REP0RTABLE

CASE NO. SA 27/2003

IN THE SUPREME COURT OF NAMIBIA

In the matter between

TSHIMANYA WILLIAMSON LUBOYA **FIRST APPELLANT**

MUHAMAD ILYAS WAHEED **SECOND APPELLANT**

and

THE STATE
RESPONDENT

CORAM: **MARITZ, JA, O'LINN, AJA et CHOMBA, AJA**
HEARD ON: **29/06/2006**
DELIVERED ON: **03/05/2007**

Article I. APPEAL JUDGMENT

CHOMBA, AJA

[1] The two foreign nationals, namely Tshimanya Williamson Luboya and Muhamad Ilyas Waheed were arraigned on three counts of fraud and in the alternative three counts of theft. Luboya is a Congolese of the Democratic Republic of the Congo but is resident in the Republic of South Africa and at the time of his trial he held the latter country's passport. Waheed is a Pakistan national. The two were initially charged with three other persons, but were later tried separately from those other co-accused. The charges against them were as follows:

"Count 1: Theft
In that between 20 and 27 July 2000 at or near Gobabis, the accused did wrongfully, unlawfully and falsely and with intent to defraud give out and pretend to the Telecom Namibia and/or E Kazongominya and/or Chris Nguapia that:

- they were *bona fide* businessmen; and
- that they needed telephone lines and an office to use in the course of their business;
- and they intended to pay all the accounts for calls made by them.

AND did there and then by means of the said false pretence and to the actual or potential loss or prejudice of Telecom Namibia and/or E Kazongominya and/or Chris Nguapia, induce the said E Kazongominya and/or Chris Nguapia to:

- believe some or all these misrepresentations; and/or
- apply to Telecom Namibia for telephone lines in the name of Kalahari Communications, to be installed at Erf 133 Epako, the property or under the control of Chris Nguapia; and/or
- to make the said telephone lines with the account number 0103791227, installed at Erf 133, Epaku, in the name of Kalahari Communications and for the account of Chris Nguapia, available to them (i.e. the accused).

AND did there and then by means of the said false pretence and to the actual or potential loss or prejudice of Telecom Namibia and/or E Kazongominya and/or Chris Nguapia, induce the said Telecom Namibia to

- believe some or all these misrepresentations; and/or
- provide the accused and/or Chris Nguapia, who acted on their behalf and/or at their request, with telephone lines with the account number 0103791227 in the name of Kalahari Communications installed at Erf 133,.Epako, Gobabis; and/or
- allow the accused to use the said installed telephone lines to make calls from the said telephone lines to the amount of N$549,727.62.

WHEREAS in truth and in fact the accused when they so gave out and pretended as aforesaid well knew that

- they were not *bona fide* businessmen;
- they did not intend to use the telephone lines in the course of

ordinary practices; and/or
- they had no intention to pay the accounts

BUT that they used the telephone lines to sell calls to other people, both in, and outside Namibia; and that they vacated the premises where the lines were installed without settling the account

AND thus the accused are guilty of the crime of fraud.

ALTERNATIVELY

That the accused are guilty of the crime of theft.

In that between 20 and 27 July 2000, at or near Gobabis in the District of Gobabis the accused did wrongfully and unlawfully steal the amount of N$549,727.62 the property of or in the lawful possession of the Telecom Namibia and/or Chris Nguapia."

[2] On the second count the particulars supporting the charge were similar to those constituting the first count save for the following details, namely:

(i) the persons to whom the accused were alleged to have falsely made the wrongful and unlawful pretences were named as E Kazongominya and/or Gerson Nunuhe.

(ii) the telephone lines were allegedly to be installed at Erf BM21/16 GOBABIS, the property or under the control of the said E Kazongominya.

(iii) the account number allocated for the telephone transactions was number 103169801 in the name of Gerson Nunube.

(iv) the amount with which the said account was debited for the telephones made and out of which Telecom Namibia was allegedly defrauded was N$657,463.47.

