial and fundamental to this enquiry, and that the question placed before us can be answered in the light of this article. This should, however, not be interpreted to mean that none of the other articles conflict with Proclamation AG 8, or a specific provision thereof.

I have already quoted the article before, but because of its crucial importance wish to repeat it here. It reads:

“The Right to Equality before the Law:

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.”

This article can be divided into two distinct, though interrelated, parts. The prescription that every one shall be equal before the law is one found in almost every Bill of Rights to which we were referred, and there is a vast amount of literature dealing with the concept and ambit of this right alone. I need only refer to the work by Polyviou on “The Equal Protection of the Laws”. It is however, the second part of the article which is of immediate relevance and importance.

Analysing this part, the first question that arises is whether the governmental structure of representative authorities established by Proclamation AG 8 falls within the definition of “branch or organ of government”. We have no doubt that it does. To place any other interpretation thereon would be to strain the generality of the language used, particularly bearing in mind the special approach to the interpretation of a constitutional provision. Mr Maritz did argue that the legislative authority of the Representative Authorities created by Proclamation AG 8 are not, on a true interpretation, a “branch of government” in terms of article 3 of the Declaration of Rights. But as already stated the reference to “branch or organ of government” and “public institution” clearly in our view includes all legislative and executive organs of the representative authorities. The cases of

Monta of Genoa v Cechrofract Co. Ltd (1956) 2 AER 769 at 773;

Ramlogan v The Mayor and Others, San Fernando (1986) LRC (Const.) 377 at 383 b–f and

Gunaratne v People’s Bank (1987) LRC (Const.) 383 at 396–398 b.

to which Mr Farlam referred us, lend further support to that view.

(19) The next problem encountered is to interpret and define the meaning of the phrase that the bodies concerned may not "prejudice nor afford any advantage" to any person on the grounds stated. Does it mean that the "prejudice" or "advantage" refers only to non-material or non-economic rights, as some of the other articles do, or do they refer also to a person's rights which are concerned with his economic and material well-being? It is noteworthy that we have not been referred to, nor found in our researches, a similar detailed provision in any of the other Bills of Rights placed before us. They all do contain, however, in some form or other, the right to equality before the law coupled with a general statement prohibiting distinctions of any kind (such as race, colour, sex, and so on).

These general provisions do in my view clearly include the right to participate in the economic and material benefits generally available to all persons, without discrimination on any of the grounds mentioned.

In the present case, however the article is more explicit. Bearing in mind that the majority of the subjects in this Territory are economically weak and have to a large extent to rely on direct or indirect financial assistance by government and its agencies in respect of health services, pensions, education and the like, and finding no indication in the language used limiting the ambit of the words "prejudice" or "advantage", we have come to the conclusion that the word "advantage" ought to be interpreted in a wide sense and include material or economic advantage, and that the word "prejudice" has a corresponding meaning.

To hold otherwise would result in the assumption that the lesser privileged subjects in the territory would be primarily, if not exclusively, be concerned with non-material fundamental human rights to the exclusion of the entitlement on a basis of equality to economic advantages offered by the State.

The view that the word "advantage" includes economic advantages finds some measure of support from the following paragraph contained in the preamble to the Bill of Rights, which reads —

"Whereas Governments are instituted among men for the purpose of promoting the safety and *welfare of the people*, from whose consent those governments derive their powers and capacities." (our emphasis)

(20) I must deal shortly with another point raised during argument, namely the question as to what extent, if at all, article 9 of the Bill of Rights, supports, modifies or is in conflict with article 3 of the Bill of Rights.

Article 9 reads as follows:

"All ethnic, linguistic and religious groups and all persons belonging to such groups shall have the right to enjoy, practise, profess, main-

tain and promote their cultures, languages, traditions and religions, in so far as these do not infringe upon the rights of others or the national interest."

The recognition of rights of ethnic, linguistic and religious groups within a state are well known and have, especially since the First World War, been recognized in one form or another by many States and International Agencies. It falls obviously outside the ambit of this opinion to deal with the limitations and parameters of the recognition of those rights, which have given rise to a great number of learned treatises and divergent opinions. Nor is this surprising as there is an inherent clash of interests between the rights of such groups (generally called "minority rights") on the one hand, and the aim of national States within whose boundaries such minorities exist, to establish national unity, as well as undivided loyalty to the State, and to ensure the security of the State. These problems have become very real in particularly the newly created national States of the continent of Africa. However, in the present case we do not consider there to be any conflict between the two articles concerned. Article 9 deals specifically with the protection of rights arising from membership in ethnic, linguistic or religious groups, such as the right to speak one's own language, the right to worship in one's own churches and so on. There is no element of compulsion involved, in the sense that a person *must* worship in a certain church, or *must* speak in a particular language. He is free to choose whether he wishes to belong to such group or not, but if he does so choose, his rights are protected in that respect. It is, however, all important to note that these rights are only protected in so far as they do not infringe upon the rights of others or the national interest. No such qualification is added in article 3, which is therefore absolute.

Article 3 unqualifiedly prohibits any government or governmental agency to prejudice or disadvantage any person on the grounds of his ethnic or social origin, sex, race, language, colour, religion or political conviction, whereas Section (sic) 9 protects the right of ethnic linguistic or religious groups to practice, enjoy, maintain and promote their cultures, languages, traditions and religions.

We can see no inherent conflict between these two articles: Essentially, the two articles complement each other. Article 9 acknowledges the existence of different ethnic, linguistic and religious groups and the individual's right to membership of one or other of those groups. The section enshrines the right to enjoy the cultural and other attributes of membership of a particular group.

Article 3 is on the other hand designed to ensure that no prejudice or advantage results from that group differentiation.

(21) Although one could, by simply analysing the provisions of Proclamation

AG 8 test them without any further evidence, for any conflict with the provisions of the Articles of the Bill of Rights, and in particular Article 3 thereof, I consider that a proper evaluation can only be made by taking into consideration certain aspects of the practical implementation of the governmental structure established by Proclamation AG 8. In order to do so, it will of course be necessary to consider evidence to determine, at least in broad outlines, how the representative authorities have, in fact, operated and are still operating. This raises the question as to what evidence is admissible for this purpose. Argument on this question was put before us by both sets of Counsel. Bearing in mind the special nature of the legal provisions we are called upon to interpret, as set out earlier, I consider that we are entitled to receive and consider all evidence, mainly contained in official documents placed before us, which is objective and incontrovertible. Mr Farlam has fairly summed up the position by stating that such evidence could only be received if it was:

- (1) not contentious;
- (2) not selective and
- (3) of such a nature that a Court could in a wider sense take judicial notice thereof.

This approach appears to be practicable and in line with the various decisions quoted to us relating to the interpretation of constitutional instruments, which we have therefore adopted.

As will become apparent later the availability or otherwise of funds available to the various representative authorities to provide for the various services, for the administrative machinery required, and to provide for necessary capital expenditure and so on, is crucial to the specific enquiry before us.

A closer examination of the financial structure and related subjects of representative authorities is therefore necessary.

As far as the mechanics are concerned, Article 32 of Proclamation AG 8 provides for the establishment of a revenue fund into which all moneys received by the respective executive authority, from whatever source derived, must be paid. The procedure for the operation on this revenue fund is laid down in sections 33 and 34, and section 35 provides for an annual estimate of revenue and expenditure, that is a budget, which must be prepared and placed before the legislative authority to pass the appropriation of funds and the like. Copies of the estimates of income and expenditure of the various representative authorities for the financial year ending on 31 March 1987 have been placed before us, to which I shall refer to in some detail later.

- (22) Items 12, 13, 14 and 15 of the "defined matters" in the schedule to Proclamation AG 8 also refer to the powers by representative authorities to raise moneys and exercise control over them.

I shall now deal with the sources of revenue and assets of the representative authorities.

