THE FREE PRESS OF NAMIBIA (PTY) LTD v CABINET FOR THE INTERIM GOVERNMENT OF SOUTH WEST AFRICA
[1987] 4 All SA 63 (SWA)

Division:	South West Africa Division
Judgment Date:	19 November 1986
Case No:	Not Recorded
Before:	Levy J
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• Keywords • Cases referred to • Judgment •

Keywords

Newspaper - Freedom of speech Practice and Procedure - Striking out - Irrelevant matter - Robust approach

Cases referred to:

Beaufort West Club v Beaufort West Licensing Court and Others 1928 CPD 317 - Referred to

Jabaar and Another v Minister of the Interior 1958 (4) SA 107 (T) - Referred to

Johannesburg City Council v Sohn 1933 TPD 8 - Referred to

Matroos and Another v Coetzee NO 1985 (3) SA 474 (SE) - Referred to

Metal and Allied Workers Union v Castell No 1985 (2) SA 280 (D) - Referred to

More and Another v Springs Town Council 1965 (3) SA 666 (W) - Referred to

Palko v Connecticut 302 US 319 (1937) (SC) - Referred to

Patel v Witbank Town Council 1931 TPD 284 - Referred to

Pienaar and Another v Argus Printing and Publishing Co Ltd 1956 (4) SA 310 (W) - Considered

Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (AD) - Referred to

Publications Control Board v William Heinemann Ltd and Others 1965 (4) SA 137 (AD) - Applied

S v Turrell and Others 1973 (1) SA 248 (C) - Approved

Soffiantini v Mould 1956 (4) SA 150 (E) - Applied

South African Defence and Aid Fund and Another v Minister of Justice 1967 (1) SA 31 (C) - Referred to

Veriava and Others v President, SA Medical And Dental Council, and Others 1985 (2) SA 293 (T) - Referred to

Voorsitter, Nasionale Vervoerkommissie, en 'n Ander v Sonnex (Edms) Bpk 1986 (3) SA 70 (AD) - Referred to

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Judgment

LEVY J: The applicant is The Free Press of Namibia (Proprietary) Limited and the respondent is The Cabinet of the Interim Government of South West Africa.

The applicant's represented by Mr *J J Gauntlett* and the respondent by Mr *S J Mynhardt*.

Applicant is the owner and publisher of *The Namibian*, a newspaper circulating in SWA/Namibia and is represented in these proceedings by Gwendolyn-Anne Lister who is a director of applicant and the editor of the said newspaper.

On 25 November 1985, the applicant launched notice of motion proceedings and asked for the following relief:

> '.....for an order:
>
> *(a)* Reviewing and setting aside the decision of the respondent of 14 August 1985, and the subsequent reiteration thereof on or about 28 August 1985, requiring the applicant to deposit an amount of R20 000 as a condition of registration of the newspaper, *The Namibian*, and/or the proceedings which gave rise to such decisions, as being *ultra vires* and/or irregular and/or invalid;
>
> *(b)* for further or alternative relief;
>
> *(c)* costs of suit.'

In her affidavit in support of the notice of motion proceedings, Lister said that on 26 July 1985, applicant's attorney, one Smuts, lodged the applicant's application for registration of *The Namibian* as a newspaper in terms of the provisions of the Newspaper and Imprint Registration Act 63 of 1971. The application form required applicant to fill in certain particulars appertaining to the newspaper including the description of the intended nature and contents

thereof, particulars of the proprietors, the manager and the editor including the names of other newspapers with which the editor had been connected, and certain particulars as to who the printer and publisher would be.

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The application form informed the applicant that the prescribed registration fee of R10 had to accompany each application.

The application form was duly completed and as such contained the information that Lister would be the editor and that she had previously been connected with the *Windhoek Advertiser* and *Windhoek Observer*. The registration fee of R10 accompanied the application.

In response to the application one Van der Westhuizen of the Department of Civic Affairs and Manpower advised applicant that, prior to registration, the respondent had to make a ruling in terms of s 6*bis* of the Internal Security Act 44 of 1950 (hereinafter referred to as 'The Act') in respect of the deposit to be paid by the applicant.