[3] In the alternative charge to the second count the amount allegedly stolen was said to be N$657,463.47.

[4] Again on the third count, the offence charged was fraud with virtually similar particulars save that –

(i) the offence was alleged to have been committed between 4 and 31 July 2000.

(ii) the District in which the offence was allegedly committed was Windhoek.

(iii) the pretence was in the first place allegedly made to Telecom Namibia and alternatively to Anna M Ingwafa.

(iv) the telephone lines were allegedly to be installed at 11 Pullman Street, Windhoek North.

(v) the amount out of which Telecom Namibia was allegedly defrauded was N$45,904.30.

[5] And the amount stolen in respect of the third alternative count was accordingly alleged to be N$45,904.30.

[6] The cumulative alternative count to counts 1 to 3 alleged theft of a total amount of N$1,253,095.39, the property or in the lawful possession of Telecom Namibia and/or Gerson Nunube and/or Chris Nguapia and/or Anna M Ingwafa.

[7] The appellants pleaded not guilty to all the charges and consequently

stood trial which covered a period commencing from 28th May 2001 and ended on 29th October 2001, when judgment was delivered. They were convicted as charged on counts 1 and 2 and were later sentenced to 12 years imprisonment each.

[8] The appellants were initially both represented by legal counsel during the pre-trial proceedings, but their counsel later withdrew from the case because they were not assured of payment of their professional fees.

[9] For reasons which will be apparent as this judgment develops, I do not intend to review all the evidence given by the State witnesses, but it suffices to mention that this appeal constitutes a case record covering eleven (11) volumes; there were ten (10) State witnesses who gave evidence; and 32 documents were produced as part of the State's case.

[10] The following appears in the first volume of the appeal record as the summary of substantial facts of the case against the appellants:

> "Counts 1 and 2
> The accused are all foreigners. During June 2000 the accused approached Ephath Kazongominya and Anna M Ingwafa in Windhoek.

Through Kazongominya they made contact with Gerson Nunuhe and Chris Nguapia in Gobabis. The accused convinced the latter to apply for telephone lines in their own names. Three telephone lines were installed at

Kazongominya's house, Erf BM21/16, Gobabis in the name of Gerson Nunuhe and four telephone lines were installed in the name of Kalahari Communications at Erf 133 Epako. Gobabis, the property of the said Chris Nguapia.

The accused operated on these lines fraudulently selling telephone calls to third parties. The accused built up accounts of N$657,463.47 and N$549,727.62 respectively before they vacated the premises without paying the accounts.

Count 3

During June, 2000 the accused approached Anna M Ingwafa, a student at the Vocational Training Centre, Windhoek, in Windhoek.

The accused convinced Anna M Ingwafa to rent a house for them and to apply for telephone lines in her name. She rented a house at Pullman Street 11, Windhoek North. Two telephones were installed at Pullman Street 11, Windhoek North in the name of Anna M Ingwafa.

The accused operated these lines, fraudulently selling telephone calls to third parties. The accused built up accounts of N$45,904.30. On 8 August members of Telecom Namibia and the Police went to 11, Pullman Street, Windhoek North. They found the accused 2, 3, 4 and 5 at the premises and

arrested them. Accused 1 was arrested later (that) day while negotiating with Telecom Namibia for additional lines at other premises."

[11] The first and second appellants in this court were the ones referred to in the court *a quo* as accused 1 and 5 respectively.

[12] Needless to mention that the actual evidence given by the State witnesses was by far more extensive and detailed than the summary of substantial facts set out above. That evidence disclosed quite an intricate *modus operandi* which was said to have culminated in the sale of telephone calls internationally as well as locally. Some of the payments alleged to have been made for the calls were received in Namibia from as far afield as the Middle East and Pakistan, according to the evidence. The particular *modus operandi* the appellants were alleged to have employed was given the tag of "Pakistan Fraudulent Scheme". The State witness who gave that tag was Gideon Shivuka Iiyambo an Assistant Administrator at Telecom Namibia, Traffic, Quality and Fraud Centre.