To start off, when these authorities were established as a result of the passing of Proclamation AG 8, there already existed certain representative authorities or governments previously established on an "ethnic" basis, with their own limited financial control and with limited legislative and executive powers albeit to a lesser degree than those established by Proclamation AG 8. These authorities or governments had control over, or owned, certain buildings, stocks, funds and so on.

With the division of the whole territory into population groups, each with its own governmental structure, the existing governments or authorities ceased to exist and were thereafter re-constituted in a different form with different powers and responsibilities being allocated to the newly established representative authorities.

The residue of governmental activities which were not transferred to the various representative authorities, remained in the so-called Central Government of the Territory.

The separate governments or authorities existing, apart from the South West Africa Administration, immediately prior to the passing of Proclamation AG 8 were those of the Basters, the Caprivians, the Damaras, the Kavangos and the Ovambos.

The transfer of existing assets and funds from the old governments or authorities to the newly created representative authorities was then to be achieved by Section 45 of Proclamation AG 8 which reads as follows:

"45. As from the date on which the administrative control, powers, duties and functions in relation to any defined matter vest in the executive authority of a population group in terms of section 22 and 23, the ownership and control of all movable and immovable property —

- (a) of which the ownership and control vested in the existing executive body or the existing government or administration, or in the executive authority in its capacity as the existing executive body in terms of section 43(1), immediately before that date and which relate to such defined matter; or
- (b) which on that date is registered in any deeds office in the name of the Government of the territory and immediately before that date was used exclusively in relation to such defined matter by or under the control of the Administrator-General, shall vest in the representative authority of that population group."

I would draw specific attention to subsection (b) of this section, which resulted in the transfer of very important and substantial assets, such as schools, hospitals and the like, to specific representative authorities.

Specific provision is also made for the transfer of funds to the various

representative authorities by Section 44 of Proclamation AG 8, which reads as follows:

“44. (1) On or as soon as possible after the date on which the administrative control, powers, duties and functions in relation to any defined matter vest in the executive authority of a population group in terms of sections 22 and 23, there shall be paid into the revenue fund of the representative authority, out of—

- (a) the existing revenue fund; or
- (b) any other existing revenue fund of which moneys have been appropriated for services which are supplied also in relation to such defined matter and which are no longer financed from such moneys as from or at any time after that date; or
- (c) the Central Revenue Fund,

the amount or amounts, if any, determined by the Treasury referred to in section 1 of the Exchequer and Audit Act, 1975 (Act 66 of 1975), after consultation with that executive authority and the authority controlling such other existing revenue fund, and which shall represent the unexpended portion of, or the receipts after that date in respect of, the amount which has been appropriated by law in respect of the financial year in which that date falls for services in relation to such defined matter as a charge to the existing revenue fund or such other existing revenue fund or the Central Revenue Fund, as the case may be.

(2) Any amount paid into the revenue fund of a representative authority in terms of subsection (1), shall for the purposes of section 34 and unless the legislative authority provides otherwise, be deemed to have been appropriated by law, in respect of the financial year mentioned in that subsection, for the services for which it was appropriated by law as contemplated in that subsection.”

Dealing with the practical result of Section 44 just quoted, according to the reports by the Auditor-General on the various representative authorities at the end of the first year of their existence, the following funds were transferred into their respective revenue funds in terms of that section:

Caprivians	R1 097 761,66
Kavangos	R1 210 684,93
Ovambos	R767 620,20
Whites	R44 990 465,60

As far as actual funds are concerned there existed also a “Territorial Development and Reserve Fund” at the time, amounting to R541 149 173. A substantial part of this fund was also transferred into the revenue fund of the representative authority of the Whites. To establish the precise amount would be outside the scope of this opinion — the

Fund was eventually liquidated in 1982 when an amount of R7 167 878,32 was paid into the Revenue Fund of the representative authority of the Whites, and the then balance of R14 670 375,71 into the Central Revenue Fund. (See the Financial Affairs Ordinance 1982 (Ord 8 of 1982)).

The important point arising from this is that as from the commencement of the various representative authorities, enormous disparities existed in the funds which were placed at the disposal of the various representative authorities, taking into consideration also the population figures of the population groups concerned. This appears clearly from the summaries appearing in the reports by the Auditor-General at the end of the first financial year during which the representative authorities operated (31 March 1981), showing the total revenue at the disposal of the various authorities, their total expenditure during the year, and the surplus or deficit.

	Total revenue for year ending 31/3/81	Total expenditure for same year	Surplus or deficit
Damaras	12 712 276,11	13 303 667,01	(591 390,90)
Caprivians	12 486 617,92	12 485 451,12	1 166,80
Kavangos	17 747 614,26	17 481 620,58	265 993,68
Coloureds	15 259 510,21	12 546 288,97	2 713 221,29
Tswanas	350 150,00	322 968,54	27 181,46
Hereros	11 640 536,10	9 346 429,82	2 294 106,28
Ovambos	38 483 470,12	40 721 386,20	(2 237 916,08)
Basters	15 278 018,15	18 172 978,48	(2 894 960,33)
Whites	283 462 669,55	221 492 954,16	61 969 715,39

What emerges from this is simply that from the start the Representative Authority of the Whites had at its disposal funds almost double in size to the rest of representative authorities together, remembering that the ambit of their governmental activities were on principle the same (in respect of the defined matters), and that the Whites represented only about seven per cent of the total population.

- (23) I shall now deal with the yearly income of the various representative authorities later, but before doing so must refer to one other important result of the transfer of assets in terms of Section 45 of Proclamation AG 8, and in particular to the transfer of assets in terms of subsection (b) thereof.

Very considerable assets, such as buildings (schools, hospitals, etc.), loans, farms, equipment and so on, were under the control of the South

West Africa Administration prior to the various representative authorities taking over governmental functions in terms of Proclamation AG 8. In terms of Section 45 of that Proclamation, quoted above, certain of these assets were to be transferred to the respective authorities.

I have, despite every effort, not been able to find a compilation of assets which have so been transferred to the various authorities. They do not appear in the budgets, nor do they appear in the annual reports of the Auditor-General on the accounts of the various authorities. It is, however, clear that the representative authority for the Whites became entitled to, and claimed, a vast number of assets such as in particular schools, hospitals with equipment and the like, which were under the control of the South West Africa Administration before the introduction of the Proclamation AG 8 structure, and which were then used exclusively by Whites. The same applied, of course, to assets which were exclusively used by members of other population groups, but in their case the assets were relatively minimal in comparison to those used exclusively by Whites.

Among those assets transferred to the representative authority for Whites were for instance also farms registered in the name of the South West Africa Administration which were held for purposes of the Agricultural Credit Act of 1966, which like the Land Settlement Act and similar statutes, was applicable at the relevant time only to Whites, and which were therefore claimed and transferred to the representative authority of the Whites.

The division of assets, especially between the Central Government and the representative authority of the Whites has given rise to considerable problems and conflicting claims, which are still not completely settled.

Again, the important point, without going into further details, is that in particular the representative authority for the Whites is vested with very considerable assets, with result that it can and does render far more *effective and better services to the members of its population group than any other representative authority is in a position to do.*

I shall return to this aspect later. At this stage the point is that *as a result of the implementation of the provisions of Proclamation AG 8 the representative authority for the Whites is the owner and controls infinitely more assets, consisting of immovable and movable property, than any other representative authority.*

(24) Having dealt with funds and assets taken over by the representative authorities after their establishment, I shall now deal with their financial positions thereafter, and in particular with the sources of income of each such authority.

There are three sources from which representative authorities derive

their income. First of all is the income raised by the various departments and agencies of the representative authorities themselves. Secondly there is the contribution made by the Central Government (as I shall call the legislative and executive authority established by Proclamation R101 of 1985) to the various representative authorities, and thirdly there are the transfer payments made from the Central Revenue Fund in respect of income tax collected from the members of a particular population group to the representative authority of the population group concerned in terms of article 5(1)(b) of the Income Tax Act 1981 (Act No. 24 of 1981).

