REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 416/2013

In the matter between:

THOMAS ADOLF FLORIN **APPLICANT**

and

THE MINISTER OF SAFETY AND SECURITY **1ST RESPONDENT**
THE HEAD OF THE WINDHOEK CENTRAL PRISON **2ND RESPONDENT**
THE CHAIRPERSON OF THE PAROLE BOARD **3RD RESPONDENT**

Neutral citation: *Florin v The Minister of Safety and Security* (A 416/2013) [2013] NAHCMD 383 (05 December 2013)

Coram: GEIER J
Heard: **28 November 2013**
Delivered: **05 December 2013**
Release date: 29 January 2014

Flynote: Practice - Plea - Lis pendens – Applicant's urgent application stayed pending the determination of a similar application between the same parties and based on the same cause of action already pending before another judge in the same court -

Summary: The applicant – who is currently serving a sentence of life imprisonment for the murder of his wife - brought an urgent application after nearly having served 14 years of his life sentence for the review and setting aside the decision by the respondents not to consider the applicant for release on probation before the lapse of not less than 15 years imprisonment and an order directing the respondents' to consider the applicant for release on probation as a matter of urgency – at the time of sentencing the trial judge had recommended that the applicant not be released on probation before the lapse of not less than fifteen (15) years imprisonment calculated from the 22nd December 1999.

The application was based on a pre- independence cabinet resolution, number 1177 of 1986, which was based on the now repealed Prison's Act, Act No 8 of 1959 allegedly still utilised by the Correctional Services as the applicable parole policy when considering the eligibility of inmates sentenced to life for release on parole -.

In terms of the said resolution/policy, a sentence of life imprisonment, for administrative purposes, is considered to be a minimum of 20 years. A prisoner serving a sentence of life can thus be considered for release on parole after having served half of 20 years, i.e. after having served 10 years.

The applicant enquired from time to time about the possibility of parole. His enquiries were made after the first 10 years of the sentence had been served. To date he has not been considered for parole and the replies received from time to time from the prison authorities were to the effect that he could only be so considered after the expiry of 15 years, as recommended by the trial judge. Accordingly he was now seeking to review these decisions and to be considered for parole –

The application was opposed on a number of grounds – the respondents also disputed the validity of the relied upon parole policy – inter alia raising the defence of *lis alibi pendens*.

Fundamental to the applicant's case - and its success or failure - is the validity or not of the parole policy as adopted in 1986. As that pivotal issue is presently pending

before another Court between the same parties the court upheld the respondent's plea of lis pendens -

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ORDER

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1. The present application brought under case A 416-2013 be stayed pending the determination of case A 240-2013.

2. The applicant is ordered to pay the resulting costs, such cost to include the cost of the engagement of two legal practitioners.

JUDGMENT

GEIER J:

[1] The applicant was sentenced to life imprisonment for the murder of his wife Monica.

[2] He was also convicted and sentenced in respect of a number of lesser counts.

[3] The Trial Judge, *inter alia,* in motivation of sentence had this to say:

'Needless to say that you have committed a very serious and gruesome murder on an unsuspecting and helpless person. There wasn't any sudden and gross provocation causing you to react in the heat of the moment. The motive for the murder was not so much sexual jealously on your part, but the custody and control of your children. In any evident, the evidence has shown that there was not much of a marital relationship left between the two of you as a couple. The deceased somehow despised and ridiculed you for being unemployed and without a fixed income. After the breakdown of your marital relationship and having found a new lover the deceased had no intention of returning to Germany, nor to part with her children. As you had to return to Germany, because of the cancellation of your residence permit you unscrupulously schemed to physically eliminate the deceased and

even fixed the day she would disappear, i.e. be killed. When the day and time arrived you stalked the deceased and smashed her skull while she was in all probabilities asleep. Thereafter you removed the flash from the bones and together with the internal organs discarded these. Then you cooked the skeletal remains to minimize the rotting and concealed them in the ceiling of your dwelling. This was a selfish and senseless murder because it was totally unnecessary as there were other possible civil remedies to the custody issue of the children to pursue than the extreme action you resorted to. Your professed love for your children caused you to deprive them of the love and affection of their mother for the rest of their natural lives. I can only wonder how you would explain to them what you have done to their mother when they are grown-ups. Whether or not they would forgive you is not for me, but providence to tell. I hold sacred the belief that partners in a love relationship should part ways not necessary in love and affection with which they entered into the relationship, but surely with respect and dignity.