It is convenient at this stage to set out the aforesaid relevant provisions of the Act:

Section 6*bis* provides:

> 'Restriction on Registration of Newspapers:
>
> (1) No newspaper shall be registered under the Newspaper and Imprint Registration Act 63 of 1971 -
>
> *(a)* ...
>
> *(c)* Unless the proprietor of such newspaper deposits with the Minister of the Interior such amount not exceeding R40 000 - (originally the Act provided R20 000) - as the Minister may within the said period determine whenever he is not satisfied that a prohibition under s 6 will not at any time become necessary in respect of such newspaper.'

Section 6 of the Act provides:

> 'Prohibition of certain publications -
>
> If the State President is satisfied that any periodical or other publication -
>
> *(a)* professes, by its name or otherwise, to be a publication for propagating the principles or promoting the spread of communism; or
>
> (*b*) is published or disseminated by or under the direction or guidance of an organisation which has been declared an unlawful organisation by or under s 2, or was published or disseminated by or under the definition or guidance of any such organisation immediately prior to the date upon which it became an unlawful organisation; or
>
> *(c)* serves *inter alia* as a means for expressing views propagated by any such organisation, or did so serve immediately prior to the said date; or
>
> *(d)* serves *inter alia* as a means for expressing views or conveying information, the publication of which is calculated to further the achievement of any of the objects of communism; or
>
> (*dA*) serves *inter alia* as a means for expressing views or conveying information the publication of which is calculated to endanger the security of the State or the maintenance of public order; or
>
> *(e)* is a continuation or substitution, whether or not under another name, of any periodical or other publication the printing, publication or dissemination whereof has been prohibited under this section, he may, without notice to any person concerned, by proclamation in the *Gazette* prohibit the printing, publication or dissemination of such periodical publication or the dissemination of such other publication; and the State President may in like manner withdraw any such proclamation.'

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In a letter dated 15 August 1985, the Secretary of the Department of Civic Affairs and Manpower advised attorney Smuts of the Cabinet's ruling 'that a deposit of R20 000 be lodged before registration of the *Namibian* is effected'. On 19 August 1985, Smuts responded to this letter informing respondent that,

> '... after taking advice, (we) have been advised that your decision to impose a R20 000 deposit before registration is effected is unlawful, being unconstitutional and in conflict with the Declaration of Rights embodied in Proc R101 of 17 June 1985.
>
> We are further advised that such decision is reviewable and liable to be set aside *inter alia* on the basis that such amount is inappropriate and/or such decision was not taken in compliance with the rules of natural justice and/or was based on extraneous facts or circumstances.
>
> We accordingly respectfully request you to reconsider such decision and to eliminate any misunderstanding which may exist as a matter of urgency. Inasmuch as the newspaper has pressing commercial commitments we respectfully require to hear from you by noon on Friday, 23 August 1985, failing which we shall be obliged to institute proceedings in the Supreme Court of South West Africa for the setting aside of your above-mentioned decision on the basis *inter alia* of the above grounds.'

As a result of this letter, one Brandt of the office of the Government's Attorney contacted Smuts to inform him that

the respondent was unable to consider the matter until 28 August 1985 and requested that the deadline of 23 August 1985 be extended.

In view of the aforesaid pressing commercial commitments and a prior decision to publish the first copy of *The Namibian* on 30 August 1985, applicant paid the deposit under protest and without prejudice to its rights to bring an action if necessary.

On 26 August 1985 (prior to reconsideration by the Cabinet), the Department of Civic Affairs and Manpower issued a certificate of registration.

By letter dated 29 August 1985, applicants were advised by the department of Civic Affairs and Manpower that the Cabinet after reconsidering the matter resolved to persist in its decision that a deposit of R20 000 be required for the registration of *The Namibian*. The actual terms of the resolution were set out in the letter as follows:

> 'Die Kabinet volstaan by sy besluit nr 234/85 van 14 Augustus 1985, naamlik dat die Kabinet nie oortuig is dat 'n verbod kragtens art 6 van Wet 44 van 1950 te eniger tvd ten opsigte van *The Namibian* nodig mag word nie en dit dus nodig vind om nie die nuusblad te registreer alvorens die eienaars nie 'n deposito van R20 000 betaal het nie.'