- (25) The first source of revenue for the representative authorities consists of revenue raised by such authority through its various agencies in respect of services rendered, fees raised and the like. I have extracted the following figures from the estimates of Income and Expenditure for the financial year ending 31 March 1987 of the various representative authorities. These figures may not be absolutely accurate, but for the purposes of this opinion this is of no real significance, as the only important point is the approximate magnitude of such revenue and a comparison as between the various representative authorities in this connection.

The following picture emerges:

Revenue raised by Caprivians	R2 308 100
Revenue raised by Damaras	R2 595 510
Revenue raised by Hereros	R2 244 200
Revenue raised by Kavangos (which includes an amount of R1 200 000 for medical services rendered to other authorities)	R4 389 000
Revenue raised by Coloureds	R1 174 800
Revenue raised by Namas	R597 000
Revenue raised by Ovambos (including R3 000 000 interest on investments)	R5 200 000
Revenue raised by Tswanas	R815 000
Revenue raised by Whites (including an amount of R22 100 000 as proceeds on investments and unspecified)	R43 218 000

- (26) The second source of revenue for the representative authorities is the contribution made by the Central Government to the various representative authorities. As a result of several commissions dealing with the principles and formulae under which such contributions were to be made, notably the Van Eeden Report, several formulae were adopted by the Central Government which determined the actual amount to be contributed each year. Again I will only give the outlines of this procedure, and the actual amounts determined in consequence thereof. Basically these contributions were fixed under five headings, namely education, pen-

sions and social services, health, administration and so-called additional contributions.

The underlying principle adopted was to establish *minimum* amounts required for the functioning of the services under the heads referred to above. Thus *in respect of education* for instance an amount of R85,00 was fixed as the minimum required for the education of a pupil in the primary school, and an amount of R125,00 in respect of a pupil in secondary school. Similarly minimum amounts were fixed for boarding pupils, teachers' salaries and a number of other services and costs involved.

It was further determined that representative authorities are expected to make their own contributions to finance education, and the minimum contributions by the Central Government were therefore in the past year reduced by ten per cent.

In similar fashion certain minimum contributions were determined in respect of pensions (R780,00 per pensioner per year, with a maximum of five per cent of the total population of a particular group) and health services (R60,00 per head for each member of the population group concerned, plus a *pro rata* share in the difference between the total *per capita* amount determined and R75 million). In respect of administration expenses a fixed amount of R3 865 000 plus R26,27 per member of each population group, was determined and paid over.

I have not taken into consideration additional budgets, which may have been passed during a particular financial year, as they do not materially change the overall position.

Of importance for purposes of this opinion are, however, the total amounts contributed by the Central Government to the various representative authorities, which are conveniently tabularised in the following compilation, also giving the total number of members of each population group on which contribution were assessed.

(27) I now come to the third source of revenue, namely the contribution made by the Central Revenue Fund by way of transfer payments to the various representative authorities. In terms of the Income Tax Act 1981 (Act No. 24 of 1981) every person became liable to personal income tax in respect of his or her taxable income. This tax was collected by the appropriate authority and paid into the Central Revenue Fund of the territory. Section 5(1)(b) of that Act provides further that:

“all taxes paid by members of any particular population group in respect of the taxable income contemplated in paragraph (a)(i) of this subsection (that is personal tax) shall be transferred by the Secretary of the revenue fund of the representative authority concerned.”

Apart from being liable for personal tax, each representative authority was given the power by Item 12(1) of the “defined matters” to levy “di-

Compilation of contributions to current expenses of authorities 1987-1988

	Education	Own health services (a)	Social pensions and welfare allowances (b)	Administration and other services		Additional contribution	Total contribution
	Amount	Amount	Amount	Population	Amount	Amount	Amount
	R	R	R		R	R	R
Whites	21 532 000	5 168 000	2 993 000	76 760	5 881 000	2 835 000	38 409 000
Caprivians	10 854 000	2 767 000	1 857 000	47 610	5 115 000	1 228 000	21 821 000
Damaras	7 998 000	1 868 000	3 586 000	91 951	6 280 000	1 114 000	20 846 000
Hereros	11 490 000	—	3 584 000	91 908	6 279 000	1 568 000	22 921 000
Kavangos	17 191 000	6 377 000	4 561 000	116 955	6 937 000	1 922 000	36 988 000
Coloureds	14 136 000	—	2 034 000	52 164	5 235 000	687 000	22 092 000
Namas	10 629 000	—	2 290 000	58 721	5 407 000	615 000	18 941 000
Ovambos	74 711 000	19 473 000	23 826 000	610 944	19 914 000	4 016 000	141 940 000
Tswanas	963 000	—	327 000	8 384	4 085 000	238 000	5 613 000
Basters	9 395 000	600 000	1 215 000	31 154	4 683 000	4 279 000	20 172 000
Total	178 899 000	36 253 000	46 273 000	1 186 551	69 816 000	18 502 000	349 743 000

(a) Contribution only for services rendered by Authorities.

(b) R780,00 per pensioner up to a maximum of 5 per cent of the population.

(c) A fixed amount of R3 865 000, plus R26,27 per member of the population group.

(d) Includes services which cannot be calculated according to approved formula, for example salaries of political office-bearers and occupational differentiation.

(e) Includes R3 745 000 for services as arranged by the Rehoboth Self-Government Act, 1976 (Act 56 of 1976).

rect taxes on the income of, and personal taxes on, members of the particular population group, apart from any such taxes levied in terms of any law of the Assembly or any other competent authority”.

A member of a particular population group may therefore be subject to personal tax both by the Central Government (where his tax would thereafter by transfer payment be paid over to the representative authority of his population group), as well as for direct personal tax to his own representative authority, if the latter so decides.

As far as I have ascertained, however no representative authority has, with one exception, in fact levied personal income tax from any of the members of its population group. An attempt to do so was apparently made by the representative authority of the Kavangos, but was abandoned due to practical difficulties.

What is, however, significant is that due to the large differences in income of the various population groups, the revenue derived from this source by the various representative authorities, varies very substantially, as the following table* showing the income tax paid over during the six years 1981 to 1987 clearly shows. (*not included).

The total personal income tax according to this table collected during the six years up to 31 March 1987 amounted to R574 630 000 of which the representative authority for Whites received a total of R461 889 000, that is just over 80 per cent of the total, constituting less than seven per cent of the *total population of the territory* according to the official figures submitted to us.

(28) What then, is the practical effect of all these figures and comparative tables, in particular in respect of the educational, health and social services which the respective representative authorities are obliged to provide for the members of their population groups?

With the exception of the representative authority of the Whites, the *remaining authorities derive for practical purposes between 80 and 90 per cent of their income-revenue from the contributions made by the Central Government*. These contributions, as shown above, are worked out on certain minimum contributions *per capita* in respect of various important services. These minimum contributions are what they purport to be — absolute minimum amounts required to provide these services. In a number of cases it appears that not even these minimum amounts were, in fact, expended for the *respective services for which they were allocated*. This is due to the provision that representative authorities are not obliged to expend the funds received under a certain head from the Central Government on the particular service for which they were allocated.

I should like to give an example, as this is an important point. In respect of *education* the following table shows the contributions received by the various representative authorities during the financial year ending 31

March 1987 from the Central Government, showing in the second column the actual amounts budgeted for.

Whites	21 532 000	49 443 000
Caprivians	10 854 000	8 124 500
Damaras	7 998 000	7 722 615
Hereros	11 490 000	10 122 000
Kavangos	17 191 000	15 288 500
Coloureds	14 136 000	13 927 100
Namas	10 629 000	10 282 000
Ovambos	72 711 000	56 367 000
Tswanas	963 000	1 237 000
Basters	9 397 000	8 633 000

The extra-ordinarily high amount (taking into consideration the numbers of pupils) in the case of the Whites is due to the fact that there is a *much higher proportion of secondary school pupils than is the case in the other population groups*, in respect of which a considerably higher *per capita* amount is contributed. The table shows further that with the exception of the Tswanas (where the difference is not significant), and the Whites, each population group, in fact, budgeted for less in respect of education than the minimum contribution received. In the case of the Whites it is more than double the amount received as a contribution from the Central Government.