The society abhors and resents what you have done to the Deceased. I have been reminded by your Counsel not to be swayed by the national and international media publicity the matter enjoyed. It is true that I should guard against undue influence emanating from outside pressures. However, one cannot turn a blind eye and deaf ear to the cries of society about not only the prevalence of violent crimes against women, but also against young children, lest they lose confidence in the administration of justice and resort to taking the law into their own hands meeting out unsanctioned punishment. The society is entitled to the protection of these courts by the imposition of severe sentences in appropriate instances when called upon to do so. Failure to do so would amount to dereliction of a judicial duty'. [1]

[4] After considering in the remaining factors pertaining to sentence the learned Judge concluded:

'In the result convict, Thomas Adolf Florin, I sentence you for the murder of Monica Florin to life imprisonment in respect of the first Count;

Count's 2 and 3 are taken together and I sentence you to two (2) months imprisonment; counts 6 and 7, each one (1) month imprisonment; and count 6 and 8, two (2) months imprisonment.

That is your Sentence.

I recommend to the prison authorities that you ought not to be released on probation before the lapse of not less than fifteen (15) years imprisonment calculated from today the 22nd December 1999.'

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[1] Per Teek J, (as he then was) in The State v Thomas Adolf Florin Case CC 120/1999 delivered on 22.12.1999

[5] The applicant has now, after nearly serving 14 years of his life sentence, approached this court on an urgent basis for relief in the following terms:

1. Condoning applicant's none compliance with the Rules of this Honourable Court and hearing the application for the relief set out below on an urgent basis as is provided for in Rule 6 (24) of the Rules of the High Court Rules and in particular but not limited to condoning the abridgement of time periods and dispensing, as far may be necessary, with the forms and service provided for in the Rules of this Honourable Court;

2. Reviewing and setting aside the decision by the respondents not to consider the applicant for release on probation before the lapse of not less than 15 years imprisonment;

3. Ordering and directing the respondents' to consider the applicant for release on probation as a matter of urgency;

4. Ordering the respondents' to pay the cost of this application jointly and severally, the one paying the other to be absolved;

5. Further and/or alternative relief.

[6] Underpinning the applicant's quest to be considered for parole and to possibly be released on probation is a pre- independence cabinet resolution, number 1177 of 1986, which was based on the now repealed Prison's Act, Act No 8 of 1959.

[7] The applicant alleges that Namibia's Correctional Services still utilize this parole policy when considering the eligibility of inmates for release on parole, that is for inmates, sentenced to life.

[8] In terms of paragraph 3.4.3.1 (h)(i) of the said resolution/policy, a sentence of life imprisonment, for administrative purposes, is considered to be a minimum of 20 years. A prisoner serving a sentence of life can thus be considered for release on parole after having served half of 20 years, i.e. after having served 10 years.

[9] The applicant enquired from time to time about the possibility of parole. His enquiries were made after the first 10 years of the sentence had been served. These enquiries were made, so the applicant explains, because he understood a

sentence of life to mean 20 years and that he could be considered for release on probation after 10.

[10] To date he has not been considered for parole and the replies received from time to time from the prison authorities were to the effect that he could only be so considered after the expiry of 15 years, as recommended by the trial Judge.

[11] On 31 October 2013 the applicant met his current counsel, Mr Rukoro, who had been instructed to act on behalf of all prisoners serving a sentence of life in Namibia in an application for a declaratory order that a sentence of life, for administrative purposes, should be regarded as a term of 20 years imprisonment, as per the said policy. I will revert to this aspect.

[12] Counsel apparently advised the applicant that he would not benefit from the declarator sought as his case was different.

[13] In further support of the relief sought, applicant also contended that the recommendations made by the trial Judge should merely be regarded as one of a multitude of factors which should be considered in the decision to recommend him for possible release on parole 'as the trial courts involvement ended at sentencing, where after it is for the correctional authorities to deal with the issues of incarceration, discipline and parole'.