[13] Mr Iiyambo's evidence was technically intricate and lengthy. However, it boiled down to the following. A foreigner coming to Namibia with the intent to operate the Pakistani Fraud Scheme would recruit Namibians to apply for telephone lines instead of doing so himself. This is because it is far cheaper for a local person to acquire the service from Telecom Namibia than it is for a

foreigner. Once set up, the scheme facilitated a Namibian based fraudulent telephone operative to work in cahoots with a co-conspirator in the scheme based in, say Saudi Arabia. The Saudi based person would provide international telephone calls to customers in that country using the telephone fraudulently obtained in Namibia. The customers would pay for the service provided and the Saudi operative would subsequently remunerate the Namibian based counter-part but all the money so paid was pocketed by the latter and nothing went to Telecom Namibia. Before Telecom Namibia could bill the operative the latter would clandestinely vacate the premises operated from, thus leaving unpaid bills. Mr Iiyambo, who investigated the frauds, was able to trace initially the Namibian fronts used in the scheme and it was through those Namibian fronts that the appellants were traced and subsequently arrested and charged as earlier stated.

[14] Answering to the Prosecutor's question if there was anything else of relevance that he wished to inform the court about, State witness Iiyambo testified as follows:

> **"**Just telling the court that this is an international scam; it is being done everywhere in any country; you don't need to be there in that particular country sometimes to run it, you can just establish it, go to another country and employ people who can also do the services for you. Like in some countries they employ the local people to do the services for them while they go to another country. They come to Namibia, they put up the whole thing, make the whole set up, go to South Africa, live in South Africa and these people here send them money by means, they normally use *modus operandi* they use the Western Union Transfer or Post Offices depending on what facilities are available for them to transfer the money and pay the local people through any of the other institution and he receives his money from the other operators around the world while he is in the

> first country. That is also the way how they do it, how they operate the whole thing."
>
> (see at pp210 and 211, vol 2).

[15] As already noted in this judgment, the appellants were convicted on the first and second counts and were then sentenced to a total of 12 years imprisonment each. Being dissatisfied with their fate they both applied to the Judge *a quo* for leave to appeal, but their applications were refused. However, this court granted them leave to appeal against conviction only on both counts.

Grounds of Appeal

[16] No formal grounds of appeal were submitted on both appellants' behalf, but Advocate J A N Strydom, who appeared as an *amicus curiae* on their behalf prepared and submitted detailed and substantial heads of arguments. These comprised arguments on the merits as to facts and arguments as to merits on the law. I shall confine this judgment to the latter arguments, the grounds as to merits on the law.

[17] In essence the arguments were to the effect that the appellants did not have a fair trial in that they were not legally represented and that they were denied legal aid. As to the latter aspect relating to legal aid, the argument was that the denial was based on their foreign origin since they were not

Namibians. It was argued that such a basis was discriminatory since by article 10(1) of the Constitution of the Republic of Namibia equality before the law was an entrenched right. An extension to that argument was that the Director of Legal Aid in the Department of Legal Aid infringed the provisions of the Constitution when he failed to assign any reasons at all for this refusal to grant legal aid to the appellants.

Merits as to the law – Fair Trial

[18] **Legal aid vis-à-vis foreign nationality**

The argument that legal aid was withheld from the appellants on the ground of their foreign origin can be disposed of easily and briefly. The record shows that at one stage when the issue of legal aid was raised the following dialogue occurred:

> "Court (to the present first appellant):
>
> Were you informed of the legal aid?
> Accused 1: No.
> Court: You were not informed?
>
> Accused 1: No
>
> Court: Is there anybody from legal aid?
> Potgieter
> (Public Prosecutor): My Lord Mr Windstaan is present. Allow me My Lord to point out that according to our information all the remaining accused are foreigners and as such I submit they do not qualify for legal aid.
> Court: They do not?
> Potgieter: In my understanding it can perhaps just be confirmed.