Although the comparison is not in all respects correct, I have divided the total amount allocated for education by the number of pupils extracted from official sources, (Statistics of Schools in the Territory for the years 1983 to 1986 compiled by the Directorate: Development Co-ordination) when the following *per capita* expenditure for each pupil by the various groups emerges as follows:

Whites	R2 947
Caprivians	R461
Damaras	R844
Hereros	R690
Kavangos	R480
Coloureds	R882
Namas	R701
Tswanas	R1 455
Ovambos	R311
Basters	R831

(The comparison is not quite correct as the total amount allocated to educational services is not necessarily spent on school education.)

Again, the all important point is that by virtue of its extremely strong financial position the Representative Authority of the Whites can afford to and does, supplement the expenditure for education substantially, and

by doing so provide for better educational facilities, more and far better qualified teachers, more and better equipped hostels and sporting facilities and so on, than can any of the other representative authorities.

Considerable additional documentary evidence has been placed before us, which supports this conclusion, but again this is not necessary as this would unduly burden this opinion, and as in any event the position is abundantly clear.

(29) I have dealt in considerable detail with the position as regards educational services provided by the various representative authorities. With regard to health services and social welfare (in particular pension) services similarly facts and arguments were put before us. I have carefully considered these, but find it unnecessary to deal with them *in extenso* in a manner similar to education. By way of example, whereas the amounts budgeted for by the various representative authorities, except that of the Whites, for social pensions and welfare for the year ending 31 March 1987 are more or less those paid to them in respect of those services by the Central Government, the amount received by the Representative Authority for Whites under that heading amounted to R2 993 000, whereas the amount budgeted for in that year is R7 325 000, almost two and a half times that amount.

The inescapable conclusion in my view is that as a result of the assets and moneys which were transferred as a result of the provisions of Proclamation AG 8 to the various representative authorities, and the subsequent sources of revenue open to them thereafter, the members of the White population group were receiving infinitely better services and financial benefits than those of the other population groups. This is particularly obvious in the case of educational and health services supplied. In other words the members of the White population group receive substantially bigger advantages and privileges on account of their membership in that population group, than do the members of the remaining population groups. Furthermore they receive those advantages as a result of their membership of a group clearly being established (within the context of the Proclamation) on either ethnic, racial or colour grounds, and therefore fall squarely within the unqualified prohibition set out in Article 3 of the Bill of Rights.

I have only dealt with the consequences of the disparity of money and assets available between the various representative authorities. Some of these disparities are, of course, due in part to the formulae adopted in providing revenue to the various authorities by the Central Government, and the transfer payments made in terms of Section 5(1)(b) of the Income Tax Act. These specific methods and formulae are not determined as such in Proclamation AG 8, and form no part of the body thereof.

The argument has therefore been raised that the unequal financial and material results referred to are due to legislation and agreements falling outside the scope of Proclamation AG 8, and are therefore the real offenders against Article 3 of the Fundamental Rights.

This argument does not, in my view, hold water. One need not look further than the allocation of moneys and assets which were made in terms of Sections 44 and 45 of Proclamation AG 8, and which right from the beginning laid the foundation for an unequal distribution of the available funds, assets, and other resources to the various population groups.

But quite apart from this argument, a more fundamental consideration is the following.

The introduction of the various Rights contained in the Bill of Fundamental Rights and Objectives by the Proclamation, whilst recognizing a diversity in the cultural, religious and linguistic sphere, were introduced for the benefit of *all* the people of this Territory. The text of the preamble makes this quite clear, and indeed almost all of the Fundamental Rights deal with rights to be enjoyed by individuals — the individuals making up the people of South West Africa/Namibia.

By dividing up the total population of the people of this Territory into population groups and establishing governments for them with limited, but very important powers, the members of each of such population groups, are subject to the legislation and administration by their respective governments, that is their representative authorities. A citizen of this Territory has, as already stated, ultimately no real choice to determine to which population group he wishes to belong. He is, whether he likes it or not, therefore made subject to all the laws and actions taken by *his* representative authority.

Representative authorities differ as to what actions — legislative and otherwise — should be taken and at what times. Priorities differ. This is obvious in the field of education and health. But it applies to almost all the “defined matters”. Item 6 thereof provides for sub-economic or subsidized housing to members of the particular population group. Thus a representative authority, where most of the members of the population group concerned are living in rural areas, would be more concerned to provide assistance to farmers than to provide housing. The members of that group living in urban areas would therefore almost certainly be disadvantaged by this action in comparison to members of another population group whose representative authority decides that subsidized housing is of greater necessity than assistance to farmers. Items 7 (the promotion of art and culture) and 8 (establishment and control over, and financial assistance to, associations and organizations) also make this point clear.

The right if he so chooses to enjoy his own culture, practice and pro-

fess his own religion and use his own language in community with other members of his particular group, does not, and cannot, imply or mean that as a member of that group he may be disadvantaged or prejudiced in other respects *vis-a-vis* members of other groups or other individuals. This, however, can and in many respects is, the precise result of the whole structure created by Proclamation AG 8.

That being so, the possibility to excise those provisions of Proclamation AG 8 which are in conflict with the Bill of Rights, and leave the remainder in force, in accordance with the principles laid down in the case of

Johannesburg City Council v Chesterfield House (Pty) Ltd 1952 (3) SA 809 (A)

is not only impractical, but impossible. The headnote of that case reads as follows;

“Where it is possible to separate the good from the bad in a Statute and the good is not dependant on the bad, then that part of the Statute which is good must be given effect to, provided that what remains carries out the main object of the Statute. Where, however, the task of separating the bad from the good is of such complication that it is impracticable to do so, the whole Statute must be declared *ultra vires*”.

(30) Before concluding I should like to make the following observations. An enormous number of text-books, official documents, reports, and other documents have been put before us during the course of argument. Likewise have there been extensive arguments placed before us. I have not dealt with a number of arguments, nor with certain relevant documentary evidence placed before us, in this opinion. This does not mean that they were not carefully considered. But as they do not affect the ultimate conclusion and would have resulted in delays in submitting this opinion, I have not included them here.

Secondly, this is a legal opinion. We were not concerned, nor could we be concerned, with the political expediency or the wishes of the citizens of this country as regards the retention or otherwise of the governmental structure created by Proclamation AG 8. It is clearly for political and other bodies to decide on this. What we have done, and what we were asked to do, was to determine whether there is a conflict between Proclamation AG 8, or any of its provisions, with any of the Fundamental Rights introduced in 1985. It lies in the hands of the Cabinet what further action, if any, should or could be taken, except that this opinion must be submitted to the standing committee concerned (the ninth committee) for consideration and report in terms of Section 19(3) of the Proclamation.

The conclusion this Court has reached in answering the question put

to it by the Cabinet in terms of Section 19(2) of Proclamation R101 of 1985 of the Republic of South Africa is that the whole of Proclamation AG 8 of 1980 is in conflict with the Fundamental Rights as set out in Article 3 of the Bill of Fundamental Rights and Objectives contained in Annexure 1 to Proclamation R101 of 1985. Whilst there are also other Articles in the Bill of Rights referred to, which may and probably do also conflict with some of the provisions of Proclamation AG 8 of 1980, it is in the circumstances not necessary to identify these Articles, nor is it necessary to identify precisely which of the provisions of Proclamation AG 8 of 1980 are so in conflict with the said Articles.

BERKERJ.P.
MOUTONJ.
BETHUNEJ.
STRYDOMJ.
LEVYJ.