[14] The applicant then also advanced reasons as to why he should be considered for parole alleging that he can show good prospects in this regard.

[15] The matter was urgent, so it was contended further, as the respondents were violating his rights and as the applicant's mother, who is now terminally ill, and the applicant himself are not in good health.

[16] In answer, the head of the Windhoek Central Prison alleged that 'the applicant had entered a legal terrain without proper legal reconnaissance and survey as a result of which his application was misguided and had not merit.' Inter alia, the following legal objections/defences were then raised on behalf of respondents:

'1. That that 3rd respondent, the Chairperson of the Parole Board, was a non-existent functionary, as the current Prison's Act, Act No 17 of 1998, does not create a Parole Board, with a Chairperson that could be cited in legal proceedings;

2. That the aspect of parole and probation was no longer governed by the 1959 Prison's Act, but by Sections 95(1)(a) and (b) and (2) of the 1998 Act, in terms of which it would appear that the section does not apply to prisoner's sentenced to life and that such person could only be reprieved by way of presidential pardon in terms of Section 93;

3 That in any event Section 126 of the 1998 Act limited the bringing of any action in respect of anything done or omitted in pursuance of the 1998 Act to one year and after notice in writing had been given of any such intended action at least one month before the commencement thereof, and as this was not done and that the applicant's application, which should have been brought some four years ago, was time barred;

5. That in any event the application was not urgent, as the urgency of this matter had been self-created;

6. That the applicant was part of a pending application instituted under case number A 240/2013 - in which the applicant was listed as the sixth applicant - and that the present application was thus barred by the principles of *lis alibi pendens*;

7. That the relief sought by applicant was in any event incompetent if regard was had to the scheme and structure created by the 1998 Prison's Act and in terms of which and in terms of Section 95, the kick- starter to the parole and probation process was the Institutional Committee, whose Chairperson had not been cited in these proceedings.'

[17] During oral argument Mr Rukoro, who appeared on behalf of the applicant, submitted that his client's case for urgency was simple. His client was advised and did not know better until 31 October 2013 that he did not have to await the effluxion of 15 years before he could be considered for parole or probation as the trial Judge's recommendation did according to the advice received not constitute part of the sentence. The cause for urgency arose at the moment that he received such advice. The applicant then reacted to such advice, according to Mr Rukoro, with reasonable promptitude.

[18] Mr Namandje, who appeared on behalf of the respondents with Mr Ntinda, did not hotly contest the issue of urgency and merely relied on the averments made in answer and on his Heads of Argument that the urgency of this matter was self-created.

[19] I will accept for purposes of determining the point of urgency that the applicant did not know better until he received advice in this regard on 31 October 2013, although this is doubtful given his participation in case A 240/2013. Accordingly I will exercise my discretion in favour of the applicant and hear this matter on an urgent basis, because the underlying issue at hand, in any event, is an important one which requires determination sooner rather than later.

[20] In this regard sight should not be lost of what the Supreme Court has said in *S v Tcoeib* 1991 NR 24 (SC), when it considered the constitutionality of a life sentence:

'Even when it is permitted in civilised countries it is resorted to only in extreme cases either because society legitimately needs to be protected against the risk of a repetition of such conduct by the offender in the future or because the offence committed by the offender is so monstrous in its gravity as to legitimise the extreme degree of disapprobation which the community seeks to express through such a sentence. These ideas were expressed by the Court in the case of *Thynne, Wilson and Gunnell v The United Kingdom*,[2] where it stated that:

'Life sentences are imposed in circumstances where the offence is so grave that even if there is little risk of repetition it merits such a severe, condign sentence and life sentences are also imposed where the public require protection and must have protection even though the gravity of the offence may not be so serious because there is a very real risk of repetition. . .'

