THE STATE vs ESTER SMITH NO & 3 OTHER CC 95/96

FRANK J.

HEARD ON._____**1330/00**/C7
DELIVERED ON:1996/09/27

CONSTITUTIONAL LAW - Freedom of Speech - Whether s.ll of Racial Discrimination Prohibition Act, 26 of 1991 infringes guaranteed right of freedom of speech - Parliament entitled to legislate in this field to prohibit practises of racial discrimination and it's propagation - Legislation must comply with Art. 21(2) of Constitution - Proportionality test used to ascertain whether legislation complied with Art. 21(2) - Section 11 was not "carefully designed to achieve the objective in question", did not impair the protected right "as little as possible" and stifled legitimate debate on matters of public interest - As section embraced communications which could be prohibited and communications which were protected it was overbroad
Section referred back to Parliament to ament within 6 months failing which it will become invalid ipso facto.

CASE NO. CC 95/96

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

ESTER SMITH NO	FIRST ACCUSED
(representing the Windhoek Advertiser (Pty) Ltd)	
ESTER SMITH	SECOND ACCUSED
JOHANNES MARTIN SMITH	THIRD ACCUSED
ELIZABETH BARBARA HAASE	FOURTH ACCUSED

CORAM: FRANK, J.

Heard on: 1996.08.27

Delivered on: 1996.09.27

JUDGMENT

FRANK, J.: The four accused persons are charged with contravening section 11(1) (a), (b) and (c) of the Racial Discrimination Prohibition Act, no. 26 of 1991 (the Act) . All four seek the quashing of the charges against them on the basis that the mentioned sections of the Act are in conflict with Article 21(1) (a) and (b) of the Constitution.

The definition section of the Act provides that:

> "1. In this Act -
>
> 'racial group' means a group of persons defined by reference to colour, race, nationality or ethnic or national origin."

Section **11** insofar it is relevant to the present proceedings reads as follows:

> **"(1)** No person shall publicly use any language or publish or distribute any written matter or display any article or do any act or thing with intent to -
>
> (a) threaten, ridicule or insult any person or group of persons on the ground that such person belongs or such group of persons belong to a particular racial group; or
>
> (b) cause, encourage or incite disharmony or feelings of hostility, hatred or ill-will between different racial groups or persons belonging to different racial groups;
>
> (c) disseminate ideas based on racial superiority."

The relevant portions of Article **21** reads as follows:

> **"(1)** All persons shall have the right to:
>
> (a) freedom of speech and expression, which shall include freedom of the press and other media;
>
> (b) freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning;
>
> **(2)** the fundamental freedoms referred to in sub-article **(1)** hereof shall be exercised subject to the law of Namibia, insofar as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence."

The Full Bench of this Court per O'Linn, J. considered the question as to whether section 11 of Act no. 26 of 1991 is in conflict with Article 21(1) of the Constitution and came to the conclusion that it is not. Kauesa v Minister of Home Affairs and Others. 1995(1) SA 51 (NmHC)) . This part of the judgment however was obiter and furthermore what is stated there must be read subject to the Supreme Court's judgment on appeal when it overturned the judgment of O'Linn, J. (Kauesa v Minister of Home Affairs and Others. Supreme Court judgment delivered on 11th October, 1995.)

Counsel were ad idem that Parliament was entitled to legislate in this specific field and the only question that must be decided is whether section 11 seeks to regulate this area of public life in an overly broad manner. That the area of racial relationships and especially the political and social interaction between groups can be regulated by legislation is in my view also borne out by, inter alia, the wording of Article 23 (1) of the Constitution which reads as follows:

> "The practise of racial discrimination and the practise and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and by an Act of Parliament such practises, and the propagation of such practises, may be rendered criminally punishable by the ordinary Courts by means of such punishment as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people at such practises."

In my view it is of importance to note that not only may the practises of racial discrimination and apartheid be prohibited but also the mere propagation of such practises.

I mention this so as to also express caution to the holus-bolus importation or ready reliance on authorities from the United States of America where the position seems to be that the mere propagation of such ideas cannot be curtailed but use is made of tests described as "clear and present danger" and "fighting words doctrine". This, of course, does not mean that the philosophical underpinnings of the American decisions on freedom of expression is of no value to deliberations on this topic in Namibia.