IN THE SUPREME COURT OF SOUTH WEST AFRICA

In the matter between:

HILDA SHIFIDI

Applicant

and

THE ADMINISTRATOR-GENERAL FOR
SOUTH WEST AFRICA

First Respondent

THE STATE PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA

Second Respondent

THE ATTORNEY-GENERAL FOR SOUTH
WEST AFRICA

Third Respondent

MINISTER OF DEFENCE

Fourth Respondent

NOTICE OF MOTION

BE PLEASED TO TAKE NOTICE that on a date to be determined by the Registrar of the above Honourable Court, at 10 am or as soon thereafter as counsel may be heard, application will be made on behalf of the Applicant for an order:

- (a) Authorizing the promotion of this application on the Court roll;
- (b) Declaring that the certificate purportedly issued in terms of section 103 *ter* (4) of the Defence Act, No. 44 of 1957, by the First Respondent at Cape Town on 18 March 1988 ordering that the criminal proceedings

instituted by the State against JOHANNES HENDRIK VORSTER, WILLEM HENDRIK WELGEMOED, ANTONIE JOHANNES LOUWRENS BOTES, NIKOLAAS JACOBUS ANDRÉ PRINSLOO, EUSEBIUS CHRISTIAAN KASHIMBI, and STEVEN FESTUS shall not be continued, is invalid and without any effect in law;

- (c) Declaring that the said certificate is no bar to the prosecution of the said accused for the murder of IMMANUEL SHIFIDI, and further charges of public violence, contravention of section 18(2)(b) of Act 17 of 1956 and such further alternative charges as may be competent in law, pursuant to the decision of the Third Respondent to prosecute such persons in respect of such offences;
- (d) Reviewing, correcting and setting aside the purported decision of the First Respondent to issue the said certificate.
- (e) Reviewing, correcting and setting aside the purported decision by the Second Respondent to authorize the First Respondent to issue the said certificate.
- (f) Directing the First and Second Respondents (and such other Respondents as may oppose this application) to pay the costs of this application jointly and severally, in their official capacities aforesaid;
- (g) For further or alternative relief.

TAKE NOTICE FURTHER that the First, Second and Fourth Respondents are hereby called upon to despatch, within twenty-one (21) days of receipt of this Notice of Motion, to the Registrar the record of the proceedings relating to the purported decisions by First and Second Respondents and the purported issuance of the certificate in terms of section 103 *ter* of the Defence Act, 44 of 1957, on 18 March 1988 and to inform the Applicant's attorneys that each has done so, together with such reasons as each is required by law or desires to give.

TAKE NOTICE FURTHER that the affidavit of HILDA SHIFIDI will be used in support of this application.

TAKE NOTICE FURTHER that the Applicant has appointed the offices of Lorentz & Bone (Standard Bank Chambers, Kaiser Street, Windhoek (Reference: Mr H.F.E. Ruppel)) at which she will accept notice and service of all process in these proceedings.

TAKE NOTICE that if you intend opposing this application, you are called upon:

- (a) To notify the Applicant's attorney in writing within 14 (fourteen) days of receipt hereof; and
- (b) To file your answering affidavits (if any) within 21 (twenty-one) days of the time specified in Rule 53(4);

and further that you are required to appoint in such notification an address referred to in Rule 6(5)(b) at which you will accept notice and service of all documents in these proceedings.

KINDLY set the matter down for hearing as a matter of relative urgency accordingly.

DATED at WINDHOEK this 29th day of MARCH, 1988.

LORENTZ & BONE

per

H.F.E. RUPPEL

Attorneys for the

Applicant

Standard Bank Chambers

Kaiser Street

Windhoek

TO: The Registrar of the
above Honourable Court
Windhoek

AND TO: THE ADMINISTRATOR-GENERAL
Windhoek

AND TO: THE STATE PRESIDENT OF THE REPUBLIC OF SOUTH
AFRICA
"Tuynhuys"
Parliament Street
Cape Town

AND TO: THE ATTORNEY-GENERAL FOR SOUTH
WEST AFRICA
Supreme Court
Windhoek

AND TO: THE GOVERNMENT ATTORNEY
Justitia Building
Kaiser Street
Windhoek

RECEIVED COPIES HEREOF:

DATE:

TIME:

pp ADMINISTRATOR-GENERAL

RECEIVED COPIES HEREOF:
DATE: TIME:

pp THE ATTORNEY-GENERAL

RECEIVED COPIES HEREOF:
DATE: TIME:

pp GOVERNMENT ATTORNEY

IN THE SUPREME COURT OF SOUTH WEST AFRICA

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WEST AFRICA

Third Respondent

MINISTER OF DEFENCE

Fourth Respondent

AFFIDAVIT

I, the undersigned,

HILDA SHIFIDI

do hereby make oath and say that:

1. I am an adult female, resident in Windhoek, and the daughter of the late Immanuel Shifidi. The facts to which I here depose are, except where indicated otherwise, within my personal knowledge.
2. I verily believe that my late father was murdered or otherwise unlawfully done to death whilst a spectator at a lawful, public meeting held on a football field at Katatura Township, Windhoek, by six members of the South African Defence Force and/or the South West Africa Territory Force on 30 November 1986.
3. The circumstances surrounding my father's death are summarized in the charge sheet prepared by the Third Respondent, and his Summary of Material Facts and List of Witnesses in terms of section 144(3)(a), a copy of which composite document I annex, marked "APP1". The facts set out in the Third Respondent's Summary are in turn drawn from the evidence deposed to by a large number of witnesses in the inquest held into the death of my father at Windhoek on 29 June 1987 (and following days), under Case No. 144/87. I am advised that no purpose would be served by burdening this affidavit with the nearly 400 pages of evidence in that inquest, more particularly in that a full copy of the inquest record is in the possession of the State Attorney, and thereby accessible to the Respondents. I furthermore tender inspection of this record at the offices of my attorneys in Windhoek, and to provide copies thereof to any of the Respondents immediately if required. I am advised that my attorneys will arrange for copies of this record to be available to this Honourable Court prior to the hearing of the matter, and I ask that this inquest record be regarded as incorporated herein.
4. This application arises as a consequence of the fact that following the aforesaid inquest, and the decision of the Third Respondent to prosecute six members of the SADF and/or SWATF on the charges set out in "APP1", including a charge of murder of my father, on the morning the trial was due to commence in this Honourable Court, a certificate was handed in on behalf of the First Respondent, purportedly in terms of section 103 *ter* (4) of Act 44 of 1957. I annex a copy of this certificate, marked "APP2".
5. I bring this application as the daughter of the deceased by virtue of the fact that it is a matter of great concern to me that those who have been

implicated in the killing of my father should be brought to justice. I would draw the attention of this Honourable Court to the fact that, having heard the considerable volume of evidence in the inquest proceedings to which I have referred, the inquest Magistrate returned a finding in terms of section 16(2)(d) of the Inquest Act that my father was indeed killed by unlawful acts on the part of "a group operation to disrupt a political meeting". I annex a copy of these findings marked "APP3". I would point out the evidence before the inquest magistrate established that a group of members of the SADF or SWATF had been despatched from an army base in the north in a planned operation to disrupt the meeting (a lawful and openly-held gathering of the South West African Peoples' Organization).

Further investigations by the police, together with the consideration of the body of evidence adduced at the inquest, has clearly led the Third Applicant in his considered opinion to reach the conclusion that the six accused specified in "APP1" should stand trial. It is accordingly a considerable shock to me that the Second Respondent should have "authorized" the First Respondent to issue a certificate, the effect of which, it has been explained to me, is purportedly to stop the prosecution of the six accused.

6. I have been advised that both the First and Second Respondents have acted *ultra vires* and otherwise unlawfully in purporting (respectively) to authorize and to issue the certificate, and that this certificate is void in law. The reasons in this regard are essentially, I am advised, a matter of law and will be fully advanced in argument. Without in any way detracting from the ambit of this argument, I would, however, wish to accentuate certain relevant factors, and raise certain facts, here:
 - (a) The First Respondent had no valid authority in law on 18 March 1988 to issue the said certificate in terms of section 103 *ter* (4) of the Defence Act.
 - (b) There was no factual basis upon which a person in the Second Respondent's position could have held that the six accused killed the deceased, and performed other unlawful acts giving rise to the further charges, "in good faith", or "for the purposes of" or "in connection with" the "prevention or suppression of terrorism", or that it was "not in the national interest" that a prosecution be instituted. I also say that there was no basis upon which the Second Respondent could have held that the acts in question were performed in an "operational area", as defined by section 103 *ter*. I say that in all these regards the Second Respondent acted outside his powers and manifestly failed to apply his mind to the facts summarized in "APP1", and set out in detail in the inquest record, or took into account irrelevant factors or applied his powers for unauthorized purposes, or

acted in bad faith, or grossly unreasonably, in authorizing the issue of the certificate. I say that he authorized the issue of the certificate to prevent justice taking its ordinary course in relation to the prosecution of these six men, and that he was not entitled to do so.