Applicant contends that respondent's resolution of 14 August 1985 and its reiteration in terms of the subsequent resolution as set out in the letter of 29 August 1985 falls to be reviewed and set aside on several grounds.

Mr *Gauntlett*, while not abandoning any of the grounds referred to in the founding affidavit, stressed and enlarged on certain of them.

The first of these grounds involves the *audi alteram partem* rule. Applicant says that the respondent arrived at its decision without affording applicant an opportunity of making representations to the respondent or of presenting evidence directed at satisfying the respondent that no prohibition under s 6 would become necessary, or of otherwise influencing its decision and/or the fixing of the amount of a deposit appropriate in all the circumstances.

Applicant's second ground is that respondent failed to apply its mind properly in reaching the said decision and/or took into account irrelevant and extraneous facts and/or was prompted by improper motives or

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objects or acted *mala fide* in reaching the said decision. In support of this ground Lister says that during the period 1978 to September 1985, she acted as political correspondent and columnist of *The Windhoek Observer*. On several occasions, she says, she wrote articles critical of members of respondent, namely Messrs Shipanga, Katjiuongua, Kozonguizi, Bezuidenhout and Mudge and, as she terms it, 'the political grouping to which they belong'. Lister adds that members of respondent in return attacked her articles. In support of these allegations she annexes to her affidavit photocopies of certain press reports which appeared in certain newspapers.

Lister points out that, except for *The Namibian* and *The Windhoek Observer* (the newspaper which had previously employed her), all newspapers have merely been required to pay RIO (the prescribed registration fee) in order to be validly registered. She says the deposit is excessively high and was 'calculated' to prevent or at least impede the publication of The Namibian and was grossly and improperly discriminatory. In the alternative, the applicant appears to draw a distinction between the decision of the respondent to register the newspaper and the fixing of the deposit and says the fixing of the deposit at the excessive amount of R20 000 is *mala fide* and/or prompted by improper motives or considerations and/or is determined on the basis of extraneous and irrelevant facts and without regard to relevant facts and/or was arbitrary, capricious and grossly unreasonable. In support of the alternative contention, applicant says *inter alia* that the amount was determined without affording the applicant an opportunity to make representations in respect thereof. Furthermore the amount was determined, she says, without regard to the extent of quantifiable prejudice, if any, which the State may suffer if a prohibition in terms of s 6 of the Act became necessary. Likewise, the amount was determined without regard to the consequences for the applicant and whether in fact the amount was even capable of being paid. Finally, she says, it was fixed upon simply because it was excessively high.

Before respondent could reply to the application, applicant filed two supplementary affidavits made by Lister referring to an annexing further press articles, one reporting a speech alleged to have been made by Mr Shipanga in the National Assembly. These affidavits referred to events which allegedly occurred subsequent to the decision of the respondent concerning the payment of R20 000 by applicant to enable applicant to register.

Pursuant to the provisions of Rule 53(1)*(b)* of the Rules of Court, certain documents submitted to respondent by the Department of Civic Affairs and Manpower to assist it in arriving at its decision as to the registration of *The Namibian* were lodged and are annexed to the notice of motion proceedings. It is unnecessary to analyse the contents of these documents. However, included with them is a copy of the Cabinet decision dated 14 August 1985, Resolution 234/85, providing as follows:

> 'That the recommendation in the submission be approved of, but that the amount of the deposit be fixed in the amount of R20 000.'

The 'submission' referred to here is the report of the Department of Civic Affairs and Manpower and the

recommendation reads as follows:

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> 'That the Cabinet is not satisfied that a prohibition under s 6 of Act 44 of 1950 will not at any time become necessary in respect of *The Namibian* and therefore deems it necessary not to register the newspaper unless a deposit of R40 000 be lodged by the proprietor.'