But, however relevant such considerations may be, there is no escape from the conclusion that an order deliberately incarcerating a citizen for the rest of his or her natural life severely impacts upon much of what is central to the enjoyment of life itself in any civilised community and can therefore only be upheld if it is demonstrably justified. In my view, it cannot be justified if it effectively amounts to a sentence which locks the gates of the prison irreversibly for the offender without any prospect whatever of any lawful escape from that condition for the rest of his or her natural life and regardless of any circumstances which might subsequently arise. Such circumstances might include sociological and psychological re-evaluation of the character of the offender which might destroy the previous fear that his

[2] EHRR 666, See also *S v Letsolo* 1970 (3) SA 476 (A); *S v Mdau* 1991 (1) SA 169 (A)

or her release after a few years might endanger the safety of others or evidence which might otherwise show that the offender has reached such an advanced age or become so infirm and sick or so repentant about his or her past, that continuous incarceration of the offender at State expense constitutes a cruelty which can no longer be defended in the public interest. To insist, therefore, that regardless of the circumstances, an offender should always spend the rest of his natural life in incarceration is to express despair about his future and to legitimately induce within the mind and the soul of the offender also a feeling of such despair and helplessness. Such a culture of mutually sustaining despair appears to me to be inconsistent with the deeply humane values articulated in the preamble and the text of the Namibian Constitution which so eloquently portrays the vision of a caring and compassionate democracy determined to liberate itself from the cruelty, the repression, the pain and the shame of its racist and colonial past.[3] Those values require the organs of that society continuously and consistently to care for the condition of its prisoners, to seek to manifest concern for, to reform and rehabilitate those prisoners during incarceration and concomitantly to induce in them a consciousness of their dignity, a belief in their worthiness and hope in their future. It is these concerns which influenced the German Federal Court in 'the life imprisonment case'[4] to hold, inter alia, that

'the essence of human dignity is attacked if the prisoner, notwithstanding his personal development, must abandon any hope of ever regaining his freedom'.

The German Federal Court in that matter also referred to the German Prison Act in this context and stated:

'The threat of life imprisonment is contemplated, as is constitutionally required, by meaningful treatment of the prisoner. The prison institutions also have the duty in the case of prisoners sentenced to life imprisonment, to strive towards their resocialisation, to preserve their ability to cope with life and to counteract the negative effects of incarceration and destructive personality changes which go with it. The task which is involved here is based on the Constitution and can be deduced from the guarantee of the inviolability of human dignity contained in article 1(1) of the Grundgesetz.'

It seems to me that the sentence of life imprisonment in Namibia can therefore not be constitutionally sustainable if it effectively amounts to an order throwing the prisoner into a cell for the rest of the prisoner's natural life as if he was a 'thing' instead of a person without any continuing duty to respect his dignity (which would include his right not to live in despair and helplessness and without any hope of release, regardless of the circumstances).

The crucial issue is whether this is indeed the effect of a sentence of life imprisonment in Namibia. I am not satisfied that it is.

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[3] *S v Acheson* 1991 (2) SA 805 (Nm) at 813 A – C; *Government of the Republic of Namibia and Another v Cultura 2000 and Another* 1994 (1) SA 407 (NmS) at 411C – 412D

[4] 45 BverfGE 187

Section 2(b) of the Prisons Act expressly identifies the treatment of convicted prisoners with the object of their reformation and rehabilitation as a function of the Prison Service and s 61 as read with s 5bis provides a mechanism for the appointment of an institutional committee with the duty to make recommendations pertaining to the training and treatment of prisoners upon whom a life sentence has been imposed. Section 61bis as read with s 5 of that Act creates machinery for the appointment of a release board which may make recommendations for the release of prisoners on probation and s 64 (as amended) inter alia empowers the President of Namibia acting on the recommendation of the release boards to authorise the release of prisoners sentenced to life and there are similar mechanisms for release provided in s 67. It therefore cannot properly be said that a person sentenced to life imprisonment is effectively abandoned as a 'thing' without any residual dignity and without affording such prisoner any hope of ever escaping from a condition of helpless and perpetual incarceration for the rest of his or her natural life. The hope of release is inherent in the statutory mechanisms. The realisation of that hope depends not only on the efforts of the prison authorities but also on the sentenced offender himself. He can, by his own responses to the rehabilitatory efforts of the authorities, by the development and expansion of his own potential and his dignity and by the reconstruction and realisation of his own potential and personality, retain and enhance his dignity and enrich his prospects of liberation from what is undoubtedly a humiliating and punishing condition but not a condition inherently or inevitably irreversible.'[5]

[21] It so appears that the constitutionality of life imprisonment was considered by the Supreme Court and the Learned Chief Justice against the backdrop of the now repealed Prison's Act, Act No 8 of 1959, as amended by Act 13 of 1981 (SWA) and in terms of which the mechanisms pertaining to the release of prisoners sentenced to life on parole or probation were regulated. It was the hope of release, inherent in these statutory provisions of the repealed legislation, which rescued the sentence of life imprisonment from constitutional sanction.