- (c) The Second Respondent's authorization is dependant upon the prior consideration of a report by the Fourth Respondent in terms of section 103 *ter* (5). I submit that by compelling inference from the facts to which I have deposed above, either no report at all was submitted by the Fourth Respondent of Defence to the Second Respondent, or if any report was submitted, it entirely failed (as required by section 103 *ter* (5)) to

“[set] forth the circumstances under which the act in question took place as well as the factors indicating that that act was . . . done in good faith and for the purposes of or in connection with the prevention or suppression of terrorism in an operational area”.

I say in particular that the full inquest record and findings could never have been placed before the Second Respondent prior to his taking the decision, and that he could never have carefully considered each page thereof, of the evidence of each witness in the inquest proceedings. I say further that clearly no adequate other investigation could have been conducted by or on behalf of the Second Respondent or the Minister of Defence. Thus, for instance, no affidavits or other evidence by persons other than security force personnel who were present at the meeting was ever included in the said report.

- (d) I say that, by virtue of the Second Respondent's decision to authorize the issuance of the certificate being vitiated upon the grounds aforesaid, the issuance of the certificate by the First Respondent is accordingly invalid.
- (e) It is in any event apparent from the format of the certificate, and from a statement by the First Respondent at a press conference in Windhoek on 23 March 1988, that he considered himself obliged to issue the certificate once he had been authorized to do so by the Second Respondent. The statement by the First Respondent was reported in *The Windhoek Advertiser* on the same day. A copy of the report is annexed hereto, marked “APP4”. The First Respondent clearly made no independent inquiry, nor applied his mind independently to the question of the issuance of the certificate. Clearly no affidavits or other evidence by witnesses of the events at the meeting were placed before him, and considered by him, independently of the Second Respondent's decision. It is also evident from the certificate itself and his reported remarks at the press conference that the

First Respondent did not approach the matter on the basis that he had a separate discretion to exercise, but regarded himself as constitutionally obliged to issue the certificate once authorized to do so. I say that for reasons which are further a matter for argument, he misconceived his powers in this regard. Further and in any event, I say that the First Respondent failed to apply his mind, took into account extraneous or irrelevant considerations, acted grossly unreasonably and in bad faith in issuing the certificate given the nature of the evidence contained in the inquest proceedings, the findings by the inquest Magistrate, and the decision by the Third Respondent that the six accused were required to answer before a court of law the serious charges framed by him. That this is so, is further supported, I submit by the considered view of the Minister of Justice in the SWA Cabinet expressed in his public statement, a copy of which I annex marked "APP5".

- (f) I accordingly say that the First and Second Respondents acted outside their powers in the authorization and issuance of the certificates.
7. I submit further and in any event that the exercise by the First and Second Respondents of their respective discretions and obligations in terms of section 103 *ter* of the Defence Act was in conflict with the provisions of the Bill of Rights (and particularly Article 3 thereof) incorporated in Proclamation R101 of 17 June 1985, and are for this reason alone invalid.
 8. I respectfully submit that I have an interest in the prosecution of those charged with the death of my father. I submit that the Third Respondent is now both clearly unable to issue a certificate of *nolle prosequi*, while at the same time he is prevented from proceeding with the prosecution. In these circumstances I submit that I have a material interest in seeing that those who are charged with the murder of my father, and further unlawful acts, are brought to justice. I must point out that in the aforesaid press conference on 23 March 1988 (annexure "APP4" hereto) the First Respondent publicly stated in his official capacity that it was recognized that "interested parties" would have the right to turn to his Honourable Court to seek to have the certificate set aside. I accordingly submit that I have standing in this application, and that the First Respondent (acting, of course, both on his own behalf and on behalf of Second Respondent) was correct in not contending otherwise, or in seeking to restrict yet further the powers of this Honourable Court to hear those who, in need and good faith, turn to it for assistance. I say that, as a trained lawyer, and experienced attorney and advocate, the First Respondent (acting as aforesaid) clearly did not intend a mere platitude by his said statements. I say that he thereby waived the provisions of section 103 *ter* (7). Any other conclusion would mean that the reassurances by the First Respondent set out in "APP4" were indeed devoid of sincerity and content.

9. I accordingly ask for an order as prayed in the Notice of Motion.

HILDA SHIFIDI

The provisions of Regulation R1258 published in the Government Gazette No. 3619 of 21 July 1972 having been complied with, I hereby certify that the deponent has acknowledged that she knows and understands the contents of this affidavit which was signed and sworn to before me at WINDHOEK on this the 29th day of MARCH, 1988.

COMMISSIONER OF OATHS
SYLVESTER BLACK

IN DIE HOOGGEREGSHOF VAN SUIDWES-AFRIKA

In die saak:

DIE STAAT

TEEN

- (1) JOHANNES HENDRIK VORSTER
'n meerderjarige Blanke man in Suid-Afrika gebore;
- (2) WILLEM HENDRIK WELGEMOED
'n meerderjarige Blanke man in Suid-Afrika gebore;
- (3) ANTONIE JOHANNES LOUWRENS BOTES
'n meerderjarige Blanke man in Suid-Afrika gebore;
- (4) NICOLAAS JACOBUS ANDRÉ PRINSLOO
'n meerderjarige Blanke man in Suid-Afrika gebore;
- (5) EUSEBIUS CHRISTIAAN KASHIMBI
'n meerderjarige Ovambo-man in Suidwes-Afrika gebore;
- (6) STEVEN FESTUS
'n 23-jarige Ovambo-man in Suidwes-Afrika gebore;

(hierna die beskuldigdes genoem)

Die Prokureur-generaal van Suidwes-Afrika stel die Hof hiermee in kennis dat:

NADEMAAL te alle tersaaklike tye beskuldigde 1 'n Kolonel in die Suid-Afrikaanse Weermag en/of die Suidwes-Afrikaanse Gebiedsmag gestasioneer te SWA Gebiedsmag Hoofkwartier in Windhoek was;

EN NADEMAAL te alle tersaaklike tye beskuldigde 2 'n Kolonel in die Suid-Afrikaanse Weermag en/of die Suidwes-Afrikaanse Gebiedsmag was, en die bevelvoerder was van 101 Bataljon te Ondangwa;

EN NADEMAAL te alle tersaaklike tye beskuldigde 3 'n Kolonel in die Suid-

Afrikaanse Weermag en/of die Suidwes-Afrikaanse Gebiedsmag gestasioneer te SWA Gebiedsmag Hoofkwartier in Windhoek was;

EN NADEMAAL te alle tersaaklike tye beskuldigde 4 'n Luitenant in die Suid-Afrikaanse Weermag en/of die Suidwes-Afrikaanse Gebiedsmag gestasioneer te 101 Bataljon te Ondangwa was;

EN NADEMAAL te alle tersaaklike tye beskuldigde 5 'n Korporaal in die Suidwes-Afrikaanse Gebiedsmag gestasioneer te 101 Bataljon te Ondangwa was;

EN NADEMAAL te alle tersaaklike tye beskuldigde 6 'n Skutter in die Suidwes-Afrikaanse Gebiedsmag gestasioneer te 101 Bataljon te Ondangwa was;

EN NADEMAAL te alle tersaaklike tye die beskuldigdes gesamentlik en/of afsonderlik opgetree en gehandel het ter uitvoering van 'n gemeenskaplike doel;

DERHALWE is die beskuldigdes skuldig aan die misdade van:

AANKLAG EEN: OPENBARE GEWELD

ALTERNATIEWELIK: Oortreding van Artikel 18(2)(b) van die Wet op Oproerige Byeenkomste, 1956, Wet No. 17 van 1956.