The principal opposing affidavit is filed by Mr Moses Katjiuongua who was chairman of respondent and who was authorised by respondent to make the affidavit on its behalf. He dealt *seriatim* with the paragraphs in the applicant's affidavits and admits that the memorandum of the Department of Civic Affairs and Manpower was considered by respondent and that respondent adopted its recommendation, but he says that, after considering memoranda, respondent came to the conclusion and resolved that the deposit be fixed in the amount of R20 000. He annexed an affidavit by Mr Van der Westhuizen in support of a statement that he had been advised that respondent's ruling was valid and not liable to be set aside. Mr Katjiuongua then makes certain legal submissions contradicting those of the applicant. He then says:

> 'The grounds upon which the aforesaid resolutions were adopted by the Cabinet will appear from what I will set out hereunder.'

He says:

> 'It is true that the applicant was afforded no opportunity to make representation to the Cabinet or to present evidence to it directed at satisfying the Cabinet that no prohibition under s 6 of the aforesaid Act might become necessary, or of otherwise influencing the Cabinet's decision or the fixing of the amount of the deposit;' but, says Mr Katjiuongua, it was not necessary for the Cabinet to have afforded the applicant such opportunity. After dealing with further legal contentions the deponent says:
>
> 'In particular, the Cabinet was not satisfied that the prohibition under s 6*(d)* and/or 6(dA) of the Act will not at any time in the future become necessary in respect of *The Namibian*.'

Mr Katjiuongua then deals specifically with the grounds which motivated respondent in taking the said decisions. He admits that as a political correspondent and columnist of the *Windhoek Observer* during the period 1978 to September 1985, Lister wrote articles which were critical of Messrs Shipanga, Kozonguizi, Bezuidenhout, Mudge and himself and 'the different political groupings to which we belong'. He adds that it is true that some of the Cabinet members reacted to these articles.

Mr Katjiuongua concedes that Lister had the right to be critical 'within the limits of the law' and that the members of the Cabinet had the right to respond also 'within the limits of the law'. He then specifically adds the following: 'Insofar as the articles of Ms Lister tended to become, or was intended to be, an attack on us personally or our political integrity, we from time to time and publicly reacted to her statements and articles in order to refute her allegations....'

He then refers to the report of the Directorate of Security Management and the memorandum of the Department of Civic Affairs and Manpower. In the former report there are quotations from various newspaper articles written by Lister in which she criticises certain members of respondent. Mr Katjiuongua then says in his affidavit:

> '... the Cabinet naturally took this factor into account in coming to its decision on the question whether or not the applicant should be required to deposit an amount

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> before registration of *The Namibian* could be effected. The Cabinet was of the view that unfair attacks on its members will *inter alia* tend to lower the esteem in which they are held by the public; it will adversely effect their political integrity and their credibility; it will lower the status of the Cabinet as such and, ultimately, the Cabinet, and its members, will be hampered in the performance of its, and their, duties and functions. This, in the view of the Cabinet, is likely to have the effect to endanger the security of the State or the maintenance of the public order.'

The affidavit hereafter deals with the allegations made by Lister concerning reports appearing in the newspaper *Die Republikein* and certain other newspaper reports. Mr Katjiuongua says that these are all irrelevant as they relate to events subsequent to the taking of the resolution concerned and that application would in due course be made to strike these paragraphs out and to strike out the supplementary affidavits of Lister as these also deal with subsequent events. Notwithstanding this contention, Mr Katjiuongua then dealt with these allegations. Other affidavits filed in support of respondent also dealt with these allegations.

Filed by respondent, in addition to copies of *The Namibian* newspaper, a press release of President Botha, press statements by the Administrator-General and others, Swapo's Constitution, Political Programme and Manual, a judgment by the Publications Appeal Board, Die Handves van Fundamentele Regte en Doelstellinge and many other documents, were affidavits by eminent persons involved in the Administration of South West Africa/Namibia.

As stated in his affidavit Mr Katjiuongua complained of irrelevant matter in applicant's affidavits and threatened an application to strike out, but indeed it is difficult to find any connection between much of the matter filed by respondent and the point in issue here. Needless to say, this surfeit of annexures running into several hundred pages led to an application by applicant to strike out. The application relates to the major portion of respondent's affidavits.