[22] The applicant's bid to be considered for parole or probation has now exposed that Section 95 of the current Prison's Act 1998 poses a problem in this regard in its current form. Section 95 provides:

'95 **Parole or probation of prisoners serving imprisonment of three years and more**

(1) Where-

[5] At 32D – 34D

(a) a convicted prisoner who has been sentenced to a term of imprisonment of three years or more has served half of such term; and

(b) the relevant institutional committee is satisfied that such prisoner has displayed meritorious conduct, self discipline, responsibility and industry during the period referred to in paragraph (a),

that institutional committee may submit a report in respect of such prisoner to the National Release Board, in which it recommends that such prisoner be released on parole or probation and the conditions relating to such release as it may deem necessary.'

(2) The National Release Board may, after considering the report and recommendations referred to in subsection (1) submit a report to the Minister recommending the release on parole or probation of the prisoner concerned and the conditions relating to such release as the National Release Board may deem necessary.'

[23] The interpretation and application of this section in regard to prisoners serving fixed periods of imprisonment, expressed in a number of years, is simple enough as it is easy to determine when any such convicted prisoner has served more than half such term.

[24] The same cannot be said for prisoners serving a life sentence and in respect of which - and in the absence of any administrative regulation, in this regard - it is impossible to determine when such convicted prisoner has served half of such term and when such convict can thus be considered by the Institutional Committee for a recommendation to be released on parole or probation by the National Release Board.

[25] It is in this context that the 1986 cabinet resolution allegedly plays a pivotal role as it is seemingly still applied.

[26] It is however precisely this policy, the validity of which is in dispute in these proceedings and which issue also forms the subject matter of another court case, pending before another judge in this court, in which the applicant is also a party. I will revert to this aspect below.

[27] Underpinning the applicant's quest for urgent relief in this matter is this disputed cabinet resolution which has formulated the relied upon policy regarding the possible admission of prisoners sentenced to life to parole. It must be clear that if that policy is ruled to be invalid for any reason whatsoever in the proceedings pending before another court, the legal basis for the relief sought by applicant in this case will fall away. It is only a possible declaration of validity and the applicability of that policy to applicant that would found this application.

[28] By that same token the respondents' time- bar plea, based on the provisions of Section 126 of the 1998 Prisons Act, would also hinge on this declaration of validity sought before another Court.

[29] To be more precise: if the cabinet resolution and the policy for the release on parole of life sentenced prisoners will be declared to be invalid, the argument that the applicant should have brought this application some four years ago i.e after the elapse of 10 years will fall away, as the new Prisons Act does not set any period of time after which a prisoner sentenced to life can be considered for parole or probation.

[30] It has thus become clear that, in such circumstances prisoners sentenced to life imprisonment only hope for release would be the 'presidential pardon or reprieve' in terms of Section 93 of the 1998 Prison's Act.

[31] Whether or not these new statutory mechanisms can ultimately be constitutionally justified – and - whether or not they have effectively closed the gates of prison irreversibly to prisoners serving a sentence of life, thereby removing from such inmates the hope of release - particularly in the absence of any regulation of what half of a life sentence for purposes of administering the provisions of Section 95 is to mean - and whether or not thus the scheme created by the 1998 Prison's Act ultimately passes constitutional muster - is of course not for me to determine in these proceedings in which no constitutional challenge in respect of the provisions of the 1998 Prisons Act has been mounted.

[32] Fundamental to the applicant's case - and its success or failure - is the validity or not of the parole policy as adopted in 1986.

[33] It will already have been noted that this issue is presently pending before another Court.

[34] Although Mr Rukoro has indicated that the applicant considers- and might withdraw from these proceedings, this has not occurred.

[35] Accordingly I deem it apposite to determine the defence of *lis pendens* next.