AANKLAG TWEE: MOORD

AANKLAG EEN: OPENBARE GEWELD

DEURDAT op of omtrent 30 November 1986 en te of naby WINDHOEK in die distrik WINDHOEK, die beskuldigdes gesamentlik en/of afsonderlik en ter uitvoering van 'n gemeenskaplike doel, wederregtelik handeling van 'n ernstige aard verrig het met die opset om die openbare rus en vrede te versteur, of om inbreuk te maak op die regte van lede van die gemeenskap daar synde, deur gewelddadiglik 'n oloop, oproer en vegtery te veroorsaak, te wete deur 'n politieke vergadering te ontwrig of te laat ontwrig en deur die aanwesiges by genoemde vergadering met assegaai en/of pyl en boë en/of messe en/of spiese en/of kieries en/of klippe aan te rand en/of die opdragte te gee dat genoemde ontwrigting of aanrandings plaasvind.

ALTERNATIEWELIK: Oortreding van Artikel 18(2)(b) van Wet No. 17 van 1956.

DEURDAT gedurende November 1986 en te of naby WINDHOEK in die distrik WINDHOEK en/of te of naby OKAHANDJA in die distrik OKAHANDJA en/of te of naby ONDANGWA in die distrik OVAMBO die beskuldigdes gesamentlik en/of afsonderlik en ter uitvoering van 'n gemeenskaplike doel, wederregtelik ander persone te wete lede van 101 Bataljon te Ondangwa uitgelok, aangestig, beveel of verkry het om 'n misdryf in gevolge die gemeenereg te wete die misdryf van openbare geweld en/of aanranding met die opset om ernstig te beseer te Windhoek te pleeg, deur weder-

regtelike lede van 101 Bataljon opdrag te gee om 'n politieke vergadering te ontwrig en die aanwesiges by genoemde vergadering met assegaie en/of pyl en boë en/of messe en/of spiese en/of kieries en/of klippe aan te rand.

AANKLAG TWEE: MOORD

NADEMAAL die beskuldigdes te alle tersaaklike tye gesamentlik en/of afsonderlik opgetree het en gehandel het ter uitvoering van 'n gemeenskaplike doel;

EN NADEMAAL die beskuldigdes lede van 101 Bataljon uitgelok, aangestig, beveel of verkry het om op of omtrent 30 November 1986 en te of naby WINDHOEK in die distrik WINDHOEK 'n politieke vergadering te ontwrig en die aanwesiges by genoemde vergadering aan te rand;

EN NADEMAAL die een of die ander of almal van die beskuldigdes geweet, voorsien of besef het dat wanneer genoemde lede van 101 Bataljon, al dus uitgelok, aangestig, beveel of verkry is, daar wel tot oproer en/of aanrandings en/of doodslag oorgegaan sal of kan word;

EN NADEMAAL genoemde lede van 101 Bataljon op of omtrent 30 November 1986 en te of naby WINDHOEK in die distrik WINDHOEK 'n politieke vergadering ontwrig het en daar oorgegaan is tot oproer, aanrandings en doodslag;

Derhalwe het beskuldigdes toe en daar op of omtrent 30 November 1986 en te of naby WINDHOEK in die distrik WINDHOEK wederregtelik en opset vir IMMANUEL SHIFIDI gedood en/of die genoemde daad begunstig;

EN derhalwe is die beskuldigdes skuldig aan die misdaad van: MOORD.

WESHALWE na behoorlike bewys en skuldigbevinding daarvan versoek die genoemde Prokureur-generaal die vonnis van die Hof teen die beskuldigdes ooreenkomstig die reg.

E. PRETORIUS

PROKUREUR-GENERAAL, SWA

IN DIE HOOGGEREGSHOF VAN SUIDWES-AFRIKA

DIE STAAT

TEEN

1. JOHANNES HENDRIK VORSTER
2. WILLEM HENDRIK WELGEMOED
3. ANTONIE JOHANNES LOUWRENS BOTES
4. NICOLAAS JACOBUS ANDRÉ PRINSLOO

5. EUSEBIUS CHRISTIAAN KASHIMBI
6. STEVEN FESTUS

OPSOMMING VAN DIE WESENTLIKE FEITE EN LYS VAN GETUIES INGEVOLGE ARTIKEL 144(3)(a) VAN DIE STRAFPROSESWET, 1977 (WET 51 VAN 1977)

Te alle tersaaklike-tye was al die beskuldigdes lede van die Suid-Afrikaanse Weermag en/of SWA Gebiedsmag. Beskuldigde 1 was 'n Kolonel en beskuldigde 3 'n Kommandant, beide gestasioneer te SWA Gebiedsmag Hoofkwartier, Windhoek. Beskuldigde 2 was 'n Kolonel en die bevelvoerder van 101 Bataljon te Ondangwa. Beskuldigdes 4, 5 en 6 was onderskeidelik 'n Luitenant, 'n Korporaal en 'n Skutter, gestasioneer te 101 Bataljon, Ondangwa.

Gedurende November 1986 het beskuldigde 1 vir beskuldigde 2 versoek en is daar tussen hulle ooreengekom om sowat 50 lede van 101 Bataljon te Ondangwa te taak om op 30 November 1986 'n politieke vergadering van die South West African People's Organization (SWAPO) te Windhoek in burgerlike drag by te woon. Die troepe moes hulself bewapen met tradisionele wapens, te wete pangas, spiese, assegaie, kieries, messe en pyl en boë. Hulle moes die vergadering ontwrig.

Beskuldigde 2 het beskuldigde 4 opdrag gegee om ongeveer 50 lede van 101 Bataljon vir gemelde doel byeen te bring en te reël dat hulle na Windhoek vervoer word om die gemelde vergadering by te woon.

Beskuldigde 4 het aan beskuldigde 5 opdrag gegee om 54 troepe bymekaar te kry, welke opdrag laasgenoemde uitgevoer het. Beskuldigde 4 het die troepe meegedeel dat hulle na gemelde vergadering geneem sal word en dat hulle hul wapens moes saamneem.

Beskuldigde 6 was een van die groep van 54 troepe wat die SWAPO-vergadering bygewoon het.

Op 29 November 1986 het die 54 troepe vanaf hul basis te Ondangwa na 'n Weermagbasis te Okahandja gereis. By dié basis het beskuldigde 4 vir beskuldigde 3 ontmoet. Laasgenoemde het daar die 54 troepe in 'n voorligtingssessie verduidelik wat van hulle verwag word om by die SWAPO-vergadering te doen. Beskuldigde 4 het die troepe insgelyks toegelig. Hulle is opdrag gegee om die vergadering te ontwrig en die aanwesiges aan te rand.

Die oggend van 30 November 1986 het beskuldigde 3 en 4 weer die troepe voorgelig oor wat hulle by die vergadering moes doen.

Beskuldigde 5 het met 'n bakkie, waarop die troepe se wapens was, na die gemelde SWAPO-vergadering gery. Dieselfde oggend het die 54 troepe die vergadering geïnfiltrer om hul opdragte uit te voer.

Kort ná die aanvang van die vergadering het daar 'n bakleiery tussen van die troepe en die aanwesiges op die vergadering ontstaan. Beskuldigde 6 het

aanvanklik met 'n kicrie en daarna met 'n pyl en boog aan die geveg deelgeneem. Die bakleier het uitgelooop op volskaalse oproer waartydens die oorledene, wat die vergadering bygewoon het, gedood is. Verskeie ander mense is ernstig beseer en eiendom is beskadig.

Die oorledene is dood weens 'n steekwond met gevolglike massiewe bloedverlies uit die hartslagare.