Applicant filed a replying affidavit which dealt with many of the matters in respondent's opposing affidavits, denying some relevant matter and also annexing an affidavit by one Andrè du Pisani, a senior lecturer in political science at the University of South Africa, which purported to refute many of the allegations concerning Swapo.

Applicant's application to strike-out was based on the grounds that certain paragraphs of the affidavit of Mr Moses Katjiuongua as well as certain annexures were

> 'irrelevant and/or vexatious material, more particularly in that respondent did not in fact have regard thereto in reaching either of its decisions of 14 August 1985 and 28 August 1985 and/or comprise inadmissible hearsay evidence and/or are vague and embarrassing'.

This application was dated 15 June 1986.

Respondent's application to strike-out as already stated was based on the contention that certain allegations in Lister's affidavit and annexures thereto were irrelevant in that they referred to events which had taken place subsequent to the ruling of respondent. This application by respondent was filed four days before the hearing and attracted in its turn an application by applicant to have it struck out as an irregular proceeding.

Whenever it can be avoided, no litigant should ever be taken by surprise by his opponent and adequate notice of an application to strike-out

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should be given. In the present case respondent had indicated several months before in its replying affidavit that it intended applying to Court to strike out those portions of the founding affidavit and the annexures thereto. Respondent therefore did not take applicant by surprise. Applicant's contention that respondent's application is an irregular proceeding is rejected and applicant's application in respect thereof is therefore dismissed. The argument concerning this application (ie the 'irregular proceeding' one) took a few minutes only and no order is made in respect of the costs thereof.

The congestion of the Court rolls in respect of trial actions, the delay in getting an early date of hearing, the costs of a full-blooded trial, all these and others are factors which have led more and more to litigants resorting to notice of motion proceedings in preference to procedures commenced by way of summons. Inherent in such proceedings, however, are certain risks. These include the chances of having factual disputes or of a litigant including in his affidavits irrelevant matter. However, every factual dispute and all and any irrelevant matter must not be allowed to frustrate or impede legitimate judicial proceedings. In *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154H Price JP said:

> 'It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits.'

One should add 'or by an over-fastidious approach to irrelevant matter' to this quotation.

In *Joshua Hoebeb v Unotjari Katjimune and Another* (judgment delivered in the Supreme Court of South West Africa on 30 September 1986) my Brother Strydom J dealt fully with the question of applications to strike out. With respect I agree with his judgment and it would be an exercise in superfluity to repeat his research. His conclusion is that irrelevant matter should only be struck out if such matter prejudices the opposing side. In the present case while both counsel were at pains to point out the irrelevance of their opponents' allegations, neither informed the Court of the prejudice which their clients would suffer if such allegations were not struck out. In applicant's application to strike out reference was made to hearsay matter. The question of prejudice does not arise in respect of hearsay matter. However, applicant did not isolate the alleged hearsay matter from the mass of affidavits and annexures and did not focus the Court's attention on those statements which it considered to be hearsay. It is not the function of the Court to wade through the various paragraphs, even if they are numbered in the application. Counsel must direct the Court's attention to those statements of which he complains and say which of the paragraphs he contends are irrelevant, which are vexatious, which are hearsay and which are vague and embarrassing. This is not a reflection on either counsel. Both counsel argued a difficult case extremely well, but they both concentrated on the merits.

In the circumstances both the applicant's application to strike out and the respondent's application to strike out are dismissed. There will be no order as to costs in respect of both these applications.

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Although a 'robust approach' as visualised in *Soffiantini's* case is in many cases desirable, this does not mean that the principles as set out by Corbett JA in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 - 35 and which are applicable when disputes of fact arise must be disregarded.

In the present case there are several disputes of fact. However, notwithstanding such disputes, appropriate relief 'may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent together with the facts alleged by the respondent, justify such an order' (at 634H in the *Plascon-Evans* case).

I have already quoted *in extenso* certain paragraphs of the affidavit made by Mr Katjiuongua on behalf of respondent. He specifically states that respondent was influenced in coming to the decision that *The Namibian* had to pay R20 000 in order to be registered by the adverse criticism of himself and certain other members of respondent. Furthermore, he added that the respondent was of the opinion that Lister would continue in this vein as editor of *The Namibian* and that such criticism 'was likely to have the effect to endanger the security of the State or the maintenance of public order'.