[36] In order to successfully raise this objection it must be shown that there is an action or application pending between the same parties, which raises the same issues, which arise from the same cause of action and is in respect of the same subject matter, although it does not have to be exactly identical.[6]

[37] In this regard respondents refer to the other pending application in this court under case number A240/2013. A case originally brought by one *Steve 'Ricco' Kamuhere* and in which the applicant is cited as the 6th applicant.

[38] The 1st respondent in that case is the Minister of Safety and Security also the 1st respondent in this instance. The 3rd respondent to case A240-2013 is the Officer in Charge of the Windhoek Central Prison, the 2nd respondent in this instance.

[39] Mr Rukoro has conceded that the 3rd respondent in this instance is non-existent.

[40] It becomes clear that both applications are pending between essentially the same parties.

[41] In order to determine whether the pending proceedings are also based on the same cause of action and in respect of the same subject matter it is necessary to have regard to the recent Notice of Amendment which the applicants - in case A240-2013 - delivered on 17 October 2013 – and - in terms of which, Prayers 1, 2 and 3, of

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[6] See for instance : *Jacobson and Another v Machado* 1992 NR 159 (HC) at p162 - p163; *Kalipi v Hochobeb* – High Court case (A 65/2012) [2013] NAHCMD 142 (30 May 2013) reported on the *Saflii web-site* at http://www.saflii.org/na/cases/NAHCMD/2013/142.html at para [30]

the existing Notice of Motion, were amended as follows and from which it appears that the following relief is now sought and case A240-2013 :

'1. An Order declaring 20 years to be the maximum term of imprisonment for any offender sentenced to life imprisonment.

2. An Order declaring 10 years to be the minimum period of imprisonment any offender sentenced to life imprisonment should serve before becoming eligible for parole.

3. An Order directing the respondents to consider any offender sentenced to life imprisonment and who served a period of 10 years or more of such life sentence for parole in terms of the Prison's Act and applicable regulations.'

[42] By comparison - and as per the Notice of Motion in this case - case A416/2013 - the applicant tellingly also seeks an order directing the respondents to consider the applicant for release on probation as a matter of urgency. (It is so that the applicant also seeks urgent review relief.)

[43] In order to determine whether the two applications are identical in form and whether or not the same cause of action is involved, one will have to consider whether or not the determination of the same underlying point of law is involved.

[44] I have already mentioned that the central underlying issue - to any review relief and any order directing respondents to consider the applicant for release on probation - is the underlying parole policy formulated in 1986 by Cabinet Resolution 1177.

[45] It appears from the supporting affidavit deposed to by *'Steve 'Ricco' Kamuhere,* in case A240/2013, that it is there alleged that the respondents have failed to comply with the parole policy of Cabinet Resolution 1177 of 1986, etc. - hence the prayer for the declaratory relief and the consequent prayer to be considered for parole in that case.

[46] It emerges that the pending proceedings are essentially based on the same cause of action i.e. are based on the rights flowing from the Cabinet Resolution 1177 of 1986, which right has been placed in issue in both proceedings.

[47] The requirements of the defence of *lis alibi pendens* have accordingly been established.

[48] What remains is the consideration of whether or not I should exercise my discretion to stay these proceedings pending the decision in case A240/2013 or not.[7]

[49] To me the dictates of logic and of pragmatism determine this issue.

[50] It is clear that the applicant's case will ultimately stand or fall with the outcome of the declaratory relief sought in the proceedings which are pending in case A240/2013.

[51] Whether or not the refusal to consider applicant for parole is liable for review also hinges on this determination.

[52] The further conduct in these proceedings will obviously be determined by the outcome of the relief sought in case A240/2013.

[53] It is for these reasons that I consider it in the interest of justice to uphold the special plea of *lis alibi pendens*.

[54] In the result I order that:

1. The present application brought under case A 416/2013 be stayed pending the determination of case A 240/2013.

2. The applicant is ordered to pay the resultant costs, such cost to include the cost of the engagement of two legal practitioners.

H GEIER

Judge

[7] See for instance : *Ex Parte Momentum Group Ltd and Another* 2007 (2) NR 453 (HC) at 462 H - I

APPEARANCES

APPLICANT:	S Rukoro Instructed by: GF Köpplinger Legal Practitioners, Windhoek.
1st and 2nd RESPONDENTS:	S Namandje Instructed by: Government Attorney, Windhoek