Court: The law makes a discrimination in that regard.
Potgieter: Mr Windstaan could you come nearer please, near the microphone? Do I understand that foreigners are not qualified for legal aid?
Windstaan: No My Lord it's not actually our way or how our decision is, it depends on whether they have applied, which we rally don't think they did so My Lord. Further we have already made our decision just on the indictment that we received from the office of the Prosecutor-General, we have decided not to grant legal aid to all the accused."

[19] What Mr Windstaan said, in effect, was that it was not the practice of the Legal Aid Directorate to deny an accused person legal aid on account of being a foreigner. That indeed was and continues to be the legal position. A close scrutiny of the provisions of the Legal Aid Act, No. 29 of 1990 (the Legal Aid Act) shows that there is no discrimination based on nationality in the granting of legal aid. The sole criterion is one's indigence as regards the ability to engage a legal practitioner to represent one in criminal or civil trials.

[20] There was therefore no substance in the appellants' argument that they were discriminated against on account of their foreign origin or that the state agency responsible for granting legal aid breached article 10(1) of the Constitution concerning equality before the law.

Refusal to grant legal aid

[21] As we have seen from the preceding abstract of the appeal record,

although the appellants did not apply for legal aid – they did not know about their right to apply for legal aid – it is evident that the Prosecutor-General's office did refer the indictment against the appellants to the Legal Aid Department. The Director of the Legal Aid (the Director), according to Mr Windstaan's explanation at the pre-trial hearing, thereupon made a decision denying the appellants legal aid. He gave no reason for his decision, and Mr Windstaan said that under the enabling statute the Director was not obliged to give any reasons for his refusal to grand legal aid.

[22] In the first place the Legal Aid Act does not contain any provision stating, as Mr Windstaan erroneously stated, that the Director is not obliged to give any reasons for refusing to grand legal aid. In so asserting Mr Windstaan was relying on a figment of his own imagination. Furthermore, this court has repeatedly stated that when public officials and administrative bodies are charged with the responsibility of making decisions which may adversely affect members of the public, they are in the first place required to comply with the *audi alterem partem* rule, thereby enabling the affected member of the public to be heard on the matter before the decision is made. See for example our unanimous judgment in the case of the *Minister of Health and Social Services v. Eberhard Wolfgang Lisse*, appeal case no. SA 23/2004 (unreported). Our *ratio decidendi* is based on the interpretation of article 18 of the Constitution which provides as follows:

> "18. Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials, by common law and

> any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent court or tribunal."

[23] The dictum of O'Linn, J, as he then was, in the case of *Aonin Fishing v. Minister of Fishing and Marine Resources,* 1998 N R 147 (HC) at 150G was to the like effect. He said:

> **"**There can be no doubt that article 18 of the Constitution of Namibia pertaining to administrative justice requires not only reasonable and fair decisions based on reasonable grounds, but fair procedures which are transparent."

[24] In the present case the refusal to grant legal aid was made without the appellants even knowing that their fate regarding access to such aid was being considered to their detriment. Additionally no reasons for the decision were disclosed to them. Such exercise of public duty did not measure up to the requirement of the common law and did not accord with the precept of transparency required by article 18 of the Constitution. Transparency encapsulates the application of the *audi alterem partem* rule.

[25] It is my considered view that the Director failed to comply with the requirements of Article 18 of the Constitution. In particular, he failed to abide by the requirement to hear the appellants before deciding to deny them legal aid. Better still, and although he was not obliged under the law to do so, he should have given reasons for not granting them legal aid. Had he done so he might have forestalled the speculation which was aired by the appellants' counsel that they were denied legal aid because they were foreigners. We

have seen that Article 18, *ibid*., provides that "persons aggrieved by the exercise of such acts and decisions have the right to seek redress before a Court or Tribunal." By necessary implication this means that the duty imposed on public officials and administrative bodies is owed to all persons for the time being resident in Namibia irrespective of their nationality.