This reply of Mr Katjiuongua moves the spotlight on to questions involving the freedom of speech, the freedom of the press and the right to criticise members of the Government, their policies and their philosophies.

The history of Southern Africa is studded with events illustrating the struggle for these freedoms. Our law recognises as common law, rights the rights of individuals to free speech and to publish in print criticism of others including members of the government. These rights have to be exercised with due consideration to statutory limitations thereon and with due consideration for those common law rights of others which rights are known as rights of personality. These rights of personality include those common law interests which everyone has to an unimpaired personal dignity and reputation. Where these rights are infringed with wrongful intent, the person who has suffered as a result thereof can invoke certain recognised legal procedures to protect his fair name, dignity and reputation.

People in authority or people who are involved in public life may be more frequently and more widely criticised than other people. The criticism which is sometimes levelled at them can be far more stinging than that which a person who is not in public life may receive. In *Pienaar and Another v Argus Printing and Publishing Co Ltd* 1956 (4) SA 310 (W) at 318C - D, Ludorf J said:

> 'Although conscious of the fact that I am venturing on what may be new ground, I think that the Courts must not avoid the reality that in South Africa political matters are usually discussed in forthright terms. Strong epithets are used and accusations come readily to the tongue. I think, too, that the public and readers of newspapers that debate political matters are aware of this.'

The learned Judge then referred to Gatley on *Libel and Slander* 3rd ed at 468 which reads:

> 'In cases of comment on a matter of public interest the limits of comment are very wide indeed. This is especially so in the case of public men. Those who fill public positions must not be too thin-skinned in reference to comments made upon them.'

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> Furthermore, constructive criticism is fundamental to a healthy, progressive, democratic society. Newspapers perform a public duty when they permit their columns to be used for this purpose. Newspapers, however, also have a responsibility to be factually accurate and, where they publish comment, the comment must be fair. Public figures may indeed be criticised, but that certainly does not mean that they cannot invoke those legal procedures known to the law to defend their names, their dignities and their reputations.

Public criticism is not confined to the criticism of individuals. It is frequently directed at policies, organs or institutions of government and at political philosophies. Rumpff JA (as he then was), referring to freedom of speech and to legislation controlling such freedom of speech in *Publications Control Board v William Heinemann Ltd and Others* 1965 (4) SA 137 (A) at 160E - H said:

> 'The freedom of speech - which includes the freedom to print - is a facet of civilisation which always presents two well-known inherent traits. The one consists of the constant desire by some to abuse it. The other is the inclination of those who want to protect it to repress more than is necessary. The latter is also fraught with danger. It is based on intolerance and is a symptom of the primitive urge in mankind to prohibit that with which one does not agree. When a Court of law is called upon to decide whether liberty should be repressed - in this case the freedom to publish a story - it should be anxious to steer a course as close to the preservation of liberty as possible. It should do so because freedom of speech is a hard-won and precious asset, yet easily lost. And in its approach to the law, including any statute by which the Court may be bound, it should assume that Parliament, itself a product of political liberty, in every case intends liberty to be repressed only to such an extent as it in clear terms declares, and, if it gives a discretion to a Court of law, only to such extent as is absolutely necessary.'

In *S v Turrell and Others* 1973 (1) SA 248 (C) at 256G Van Zijl J said:

> 'Freedom of speech and freedom of assembly are part of the democratic right of every citizen of the Republic and Parliament guards these rights jealously for they are part of the very foundation upon which Parliament itself rests.'

If freedom of speech is to have any significance in a democratic country, its concomitant, freedom of the press, must be recognised because it is only by reaching a large number of people and rallying their support that these freedoms can be utilised for the benefit of society.

In the United States, where freedom of speech has been inscribed in the constitution since 1791, Cardozo J in the *Palko v Connecticut* case, 302 US 319 (1937) said:

> 'Freedom of thought and speech... is the matrix, the indispensable condition of nearly every other form of freedom.'