To decide whether section 11 of the Act is a permissable derogation of Article 21(1) of the Constitution it must be viewed in light of the provisions of Article 22(2) of the Constitution. The approach to be followed is set out by the Supreme Court in its judgment in Kauesa. Firstly, it is clear that as the provisions of Article 21(2) create exceptions to the rights enshrined in Article 21(1) the exceptions must be strictly interpreted. Thus at page 23 of the Kauesa judgment it is stated by the Supreme Court that:

> "It is important that Courts should be strict in interpreting limitations to rights so that individuals are not unnecessarily deprived of the enjoyment of their rights."

(See also p. 24 of the Supreme Court judgment in the Kauesa case).

As to when a restriction would be reasonable as contemplated in Article 21(2) the Supreme Court stated at p. 14 of the judgment:

"In this regard the principles of proportionality enunciated by the Indian Supreme Court, the European Court of Human Rights, the Canadian Courts and the United States Supreme Court are expressed in the Namibian Constitution by the requirement that such restrictions must be reasonable."

The Supreme Court furthermore expressly (at p. 23) adopts the approach set out in R v Oakes, (1986) 26 DLR (4Th) 200 at 227; 24 CCC (3d) 321 at 348 where Dickson, C.J.C. said:

"... once a sufficiently significant objective is recognised, then the party invoking section 1 must show that the means chosen are reasonable and demonstrably justified. This involves 'a form of proportionality test': R v Big M Drug Mart Ltd, supra. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in the first sense, should impair 'as little as possible' the right or freedom in question: R v Big M Drug Mart Ltd, supra. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance.'"

With respect to the third component, it is clear that the general effect of any measure impugned under section 1 will be the infringement of a right or freedom guaranteed by the Charter; This is why resort to section 1 is necessary. The inquiry into effects must, however go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation and the degree to which the measures which impose the limit trench upon to integral principles of a free and democratic society. Even if an objective is

> of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."

As already indicated the prevention of a recurrence of the type of racism and its concomitant practises which prevailed prior to independence in this country is a "sufficiently significant objective" to warrant a limitation on the rights enshrined in Article 21(1) under consideration. This however does not justify restrictions with regard to groups of persons who never featured in the pre-independence of this country and were never part of or a party to the social fissure amongst the different peoples making up the population of this country that was occasioned by the erstwhile racist policies. In my view the definition of "racial group" in Act no. 26 of 1991 goes far beyond what is required. The definition was not "carefully designed to obtain the objective in question." Two examples from recent history will hopefully illustrate this. Firstly references to Spanish pirating of our fishing resources immediately after independence were clearly not intended to endear the Spaniards to Namibians. Secondly references to Botswana intransigence with regard to the current territorial dispute relating to the Kasikili island were likewise not intended to create a neutral feeling towards Botswana's. Yet both Spaniards and Botswana's clearly fall within the definition of "racial group." Protecting these two groups can clearly

not be related to the prevention of racism or social fissure between groups of people within Namibia. The definition goes too far and thus also does not impair the freedom of expression "as little as possible" to achieve the valid societal objective of preventing the scourge of racism raising its ugly head again in this country. These two examples of topics of importance to Namibia and the subject of much public debate also indicates that the definition is such as to hinder debate on issues of public importance which has nothing to do with the race relations within Namibia.

Truth is not a defence to any of the permutations that section 11 of the Act prescribes. Whereas I accept that truth need not in all circumstances be available as a defence especially where the truth is stated or communicated "with an intention to provoke hatred" the circumstances under which truth will not be a defence must clearly be very limited. Dickson, C.J.C. points to one such circumstance in R v Keeastra, (1990) 61 CCC (3d) 33 at 62 where he states:

> "Truth may be used for widely disparate ends, and I find it difficult to accept that circumstances exist where factually accurate statements can be used for no other purpose than to stir up hatred against racial or religious groups."

The fact that one must be wary to limit expressions of the truth is adumbrated in the Kauesa Supreme Court judgment where one of the criticisms levelled against the police regulation under consideration was exactly this, it was no defence to state what was said was the truth. At p. 37 the

following passage appears:

> "'Comment unfavourable in public upon the administration of the Force' is itself vague and overbroad. A police officer might comment in public about a true state of affairs. He might say in public there are too many police officers in urban areas and very few in rural areas. There must be a change in preferences. The administration might regard that as an unfavourable comment. It matters not whether the comment is true of false. The officer will be visited with criminal sanctions as long as the administration thinks the comments are unfavourable."