Legal representation

[26] At the expense of repetition I must say that the appellants did not have legal representation during the critical part of their ordeal, the trial: they were legally represented only at the pre-trial stage. At that stage they used their respective resources in putting their counsel in funds. However, when their resources ran dry the legal representatives they had boasted of during the pre-trial stage withdrew.

[27] The record of appeal shows that in the wake of their loss of legal representation each appellant applied for bail so that once outside prison custody they could contact their relatives in their countries of origin to seek financial assistance from them. However, bail was refused. The reasons for so denying them bail were, understandably, cogent and to be expected: the appellants being foreigners had no residential basis in Namibia, nor friends or relatives here who could have paid bail money on their behalf. Granted that in the light of their unsuccessful bids to secure bail each one said initially that they would conduct their own defence, but in due course when they realised

the gravity of the charges they were facing, they said that they did after all need to be legally represented. That notwithstanding the Judge *a quo* in the end allowed the appellants to stand trial without legal representation.

[28] I have already observed that the charges the appellants faced in this case were serious and technically intricate; they were also prolix. Furthermore, the appellants faced the prospect of heavy custodial sentences if they should be convicted. The learned trial Judge was alive to these daunting considerations. In his ruling on the appellants' applications for bail the Judge stated, *inter alia*, the following:

> **"**... the Court as I have said earlier also has a discretion to refuse bail even where a court is satisfied that an accused person will stand his or her trial, but I will not even, at this stage, consider that option open to the court because I'm satisfied at this stage that it is highly unlikely that the accused persons, taking into account their particular circumstances, **the fact that they are faced with very serious offences, that if they should at the end of the trial be convicted they would face a long-term imprisonment**, that they would not stand trial should the court grant them bail." (emphasis supplied).

[29] Having been alive to the fact that the appellants faced serious offences and that in the event of a conviction they could face long-term imprisonment, was the learned Judge right in not availing to them the opportunity to secure legal aid and thereby allowing them to go through the lengthy trial without legal representation?

[30] Ms Jacobs, Counsel who represented the State in the appeal before us, impliedly gave an affirmative answer to the foregoing question because she staunchly defended the appellants' convictions. In doing so and thereby gainsaying the contention relied on by Mr Strydom, their legal counsel, that their trial was not a fair one, she averred that the appellants conducted their defence in a manner showing that they were equal to their task. She particularly asserted that the appellants evinced competence in the cross-examination of State witnesses.

[31] Ms Jacobs, moreover, further contended, as I understood her, that there was no obligation on the part of the State to grant legal aid to the appellants as a matter of law or even in Constitutional terms. In pursuing that line of argument, she prayed in her aid a number of decided cases. Among the authorities she cited was the case of *Nakani v Attorney General* 1989(3) SA 655 (Ck). Quoting from the dictum of Heath, J, who delivered the judgment in that case, Ms Jacobs said –

> **"**Heath, J, concludes that the accused is entitled to legal representation requires nothing more than that the accused be aware of his rights and be given an opportunity to exercise them. If that is done and the Accused for lack of funds or any other reason, is unable to exercise his right to legal representation, he will simply have to bear the consequences, and no irregularity occurs if the trial proceeds without such representation.
>
> It is submitted that article 12(1)(e) of the Constitution and section 73(2) of the Criminal Procedure Act 51 of 1977 states no more than that an accused person enjoys the right to procure legal representation for himself and not that he has the right to be provided with representation that he wants, but is unable for lack of

funds to procure.

No rule of law, practice or procedure is transgressed should a court proceed with a trial in a matter both complex and serious after an Accused has sought and was given the opportunity, but lacked the means to obtain representation."