In SWA/Namibia, our own Bill of Fundamental Rights also contains a recital of these rights. Article 5 provides:

'The right of freedom of expression:

Everyone has the right to freedom of expression of opinion, conscience and religious belief, including freedom to seek, receive and impart information and ideas through the press and other media. This right shall be limited only by the obligation to ensure that such expression does not infringe upon the right of others, impair the public order or morals, or constitute a threat to national security.'

Had Lister, a columnist of the *Windhoek Observer*, or any other newspaper, unlawfully attacked members of respondent (including Mr Katjiuongua) those members could have taken steps to protect themselves. They could have *inter alia* instituted actions for defamation or in appropriate cases they could have applied for interdicts to restrain unlawful criticism in the future.

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They did none of these. In the light of their failure so to do, one can assume that they were satisfied that her attacks were not unlawful and that they were not frivolous.

Even if these verbal attacks were defamatory and were not frivolous there would have to be some very special features present which would cause such personal attacks to constitute a danger to the security of the State and the maintenance of public order. From the evidence placed before this Court, the reasoning of respondent to justify this conclusion falls far short of this and appears to be a *non-sequitur*. In his affidavit, Mr Katjiuongua says (I quote verbatim):

'The Cabinet was of the view that by discrediting and disparaging the present Government and its leaders and other governmental institutions in such a manner will not only have the effect to undermine the legitimacy of the Government, but also that the people, or a section thereof, of South West Africa will hold the Government in contempt. This, of course, will only be to the benefit of Swapo and thus the chances of the revolution which is advocated and propagated by Swapo succeeding will be enhanced. This, in the view of the Cabinet, can only have and will have the effect of endangering the security of the State or the maintenance of public order.... It is also clear that *The Namibian* will from time to time, if not continuously, attack the Government and call for its rejection.'

Because people (or a section thereof) may hold their government in contempt does not mean that a situation exists which constitutes a danger to the security of the State or to the maintenance of public order. In fact, to stifle just criticism could as likely lead to these undesirable situations. This remark is not to be interpreted as meaning that I consider the criticism of which respondent complains as just. In this matter it is unnecessary for me to consider whether such criticism is just or unjust and I deliberately refrain from so doing.

In the passage quoted above respondent says that this criticism 'will only be to the benefit of Swapo'. Respondent (as well as the National Assembly) consists of representatives of many political parties. Swapo is not represented in the Government but it is not the only political entity or party not so represented. I would be ensconced in an ivory tower if I were not aware of the fact that such entities as well as political parties whose representatives form part of respondent, did not engage in criticism of respondent. In fact certain members of respondent have even instituted action in the Supreme Court against respondent. Why should the criticism by Lister endanger the security of the State, the maintenance of public order and only benefit Swapo, but not so the criticism levelled against respondent by others? To maintain that Lister's personal criticism of members of respondent will bring respondent into contempt and that this criticism 'will only be to the benefit of Swapo' is not a sound logical conclusion and there is nothing on the record to justify it.

The criticism by Lister obviously annoyed certain members of respondent and Mr Katjiuongua says that these members responded by criticising Lister in turn. An ongoing argument appears to have developed. Act 44 of 1950 established machinery for the protection and

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security of the State. It could not be used by members of respondent to settle private scores with Lister or with any one else.

Mr Mynhardt for respondent argued (correctly in my view) that the decision or ruling (as he preferred to call it) of the respondent could be set aside if:

'the respondent, in deciding that the prerequisite fact or state of affairs existed, acted *mala fide* or failed to apply its mind properly or took into account irrelevant and extraneous facts or was prompted by improper motives.'

Mr Mynhardt referred to the following authorities: Joubert *The Law of South Africa* vol 2 para 220 at 142; Baxter *Administrative Law* at 461 - 74; Kelsey Stuart *The Newspaperman's Guide to the Law* 4th ed at 14; *South African Defence and Aid Fund and Another v Minister of Justice* 1967 (1) SA 31 (C) at 34F - 5; *Metal & Allied Workers' Union v Castell NO* 1985 (2) SA 280 (D) ; *Veriava and Others v President, SA Medical and Dental Council, and Others* 1985 (2) SA 293 (T) at 3071 - 308C); *Matroos and Another v Coetzee NO* 1985 (3) SA 474 (SE) at 476 - 7E; *Voorsitter, Nasionale Vervoerkommissie, en 'n Ander v Sonnex (Edms) Bpk* 1986 (3) SA 70 (A) at 97F - 80D.