South Africa and Angola

Extracts from an interview between South African Foreign Minister the Hon. R.F. Botha and Reuters staff, on 19th May 1988.

Question

Can you tell us any more than we already know about what was discussed in Brazzaville, what was achieved and can you also tell us why on that one you wanted to do it without the Americans and the Cubans?

Minister

Let me first correct the premise from which you proceed. We didn't want to do it without the Americans, Cubans or anybody who might possibly be interested. Let me put it this way, I see nothing wrong in South Africa and Angola meeting there was also matters of a bilateral nature which perhaps do not directly concern any other country which I felt had to be raised and discussed and which we did discuss, so I really want to make one thing clear, there was no question of excluding anyone. It was a question of two governments getting together to discuss matters affecting both as well as aspects of the matters discussed in London a little earlier in regard to Angola.

Question

The Cuban advance on Namibia seems to be continuing according to the newspapers today. Is it a serious threat to the peace process or is it just an irritation? And do you think both sides at the moment are negotiating completely sincerely?

Minister

That is the problem and that has been the problem for a long while, unless we reach a position where we have trust in each others motives, faith, that whatever our differences, there is needed a political will to end the war, to end the conflict. Unless that is the case, progress will not be possible. I think that goes without saying.

You see, our delegation to the London talks reported to me and the State President that they got the impression that there was a change in tone, style and attitude. I believe I experienced the same in Brazzaville, but in the end both sides or all sides for that matter somehow will have to be persuaded or convinced of each other's sincerity in wishing to achieve an end to the conflict and the elements connected with this conflict. For instance, on Cuban withdrawal we will need to know whether it will be genuine Cuban withdrawal. I recognise that the Luanda Government, and possibly others, would wish to know if there is to be a genuine withdrawal of Cuban forces, would South Africa then implement the settlement plan. These are the main issues, these are the two issues, not the main, these are the two decisive, pertinent issues that will have to be discussed and around these two matters hinges the solution, the success or the failure on the negotiations.

Question

435 remains the programme, remains the basis?

Minister

It remains the basis as far as the South African Government is concerned. Our State President stated so publicly. We didn't like that decision at all. You know it was taken almost 10 years ago now a long time if you think back on it. And circumstances might have changed, perhaps within the UN itself, they might today adopt a slightly different resolution, but that is not important. What is important is that that is the settlement plan, the only one that is on the table and we indicated publicly that we are committed to the implementation of that settlement plan if an agreement could be reached on Cuban withdrawal.

Question

Does 435 begin to go into effect when the Cubans have left or when they agree to leave. It is a seven month time.

Minister

Yes, the running time for resolution 435 is seven months and I would not like to go into too many details about it here today, because we are entering now into the field of proposals and counter-proposals that will be discussed by the parties at the next meeting. I indicated in broad outline to the Luanda delegation in Brazzaville last week how we saw the implementation of 435, coupled with the Cuban withdrawal, and they indicated to me that they would welcome South Africa now to formulate in detail our proposals, based on our approach and view to the whole matter. We are in the process of doing so right now and as soon as this work is finished and approved by the Cabinet

I shall forward these proposals to Luanda and naturally also to the United States.

Question

You are dealing directly with Luanda on this, not through the United States, I mean after Brazzaville you are now, have your channels to go direct to . . . ?

Minister

If it is faster through the United States we'll ask them to do so.

Question

Is it simplistic to say that if as now seems to be the indication the Cubans do agree to withdraw and pull out within seven months, Namibia will be an independent . . . ?

Minister

No, no, no. That is the problem. We have been told that in principle both the Government in Luanda and in Havana agreed that the Cubans could or would be withdrawn. The time scales for it and the numbers to be withdrawn within certain time scales, those are the real nitty gritty, those are the matters that will matter at the next round of talks.

Question

Turning it around if I may, South Africa's willingness to implement 435 if the other side is in good faith, is that as it appears to be without surprises for them or for us.

Minister

The South African Government is committed to do it if agreement is reached on Cuban withdrawal.

Question

The next stumbling block would seem to be UNITA and Dr Savimbi, who we were up to see fairly recently. Is it possible in any foreseeable situation that South Africa would drop its support for Savimbi but not for UNITA? The Angolans indicated we might talk to UNITA but not with Savimbi.

Minister

Dr Savimbi is the President of UNITA, democratically elected. That I know myself and as far as the South African Government is concerned, if anybody speaks on behalf of UNITA that person is Dr Savimbi.

Question

He has that same assurance from you I assume, or understanding with you and he is aware that is South Africa's position?

Minister

O yes.

Question

If it came down to peace in the region, but Savimbi was the only issue, is this a matter of adequate importance to you that that would bring it all to a halt?

Minister

There cannot be peace in the region if attempts are made to exclude a leader like Dr Savimbi, duly elected by his top structure. There will then be no peace. It is as elementary as that.

Question

My last one on the Angolan issue. Is it at all part of your programme to require a Nkomati-like security pact with Angola, because it would seem that once independence has gone through, the Cubans have gone and all, it actually makes that border a little more vulnerable?

Minister

We are not committed to any specific form the agreement must take, as long as it is in writing and clear. In other words, we will naturally not be satisfied with any proposal that does not encompass or entail genuine Cuban withdrawal. We are not interested in a rearrangement of forces and a change on the ground of forces and a rearrangement of the war theatre.

Question

I refer to Nkomati in the context of ANC and an agreement with Angola that they would not tolerate ANC infiltration into their territory.

Minister

It goes without saying that this Government reserves the right to act in the safety of our own country and people at all times. Coming to an agreement on Cuban withdrawal does not mean that this Government has abandoned or forfeited or waved its right to insist that Angola should cease to harbour and train terrorists. That is a complementary element in respect of the security situation affecting the whole of Southern Africa. When we participated in the recent armed activities in Angola in a limited way, we did so in the first instance because of South Africa's security concerns, because of our interest

And I think it was made clear that was the overriding reason and motivation. Because you see the moment when forces which we perceive to be hostile forces like the Cubans, start moving in large numbers southward, I trust it is not necessary for me to argue that such massive movement, for whatever purpose, is raising the temperature, the tensions and becomes a threat to our security interests. I believe if you study history you will find this to be the case throughout the ages and centuries. Opposing forces need not openly declare war against one another. As a matter of fact nowadays I don't think it happens that way anymore. Look at your situation. I think I will be pardoned — or rather understood — if I say that when it became clear that Mr Chamberlain's efforts in negotiating with Adolf Hitler did not bring about genuine security in Europe, the agreements were signed, but there was a lingering suspicion in the minds of the British Parliament and Government and the British people and others, France, the French people, the Dutch, others, that Adolf Hitler might have had another agenda. The point I want to make is Britain perceived his attack — was it Danzig? — his attack on that port, his invasion of Poland was seen as a threat to British interest although he did not attack Britain. It is as clearcut and elementary as all that. Hitler said look he was just doing what belonged to him. He was just taking back what is justly Germany's. It doesn't matter what he said. It was perceived in Great Britain as a serious imminent threat to British security interests and he was warned that unless he took certain steps within a certain time limit there would be war and the war started. It is against that background that I say the moment large-scale forces of a foreign country within our region where we are the main power, as Britain saw herself to be at the beginning of the Second World War, then we say look, this should cease, it should stop. Our interests are now at stake and that is when we start getting involved and participate in order to secure our security interests.

Question

What motive do you attribute this to, the Cuban advance at this time? Could it be designed to sabotage the talks do you think?

Minister

Perhaps I wouldn't put it quite like that but they could have thought that they might improve their bargaining position at these talks which they didn't. There might be some other evil motives. This is part of the suspicion I referred to at the beginning of this interview. We would have expected them to put their money where their mouth was. In London they created the impression of being genuine. I received messages also from various governments in the West as well as in Africa, appealing to us to try and come to an agreement in order to end the conflict and we were assured in these messages

by these governments that they were convinced of, or thought that the Cubans were ready to withdraw and were interested in genuine withdrawal, which of course encouraged us. Now for the life of me I cannot see.

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