[32] Ms Jacobs also embraced the cases of *S v Rudman and Another, S v Mthwana,* 1992 (1) SACR 70(A), from which she quoted the following passage:

> **"**Legal Aid is not obligatory in South Africa and there is no general right to legal aid. It may be granted on application. A person who cannot afford a lawyer may (in South Africa) apply for legal aid, he may approach other bodies for assistance, or he may even approach relatives, friends or a bank for money for a lawyer. To bring the options to an accused's attention is most desirable.
>
> There is not and at present cannot be a blanket right to have counsel (whether it be formal legal aid, voluntary legal assistance or a financial loan). In such circumstances, surely the failure to inform an accused of potential options (the word "rights" is too loaded) to obtain legal assistance cannot normally be deemed a failure of such a nature that the proceedings should be set aside. In every case the time test should be whether substantive justice has been done. To elevate any of the requirements in issue in this case to the level of Constitutional rights or such gross departure from the established rules of procedure that they automatically void (or "abort") the proceedings is unsound and the and the *Khanyile and Davids* requirements should be rejected."

[33] The reference in the preceding quotation to "The *Khanyile and Davids* requirements" is a reference to the case *of Khanyile & Another* 1988(3) SA 795 (N), a case decided in the Natal Provincial Division in which it was held that in an instance where a trial without legal representation for an accused

would be grossly unfair, the court should refuse to proceed with the trial until representation has been obtained through some agency (at 816 C – D). That ratio is now referred to as the "*Khanyile Rule*" and it was followed in *S v Davids, S v Dladla* 1989 (4) SA 172(N). I shall deal with the *Khanyile* case presently but for the moment let me round off Ms Jacobs' submissions.

[34] Having espoused the ratio in *Nakani, supra*, and *Rudman*, also *supra*, Ms Jacobs then, but oddly, also cited in support of her argument this court's judgment in *The Government of the Republic of Namibia and two others v Mwilima and all other accused in the Caprivi Treason Trial* 2002 NR 235, (hereinafter *Mwilima*).

[35] On a proper reading *Mwilima* cannot possibly advance the State's contention in the present case. That was a case in which *Mwilima* and his co-accused were arraigned on an indictment charging many serious offences including treason, murder, sedition, public violence and attempted murder. During the pre-trial period the accused collectively applied for legal aid but the State vehemently opposed the application. The matter was brought to the High Court by way of an urgent notice of motion. Three Judges *ex banc* heard the application and at the end of the day allowed the application. In doing so they, *inter alia*, made an order directing the Legal Aid Directorate to provide legal aid to the accused. The State, being aggrieved with the Court's order, appealed to this court. In this court the appeal was heard by a Bench constituted by five Judges. In a land-mark leading judgment handed down by

Strydom, C.J., a distinction was drawn between legal aid grantable under the Legal Aid Act, Act No. 29 of 1990 as read with Article 95(h) of the Constitution on one hand, and on the other, that which can be granted on a Constitutional basis. The Chief Justice elaborated that legal aid of the former category can, in keeping with the directory principles of State policy enunciated by Article 95(h), be granted only when the limitations of State financial resources so permitted, which presupposes that when such resources are not adequate or not available it cannot be granted. For the sake of clarity, I may mention that Article 95(h) of the Constitution of Namibia, falling under Chapter eleven (11) relating to the Principles of State Policy, provides that,

> "(T)he State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, the following:
>
> > 'A legal system seeking to promote justice on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the State.'"

[36] Article 101 which falls under the same chapter, provides to the effect that the principles of State policy shall not be justiciable. In short, therefore, this kind of legal aid which he termed as 'statutory legal aid', was discretionary.

[37] The Chief Justice then proceeded to consider the combined effect of Articles 5, 12(1) and 25(2), (3) and (4) of the Constitution insofar as they have a bearing on the issue of legal aid and in the context of legal representation.