In the present context if the truth is used for "no other purpose than to" bring about the results contemplated in section **11** of the Act then there may be a case for suggesting that the section passes muster. This is however not the way the section reads. Intent as mentioned in the section does not limit the type of intent to dolus directus. The question that arises is whether I should not interpret the concept intent as used in the section to limit it to dolus directus to save the section from being unconstitutional. Unless this would reduce intent to the same meaning as sole purpose it will be of no avail. Furthermore as parliament may legitimately legislate to curb racism and its propagation it may, provided the prescribed matters are duly limited, prescribe such matters in a way that the intent can take any form of dolus. To interpret intent in section **11(1)** as only referring to dolus directus may be to limit this requirement more than parliament intended to and to more than parliament is empowered to do.

Coupled with the factors of truth and intent is the question

as to what happens if a legitimate criticism of government policy leads to or causes, say, the things mentioned in section 11(1) (c) and this was foreseen by the person uttering the criticisms. An example of this is apparent from the Kauesa case. At p. 27 the following appears:

> "It may be that some of the things appellant uttered were offensive to white senior officers in the Police command structure, but the important thing to remember is that this was a television panel discussion on the subject of affirmative action in the Police Force . . . . .
>
> In this case would it be just and fair to deny the appellant protection in terms of Article 21 (a) because some of the words he used in his contributions were insulting or defamatory or constituted a serious criminal offence such as a contravention of section 11(1)(b) of the Racial Discrimination Prohibition Act of 1991 as the learned Judge a quo pointed out . . . . .
>
> It appears to us that the right to freedom of speech and expression cannot be frustrated by mere indiscretions of a speaker. It is important to find out whether the speech fulfils the purpose for which the right to freedom of speech was enacted.
>
> > 'Freedom of expression constitutes one of the essential foundations of . . . . society, one of the basic conditions for its progress and for the development of every man. Subject to article 10(2), it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any section of the population . . . . '"

Suffice to say that unlike the Canadian legislation in this field (sections 318 and 319 of Canadian Criminal Code) no allowance is made for statements relevant to matters of public interest or even for criticism which although causing disharmony etc, is proffered with the purpose of removing racist practises (section 319(3)(c) and (d) of Canadian Criminal Code).

For the reasons aforementioned I am of the view that section **11(1)** of the Act cannot be said to impose reasonable restrictions as contemplated in Article **21(2)** of the Constitution. Firstly, the section was not "carefully designed to achieve the objective in question." Secondly the section does not "impair 'as little as possible' the right . . . in question." Thirdly it is disproportionate as it stifles and inhibits public debate on issues which are important in Namibia e.g. affirmative action and historical assessments. It follows from the aforegoing that section **11(1)** is overbroad in that it embraces communications which may be prohibited as well as communications which is protected under article **21(1)** of the Constitution.

Because the section cannot be saved by the mere excising of words or phrases but will have to be reconsidered and amended it cannot be down-read.

Certain other objections were also raised by the accused to the indictment. Due to the conclusion I have come to with regard to section **11(1)** of the Act it is not necessary to deal with these other objections.

As the purpose of the Act was to address a valid societal objective I am of the view that the matter should be referred back to Parliament to effect the necessary amendments to it if Parliament deems fit to do so. As it now stands it cannot be used as a basis for prosecution and the charges against the accused will have to be quashed. I may just mention in passing that counsel for the accused

also accepted and submitted that as a valid societal objective was at stake the matter should be referred back to Parliament.

Because the Act was aimed at addressing a valid objective and because the issues canvassed were a first for Namibia and it thus cannot be said that the State should not have persisted in at least testing the Act in a Court of law I am not inclined to make an order as to costs in this matter. Furthermore, the issue is one of importance in that it will be a guideline as to the approach to similar matters in future. It was thus of importance to crystallise the principles involved.

In the result:

1. It is declared that section 11(1) of the Racial Discrimination Prohibition Amendment Act, Act no. 26 of 1991 is in conflict with Article 21(1) and (2) of the Constitution.

2. Parliament is allowed six (6) months from the date of this judgment to amend section 11(1) of the Racial Discrimination Prohibition Amendment Act so as to conform with the requirements set out in Article 21(2) of the Constitution failing which the said section 11(1) will become invalid ipso facto.

3. All the charges against the accused are quashed.

FRANK, JUDGE

ON BEHALF OF THE STATE:	ADV. D F SMALL
ON BEHALF OF FIRST, SECOND AND THIRD ACCUSED:	ADV J J GAUNTLETT S.C. ADV. G MARITZ S.C.
Instructed by:	Theunissen, Louw & Partners
ON BEHALF OF FOURTH ACCUSED:	ADV. L BOTES
Instructed by:	Behrens & Pfeiffer