Mr Katjiuongua says that Lister's attacks were 'personal' and in respect of the 'political integrity' of members of

respondent and he says that 'the Cabinet naturally took this factor into account in coming to its decision in the question whether or not applicant should be required to deposit an amount before registration'. When Mr Katjiuongua says that these attacks (again verbatim) 'in view of the Cabinet is likely to have the effect to endanger the security of the State', he displays a certain confusion of thought. He identifies himself and members of the Cabinet with the State.

The State has an existence quite apart from those who govern or administer it, whether they do so as civil servants, members of the National Assembly or the Cabinet. If at a general election the voters reject the government of the day and return the opposition, the voters have not endangered the security of the State or threatened the maintenance of public order. The fact that the opposition in order to displace the government attacked the political integrity of Cabinet Ministers would make no difference. In a democratic country, criticism of individual Members of Parliament cannot constitute a danger to that State. This confusion in the minds of Mr Katjiuongua and those members of respondent who shared his sentiments resulted in respondent taking into account irrelevant matter and in failing to apply their minds properly in reaching the relevant decisions in this matter.

The question is of course, to what degree did the intruding factor influence the decisions. Mr Katjiuongua himself answers this. He says:

> '... the Cabinet naturally took this factor into account on the question whether or not the applicant should be required to deposit an amount before registration of *The Namibian* could be effected.'

Later he goes on to say:

> 'In the light of all the factors and considerations which were taken into account by the Cabinet in coming to the aforesaid decision, I state that an amount of R20 000 is not an excessively high deposit'.

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There were obviously factors other than the personal criticism of members of respondent which influenced the aforesaid decisions. These factors may well have been relevant and sound. There is, however, no knowing what respondent's decisions would have been and how much it would have required as a deposit had it not taken the irrelevant matter into account.

In *Administrative Law* by Baxter, the learned author says (at 521):

> 'Where it is impossible to distinguish those reasons which were decisive from those which were not, and one or more of the reasons are bad, the Court has no choice but to set the decision aside.' (See also *Beaufort West Club v Beaufort West Licensing Court and Others* 1928 CPD 317; *Patel v Witbank Town Council* 1931 TPD 284; *Johannesburg City Council v Sohn* 1933 TPD 8; *Jabaar and Another v Minister of Interior* 1958 (4) SA 107 (T) ; *More and Another v Springs Town Council* 1965 (3) SA 666 (W) .)

It is not possible to distinguish these sound reasons which could have been decisive from the irrelevant matter which influenced respondent and the Court accordingly has no choice but to set the decisions of respondent aside.

In view of the aforegoing, it is unnecessary to deal with the other issues raised in argument.

To sum up:

1 *(a)* Applicant's application to set aside respondent's application to strike-out on the grounds that the latter is an irregular proceeding, is refused,

(b) no order as to costs is made in respect of this application.

2 *(a)* Applicant's application to strike-out portions of respondent's affidavits and annexures (including affidavits) is refused;

(b) no order as to costs is made in respect of this application.

3 *(a)* Respondent's application to strike-out portions of applicant's affidavit, supplementary affidavits and annexures to the aforegoing is refused;

(b) no order as to costs is made in respect of this application.

4 *(a)* Applicant is granted the relief it has prayed for in prayer *(a)* of its notice of motion and accordingly the decision of respondent of 14 August 1985, reiterated on 28 August 1985, requiring applicant to deposit an amount of R20 000 as a condition of registration of the newspaper The Namibian, is hereby set aside;

(b) applicant is awarded costs of suit.

Appearances

JJ Gauntlett - Advocate/s for the Applicant/s

SJ Mynhardt - Advocate/s for the Respondent/s

Lorentz and Bone - Attorney/s for the Applicant/s

Government Attorney - Attorney/s for the Respondent/s