His erudite reasoning went as follows, starting from page 255 at letter D:

> "The Constitution is, in my opinion, clear as to whom must uphold the rights and freedoms set out in Chapter 3. Article 5, which is part of Chapter 3 of the Constitution, provides as follows:
>
> 'Article 5. Protection of Fundamental Rights and Freedoms.
>
> The fundamental rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive Legislature and Judiciary and all organs of Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia and shall be enforceable by the courts in the manner hereinafter prescribed.'"

[38] He went on –

> "Further elaboration of the powers of the court to enforce and protect the rights and freedoms (are) to be found in Article 25. Sub-article (1) deals with the court's power in regard to legislative acts infringing upon such rights and freedoms whereas sub-articles (2), (3) and (4) are relevant to the present instance. They provide as follows:
>
> 'Article 25, Enforcement of Fundamental Rights and Freedoms.
>
> (1) ...
>
> (2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened, shall be entitled to approach a competent court to enforce or protect such right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman

shall have the discretion in response thereto to provide such legal assistance as he or she may consider expedient.

(3) Subject to the provisions of this Constitution, the court referred to in sub-article (2) hereof shall have powers to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of such rights and freedoms conferred on them under the provisions of this Constitution should the court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or hat grounds exist for the protection of such rights or freedoms by interdict.

(4) The power of the court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases.'

Article 5 clearly requires from the first respondent (sic) and all its agencies as well as from the judiciary to uphold the rights and freedoms set out in Chapter 3. Whereas the judiciary must uphold them in the enforcement thereof in their judgments, the first respondent (sic) and its agencies have the duty to ensure that they do not over-zealously infringe upon these rights and freedoms in their multifarious interactions with the citizens and must further ensure the enjoyment of these rights and freedoms by the people of Namibia."

[39] He then goes on to state at page 258, letter D:

"In Namibia, statutory legal aid is not a right *per se* because it is contained in the policy statement and is made subject to availability of resources. As such, it is available to all indigent persons who cannot afford to pay for legal representation provided that the funds and other resources are available. However, Article 12 guarantees to accused persons a fair hearing which is not qualified or limited and it follows, in my opinion, as a matter of course, that if the trial of an indigent accused is rendered unfair because he or she cannot

> afford legal representation, there would be an obligation on the first respondent (sic) to provide such legal aid."

[40] The conclusion we arrived at in *Mwilima*, *supra*, is consonant with the decision of Didcott, J, in *Khanyile*, *supra*. The following passage is culled from page 803H-J of that decision:

> **"**The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard (through) counsel. Even the educated and intelligent layman has small and sometimes no skill in the science of law. If charged with crimes, he is incapable generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge and convicted upon incompetent evidence or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defence, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant or those of feeble intellect."

[41] It was in the *Khanyile* case in which it was held as pointed out earlier herein that where a trial without legal representation for an accused would be grossly unfair, the court should refuse to proceed with the trial until legal representation is secured.

[42] Thus the decision in *Mwilima* cannot conceivably provide a leg on which the State can stand, as Ms Jacobs purported to show in her arguments. The dictum of Heath, J, in *Nakani*, *supra*, which Ms Jacobs purported to lean

on does not also help her. That dictum is out of accord with the Constitution of Namibia. In terms of Heath, J's statement of the law on the point, all that the court is required to do is to inform the Accused person of his or her right to seek legal aid of his or her choice and at his or her own expense. If, for lack of resources, he or she is unable to privately obtain legal assistance, and therefore he or she cannot secure legal representation, then, "he will simply have to bear the consequences of such inability". That statement goes against the grain of Article 5 of the Namibian Constitution which imposes a duty on the judiciary to uphold the rights and freedoms of the individual as we have already seen herein before. That duty is two-pronged, namely:

(a) to respect and uphold the rights and freedoms; and

(b) to enforce the same.

[43] The right to a fair trial is among those rights the judiciary, *inter alia*, is enjoined to respect and uphold. It is a right enshrined in Article 12(1) which provides as follows:

"Article 12 – Fair trial

(1)(a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law; provided that such Court or Tribunal may exclude the press and/or the publication of all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society.

(b) A trial referred to in sub-article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.

(c) Judgments in criminal cases shall be given in public, except where the interest of juvenile persons or morals require.

(d) All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.

(e) All persons shall be afforded adequate time and facilities for the preparation of their defence before the commencement of and during their trial and shall be entitled to be defended by a legal practitioner of their choice.

(f) No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no court shall admit in evidence against such persons testimony which has been obtained from such person in violation of Article 8(2)(b) hereof."

[44] This court's decision in *Mwilima* was compliant with the duty imposed by Article 5 of the Namibian Constitution. In the event if this court was to endorse the *ratio decidendi* in *Nakani* as espoused by Ms Jacobs, it would be negating its own decision in *Mwilima*. Under the doctrine of *stare decisis* this court is, as a general rule, bound by its earlier decisions. Therefore, as no persuasive contention has been submitted on the State's behalf, I find it inopportune at this moment, to depart from *Mwilima*. For that reason I do not agree with Ms Jacobs' argument based on the passage quoted from *S v Rudman and Another, S v Mthwana, supra*, to wit –

"To elevate any of the requirements in issue in this case to the level of Constitutional rights or such gross departure from the established

> rules of procedure that they automatically void (or "abort") the proceedings is unsound and the *Khanyile and Davids* requirements should be rejected."

[45] Reverting to the current case, it is my strongly held view that the interest of justice dictated that legal aid ought to have been granted to the appellants, which would have facilitated securement of legal representation for them. Instead legal aid was withheld from them and the Director of Legal Aid, according to Mr Windstaan, gave no reasons for his refusal to give legal aid as the Director, so Mr Windstaan said, was not obliged to do so.

[46] I have already referred to Article 18 of the Constitution which obliges administrative bodies and administrative officials to act fairly and reasonably, and to comply with the requirements imposed upon them by the common law and any relevant legislation. I have also referred to Article 5 which imposes on the Executive, the Legislative and Judiciary a duty to respect and uphold the entrenched rights and freedoms of the individual. As a member of the Executive the Director breached Article 18 by his inaction or negative action in relation to granting legal aid to the appellants. He also failed to uphold the duty imposed upon him by the Constitution to uphold and respect the right of the appellants to Constitutional legal aid as defined by Strydom, C.J. in *Mwilima*, *supra*.

[47] The court *a quo* equally failed to respect and uphold the appellants'

rights. I have already shown herein that it was evident to the Judge *a quo* that the charges which the appellants were facing in the trial before him, were quite serious and that they faced a prospect of long-term imprisonment in the event of being convicted as charged. Yet he allowed the trial to proceed to conclusion without allowing the appellants an opportunity to seek legal aid as was done by the accused in the *Mwilima* case. Had the judge handled the case in that manner his action would have conformed with the *Khanyile* principle which, as I have earlier herein indicated, states that where a judge perceives that a trial without legal representation would be grossly unfair he or she should refuse to proceed with it until legal representation for the accused is secured. The failure by the judge to do so did, in my considered view, constitute a denial of the appellants' right to a fair trial which is guaranteed to them by article 12(1)(a) of the Namibian Constitution.

[48] In the event I have come to the conclusion that the convictions of the appellants are unsafe and unsound; they are not only bad, but incurably bad. I would therefore uphold the appeal and in doing so I hereby make the following orders:

1. The appeal is allowed;
2. The appellants' convictions on both counts are quashed;
3. The sentences of 12 years imprisonment imposed on them are set aside;
4. I leave it open to the State to consider the question whether or

not the appellants should be prosecuted anew;

5. In the event that a new prosecution is to be undertaken, any sentences to be imposed if they are to be convicted shall take into account the periods already served pursuant to the sentences hereby set aside.

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CHOMBA, A.J.A.

I agree

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MARITZ, J.A.

I agree

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O’LINN, A.J.A.

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